

2001

# A Quiet Faith? Taxes, Politics, and the Privatization of Religion

Richard W. Garnett

*Notre Dame Law School*, [rgarnett@nd.edu](mailto:rgarnett@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Religion Law Commons](#), [Taxation-Federal Commons](#), and the [Taxation-State and Local Commons](#)

---

## Recommended Citation

Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2000-2001).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/47](https://scholarship.law.nd.edu/law_faculty_scholarship/47)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# A QUIET FAITH? TAXES, POLITICS, AND THE PRIVATIZATION OF RELIGION

RICHARD W. GARNETT\*

**Abstract:** The government exempts religious associations from taxation and, in return, restricts their putatively political expression and activities. This exemption-and-restriction scheme invites government to interpret and categorize the means by which religious communities live out their vocations and engage the world. But government is neither well-suited nor to be trusted with this kind of line-drawing. What's more, this invitation is dangerous to authentically religious consciousness and associations. When government communicates and enforces its own view of the nature of religion—i.e., that it is a private matter—and of its proper place—i.e., in the private sphere, not in politics—it tempts both believers and faith communities to embrace this view. The result is a privatized faith, re-shaped to suit the vision and needs of government, and a public square evacuated of religious associations capable of mediating between persons and the state and challenging prophetically the government's claims and conduct.

*Those who say that religion has nothing to do with politics do not know what religion means.<sup>1</sup>*

*Religion is not the church a man goes to, but the cosmos he lives in.<sup>2</sup>*

## INTRODUCTION

Everyone remembers Chief Justice Marshall's observation in *McCulloch v. Maryland* that the "power to tax involves the power to destroy."<sup>3</sup> And though it is tempting to join Justice Frankfurter in dis-

---

\* Assistant Professor, Notre Dame Law School. The author thanks Anthony Bellia, Patricia Bellia, Nicole Stelle Garnett, Dean John Garvey, Marci Hamilton, Steffen Johnson, Tom Shaffer, and Steven Smith for their comments and suggestions; Fred Marczyk and Diane Meyers for their usual helpful research assistance; and the staff of the BOSTON COLLEGE LAW REVIEW—particularly Michael Marcucci, Christopher Morrison, Angela Campbell, Michael Dube, and John Gordon—for their hard work and patience.

<sup>1</sup> MOHANDAS K. GANDHI, *THE WORDS OF GANDHI* 76 (Richard Attenborough ed. 1982) (quoted in Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 CATH. U. L. REV. 1, 1 (1997)).

<sup>2</sup> G. K. CHESTERTON, *IRISH IMPRESSIONS* 215 (1919).

<sup>3</sup> 17 U.S. (4 Wheat.) 316, 327 (1819); see also *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) ("The power to tax the exercise of a privilege is the power to control or sup-

missing this pithy catch-phrase as a "seductive cliché" or "flourish of rhetoric,"<sup>4</sup> Marshall *did* have a point. The imposition of a tax is, after all, an assertion of power and an "application of force."<sup>5</sup> The same is true of the decision not to tax, or to exempt from taxation. A power is no less real that is exercised selectively or indulged with restraint. The decision to exempt certain associations, persons, activities, or things from taxation presupposes and communicates the ability to do otherwise; definitional lines drawn to mark the boundaries of such exemptions implicitly assert the power to draw them differently.

Like other tax-exempt charitable organizations, religious associations may not, among other things, "participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office," nor may they devote a "substantial part of [their] activities [to] carrying on propaganda or otherwise attempting to influence legislation."<sup>6</sup> My claim here is that the decision to exempt religious associations from federal taxation may reasonably be regarded as an assertion of power—the power, perhaps, to "destroy"—over these communities, their activities, and their expression.<sup>7</sup>

---

press its enjoyment."). Cf. *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("[T]his Court . . . can defeat the attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits.").

<sup>4</sup> *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 489 (1939) (Frankfurter, J., concurring) (observing that "the intellectual fashion of the times indulged a free use of absolutes").

<sup>5</sup> Stephen L. Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1639 (1997) ("It is the application of force, not the happenstance that one is able to apply it with legitimate authority, that generates the power that destroys the specialness of religion.").

<sup>6</sup> 26 U.S.C. § 501(c)(3) (1986). It should be noted that section 501(c)(3) is only the tip of a monstrous iceberg of tax law that affects churches. It is also one of several provisions that regulates their assertedly political activities. See Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 106 & n. 3 (1998).

The history of the restrictions contained in this provision is fascinating. It appears they were adopted after almost no discussion in Congress, to advance no stated public purpose or policy, other than the silencing of then-Senator Lyndon B. Johnson's political enemies. See generally, e.g., Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Control on Political Expression by Churches*, 76 MARQ. L. REV. 217, 228 (1992); Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax-Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 392 (2001); Patrick O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning for Churches*, 42 B.C. L. REV. 733 (2001).

<sup>7</sup> See John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 414–15 (1991) ("To give the state the power to tax the church would for many be tantamount to giving it the power to destroy the church."). Cf. Rex W. Huppke, *Church leaders See Seizure as First Domino*, THE SOUTH BEND TRIB., Dec.

Strictly speaking, though, this Article is not about the churches' conditional tax exemption, or about its history, interpretation, or application.<sup>8</sup> I take it that the First Amendment permits government to exempt churches from taxation,<sup>9</sup> and I am sympathetic to the doctrinal arguments that the accompanying restrictions on churches' expression burden First Amendment freedoms.<sup>10</sup>

Instead, this Article is a reflection on just a few of the implications of the government's claim to the power and competence to draw and police a line between religious and political expression, activities, and "spheres."<sup>11</sup> Both the claim itself, and the messages it sends, raise

17, 2000, at D10 (describing 16 year tax dispute between the United States and the Indianapolis Baptist Temple and the resulting seizure of the Temple's building, and quoting its minister as saying, "[t]he church cannot be destroyed").

<sup>8</sup> This is an intimidating area, and I have learned a great deal from, for example, Eric J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J. L. ETHICS & PUB. POL'Y 541, 541 (1999); Anne Berrill Carroll, *supra* note 6; Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 1 (1990); Halloran & Kearney, *supra* note 6; and Lee, *supra* note 6; and Glenn Goodwin, Note, *Would Caesar Tax God? The Constitutionality of Governmental Taxation of Churches*, 35 DRAKE L. REV. 383, 383 (1985/1986).

<sup>9</sup> See, e.g., *Walz v. Comm'r*, 397 U.S. 664, 664 (1970); Robert E. Rodes, Jr., *The Last Days of Erastianism: Forms in the American Church-State Nexus*, 62 HARV. THEO. REV. 301, 317 (1969) ("Churches have been wholly or partially exempt from secular taxes since the time of Constantine at least; only the most rigorous ideologues feel that such exemption violates state or federal constitutional provisions."). Some argue that the First Amendment, rightly understood, *requires* the tax exemption. See, e.g., Goodwin, *supra* note 8, at 384 (arguing that "exemption of churches from taxation is not merely constitutionally-permissible, it is constitutionally-required"). Cf. *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947) ("The people [in Virginia], as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.").

<sup>10</sup> For more on these arguments, and the related claim that the prohibition on putatively political activities by churches burdens is an unconstitutional condition on their tax-exempt status, see, for example Carroll, *supra* note 6, at 254-56; Gaffney *supra* note 8, at 35-39. See generally Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001). But see, e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 380 (1990) (holding that California did not violate the First Amendment by imposing sales and use tax liability on the sale of "religious materials" by religious organization); *Branch Ministries v. Rossotti*, 211 F.3d 137, 142-43 (D.C. Cir. 2000) (noting that church whose tax-exempt status had been revoked failed to demonstrate that its "free exercise rights ha[d] been substantially burdened").

<sup>11</sup> See *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 310 (2000) (noting that the "transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere") (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)); see also *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) ("The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.").

provocative questions about the nature of religious faith and vocation, the meaning of religious freedom, the ideological ambitions of the contemporary liberal state, and the roles played in civil society by religious and other associations that mediate between persons and government.<sup>12</sup>

After borrowing from the headlines to provide real-world context for the discussion, I turn to the invitation extended to government in the exemption-and-restriction scheme to interpret and categorize the expression and activities of religious associations. This invitation is considered in light of current events and recent judicial decisions, including the Supreme Court's ruling in *Good News Club v. Milford Central School*.<sup>13</sup> This consideration yields no dramatic constitutional arguments or sweeping policy proposals. Instead, my goal is merely to encourage an appropriate wariness about government efforts either to determine or assign the "real" meaning of what religious believers and communities say and do.<sup>14</sup>

Next, I will suggest that the churches' conditional exemption, and the government theologizing it seems to invite, might, in Professor Bradley's words, "most profitably [be] understood as [government] attempts to move religion into the realm of subjective preference by eliminating religious consciousness."<sup>15</sup> In other words, maybe the power to tax churches, to exempt them from taxation, and to attach conditions to such exemptions really does, as Chief Justice Marshall quipped, "involve[] the power to destroy" religion. Neither heavy-handed repression nor even overt hostility toward faith is required, but merely the subtly didactic power of the law. Government need only express and enforce its own view of the nature of religion—i.e., that it is a private matter—and of its proper place—i.e., in the private sphere, not in politics—and religious believers and associa-

---

<sup>12</sup> See generally Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1849–56 (2001) (discussing role of religious and other mediating institutions in forming persons and shaping values).

<sup>13</sup> 121 S. Ct. 2093 (2001).

<sup>14</sup> For a fascinating discussion of a similar problem in a different context, see Tuan N. Samahon, Note, *The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L.J. 2211 (2000) (discussing the United States's efforts to detect fraudulent conversions by persons seeking asylum).

<sup>15</sup> Gerard V. Bradley, *Dogmatomachy: A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275, 277 (1986).

tions may yield to the temptation to embrace, and to incorporate, this view themselves.<sup>16</sup>

Finally, and in keeping with the revival of interest in the structure and function of "civil society,"<sup>17</sup> I offer some brief, general thoughts on the mediating role of religious associations and on how the privatization of faith might undermine that role. I will suggest that restrictions on churches' "political" activities and expression not only undermine "religious consciousness" but also threaten to denude the terrain of public life. There is the danger that, having made their own the government's view of religion's place, now-humbled and no-longer-prophetic religious associations will retreat with their witness to the "private" sphere where—they now agree—they belong, leaving persons to face the state alone in the hollowed-out remains of the public square.<sup>18</sup>

Now, I should make clear at the outset that none of this is to deny that government officials distinguish between faith and politics, and between religious and other forms of expression, all the time. Indeed, the Constitution itself sometimes requires precisely this kind of careful line drawing.<sup>19</sup> After all, the government may preach recycling, exercise, and tolerance, but it may not preach infant baptism or the Immaculate Conception; it may demand testimony in a court of law, but it may not demand recitation of the Apostle's Creed; it wisely endorses and celebrates the achievements of the Duke and Notre Dame

---

<sup>16</sup> See Bradley, *supra* note 15, at 276–77 ("The Court is now clearly committed to articulating and enforcing a normative scheme of 'private' religion."). But see Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 22 (1991) (arguing that "Bradley's argument overstates the success of the privatization thesis in influencing First Amendment doctrine").

<sup>17</sup> See generally, e.g., Symposium, *Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289 (2000) [hereinafter Symposium].

<sup>18</sup> And, as Thomas More put it in *The Man for All Seasons*, "[do we] really think [we] could stand upright in the winds that would blow then?" ROBERT BOLT, *A MAN FOR ALL SEASONS* 66 (Vintage Int'l 1990) (1960).

<sup>19</sup> Cf., *Good News*, 121 S. Ct. at 2111 n.3 (Scalia, J., concurring) ("We have drawn a . . . distinction . . . between religious speech generally and speech about religion—but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic."). Relatedly, courts considering free-exercise claims are required, as a matter of course, to determine the sincerity, though of course not the merits, of claimants' religious beliefs. See, e.g., *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("The determination of what is a religious belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

basketball teams,<sup>20</sup> but may not endorse the religious mission and vocation of the Society of Jesus. Still, it strikes me that the Internal Revenue Code section 501(c)(3)'s exemption-and-restriction scheme is noteworthy in the extent to which it invites government to label as "propaganda" or "campaign[ing]" what are, for religious believers and communities, expressions of their faith and responses to their calling.<sup>21</sup> It is far from clear that this is an appropriate task for the liberal state.<sup>22</sup>

Nor is the claim that religious expression and activity are outside the scope of legitimate government concern. To question the government's ability to determine the theological significance of an activity is not to deny its power reasonably to regulate that activity. My concern, instead, is that the premises of the conditional exemption scheme, the labeling it invites, and the monitoring of the distinctions it creates will tame religion by saying what it is and identifying what it is not, tempt religion to revise its conception of itself and of its mis-

---

<sup>20</sup> See, e.g., *Bush Salutes NCAA Champions*, A.P. Online, Apr. 23, 2001, available at 2001 WL 18930977 ("President Bush saluted NCAA basketball champs from Duke and Notre Dame at the White House Monday.").

<sup>21</sup> 26 U.S.C. § 501(c)(3) (1986). It could be objected here that for government to label as "political" (or as "propaganda" or "campaigning") a religious communities' expression or activity is not, in fact, to say that such expression or activity is not or no longer religious. In other words, the conditional-exemption scheme does not invite government to distinguish religious from political speech, or the religious from the political sphere; it simply requires government, for its own limited purposes, and not as the truth of the matter, to identify certain conduct or expression as—whatever else it may be—also "political." This is an important point—one that could reasonably be raised at many points in this Article—and I thank my colleagues Patricia Bellia and Nicole Stelle Garnett for raising it.

In response, it strikes me that while it is true that the government labeling required by the exemption scheme could be treated not as an "either/or," "religious or political?" but as more of a "but also" determination, it is in fact regarded, by government, churches, and the public, as the latter. See, e.g., Press Release, Roman Catholic Archdiocese of Philadelphia Should Drop Plan to Produce Voter Guides, Says Americans United (Mar. 31, 1999), available at <http://www.au.org/press/pr331922.htm> (last visited May 14, 2001) (quoting Rev. Barry Lynn's statement that "[c]hurches must stay out of partisan politics" because "it runs counter to the mission of America's faith communities"). I would also respond by insisting that even a "but also" determination by government sends the message, and endorses the view, that religious faith is a private matter, for the private sphere, and ought not (for any number of reasons) insert itself into politics. As I discuss in more detail below, I am troubled by the implications and effects of this message.

<sup>22</sup> Cf. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 450 (1969) (noting that the Constitution "forbids civil courts from playing . . . a role" in "the interpretation of particular church doctrines"); *United States v. Ballard*, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting) ("I would dismiss the indictment and have done with this business of judicially examining other people's faiths.").

sion, and convince religious consciousness to internalize the state's own judgment that faith simply does not belong in politics.

\* \* \* \* \*

Nearly 30 years ago, an eminent minister insisted before Congress that:

[T]he first amendment . . . should not permit the state to tell the church when it is being "religious" and when it is not. The church must be permitted to define its own goals in society in terms of the imperatives of its religious faith. Is the Christian church somehow not being religious when it works on behalf of healing the sick, or for the rights of minorities, or as peacemaker on the international scene? No, the church itself must define the perimeters of its outreach on public policy questions.<sup>23</sup>

In a similar vein, there is a powerful scene in the film about his life in which the late Archbishop Oscar Romero learns that one of his left-leaning, rabble-rousing worker-priests has been arrested and tortured by government thugs. The formerly timid Romero bursts in on the elegant patio lunch of El Salvador's president-elect, insisting that something be done about the violence that is consuming their country. But the president-elect coolly scolds the Archbishop, and blames the violence on the Church and its radicals, insisting that "the priests must stay out of politics." "But," those priests' bishop reminds him, "there are political implications to the Gospel." To which the president-elect responds with a smile, "we will take care of those."<sup>24</sup>

In this scene, religion is told both where it belongs—i.e., it is told that its "implications" will be "take[n] care of" by others; its goals, imperatives, and perimeters are defined by others—and, by implication, what it is. But when religion is content merely to be what government says it is, or may or should be, then perhaps it really has been, as Justice Marshall might have predicted, "destroyed."<sup>25</sup>

---

<sup>23</sup> *Legislative Activity By Certain Types of Exempt Organizations: Hearings Before the House Ways and Means Committee*, 92d Cong., 2d Sess. 99, 305 (1972) (quoted in Gaffney, *supra* note 8, at 20).

<sup>24</sup> ROMERO (Vidmark /Trimark 1989).

<sup>25</sup> Cf. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 147 (1993) ("[I]f the state is able to manipulate the content of religious doctrine through its power to extend or deny the favored tax treatment, then religions are already well down the road to compromising their autonomy."); Thomas L. Shaffer, *Faith Tends To Subvert Legal Order*, 66 *FORDHAM L.*



## I. BUYING THE CHURCHES' SILENCE

The United States has for nearly a century exempted churches—"[c]orporations . . . organized and operated exclusively for religious . . . purposes"<sup>26</sup>—from federal taxation.<sup>27</sup> In fact, as my colleague Professor Rodes observed more than thirty years ago, "[c]hurches have been wholly or partially exempt from secular taxes since the time of Constantine at least[.]"<sup>28</sup> Not only this, but the United States permits donors to deduct from their taxable income contributions to churches and other similarly exempt entities.<sup>29</sup> It seems, then, that the United States has benevolently foresworn whatever "power to destroy" it might enjoy over religion, and has elected instead, by lifting tax burdens and encouraging charitable gifts, to promote a more "Erastian" relationship<sup>30</sup> and to exploit the civic benefits of lived-out faith.<sup>31</sup>

REV. 1089, 1089 (1998) ("Faith must always resist acculturation, or it will have nothing to say to the world or to the culture.") (quoting JOHN F. KAVANAUGH, *THE WORD ENCOUNTERED* 8 (1996)).

<sup>26</sup> 26 U.S.C. § 501(c)(3) (1986). See generally, e.g., *Branch Ministries v. Rossotti*, 211 F.3d 137, 139–40 (D.C. Cir. 2000) (outlining religious organizations' tax status).

<sup>27</sup> Ablin, *supra* note 8, at 547 ("Since the first modern internal revenue law in 1913, churches have been tax exempt."). The States have, by and large, followed a similar course. See, e.g., Goodwin, *supra* note 8, at 383 ("All fifty states and the federal government have statutory provisions exempting churches from various forms of taxation.") (citing P. FERRARA, *RELIGION AND THE CONSTITUTION: A REINTERPRETATION* 53 (1983)); see also *Walz v. Comm'r*, 397 U.S. 664, 676 (1970) ("All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax."). See generally, BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* (6th ed. 1992) (discussing the history of charitable organizations' tax exemptions).

<sup>28</sup> Rodes, *supra* note 9, at 317. Cf. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 859 (1995) (Thomas, J., concurring) (noting that property-tax exemptions "have been in place for over 200 years without disruption to the interests represented by the Establishment Clause"). For a more detailed discussion, see generally Johnson, *supra* note 10.

<sup>29</sup> 26 U.S.C. § 170(a) (1984).

<sup>30</sup> Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1865 (1993) (noting that, in the Erastian view of the Church—named for a 16th century Swiss physician—the Church "contributes its human and material resources to the goals of the state, and also acts as a religious witness to public discussion of moral issues. It prays for the foreign policy of the state; it blesses the army's tanks in time of war; and it carries the national flag in its liturgical processions."). See generally, e.g., Rodes, *supra* note 9.

<sup>31</sup> See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 13 n.2 (1989) (noting that, in *Walz*, "the State might reasonably have determined that religious groups generally contribute to the cultural and moral improvement of the community, perform useful social services, and enhance a desirable pluralism of viewpoint and enterprise, just as do the host of other nonprofit organizations that qualified for the exemption"); *id.* at 12 (observing that the

But the churches' exemption comes at a price:<sup>32</sup> Like other tax-exempt charitable organizations, religious communities may not engage in activities and expression that concern or touch upon social realities and that are regarded by government as excessively political (or, perhaps, as insufficiently religious).<sup>33</sup> Now, we could just regard these rules as the fair cost to churches of the tax benefits they enjoy, and perhaps also as reasonable safeguards against abuse of their tax-exempt status. Or, we could even say that these restrictions on churches impose no real burdens at all; they merely require charitable organizations "to pay for [political] activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do."<sup>34</sup> On the other hand, it could be that the churches' silence on political matters, and their retreat from the political arena, are no less valuable to government than the "social services" they provide and the "cultural and moral improvement of the community" to which they contribute.<sup>35</sup> That is, we might think the tax exemption is simply the government's way of paying churches not to talk about certain things.<sup>36</sup>

But, of course, churches have been talking about these "things" for a long time. From the revivalists of the Great Awakening who

---

exemption at issue in *Walz* "possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone").

<sup>32</sup> See CARTER, *supra* note 25, at 147-52 (1993) (describing the "tradeoff" between the exemption for churches and the restrictions on their "political" activities as a "Faustian bargain"); Joseph S. Klapach, Note, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 505 (1999) ("Before a charity can save the world, enlighten the masses, or promote spiritual harmony, it first must make a deal with the devil.").

<sup>33</sup> See Gaffney, *supra* note 8, at 2-3 (noting that "the Internal Revenue Code and many state statutes modeled on the federal tax code impose significant restraints on . . . religious communities"). Professor Gaffney described these restrictions as part of the "regulation of the religious activities of churches that touch on political matters." *Id.* at 29. As Gaffney observes, "it would be a lot easier to refer to [these restrictions] as [dealing with] the 'political activity' of religious organizations," but this would "misunderstand the profoundly religious character and motivation of the activity." *Id.* at 29 n.116. I am not suggesting that the federal tax laws require churches to make sure all their activities are sober and pious (Youth-group ski trips?). I do think, though, that the exemption scheme incorporates an assumption that churches' activities become less authentically religious as they become more (to government) recognizably political.

<sup>34</sup> *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

<sup>35</sup> *Texas Monthly*, 489 U.S. at 13 n.2.

<sup>36</sup> See Lee, *supra* note 6, at 434 ("Section 501(c)(3) . . . pays churches through tax-exempt status to be silent on issues deemed by the state to be political.").

helped pave the way for the American Revolution, to the God-drenched abolitionist movements that sparked the Civil War; from the priests, ministers, and rabbis who appealed to the nation's better angels during the Civil Rights movement, to the priests, ministers, and rabbis who today urge a rejection of the Culture of Death;<sup>37</sup> from the presidential bids of Reverends Jackson and Robertson to the "God talk"<sup>38</sup> that was a staple of the campaigns of Senator Joseph Lieberman and now-President George W. Bush—our history, traditions, and interminable public debates on the social issues are and have always been awash in religious expression, argument, and activism.

Of course, forceful assertions that religion should "stay out of politics"<sup>39</sup> are nearly as deeply rooted in our traditions, and so we should not be surprised by the frequent allegations that particular religious groups who have entered the political fray are abusing their tax-exempt status.<sup>40</sup> In *Branch Ministries v. Rossotti*, for example, the United States Court of Appeals for the District of Columbia Circuit affirmed the IRS's decision to—"for the first time in its history"—revoke "a bona fide church's tax-exempt status because of its involvement in politics."<sup>41</sup> In 1992, the Church had placed full-page advertisements in *USA Today* and *The Washington Times* urging Christians not to vote for then-candidate Bill Clinton because of his positions on certain social and moral issues.<sup>42</sup> Not only were these ads found to be

---

<sup>37</sup> See generally Pope John Paul II, *Evangelium vitae* [The Gospel of Life] (1995), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html). (last visited Sept. 20, 2001).

<sup>38</sup> See, e.g., Cal Thomas, *Liberals Afraid of John Ashcroft*, BALT. SUN, Jan. 17, 2001, at 13A ("During the last presidential campaign, there was much 'God-talk' from Vice President Al Gore and his running mate, Joe Lieberman."); Interview by Lisa Simeone with Wendy Kaminer, *Weekend All Things Considered*, Dec. 17, 2000, available at 2000 WL 21464562 ("[W]e certainly heard a lot of 'God' talk during the presidential campaign, perhaps from Joe Lieberman more than anyone else.").

<sup>39</sup> See, e.g., Sandy Grady, *Holy Candidates—Chill That Religious Prose*, THE PORTLAND OREGONIAN, Sept. 1, 2000, at B1 ("Chill the sermons, Holy Joe. You too, Dubya. If we wanted a gospel thumper, we'd elect Billy Graham. God belongs in the heart, not on the stump."); Jonathan Kirsch, *A Cautionary View of Mixing Politics and Religion*, L.A. TIMES, Oct. 7, 2000, at B2 (noting that the B'Nai B'rith Anti-Defamation League had urged Senator Joseph Lieberman to "keep religion out of politics").

<sup>40</sup> For example, Americans United for the Separation of Church and State investigates vigorously and reports alleged violations of the restrictions on political speech by religious organizations. For more information, see <http://www.au.org> (last visited May 14, 2001).

<sup>41</sup> 211 F.3d 137, 139 (D.C. Cir. 2000).

<sup>42</sup> *Id.* at 140. More particularly, the ads carried the headline, "Christians Beware," and "asserted that then-Governor Clinton's positions concerning abortion, homosexuality, and the distribution of condoms . . . violated Biblical precepts." *Id.* Because "Bill Clinton is promoting policies that are in rebellion to God's laws," the ad asked, "how then can we

unlawful, they were criticized as unseemly meddling by religious institutions in political affairs and as an ominous indication of the "rise of the Christian right."<sup>43</sup>

Political activities by churches, and complaints about them, were staples of the 2000 election season.<sup>44</sup> Consider just two examples: In California, voters in the March 2000 primary elections were treated to that State's usual orgy of direct democracy. One of the nearly two dozen ballot measures up for consideration was Proposition 22, also known as the "Knight Initiative," which declared "[o]nly marriage between a man and a woman is valid or recognized in California."<sup>45</sup> Early on in the campaign season it was observed in the press that the Initiative was receiving support from, *inter alia*, the Church of Jesus Christ of Latter-day Saints (LDS).<sup>46</sup> These financial and other forms of support prompted some politicians and watchdog groups to demand an examination of the LDS's tax-exempt status.<sup>47</sup> San Francisco Board

---

vote for Bill Clinton?" *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 17 (D.D.C. 1999); see also Anthony Lewis, *Christian Right Wants it Both Ways: Playing Politics is OK, but Don't Expect Exemption from Taxes*, N.Y. TIMES, Dec. 1, 1992, at A15. At the bottom of the ad was the provocative statement, "[t]ax-deductible donations for this advertisement gladly accepted." *Branch Ministries*, 211 F.3d at 140. For a copy of the ad, see Lee, *supra*, note 6 at 437. In upholding the revocation, the Court of Appeals rejected, *inter alia*, the Church's claim that the revocation violated the First Amendment, noting both that "the Church does not maintain that a withdrawal from electoral politics would violate its beliefs," and that "Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment activities." *Branch Ministries*, 211 F.3d at 142, 143.

<sup>43</sup> See, e.g., Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1; Lewis, *supra* note 42, at A15.

<sup>44</sup> See generally, e.g., Lee, *supra*, note 6, at 392-404 (recounting incidents and episodes from the 2000 election cycle).

<sup>45</sup> The proposal passed easily. Carol Ness, *Prop 22 Passage Forces Gays to Regroup*, S.F. EXAMINER, Mar. 8, 2000, at A1.

<sup>46</sup> Jenifer Warren, *21 Initiatives Await Voters on State's March Ballot*, L.A. TIMES, Oct. 31, 1999, at A18; see also Martin Kasindorf, *No to Gay Marriage, Yes to Feinstein and Campbell*, U.S.A. TODAY, Mar. 8, 2000, at 12A ("The state GOP, the Mormon Church and Catholic bishops backed the proposition. Democrats and leaders of the state's Methodist, Episcopal and Presbyterian churches backed the 'No on Knight' side."); Robert Salladay, *Mormons Now Target California: Church Asks Members to Back State Ballot Initiative*, S.F. EXAMINER, July 4, 1999, at A1 (noting also that the LDS was actively and financially involved in recent same-sex-marriage related political campaigns in Alaska and Hawaii).

<sup>47</sup> See Carrie A. Moore, *California Polls: A Prop 22 Win*, DESERET NEWS (Salt Lake City, Utah), Mar. 5, 2000, at A1 (noting that "[t]he LDS Church has refrained from donating money to support the initiative, choosing to encourage its membership to support the proposal with time and money"); Carrie A. Moore, *Tax Threat Against Church Assailed*, DESERET NEWS (Salt Lake City, Utah), July 10, 1999, at E1 (noting that a "letter was sent to church leaders throughout the state" which was "read to individual adult members" and which "asked for their voluntary support of [the Knight Initiative]" [hereinafter *Tax Threat*]).

of Supervisors member Mark Leno urged the IRS to investigate, while the Gay and Lesbian Political Action Committee insisted that LDS's active support "transgress[ed] the autonomy of church and state"<sup>48</sup> and was "a gross abuse of their tax-exempt status."<sup>49</sup> On the other hand, such criticisms prompted one legal commentator to decry "the effort to silence churches" and "to exclude religious institutions and voices from the public place."<sup>50</sup>

A year earlier, on the other side of the country, Americans United for the Separation of Church and State had threatened to challenge the tax-exempt status of the Catholic Archdiocese of Philadelphia after the Archdiocese announced plans to distribute a voter guide that addressed, among other things, candidates' views on abortion, school vouchers, and gay rights.<sup>51</sup> In a letter to Philadelphia's Cardinal Bevilacqua, Americans United's Rev. Barry Lynn instructed the Cardinal that such "political materials" were likely in "violation of federal tax law that prohibits partisan political activity by houses of worship," and reminded him that churches "are absolutely prohibited from intervening in political campaigns."<sup>52</sup> "Churches must stay out of partisan politics," Lynn urged, "and refrain from attempting to influence the outcome of elections. It's not only illegal, it runs counter to the mission of America's faith communities."<sup>53</sup> Not so, insisted

<sup>48</sup> *Tax Threat*, *supra* note 47.

<sup>49</sup> Edward Epstein, *Supervisor Hits Mormons for Politicking*, S.F. CHRON., July 7, 1999, at A13.

<sup>50</sup> *Tax Threat*, *supra* note 47. Leno insisted, though, in a letter to the San Francisco Examiner, that:

[His] concern was not the church's advocacy for passage of the Knight initiative. . . . Churches and other religious groups in this country have a long and proud history of participation in the discourse of social policy. What did raise questions for me was whether a charitable organization such as the Mormon church can ask its members for their money as well as their vote in support of a political campaign.

Mark Leno, Letter to the Editor, *Why Leno Questions Mormon Role in Anti-Gay-Marriage Issue*, S.F. EXAMINER, July 26, 1999, at A14.

<sup>51</sup> See generally, *Phila. Archdiocese Is Sued Over Planned Voters' Guide*, PITTS. POST-GAZETTE, Apr. 3, 1999, at A7. Cf. U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 74 (1988) (reversing ruling holding Catholic Conference in contempt for failure to comply with discovery requests in action seeking to revoke tax-exempt status of the Roman Catholic Church because of its pro-life activities).

<sup>52</sup> Letter from Barry Lynn to Cardinal Bevilacqua (March 31, 1999), available at <http://www.au.org/press/pr331let.htm> (last visited May 14, 2001).

<sup>53</sup> Press Release, Roman Catholic Archdiocese of Philadelphia Should Drop Plan to Produce Voter Guides, Says Americans United (March 31, 1999), available at <http://www>.

the Archdiocese: "The only responsible course of action for the Catholic Church is to participate in the debate started by others."<sup>54</sup>

\* \* \* \* \*

The point of these few stories is to set up the more general reflections that follow. As we have seen, religion is often, and perhaps increasingly, told to "stay out of politics," but is this really desirable, or even possible? With respect to Rev. Lynn's admonition, is it engagement with the world, or is it privatized quietism, that runs "counter to the mission of America's faith communities"? Can demands that religious associations and believers concern themselves only with spiritual, private matters, and assumptions that such demands are reasonable and realistic, be squared either with our history or with the prophetic, evangelical, and world-transforming zeal that for so many animates their faith and motivates their actions?<sup>55</sup>

## II. DRAWING THE LINE BETWEEN VOCATION AND ACTIVISM

Another scene from *Romero*: El Salvador's Catholic military vicar is objecting to Romero's decision to hold a funeral mass in the Cathedral for a priest and two *campesinos* murdered by the death squads. "The Church's job is to preach the Gospel," the vicar insists, but "this is going to be interpreted as a political statement." Romero responds, "I am not trying to make a political statement. I want to draw our people together."<sup>56</sup>

---

au.org/press/pr331922.htm (last visited May 14, 2001). Cf. ROMERO, *supra*, note 24 ("There are political implications to the Gospel." "We will take care of those.").

<sup>54</sup> Rob Boston, *Philadelphia Story*, 52 CHURCH & STATE 7, 7 (May 1, 1999), available at <http://www.au.org/churchstate/cs5992.htm> (last visited June 30, 2001).

<sup>55</sup> See, e.g., Carroll, *supra* note 8, at 226 ("As Garry Wills has pointed out, the political involvement of black churches has deep roots running straight back to the miliastic theology of the Christianized slaves."). Of course, a religious community might refuse, for theological reasons rooted in its own traditions, to engage in political disputes or to influence political decisions. But such a community's lack of interest in politics is viewed by its members as the proper response to God's calling and revelation, not as an arrangement with, or an acquiescing to, government. My colleague, Tom Shaffer, has thought and written extensively about these matters. See, e.g., Thomas L. Shaffer, Review Essay, *Stephen Carter and Religion in America*, 62 U. CIN. L. REV. 1601, 1609-12 (1993) (describing and discussing the "Gathered Church").

<sup>56</sup> ROMERO, *supra* note 24.

\* \* \* \* \*

I stated at the outset that the exemption-and-restriction scheme requires government to impose its own meaning on the expression and activities of mediating institutions.<sup>57</sup> This scheme invites government to label as something else—as electioneering, endorsement, lobbying, etc.—what may be, for a religious association, worship, evangelism, or prophecy. The above episcopal disagreement from *Romero* illustrates the point nicely: How is government to decide what is really being said—or even what, for its own limited purposes, is being said—in and through the activities of religious believers in a community?

By way of illustration, recall the exchange between Justices Scalia and Thomas in *Capitol Square Review and Advisory Board v. Pinette*.<sup>58</sup> In that case, the Court held that it was not an unconstitutional “establishment” of religion for Ohio to permit a private party (the Ku Klux Klan) to “display an unattended religious symbol” (a Latin cross) in a “traditional public forum located next to its seat of government.”<sup>59</sup> After all, Justice Scalia observed, such “private religious speech, far from being a First Amendment orphan, is as fully protected . . . as secular private expression.”<sup>60</sup> What’s more, he maintained, constitutionally protected “private religious speech” does not become a constitutionally proscribed establishment or endorsement of religion simply by its proximity to a government building.<sup>61</sup>

Justice Thomas wrote separately. Although he agreed that the Klan’s expression was protected, he maintained that the cross display

---

<sup>57</sup> Cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650–51 (2000); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“[T]he inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.”).

<sup>58</sup> 515 U.S. 753, 756, 760, 762–71 (1995).

<sup>59</sup> *Id.* at 756.

<sup>60</sup> *Id.* at 760.

<sup>61</sup> *Id.* at 762–70 (plurality op.). Justice O’Connor agreed, though she did not join Justice Scalia in “limit[ing] application of the endorsement test to ‘expression by the government itself . . . or else government action alleged to discriminate in favor of private religious expression or activity.’” *Id.* at 774 (O’Connor, J., concurring in part and concurring in the judgment). In her view, rather, “when the reasonable observer would view a government practice [e.g., permitting private religious speech near the seat of government] as endorsing religion . . . it is [the Court’s] duty to hold the practice invalid.” *Id.* at 777 (O’Connor, J., concurring in part and concurring in the judgment).

was best viewed as "a political act, not a Christian one."<sup>62</sup> Thomas noted, "[t]he Klan had a primarily nonreligious purpose in erecting the cross," and, indeed, "this case may not have truly involved the Establishment Clause" at all.<sup>63</sup> While I suspect that Justice Thomas was correct about this, the question remains, how could he know? For Christians, the cross is, of course, a symbol and an expression of the most profound mysteries of their faith; for the Klan, though, it is more reasonably regarded as a vehicle for threats, intimidation, and the political posturing of nativists, racists, and bigots.<sup>64</sup> Similarly, a swastika tattooed on an angry skinhead probably says, and is intended to say, something very different than one displayed by a devout Hindu.<sup>65</sup> And when Mother Teresa held her rosary in public, she was, it seems fair to say, saying something quite different than whatever it is that Madonna Ciccone says when she wears rosary beads while performing.<sup>66</sup>

The Court's recent decisions in *Boy Scouts of America v. Dale*<sup>67</sup> and *Mitchell v. Helms*<sup>68</sup> touch on similar problems. In *Dale*, the issue was whether a state law ban on dismissing an assistant scoutmaster because he is gay unconstitutionally burdened the Scouts' First Amendment right of expressive association.<sup>69</sup> The general rule, the Justices agreed, is that "an expressive association may exclude an unwanted member if to include him would significantly undermine its expressive capabilities," or would alter, distort, or commandeer the content

---

<sup>62</sup> *Id.* at 770 (Thomas, J., concurring); *see also id.* at 771 (Thomas, J., concurring) ("[T]o the extent that the Klan had a message to communicate in Capitol Square, it was primarily a political one.").

<sup>63</sup> *Id.* at 771 (Thomas, J., concurring).

<sup>64</sup> *See id.* at 770-71 (Thomas, J., concurring).

<sup>65</sup> *Compare, e.g.,* Abdon M. Pallaschi, *Hindu Files Suit to Challenge Swastika Firing*, CHIC. TRIB., Aug. 6, 1998, at 4 (describing a workplace incident involving a swastika as a Hindu religious symbol), *and* Kaushal v. Hyatt Regency Woodfield, 1999 WL 436585 \*1, \*3 (N.D. Ill. 1999) ("While the swastika may have a revered place in the [Hindu] religious world . . . it is also one of the most offensive and condemned symbols in much of the United States and the western world."), *with, e.g.,* AMERICAN HISTORY X (New Line Productions, Inc., 1998).

<sup>66</sup> *Cf., e.g.,* *People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927) ("[I]t is not easier but probably harder to determine what is or is not religious than what is or is not sectarian. What parts of Longfellow or Holmes are religious? Is the Hymn to the Night or the Chambered Nautilus or Lincoln's Second Inaugural religious or not?"), *overruled by* *Conrad v. City and County of Denver*, 656 P.2d 662, 662 (Colo. 1982).

<sup>67</sup> 530 U.S. 640 (2000).

<sup>68</sup> 530 U.S. 793 (2000).

<sup>69</sup> *Dale*, 530 U.S. at 644.



of the messages expressed.<sup>70</sup> In order to decide, then, whether the anti-discrimination norms embodied in the State's law had to yield to the Scouts' freedoms of association and expression, the Court had to determine, first, what the Scouts' message actually was.

The Supreme Court of New Jersey had determined that, because promotion of "the view that homosexuality is immoral" was not a "shared goal of Boy Scout members," the application of the State's anti-discrimination law in Mr. Dale's case would not "affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes."<sup>71</sup> That is, because the Scouts' purpose and message were not really what the Scouts said they were, the state-law requirement that it not discriminate against gay members and leaders would neither burden nor alter that message.<sup>72</sup>

But the Court disagreed. Like the New Jersey court, Chief Justice Rehnquist asked "whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints," and he acknowledged that "[t]his inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality."<sup>73</sup> The *Dale* majority was reluctant, though, to second-guess the Scouts with respect to the content or consistency of its message or the extent to which that message would be burdened or altered by having a gay man as an assistant scoutmaster: Just "[a]s we give deference to an association's assertions regarding the nature of its expression," the Chief Justice insisted, "we must also give deference to an association's view of what would impair its expression."<sup>74</sup> And so, the Court accepted—pretty much at face value—the Scouts' assertion that it teaches, and that one of its pur-

---

<sup>70</sup> *The Supreme Court 1999 Term—Leading Cases—Freedom of Association*, 114 HARV. L. REV. 259, 259 (2000) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 609 (1984); *N.Y. Club Ass'n v. City of New York*, 487 U.S. 1, 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 537 (1987)).

<sup>71</sup> *Dale*, 530 U.S. at 647 (internal quotations and citations omitted); see also *id.* at 650–51 ("The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the 'exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership . . . [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.'" (citation omitted)).

<sup>72</sup> See generally *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1228–29 (N.J. 1999), *rev'd* 530 U.S. 640 (2000).

<sup>73</sup> *Dale*, 530 U.S. at 650.

<sup>74</sup> *Id.* at 651–55; see also *id.* at 653–57.

poses is to teach, certain things about the morality of human sexuality, one of which is that homosexuality is wrong.<sup>75</sup>

Having arrived at this interpretation, the Court then concluded that New Jersey's public accommodations law threatened to co-opt the Scouts' expression and muddy its clarity by forcing it "to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexuality as a legitimate form of behavior."<sup>76</sup> For present purposes, though, the point is that before the Court could decide whether the anti-discrimination laws unconstitutionally burdened the Scouts' freedom of expressive association, it first had to identify and interpret its expression.

At first glance, *Mitchell v. Helms* is an entirely different case, presenting entirely different questions. There, the Court decided that the federal "Chapter 2" program—through which government-owned educational materials and equipment are loaned to public, private, and parochial schools—does not violate the First Amendment.<sup>77</sup> A legal stumbling block for the program had been the Court's focus in previous school-aid cases on whether or not the schools in question were "pervasively sectarian."<sup>78</sup>

Justice Thomas would have "buried" this inquiry.<sup>79</sup> As he pointed out, not only had the pervasively-sectarian inquiry too often served as a way to launder anti-Catholic biases,<sup>80</sup> the inquiry itself was "offensive": "[C]ourts should refrain . . . from trolling through a person's or institution's religious beliefs," and from searching for signs that the

---

<sup>75</sup> *Id.* at 653. *But see id.* at 669–78 (Stevens, J., dissenting) (concluding that the record contained insufficient evidence of a coherent position on the matter).

<sup>76</sup> *Id.* at 653.

<sup>77</sup> *See Mitchell*, 530 U.S. at 808.

<sup>78</sup> 530 U.S. at 826 (plurality op.) ("The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school.").

<sup>79</sup> *Id.* at 829 ("In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.").

<sup>80</sup> *Id.* at 828–29 (noting that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow"). *See generally, e.g.*, Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J. L. & POL. 449, (1990).

It is worth noting that the United States Court of Appeals for the Fourth Circuit recently ruled, in an opinion by Chief Judge Wilkinson, that *Mitchell* had, in fact, "buried" the presumption that government aid to "pervasively sectarian" schools is unconstitutional. *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001). In an abundance of caution, though, the court went on to affirm, as not clearly erroneous, the district court's finding that the College is not, in fact, pervasively sectarian. *Id.* at 508–09.

school "take[s] . . . [its] religion seriously, . . . [or] think[s] that . . . religion should affect the whole of . . . [our] lives."<sup>81</sup>

Justice Thomas's aversion to such "trolling" brings us back to the line-drawing required by the conditional-exemption scheme. If, as he suggests, caution is appropriate when courts examine the beliefs and practices of an aid-receiving educational institution for evidence of excessive or insufficiently compartmentalized religiosity, it seems warranted as well when government attempts to separate out and measure the politics—or, again, the insufficiently compartmentalized religiosity—in a religious association's activities and expression.

Another illustration: About five years ago, the Department of Defense prohibited military chaplains from urging parishioners to join a postcard campaign calling for the override of President Clinton's veto of the partial-birth-abortion ban.<sup>82</sup> The Department insisted that such exhortations would violate departmental regulations as well as federal laws governing lobbying activities by government employees.<sup>83</sup> Father Vincent Rigdon, a Catholic priest, joined by the Muslim American Military Association, a rabbi with the Air Force, and others, objected to the order, insisting that those he served "have a right to a real chaplain, not a tame one, and to real homilies, not censored ones."<sup>84</sup>

Judge Stanley Sporkin, of the United States District Court for the District of Columbia, agreed with Father Rigdon. He concluded, among other things, that the military directive prohibiting chaplains from encouraging churchgoers to participate in the pro-life postcard

---

<sup>81</sup> *Mitchell*, 530 U.S. at 827–28.

<sup>82</sup> *Rigdon v. Perry*, 962 F. Supp. 150, 152 (D.D.C. 1997). The Catholic bishops had inaugurated in the spring of 1996 a "Project Life Postcard Campaign," which "consisted of Catholic priests throughout the country preaching to their parishioners against an abortion procedure known . . . colloquially as 'partial birth abortion.'" *Rigdon*, 962 F. Supp. at 150, 152; see also Toni Locy, *Which Boss to Obey—Church or Air Force?*, THE SEATTLE TIMES, Oct. 9, 1996, at A10.

<sup>83</sup> *Rigdon*, 962 F. Supp. at 153. The Department also argued, among other things, that the ban was required because otherwise those in the pews might confuse their ministers' exhortations with orders from a superior officer. See generally Toni Locy, *Military Chaplains' Rights Upheld; Ban on Urging Antiabortion Letters to Congress Faulted by Court*, THE WASH. POST, Apr. 7, 1997, at A19; Timothy Lynch, *Dereliction of Duty: The Constitutional Record of President Clinton*, 27 CAP. U. L. REV. 783, 789–90 (1999).

<sup>84</sup> Lynch, *supra* note 83, at 790 (quoting Doug Landow, *Military Yardstick of Religious Freedom?*, WASH. TIMES, Aug. 14, 1996, at A19). Another plaintiff in the case, Rabbi David Kaye, noted that "it is impossible, indeed incoherent, to separate moral teachings from Judaism. And when a law is immoral, [he] believe[d] that as a Rabbi [he] [could] not remain silent." Further, he insisted, "as a Rabbi, I must tell my Congregation that this abomination must not be allowed to continue in a society that calls itself just." *Rigdon*, 962 F. Supp. at 154.

campaign "muzzl[ed] . . . religious guidance" in violation of the First Amendment.<sup>85</sup> Of particular interest, though, is the fact that Judge Sporkin explicitly rejected the government's claim that Father Rigdon's pro-life expression was "really 'political,' not religious." After all, the court noted, the government had not provided any "basis for the Court in this case to distinguish the political from the religious."<sup>86</sup> He continued:

Father Rigdon's desire to urge his Catholic parishioners to contact Congress on legislation that would limit what he and many other Catholics believe to be an immoral practice . . . is no less religious in character than telling parishioners that it is their Catholic duty to protect every potential human life by not having abortions and by encouraging others to follow suit. Writing to Congress is but one way in which Catholics can fulfill this duty, and it coincidentally involves communicating with the political branches of government.

What's more, Judge Sporkin insisted, "[e]ven assuming, *arguendo*, that Father Rigdon's intended speech is in some sense political, it is not the role of this Court to draw fine distinctions between degrees of religious speech and to hold that religious speech is protected but religious speech with so-called political overtones is not."<sup>87</sup> Judge Sporkin would have shared, I suspect, Justice Thomas's expressed reluctance in *Mitchell* to "troll[] through a person's or institution's religious beliefs," searching warily for signs that these beliefs are being

---

<sup>85</sup> *Rigdon*, 962 F. Supp. at 163–64. "What we have here," Judge Sporkin concluded, "is the government's attempt to override the Constitution and the laws of the land by a directive that clearly interferes with military chaplains' free-exercise and free-speech rights, as well as those of their congregants." *Id.* at 165; see also Toni Locy, *supra* note 83, at A19. Kevin Hasson of the Becket Fund for Religious Liberty, and counsel for the objecting clergy remarked, "In over 200 years, our government has never before attempted to censor a sermon. I hope Judge Sporkin's opinion makes this first attempt . . . [its] last." Tony Snow, *Judge Rejects Clinton Attack on Military Chaplains' Free Speech Rights*, ST. LOUIS POST-DISPATCH, Apr. 21, 1997, at B7.

Judge Sporkin also concluded that it did not violate federal law or regulations for military chaplains to encourage congregants to weigh in on pending legislation, and that—even if it did—such a prohibition would violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (a), (b). *Rigdon*, 962 F. Supp. at 156–62.

<sup>86</sup> *Rigdon*, 962 F. Supp. at 164.

<sup>87</sup> *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 270 n.7 (1981) (refusing to distinguish "religious worship" from "speech about religion" and insisting that "even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer")).

taken too seriously, accumulating excessive "political overtones," and bursting the barriers of the private sphere where they belong.<sup>88</sup>

Consider, finally, the Supreme Court's recent decision in *Good News Club v. Milford Central School*.<sup>89</sup> The case involved Milford's "Community Use of School Facilities Policy," which permits Milford residents and local groups to use school facilities for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public."<sup>90</sup> Policies like this are common, make good sense, and serve the common good. By opening public property to private groups, they support the web of mediating institutions and associations—the "little platoons" of democracy—that is essential to a diverse and thriving civil society. But the Milford Policy did not permit all "uses pertaining to the welfare of the community" in school facilities; it stated that "[s]chool premises shall not be used by any individual or organization for religious purposes."<sup>91</sup>

The Good News Club is a "nondenominational," "community-based Christian youth organization open to children between the ages of six and twelve" whose "stated purpose is to instruct children in family values and morals from a Christian perspective."<sup>92</sup> When the Club asked permission to use the school cafeteria for one hour a week, its request was denied. As the Milford Superintendent explained, "[y]our group's request to use the school facilities indicated such use would be for the purpose of 'hearing a bible lesson and memorizing scripture.' I understand such proposed uses would be the equivalent of religious worship, which is prohibited under [the] policy, rather than the expression of religious views or values on a secular subject matter."<sup>93</sup>

---

<sup>88</sup> See Alan Wolfe, *Ye of Little Faith*, COMMONWEAL, Nov. 3, 2000, at 29 (reviewing and quoting STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE RIGHTS AND WRONGS OF RELIGION IN POLITICS* (2000) ("Religion has no sphere. It possesses no natural bounds. It is not amenable to being pent up.")). Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (noting the asserted "hazards of religion's intruding into the political arena").

<sup>89</sup> 121 S. Ct. 2093 (2001).

<sup>90</sup> *Good News Club v. Milford Cent. School*, 21 F. Supp. 2d 147, 150 (N.D.N.Y. 1998).

<sup>91</sup> *Id.* Milford's Policy was adopted pursuant to section 414 of the New York Education Law, which "authorizes local school boards to adopt reasonable regulations for the use of school facilities." *Id.* at 149 n.2 (quoting section 414).

<sup>92</sup> *Id.* at 149.

<sup>93</sup> *Id.* at n.3 (quoting Letter of Robert McGruder, Oct. 3, 1996).

The Club then filed a civil rights lawsuit, claiming that Milford's refusal violated, among other things, the free speech rights of the Club and its members. The Club evidently conceded that Milford could prohibit the use of its facilities for "religious purposes"; it simply insisted that its activities were "secular in nature," much like those of the Boy Scouts or the 4-H Club. "The only difference," the Club contended, was that the Club "conveys its message 'from a Christian perspective by using Bible stories, games, scripture, and religious songs.'"<sup>94</sup> Therefore, Milford's exclusion of the Club amounted to unconstitutional "viewpoint discrimination."<sup>95</sup>

The district court agreed with Milford that the "Club's activities are more appropriately classified as religious instruction and worship,"<sup>96</sup> and rejected the Club's First Amendment challenge.<sup>97</sup> Along the way, the court provided a "detailed discussion of the Club's activities," one resembling, one might think, the "trolling" disapproved in *Mitchell*. The court emphasized, for example, that Club meetings typically involve prayer and "formal instruction" in a "classroom-type setting"; that "central to [the Club's] 'perspective' is the children's acceptance of Jesus Christ into their lives" and the view that "you need the Lord Jesus to help you to be able to give you the power actually to live a moral life"; that the Bible is used to instruct children in this perspective; that "unsaved" children are "invite[d]" by the teacher "to trust the Lord Jesus to be your Savior from sin"; and that children are "read 'missionary stories' that 'spread the gospel' and encourage Bible study."<sup>98</sup> These activities, the court concluded, were "characteristic of formal religious instruction" as well as "worship activities that inculcate Christian religion and values."<sup>99</sup> The Club's purposes, the court stated, are to "pass along Christian faith and morality"; to emphasize the "importance of having a relationship with Christ"; to "invite" children to "accept Jesus Christ into their lives"; and to "challenge" them to "follow God's word."<sup>100</sup> In the end, the court

---

<sup>94</sup> *Id.* at 154.

<sup>95</sup> *Good News*, 21 F. Supp. 2d at 154.

<sup>96</sup> *Id.* ("A careful analysis of the Club's activities reveals that its subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under the District's use policies.").

<sup>97</sup> *Id.* at 160 ("[T]he District's denial of Good News' requests to use . . . [Milford's] facilities was consistent with its prior practice and use and thus constitutionally sound.").

<sup>98</sup> *Id.* at 154-57 (summarizing "genre" of Club's activities); see also *Good News Club v. Milford Cent. School*, 202 F.3d 502, 504-07 (2d Cir. 2000).

<sup>99</sup> *Id.* at 157.

<sup>100</sup> *Good News*, 21 F. Supp. 2d. at 157-58.

concluded, "Good News is a religious youth organization whose proposed use deals specifically with religious subject matter—and not . . . merely a religious perspective on secular subject matter."<sup>101</sup>

The United States Court of Appeals for the Second Circuit affirmed. It rejected the Club's viewpoint discrimination argument because, like the district court, it concluded, "the Good News Club is doing something other than simply teaching moral values."<sup>102</sup> It expressed confidence that it "is not difficult for school authorities to make the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer," and agreed that "the activities of the Club fall clearly on the side of religious instruction and prayer."<sup>103</sup> As the Second Circuit saw it, the Club did not merely express a "viewpoint on morality"—"morality" being a "secular subject"—or teach that a "relationship with God is necessary to make moral values meaningful"; it also "focused on teaching children how to cultivate their relationship with God through Jesus Christ," a "quintessentially religious" project.<sup>104</sup>

In my view,<sup>105</sup> the Second Circuit's confidence that it is "not difficult for school authorities to make the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer" was quite misplaced.<sup>106</sup> Judge Jacobs, in dissent, put the matter well: "When the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters[.]"<sup>107</sup> and "[w]henver public officials . . . evaluate private speech 'to discern [its] underlying philosophic assumptions respect-

<sup>101</sup> *Id.* at 160.

<sup>102</sup> *Good News*, 202 F.3d at 510.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Cf. *Good News/Good Sports Club v. Ladue*, 28 F.3d 1501, 1517–18 (8th Cir. 1994) (Bright, J., dissenting) ("[T]he Club is fundamentally a Christian organization, the primary purpose of which is to instill and reinforce Christian faith and values. . . . The Scouts, by contrast, are a secular organization.").

<sup>105</sup> I was a co-author of an *amicus curiae* brief filed in the United States Supreme Court by the Christian Legal Society and the Union of Orthodox Jewish Congregations of America in support of the Good News Club.

<sup>106</sup> Cf. *Rigdon*, 962 F. Supp. at 164 (noting that "it is not the role of this Court to draw fine distinctions between degrees of religious speech and to hold that religious speech is protected but religious speech with so-called political overtones is not"); see also *Widmar*, 454 U.S. at 270 n.6 (refusing to distinguish "religious worship" from "speech about religion" and insisting that "even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer").

<sup>107</sup> *Good News*, 202 F.3d at 512 (Jacobs, J., dissenting).

ing religious theory and belief,' the result is 'a denial of the right of free speech.'<sup>108</sup> This is because, again, courts and governments lack the competence and cannot reasonably be trusted to identify that precise point where private expression crosses an imagined Rubicon of religiosity separating religious viewpoints on secular subjects—such as morals—from religious instruction and worship.<sup>109</sup>

\* \* \* \* \*

Subsequently, the Supreme Court reversed the Second Circuit's decision, with six Justices agreeing that it violated the First Amendment's viewpoint-neutrality requirement to deny the Club equal access to Milford's facilities.<sup>110</sup> Interestingly, though, Justice Thomas's opinion for the majority had little to say about the wisdom or constitutionality of government efforts to draw the line between religious worship, on the one hand, and the religious perspective, on the other.<sup>111</sup> Instead, the Court stated that even "quintessentially relig-

---

<sup>108</sup> *Id.* at 515 (quoting *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 845 (1995)).

<sup>109</sup> *See, e.g., Good News*, 121 S. Ct. at 2110–11 (Scalia, J., concurring) ("If the distinction did have content, it would be beyond the courts' competence to administer. . . . And if courts . . . were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable."); *Widmar*, 454 U.S. at 272 n.11 ("We agree . . . that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'") (citations omitted).

<sup>110</sup> *Good News*, 121 S. Ct. at 2100; *see also id.* at 2109 (Scalia, J., concurring) ("This is blatant viewpoint discrimination."). Five Justices also concluded that exclusion was not required by the Establishment Clause. *Id.* at 2103–07. Justice Breyer also agreed that, "viewing the disputed facts . . . favorably to the Club . . . [Milford] has not shown an Establishment Clause violation." *Id.* at 2112 (Breyer, J., concurring in part). He emphasized, though, his view that "both parties . . . should have a fair opportunity to fill the evidentiary gap in light of today's opinion." *Id.* (Breyer, J., concurring in part).

<sup>111</sup> Indeed, in Justice Thomas's view, the Second Circuit never actually determined that the Club's activities were "religious worship"; rather, it simply compared the Club's activities to worship. *Good News*, 121 S. Ct. at 2102 n. 4. *Cf. Good News*, 202 F.3d at 510 ("[W]e believe that the school authorities, after thorough inquiry and deliberation, correctly determined that the activities of the Club fall clearly on the side of religious instruction and prayer."); ("It is difficult to see how the Club's activities differ materially from the 'religious worship' described [in other cases].") *Id.* Justice Souter and Ginsburg, on the other hand, were of the view that "[i]t is beyond question that *Good News* intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship[.]" *Good News*, 121 S. Ct. at 2117 (Souter, J., dissenting); *see also Rosenberger*, 515 U.S. at 867 (Souter, J., dissenting) ("This writing is no



ious" expression can, for First Amendment purposes, be "characterized properly as the teaching of morals and character development from a particular viewpoint."<sup>112</sup> The Court saw "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a framework for their lessons," and refused to conclude that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not."<sup>113</sup>

Although the *Good News* Court reversed the Second Circuit's decision, its conclusion, in a footnote, that the Club's activities were not "mere religious worship, divorced from any teaching of moral values," suggests the same misplaced confidence in courts' powers of theological interpretation as did the ruling of the Court of Appeals.<sup>114</sup> What criteria, we might ask, would the Court have used to identify "mere religious worship" that *was* "divorced from any teaching of moral values" or—returning to the tax exemption—from other "secular" matters, like "politics"? Justice Stevens's dissent raises similar, and perhaps even thornier, problems. His fear was not that the Club's activities might have crossed the line between discussion from a religious viewpoint and "worship," but instead the boundary between such discussion and "religious proselytizing."<sup>115</sup> But again, how is government possibly to identify the point at which a religious speaker starts

---

merely descriptive examination of religious doctrine. . . . Nor is it merely the expression of editorial opinion. . . . It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ[.]). They also dismissed as "semantic" Justices Thomas's conclusion that the Second Circuit never actually determined that the Club's activities were "worship." *Good News*, 121 S. Ct. at 2117 n.3 (Souter, J., dissenting).

<sup>112</sup> *Good News*, 121 S. Ct. at 2102.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 2102 n.4.

<sup>115</sup> *Id.* at 2113 (Stevens, J., dissenting). In his view, "just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship." *Id.* But see *id.* at 2109 (Scalia, J., concurring) (arguing that it is "blatant viewpoint discrimination" to say that "[t]he Club may not . . . independently discuss the religious premise on which its views are based . . . [and] may not seek to persuade the children that the premise is true"); *id.* at 2110 (Scalia, J., concurring) ("The right to present a viewpoint based on religion carri[es] with it the right to defend the premise.").

caring too much about what she says, or trying too hard to convince her listeners?<sup>116</sup>

I cannot provide here the detailed discussion that *Good News* deserves and will certainly provoke. For my purposes, though, the point to be emphasized is this: At the heart of the *Good News* case is the same constitutional and theological problem that lurks in the prohibitions on "political" activities by tax-exempt entities. That is, the opinions in *Good News*, like the statutory restrictions on churches' political activities, call for caution. They should prompt us to wonder how government is able to distinguish religious purposes from secular ones, worship from perspective, discussion from proselytization. In other words, Justice Souter's admission in the graduation-prayer case, *Lee v. Weisman*, seems particularly appropriate here: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology."<sup>117</sup>

### III. TEACHING THROUGH LABELS AND THE PRIVATIZATION OF RELIGION

I have tried to show that for government to identify and police a boundary between religious activities and political activities is a trickier task than the Second Circuit was able to admit in *Good News v. Milford Central School*. To which one response might be, "Yes, it is hard, but so what?" That the line is hard to draw is not, in itself, a compelling reason not to draw it, particularly in light of the government's asserted interests in enforcing it.<sup>118</sup> Are there any other drawbacks, besides difficulty?

Justice Scalia might counter, as he did in *Good News*, by pointing to the entanglements between religion and government that would accompany comparative-theology-driven boundary maintenance by

---

<sup>116</sup> Even if government officials could identify this point, it is not clear why they should be able to act upon it. After all, "[e]ffectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise[.]" *Id.* at 2109 (Scalia, J., concurring); see also *Rosenberger*, 515 U.S. at 844 ("Were the dissent's view to become law, it would require the University . . . to scrutinize the content of student speech, lest the expression in question . . . contain too great a religious content.").

<sup>117</sup> 505 U.S. 577, 616–17 (1992) (Souter, J., concurring).

<sup>118</sup> See, e.g., *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093, 2114 (2001) (Stevens, J., dissenting) ("The line between the various categories of religious speech may be difficult to draw, but I think that the distinctions are valid, and that a school . . . must be permitted to draw them.").

courts between faith and activism.<sup>119</sup> Others might agree with the *Mitchell v. Helms* plurality, and reject as "offensive" the government "trolling" through beliefs that must inevitably accompany such maintenance.<sup>120</sup> Still others might worry, citing the decision in *Dale v. Boy Scouts of America*, that by inspecting associations' activities in order to identify their true import or significance, government might intrude on the freedom of expressive association.<sup>121</sup>

Let me suggest, though, another counter-response to the "so what?" question: By determining for its own purposes the meaning of religious communities' statements and activities, and by enforcing the distinctions it draws, government subtly reshapes religious consciousness itself.<sup>122</sup> In other words, by telling religion what it may say, really is saying, or will be deemed to have said, and by telling faith where it belongs, government molds religion's own sense of what it is.<sup>123</sup>

Now, the Supreme Court has told us time and again—it is practically black-letter law—that "[our] Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."<sup>124</sup> In the 2000 Term's "football prayer" case, for example, a comfortable majority of the Justices reaffirmed that the "transmission of religious beliefs and worship" is a "responsibility and a choice committed to the private sphere."<sup>125</sup>

Similar pronouncements led my colleague, Professor Bradley, to suggest in another context that "[t]he Court is now clearly committed to articulating and enforcing a normative scheme of 'private' religion."<sup>126</sup> Indeed, he argues powerfully that the Court's post-*Everson v.*

<sup>119</sup> *Id.* at 2111 (Scalia, J., concurring); see also, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971) ("This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.").

<sup>120</sup> 530 U.S. 793, 828 (2000).

<sup>121</sup> See 530 U.S. 640, 653–57 (2000).

<sup>122</sup> Cf. Bradley, *supra* note 15, at 277 (arguing that the Court's Religion Clause jurisprudence is "most profitably understood as [a] judicial attempt to move religion into the realm of subjective preference by eliminating religious consciousness").

<sup>123</sup> See Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 268 (1992) (noting that some read the Establishment Clause as having been designed to "keep religion its place; that is, out of the public discourse to the greatest extent possible").

<sup>124</sup> *Lemon*, 403 U.S. at 625 (Douglas, J., concurring); see also, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting) (noting that the "religious function" is "altogether private").

<sup>125</sup> *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 310 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).

<sup>126</sup> See Bradley, *supra* note 15, at 276–77.

*Board of Education* cases “are most profitably understood as judicial attempts to move religion into the realm of subjective preference by eliminating religious consciousness.”<sup>127</sup> In marked contrast to James Madison’s “high-stakes constitutional gamble”—his “hope[] to achieve manageable conflict fueled by diversity and freedom,” in religion as in other matters—the Court turned to privatization “as the ‘final solution’ to the problem of religious faction.”<sup>128</sup> Its ambition—not merely the unintended effect of its decisions—is not only to confine the potentially subversive messages of religion to a “nonpublic ghetto,”<sup>129</sup> but also to revise and privatize the messages themselves. Having acquiesced to judicial declarations that it is a private matter, and accepted that its authority is entirely subjective, religious consciousness is unable to resist the conclusion that its claims to public truth are “implausible nonsense,” and therefore cannot help but concede the field of public life and morality to government.<sup>130</sup>

Although I cannot flesh out the argument here, it strikes me that the exemption-and-restriction scheme, the line-drawing it invites, and the assumptions it reflects might also be “profitably understood” as part of a “normative scheme of ‘private’ religion.” To be clear, this privatization of religion is not simply its institutional disestablishment or an entirely appropriate respect on government’s part for individual freedom of conscience and the autonomy of religious institutions.<sup>131</sup> Nor is the claim only that the exemption privatizes religion by deterring political activism and silencing political advocacy by religious believers and communities. It is, instead, that the exemption scheme and its administration subtly re-form religion’s conception of itself. Government evaluates and characterizes what churches say and do, and decides both what it will recognize as religious and what it will

---

<sup>127</sup> Bradley, *supra* note 15, at 277; see also Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 211 (1992) (“[N]ot all divisive and controversial questions have been privatized by the Constitution; only religious questions have.”).

<sup>128</sup> Bradley, *supra* note 15, at 276, 277; see also *id.* at 330 (“The sad[] truth may be that the Court indeed perceives itself as doing the dirty but indispensable work of saving the republic from faith unchained and are, thus, sadly obliged to reject Madison’s gallant gamble.”).

<sup>129</sup> *Id.* at 280.

<sup>130</sup> *Id.*; see also *id.* at 297 (stating that “privatization” thesis is that “if religion possesses any objective truth claims at all, they are not public truths”).

<sup>131</sup> See generally, e.g., SECOND VATICAN ECUMENICAL COUNCIL, DIGNITATIS HUMANAE [Declaration on Religious Liberty] ¶ 2 (1965) (insisting upon the freedom of conscience in matters of religion, and grounding freedom in the dignity of the human person) available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat\\_ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat_ii_decl_19651207_dignitatis-humanae_en.html) (last visited Sept. 20, 2001).

label as political.<sup>132</sup> The identification of certain activities by religious associations as inappropriate irruptions of faith into the political sphere, and the criteria used to identify such irruptions, allow government to tame religion, and to "blunt [its] political saliency," by identifying what it is not.<sup>133</sup>

If this is correct, then the privatization of religion is its re-making by government and its transformation from a comprehensive and demanding account of the world to a therapeutic "cocoon wrapped around the solitary individual."<sup>134</sup> It is a state-sponsored change in religious believers' own notions of what their faith means and what it requires. It is the process by which government domesticates the churches' evangelical vocation and convinces religion to see itself as a socially impotent force that does not belong in politics. The government tells faith communities that religion is a private matter, and, eventually, they come to believe it. But as the theologian Johann Metz has observed, the "eschatological promises of biblical tradition—liberty, peace, justice, reconciliation—cannot be made private. They force one ever anew into social responsibility."<sup>135</sup> And so, when religion—whether because of the didactic effects of the tax law, or for any other reason—becomes content to be what government says it is or should be, then maybe, in Chief Justice Marshall's words, it really has been "destroyed."<sup>136</sup>

#### IV. THE MONOTONOUS PUBLIC SQUARE

The administration of the churches' conditional tax exemption embroils government in the difficult business of distinguishing worship and ministry from electioneering and political advocacy. In marking these boundaries, government sends the message and reinforces the belief that religion is a private matter, of private import, for

---

<sup>132</sup> See Bradley, *supra* note 15, at 276–77.

<sup>133</sup> *Id.* at 277, 279 ("What is 'religion'? How does it descriptively irrupt into 'politics,' and what follows from these irruptions? And, most importantly, by what criteria are those effects judged desirable or undesirable?").

<sup>134</sup> *Id.* at 293.

<sup>135</sup> JOHANNES B. METZ, *THEOLOGY OF THE WORLD* 153 (Glen-Doepel trans., 1969); see also Bradley, *supra* note 15, at 277 (arguing that "religious consciousness" is "the conviction that religion contains objectively true insights into human social existence"); *id.* at 329 ("Political norms have no necessary influence on religious communities, yet religion's encompassing account of existence necessarily influences the polis.").

<sup>136</sup> See Bradley, *supra* note 15, at 293 ("It is not easy to see how religion . . . can be compartmentalized within a 'private' area, much less prosper there.").

the private sphere. And, eventually, religion embraces and incorporates this view.

This privatization point leads to another, final, concern: That the government's assignment of its own meanings to what churches do, and what government and law say about the place of religion in public life, threaten to further denude the "public square"<sup>137</sup> and weaken the much-remarked structures of civil society.<sup>138</sup> In other words, it is not only religious consciousness that suffers when faith is told its place. Rather, the privatization of faith and its retreat to the sphere assigned to it by the state will likely be accompanied by a similar retreat of authentically religious associations and by the hollowing out of civil society.<sup>139</sup> When government constructs a boundary between religion (which is private) and public life; and when religious people and associations embrace and internalize this boundary, we should not be surprised when the churches stop functioning as intermediate institutions. Having taken their cue from the state as to what they should be, religious associations retreat to private life, to subjectivity. But a church that accepts its banishment from civil society, and whose mission is more therapeutic than transforming, cannot really be expected to serve as a buffer, to mediate between persons and the state, or to compete with the liberal state for our values and loyalties.<sup>140</sup>

This retreat is troubling, first, because even though faith ultimately inheres in persons, it also depends on institutions and associations for its transmission. History demonstrates that faith can flourish in times of persecution; nonetheless, it requires mediating associations to thrive, if only to filter and counter competing messages.<sup>141</sup> Retreat is also regrettable because, as Professor Gaffney has suggested, "being in trouble with the State is one of the marks or sure signs of

---

<sup>137</sup> See generally RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1986).

<sup>138</sup> See generally, Symposium, *supra* note 17.

<sup>139</sup> I do not mean, with this talk of privatization and retreat, to ignore the endless (and tedious) expressions of civil religion, ceremonial deism, "American Shinto," and treacly piety that, all admit, are staples of our cultural life. See JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 236 (2000).

<sup>140</sup> See Garnett, *supra* note 12, at 1853 ("[A]ssociations are about social structure as much as self-expression. They get in the way just as they facilitate. They are the hedgerows of civil society. They are wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge.").

<sup>141</sup> This is not to say that the function of religious communities is simply to mediate and compete in civil society. For example, many Christian denominations and traditions speak of the Church as "the body of Christ." See, e.g., 1 *Corinthians* 12:1-31; The Catechism of the Catholic Church ¶¶ 787-795 ("The Church-Body of Christ") (1994).

the church's authenticity."<sup>142</sup> But a church that has retreated, and whose consciousness has been remade to cohere with state-drawn lines between spheres, is less likely to get into such trouble with government. And finally, the retreat of religious associations to the private sphere suggests an ill-founded confidence that government will not follow. But it will. The privatization of religion is a one-way "ratchet that stems the flow of religious current into the public sphere, but does not slow the incursion of political norms into the private realm."<sup>143</sup>

We should not think that this hollowing out of civil society is bad only for religion. A free and liberal society, and the goods for which it aims, depend on a busy and crowded public square. They require—because the formation of citizens requires—the activity and voices of independent associations. They require mediating institutions to serve as social scaffolding and to "contribute[] to the public good by inculcating ideas of public and private virtue."<sup>144</sup> And they do this—perhaps counter-intuitively—sometimes by obstructing, rather than cooperating with, the government's projects; they compete with, and do not merely echo or amplify, the state's voice in the formation of persons. The classical liberal hope, remember, is that this kind of competition is more likely than state-sponsored homogenization to nurture civic virtue and produce citizens oriented toward the common good.<sup>145</sup>

Religious communities are crucial sources for the kind of counter-speech that liberal governments should expect and free societies

---

<sup>142</sup> Gaffney, *supra* note 123, at 303.

<sup>143</sup> Bradley, *supra* note 15, at 324. Cf. *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 593 (1983) (denying tax-exempt status to private school that discriminated, for assertedly religious reasons, on the basis of race, because such discrimination is against "public policy"). I am reminded here, for example, of contemporary scholars whose support for private-school choice programs reflects, at least in part, a hope that tuition vouchers will serve as a vehicle for additional regulation in the service of "liberal public values." See, e.g., Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Non-Profit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 430–42, 450–51 (2000).

<sup>144</sup> Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 455 (2000).

<sup>145</sup> *Id.* at 475 ("The great solution to the republican problem was to promote public virtue indirectly, by protecting freedom of speech, association, and religion, and leaving the nation's communities of belief free to inculcate their ideas of the good life, each in their own way."). Thus, odd as it might sound, the tax-exemption scheme might have things backward. As my colleague Anthony Bellia remarked, maybe a government that sees its purpose as the promotion of the common good in a free society should not only exempt its non-commercial, mediating institutions from the burdens of taxation, it should want these same associations to participate in and contribute to the political process.

require.<sup>146</sup> The alternative is, literally, monotony.<sup>147</sup> Recall here the president-elect's retort to Archbishop Romero, when reminded that "there are political implications to the Gospel": "We will take care of those," he said.<sup>148</sup> And surely they will. But the task of identifying those political implications, and of monitoring whatever distinctions there might be between these mere implications and the Gospel itself, is a *theological* task. It is not something the state can be trusted to "take care of," though we should expect it to embrace eagerly the opportunity to harmonize, if not monotonize, these implications. I suspect, though, that "the Gospel" implies, and authentic religious consciousness should produce, some dissonance.

This brings us back to Professor Lee's observation that the conditional tax exemption is, at bottom, the government's way of paying churches not to talk about certain things.<sup>149</sup> But perhaps the most important way that intermediate associations do what it is that civil-society revivalists want them to do is precisely to "talk about certain things." Again, these associations mediate; they serve as vehicles for concerted activity by individuals, and for amplified expression to government and to the world. They also, like government, express and transmit messages of their own. We are shaped by mediating associations, even as we shape our world through them.<sup>150</sup> These associations are at their best, it seems to me, precisely when they "talk about certain things" that government is not talking about, or is talking against. After privatization and retreat, their absence is felt most keenly in the monotonous, homogenizing sameness of the government's own efforts to create the citizens it needs.

### CONCLUSION

At this point, it would be fair to ask what solutions I propose for the problems I posit. It strikes me as sound policy for government not to impose tax burdens on associations and organizations whose pur-

---

<sup>146</sup> For an engaging discussion of the "loyalty" demanded by mediating associations—religious communities, in particular, see generally STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* (1998).

<sup>147</sup> That said, I agree with George Weigel that it would be a mistake to reduce the Church to a mediating institution with a message, or a "voluntary association with a cause." George Weigel, *Papacy and Power*, *FIRST THINGS*, Feb. 2001 at 18, 25 (stating that the Church "is the institutional embodiment of truth claims").

<sup>148</sup> ROMERO, *supra* note 24.

<sup>149</sup> Lee, *supra* note 6, at 434 ("Section 501(c)(3) . . . pays churches through tax-exempt status to be silent on issues deemed by the state to be political.").

<sup>150</sup> See Garnett, *supra* note 12, at 1849–56.



pose is not to generate income and that contribute to the polity in ways other than wealth-generation. Notwithstanding the concerns I have expressed, I do not mean to suggest that government restrictions on tax-exempt organizations' election-related activities are always unreasonable or unjustifiable.<sup>151</sup> Likewise, I recognize that it would be difficult to remove such restrictions for religious associations, while retraining them for other tax-exempt organizations.<sup>152</sup>

In the end, I have no solution to propose other than caution. My hope for this admittedly diffuse Article is merely that it will prompt further reflection about the interpretation and categorization by government of what religious associations say and do. A more particular goal, perhaps, has been to highlight the dangers posed to authentically religious consciousness, to religious associations, to civil society—and, indeed, to persons—by government efforts to define for religious believers what is religious and what is political activity.<sup>153</sup> As I suggested at the outset, maybe Chief Justice Marshall had a point; maybe his observation about the destructive character of the power to tax was more than a mere “seductive cliché.” Our government exercises its power to tax precisely by conditionally exempting churches from taxation. It labels their expression and activity according to its own terms and, in so doing, “destroy[s]” authentically religious consciousness and undermines the mediating structures of civil society.

\* \* \* \* \*

There is a scene in the Book of Kings where Elijah the Prophet confronts King Ahab, who, we are told, “did more to provoke the LORD, the God of Israel, to anger than all the kings of Israel who

---

<sup>151</sup> See generally, e.g., Johnson, *supra* note 10 (discussing government's interest in preventing circumvention of campaign-finance laws and in not requiring taxpayers to “subsidize” political expression to which they object). Cf. Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?* 42 B.C. L. REV. 805, 841 (2001) (“In the final analysis, tax exemption does not subsidize churches, but leaves them alone.”).

<sup>152</sup> The question whether the Constitution would permit—or, perhaps, whether it requires—such unequal treatment of religious and non-religious nonprofits, again, goes beyond the scope of this Article. See, e.g., Gaffney, *supra* note 8, at 35–39 (arguing that the restrictions on churches' putatively political activities are unconstitutional conditions); Goodwin, *supra* note 8, at 384 (arguing that “exemption of churches from taxation is not merely constitutionally-permissible, it is constitutionally-required”).

<sup>153</sup> See Bradley, *supra* note 17, at 330 (noting the “dehumanization implicit in the separation of individual existence into political, economic, religious, and cultural performances, each severally and tightly controlled by internally generated norms”).

were before him."<sup>154</sup> Ahab meets Elijah—wearily, I imagine—with this greeting, "Is that you, O Disturber of the Peace?"<sup>155</sup> I cannot help thinking that this is how religious believers, associations, and expression should be greeted—at least sometimes—by the government. If they are not, maybe something is wrong. It strikes me that a radically privatized and insufficiently irritating faith is not all that it is called to be.<sup>156</sup>

In a similar vein, Charles Peguy, in his *The Mystery of the Charity of Joan of Arc*, observes that Christ "had been a good workman," "a good carpenter," "a good son," "a quiet young man," and "a good citizen . . . easy to govern . . . until the day he had begun his mission."<sup>157</sup> And then, Peguy continues, he "introduced disorder" and "disturbed the world."<sup>158</sup> Religious faith should "disturb[] the world" and religious communities should expect to be bothered by government. In Professor Shaffer's words, faith is "nothing until it can be allowed to mess up American democratic, constitutional, legal, professional commitment."<sup>159</sup> Whatever tranquility government promises from privatization is, in the end, not worth the cost to discipleship.

---

<sup>154</sup> 1 *Kings* 18:17.

<sup>155</sup> *Id.*

<sup>156</sup> See Shaffer, *supra* note 30, at 1875 (noting that privatized religion "will not likely attract or deserve words such as deviant or subversive, because it will so often be *talked out of* confronting power").

<sup>157</sup> CHARLES PEGUY, *MYSTERY OF THE CHARITY OF JOAN OF ARC* 114 (Pantheon 1950).

<sup>158</sup> *Id.* at 115.

<sup>159</sup> Thomas L. Shaffer, *Maybe a Lawyer Can Be a Servant. If Not . . .*, 27 *TEX. TECH. L. REV.* 1345, 1348 (1996).

