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The Establishment Clause, Civil Rights, and the Accomodationist Path Forward

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The Establishment Clause, Civil Rights, and the Accommodationist Path Forward

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The U.S. Supreme Court's First Amendment Religion Clause doctrine is undergoing a transition between the Court's older, strict separationist decisions and its current accommodationist approach. This shift can be seen in the Court's most recent Establishment and Free Exercise Clause decisions, and in particular, in its unanimous Free Speech Clause decision in Shurtleff v. City of Boston*, a case which found that the challenger, Harold Shurtleff, had a First Amendment right to raise a flag with a cross on a city flagpole. In many ways,* Shurtleff *exemplifies the Court's incremental movement toward an accommodationist Establishment Clause doctrine, and this shift gives some observers cause for concern. Does the move away from strict separation signal the end of doctrinal commitments to religious pluralism and the rights of minorities? In this Article, I attempt to answer that question in the negative by framing the Court's accommodationist turn in an unexpected historical context—the Civil Rights Movement. The religiously inflected advocacy on display during the Civil Rights Movement suggested a positive role for religion in the public square. At the same time, the Civil Rights Movement was pluralist in tone and vision. This Article offers the opportunity to reflect on the neglected lessons of that movement for church and state.*

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INTRODUCTION

The U.S. Supreme Court's Religion Clause doctrine is undergoing a period of change. The Court's strict separationist Establishment Clause decisions have receded into the background, and the Court's recent accommodationist decisions reflect major shifts in existing doctrine.[1] In the Court's most recent term, a majority of the Court announced that *Lemon v. Kurtzman* had been overruled (in all contexts) and had been replaced with a test that focuses on historical practices and understandings.[2]

Is the Supreme Court's new direction a cause for celebration or concern? As the Court moves away from the strict separation of *Lemon*, toward a modest accommodation, some see in the Court's doctrine an insurgent establishmentarianism that portends harm to religious minorities and nonbelievers. But it is not clear why this should be so. From the beginning of the Court's doctrine applying the Religion Clauses, there have been competing views of religious liberty.[3] In this Article I hope to make a simple but often overlooked point: It is possible to cast an inclusive accommodationist vision, as evidenced by one of the

1. *See, e.g.*, Espinoza v. Mont. Dept. of Rev., 140 S. Ct. 2246, 2263 (2020); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2105 (2019) (Ginsburg, J., dissenting).

2. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (noting the Court "long ago abandoned *Lemon* and its endorsement test offshoot" for an Establishment Clause interpretation based on "reference to historical practices and understandings" (quoting *American Legion*, 139 S. Ct. at 2079–81; then quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))). This shift tracks similar movement away from neutrality in favor of accommodation under the Free Exercise Clause. In several cases, the Court has ruled in favor of Free Exercise claimants on the basis of an anti-discrimination principle. *See, e.g.*, Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2030 (2017); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018); Espinoza v. Mont. Dept. of Rev., 140 S. Ct. 2246, 2265 (2020); Carson v. Makin, 142 S. Ct. 1987, 1997 (2022) ("The 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case.").

3. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (espousing both separation and neutrality in holding that a state cannot exclude religious individuals from receiving generally available public benefits); *see also* Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) (upholding off-campus release time program, noting American traditions "respect[] the religious nature of our people and accommodates the public service to their spiritual needs").

most self-consciously religious social movements in recent history, the Civil Rights Movement.[4]

To make this observation, however, is at once to invite an objection. There is a conventional story that is believed about twentieth century Establishment Clause litigation that situates the U.S. Supreme Court's separationist Establishment Clause decisions within the rights revolution that produced *Brown v. Board of Education*. Likewise, the Civil Rights Movement is thought to have produced several children—other movements that flourished as a result of the strides achieved by Black Americans during that period.[5] Scholars have assumed, for example, that the Court's Establishment Clause decisions removing public religious symbols owe a debt to *Brown* and other Civil Rights Movement-era victories.[6]

As a broad-brush proposition, this account of Establishment Clause doctrine misses some important differences between separationist Establishment Clause decisions and the advocacy and rhetoric of the Civil Rights Movement. It is true that some prominent civil rights leaders embraced the principle of separation. Rev. Martin Luther King, Jr., for example, defended the Court's school prayer decision in *Engel*.[7] And Thurgood Marshall was a stalwart separationist during his tenure as an associate justice of the U.S. Supreme Court.[8] Taken to the limits of its logic, however, the strict separationist path would have undermined the very type of advocacy engaged in by civil rights luminaries—Martin Luther King, Jr., chief among them.[9]

Still, there is some overlap between the Civil Rights Movement and Establishment Clause litigation from that era and beyond. To the extent

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4. *See infra* Section II.A.

5. *See, e.g.*, Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 15 (2004).

6. *See, e.g.*, Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 14 & n.64 (2004) (collecting sources).

7. *See infra* Section II.B.

8. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 416–17 (1983) (Marshall, J., dissenting) ("For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion."); *see also* Lynch v. Donnelly, 465 U.S. 668, 709 (1984) (Brennan, J., dissenting) (joined by Justices Marshall, Blackmun, and Stevens) (opining that government display of a crèche violates the *Lemon* test in which "[t]o be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause"). *But see* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (majority opinion by Marshall, J.) (rejecting Establishment Clause challenge to handicapped petitioner's use of state vocational rehabilitation aid to finance religious training at a Christian college).

9. *See infra* Section II.A.

that the Supreme Court's separationist Establishment Clause decisions were informed by the failures of desegregation, or the indignities that can accompany minority status, they resonate with *Brown*.[10] An enduring Establishment Clause theme has been religious pluralism, which is informed by what the Court and the country learned about civil rights during those years. Cases that have been overruled do not reflect so much a turn away from civil rights, as a turning of the page.[11] In the current doctrinal moment, the Supreme Court is not running away from the victories of the past; rather, it is finding the accommodationist road not taken.

One of the Court's Free Speech Clause decisions from the 2021 Term, *Shurtleff v. City of Boston*, exemplifies this trend.[12] The decision in *Shurtleff* ties together free speech, government speech, and Establishment Clause doctrines.[13] Eclipsed by the prayer and school funding Religion Clause decisions this term, *Shurtleff* may not seem to move the Supreme Court's doctrine too far.[14] Some expected that *Shurtleff*—with supporting briefs from no less than the Biden Administration and the ACLU—would win his case against the City of Boston.[15] But the *Shurtleff* case is significant in a few ways: *Shurtleff* reinforces the Court's view of religious speech, it cabins the mischief that the government speech doctrine can do to private speech, including religious speech, and perhaps most important, it reinforces the Court's current view of the Establishment Clause.[16] *Shurtleff* comes at a moment of doctrinal change.[17] The case underscores the anti-discrimination strain of the Court's recent Free Exercise decisions—that religion is not to be treated

10. *See* Roy, *supra* note 6, at 6; *see also* Thomas Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 158–60 (2001).

11. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019) (plurality opinion) (explaining the shortcomings of *Lemon v. Kurtzman*, particularly in symbols cases); *see also infra* Section II.B.

12. *See generally* Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022).

13. *See id.* at 1593.

14. *Compare* Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) (city flag-raising program that excluded religious flags), *with* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (prayer by public school football coach after football games), *and* Carson v. Makin, 142 S. Ct. 1987 (2022) (public voucher program that excluded religious schools).

15. *Cf., e.g.*, Jeff Neal, *Supreme Court Preview:* Shurtleff v. City of Boston, HARV. L. TODAY (Jan. 7, 2022), https://today.law.harvard.edu/supreme-court-preview-shurtleff-v-boston/ [https://perma.cc/7W3W-DT2C] (Interview with Professor Sanford Levinson).

16. *See Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring) ("As the Court now recognizes, those cases did not set forth a test that always and everywhere applies when the government claims that its actions are immune to First Amendment challenge under the government speech doctrine.").

17. *See supra* note 14 (citing cases); *see also infra* Section I.A.

as suspect or subjected to discriminatory exclusion.[18] And it accomplishes all of this in the context of a case involving a singular religious symbol.[19] Under the Court's older, more separationist cases, *Shurtleff* might have been a fractured decision that turned on the Establishment Clause.[20] This Term, however, it produced a unanimous Free Speech Clause decision.[21]

Part I of this Article briefly surveys the U.S. Supreme Court's recent accommodationist Establishment Clause decisions and discusses *Shurtleff*.[22] Part II traces the religious DNA of the Civil Rights Movement and contrasts it with a strict separationist approach to the Establishment Clause.[23] Part III concludes that an accommodationist approach to the Establishment Clause need not be inconsistent with the civic ideal of pluralism.[24]

I. THE ACCOMMODATIONIST ESTABLISHMENT CLAUSE

A. Legislative Prayer and Religious Symbols

In *Marsh v. Chambers*, a majority of the U.S. Supreme Court upheld the practice of legislative prayer based on the "unique history" of the practice, dating back to the framing of the First Amendment.[25] After thirty years with *Marsh* and several intervening decisions, the Court affirmed the constitutionality of legislative prayer in the context of town board meetings in *Town of Greece v. Galloway*.[26] *Town of Greece* proved to be a seedbed of new doctrine, expanding the scope of the Court's historical approach in *Marsh* and minimizing the Court's earlier

18. *See, e.g.*, Fulton v. Philadelphia, 141 S. Ct. 1868, 1882 (2021) ("C[atholic] S[ocial] S[ervices] seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else."); Espinoza v. Mont. Dept. of Rev., 140 S. Ct. 2246, 2246 (2020); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2025 (2017) ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.").

19. *See generally* Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022).

20. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 601–02, 620–21 (1989).

21. *Shurtleff*, 142 S. Ct. at 1593 ("[T]he city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment.").

22. *See infra* Part I.

23. *See infra* Part II.

24. *See infra* Part III.

25. Marsh v. Chambers, 463 U.S. 783, 791 (1983) ("The unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.").

26. Town of Greece v. Galloway, 572 U.S. 565, 578–81 (2014).

decisions, including *Lemon*.[27] *Town of Greece* held that the Establishment Clause should be understood in terms of "historical practices and understandings."[28] Applying this historically-oriented approach, the Court upheld the rotating chaplaincy adopted by the Town as consistent with *Marsh*, notwithstanding that the prayers and prayer-givers had been almost exclusively Christian.[29]

Five years later, in *American Legion*, the Court upheld the Bladensburg peace cross, a ninety-four-year-old World War I memorial, and announced a constitutional presumption in favor of long-standing monuments.[30] Prior to *American Legion*, the Court had sometimes applied the *Lemon* or no-endorsement tests to determine the constitutionality of religious symbols.[31] *American Legion* broke new doctrinal ground with its presumption in favor of long-standing monuments. One of the justifications for changing the law in this area was a concern, first articulated by Justice Breyer years earlier, about perceived hostility to religion in striking down religious symbols.[32] In *American Legion*, the tone of the majority opinion was one of inclusiveness and mutual respect.[33] In opening the opinion, the majority stated that the aim of the Religion Clauses is "to foster a society in which people of all beliefs can live together harmoniously."[34]

A plurality of the Court discussed *Town of Greece* and identified the practice of legislative prayer by the first Congress as "an example of respect and tolerance for differing views, an honest endeavor to achieve

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27. *See generally id*.; *see also* Lisa Shaw Roy, *The Unexplored Implications of* Town of Greece v. Galloway, 80 ALB. L. REV. 877, 880–81 (2017).

28. *See Town of Greece*, 572 U.S. at 576, 587 ("The prayer opportunity in this case must be evaluated against the backdrop of historical practice.").

29. *See id*. at 570.

30. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081–82 (2019).

31. *See, e.g.*, McCreary v. ACLU, 545 U.S. 844, 859 (2005) ("Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has 'a secular legislative purpose' has been common, albeit seldom dispositive, element of our cases." (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971))); Cnty. of Allegheny v. ACLU, 429 U.S. 573, 592 (1989) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.")

32. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074–79 (2019) ("[The] removal or radical alteration [of the Bladensburg Cross] at this date would be seen by many not as a neutral act but as the manifestation of 'a hostility toward religion that has no place in our Establishment Clause traditions.'" (quoting Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring))); *id.* at 2084–85 ("A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.").

33. *See, e.g.*, Lisa Shaw Roy, *The Replacement Campaign: Monuments and Symbols*, 56 TULSA L. REV. 255, 280 (2021).

34. *Am. Legion*, 139 S. Ct. at 2074.

inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans."[35] The opinion closed with similar observations about the "respect and tolerance embodied in the First Amendment."[36] *American Legion* left open the possibility that newly-installed monuments might not pass constitutional muster.[37] And the opinion reserved the presumption for long-standing monuments that "follow in the tradition" of the inclusiveness praised by the plurality, and for ones whose histories do not include deliberate exclusion or disrespect.[38]

Such was the state of the Court's Establishment Clause doctrine leading up to the Court's 2021 Term and its decision in *Shurtleff*.

B. Free Speech v. Anti-Establishment

In *Shurtleff*, although Boston allowed outside groups to raise a flag on the city's third flagpole, Boston rejected Harold Shurtleff's and his Camp Constitution's "Christian Flag" on account of its religious nature.[39] Over a period of ten years, the city had hosted over 284 flag-raisings with more than fifty different flags; Shurtleff's flag was the first rejection.[40] The city official responsible for running the unusual flag-raising program stated that he was worried that Shurtleff's proposed flag, a Latin red cross inside a blue canton against a white background, would violate the Establishment Clause.[41] Several months after the litigation began, the city created a policy for its future flag decisions which forbade the "'display [of] flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements.'"[42]

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35. *Id.* at 2088–89. Though Justice Kagan did not join the plurality's discussion, she praised this portion of the opinion as attentive to the demands of pluralism, neutrality, and inclusion. *Id.* at 2094 (Kagan, J., concurring) ("[T]he opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands.").

36. *Id.* at 2090 (plurality opinion) ("[D]estroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment.").

37. *See id.* at 2085; *see also id*. at 2091 (Breyer, J., concurring) ("A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach.").

38. *Id.* at 2089–90.

39. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1588 (2022). Camp Constitution's mission includes "enhanc[ing] understanding of the country's Judeo-Christian moral heritage . . . ." Shurtleff v. City of Boston, 986 F.3d 78, 84 (1st Cir. 2021), *cert. granted sub nom.* Shurtleff v. City of Boston, 142 S. Ct. 55 (2021), *rev'd and remanded sub nom*. Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022).

40. *Shurtleff*, 142 S. Ct. at 1587 ("All told, between 2005 and 2017, Boston approved about 50 unique flags, raised at 284 ceremonies. Boston has no record of refusing a request before the events that gave rise to this case.").

41. *Id.* at 1588.

42. *Shurtleff*, 986 F.3d at 84.

The plaza area around the flagpoles was dubbed a "public forum" by the city, which no doubt solidified the Court's choice between government speech and private speech which dictated the outcome in the case.[43]

The Court found that the flag-raisings constituted private speech, not government speech, therefore the flagpole was, in fact, a forum.[44] In a public forum, the government is forbidden from discriminating on the basis of viewpoint. The government speech doctrine represents perhaps the only circumstance in which the government may engage in viewpoint discrimination without having to show a compelling government interest.[45] Because a feared violation of the Establishment Clause was not likely to be a compelling interest in this context, the city had to lose.[46]

The doctrinal lever for *Shurtleff* is the government speech doctrine; everything else the Court decided flowed from whether Boston's flagpole arrangement was government speech. In the background was the Establishment Clause, which the First Circuit found would be violated by the display of the religious flag under Boston's policy. In other words, if Boston is speaking, then it can reject what it wants, including an explicitly religious symbol like the Christian flag, and that part of the Court's doctrine has not changed. Once the Court found the City's flagpole arrangement to be a public forum, the city no longer had the justification of the Establishment Clause as a reason to exclude a religious symbol.[47]

This is a familiar problem for religious speakers that had seemed settled long ago, as some of the Justices recognized in oral argument.[48]

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43. *Shurtleff*, 142 S. Ct. at 1588 ("Boston makes City Hall Plaza available to the public for events. Boston acknowledges that this means the plaza is a 'public forum.'").

44. *Id.* at 1593.

45. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022) ("When the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to 'promote a program' or 'espouse a policy' in order to function.") (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015))).

46. *See id.* at 1593; *see also id.* at 1608–09 (Gorsuch, J., concurring) ("For as long as the First Amendment means anything, government policies that discriminate against religious speech and exercise will only invite litigation and result in losses like Boston's. Today's case is just one more in a long line of reminders about the costs associated with governmental efforts to discriminate against disfavored religious speakers."); *see infra* note 54 (citing cases).

47. *Shurtleff*, 142 S. Ct. at 1593.

48. *See* Transcript of Oral Argument at 63, Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) (No. 20-1800) (Justice Kavanaugh) ("On the Establishment Clause point, it seems to me that maybe the root cause of this . . . is actually a mistaken view about the Establishment Clause, that when you have government property that's opened for a forum for speech or for use, that there is a mistaken understanding that has existed that if you allow a bunch of secular groups and then allow a religious group to use it, that you've violated the Establishment Clause by doing that. It seems like we've had case after case after case that has tried to correct that misimpression of the Establishment Clause, and that seems to me what the root cause is here."); *see also id*. at 70 (Justice Kagan) ("Well, I wonder if you think I'm exactly right if I say the following—and this really does

But in this context, the case presented another opportunity for the Court to clarify that if the government opens a forum, then the Establishment Clause does not require it to exclude religion from that forum.[49] Because Shurtleff's flag was not government speech, the Establishment Clause did not bar flying the flag; instead, Boston's refusal constituted viewpoint discrimination.[50] The unanimous opinion does not itself adopt the view that only if the flag constituted government speech, would it constitute an Establishment Clause violation.[51] The *Shurtleff* majority's studied ambivalence about the Establishment Clause all but previewed the explicit overruling of *Lemon v. Kurtzman*[52] in the *Kennedy* case two months later.[53]

The sweep of the religion-as-speech decisions resulted in incremental victories for religious challengers under the same basic legal rule.[54] Each subsequent decision reinforced the rule that religion may not be excluded from a forum on the grounds of a feared Establishment Clause violation. And each decision diminished the force of arguments asking the Court to view new contexts as unique for purposes of the Establishment Clause.[55]

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go back to Justice Kavanaugh's point, because the reason I said, like, why wasn't this settled is because my guess is the same as his, that this all came about because of a mistake by Mr. Rooney, and it–it's—it's actually an understandable mistake.").

49. Of course, Boston could have argued that even if the flagpole constituted a forum and not government speech, the Establishment Clause would prohibit the City from flying the Christian flag. This was not the City's position, and would have been a difficult argument to make in light of the Court's precedent. *See, e.g.*, Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995).

50. *See Shurtleff*, 142 S. Ct. at 1593.

51. *Id.* This is reminiscent of *Trinity Lutheran*, a recent decision in which the Court deferred to the parties' view of the Establishment Clause without having to express an opinion. Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2019 (2017) ("The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.").

52. 403 U.S. 602 (1971); *see also Shurtleff*, 142 S. Ct. at 1607 (Gorsuch, J., concurring in judgement) ("Recognizing *Lemon*'s flaws, this Court has not applied its test for nearly two decades.").

53. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (noting that "just this Term the Court [in *Shurtleff*] unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test."); *see also* Daniel D. Benson, Lemon *on the Chopping Block: The Establishment Clause Implications of* Shurtleff v. City of Boston, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, at 11 ("*Shurtleff* itself won't be the case to hammer the final nail in *Lemon*'s coffin. But a unanimous Supreme Court holding that Boston violated the First Amendment by discriminating against religious speech at least takes another swing at it.").

54. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102–03 (2001); Rosenberger v. Rector & Visitors, Univ. of Va., 515 U.S. 819, 827 (1995); Bd. of Educ. v. Mergens By & Through Mergens, 496 U.S. 226, 251 (1990); Lamb's Chapel v. Ctr. Moriches Union Sch. Dist., 508 U.S. 384, 387–88 (1993); Widmar v. Vincent, 454 U.S. 263, 265 (1981).

55. For two cases that involved the same rule excluding religion applied in different contexts, see generally, e.g., *Lamb's Chapel*, 508 U.S. 384; *Good News Club*, 533 U.S. 98.

Likewise, in *Shurtleff*, Boston argued essentially that flagpoles are different, and therefore Boston's Establishment Clause fears were warranted.[56] Much of this argument centered around the issue of whether the flagpoles were government speech—but the government speech doctrine itself embeds certain features of the Court's older, separationist Establishment Clause cases—namely the reasonable observer.[57] So, an argument that the reasonable observer would attribute the flagpoles to the city is not very far removed from an argument that the reasonable observer would think that the government was sending a message of favoritism.[58] The Court's response was, once again, to prioritize the features of the forum over whatever an observer might conclude.[59]

Shurtleff is not an anomaly. All of this tracks what the Court has said about religious speech, and, in recent years, the Establishment Clause—hence the unanimous decision in the case. When the earlier religion-as-speech cases were decided, the Court's doctrine of religious symbols had a separationist tone, and its Free Exercise doctrine was at its nadir, setting up a contrast between the separate lines of decisions.[60] *Shurtleff*, however, comes at a time when the Court has solidified the return to history in its Establishment Clause doctrine, and it is shoring up the anti-discrimination aspects of the Free Exercise Clause.[61]

The opinion that engages most sharply with the Establishment Clause issue is Justice Gorsuch's concurrence, which attempts to explain why Boston may have rejected Shurtleff's flag in the first place.[62] Gorsuch locates the trouble in the Court's oft-criticized and less often applied Establishment Clause decision, *Lemon v. Kurtzman*.[63] He posits that to

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56. *See* Shurtleff v. City of Boston, 986 F.3d 78, 96 (1st Cir. 2021), *cert. granted sub nom*. Shurtleff v. City of Boston, 142 S. Ct. 55 (2021), *rev'd and remanded sub nom*. Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) ("The raising of the Christian Flag thus would threaten to communicate and endorse a purely religious message on behalf of the City.").

57. *Compare* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1133–36 (2009), *with* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 618–20 (1989).

58. *See* Lynch v. Donnelly, 104 S. Ct. 1355, 1368 (1984) (O'Connor, J., concurring); *see also* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 766–67 (1995).

59. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1591 (2022) ("[E]ven if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here. Again, this evidence of the public's perception does not resolve whether Boston conveyed a city message with these flags.").

60. *See* Lisa Shaw Roy, *The Evangelical Footprint*, 2011 MICH. ST. L. REV. 1235, 1255–64 (2011) (discussing cases).

61. *See supra* note 2 (citing cases).

62. *See Shurtleff*, 142 S. Ct. at 1605 (Gorsuch, J. concurring).

63. *See id.* at 1606 (Gorsuch, J., concurring) ("While it is easy to see how *Lemon* led to a strange world in which local governments have sometimes violated the First Amendment in the name of protecting it, less clear is why this state of affairs still persists. *Lemon* has long since been exposed as an anomaly and a mistake.").

avoid a feared Establishment Clause violation, local government officials commit an actual Free Speech or Free Exercise Clause violation—a "*Lemon* trade."[64] Justice Gorsuch cites other cases in which the Court has questioned *Lemon*, the most recent of which was *American Legion*, and declares that *Lemon* already has been overruled.[65] A majority of the Court made this explicit in *Kennedy*, a case about prayer by a public school football coach, in which the Court announced that *Lemon* already had been replaced with a test that focuses on historical practices and understandings.[66]

Shurtleff confirms the accommodationist direction of the Court's religion jurisprudence. At the same time, the facts of the case, involving the public display of a religious symbol, invite reflection on what the Court's new direction may mean for religious pluralism. The Civil Rights Movement is a useful paradigm for thinking about the relationship between pluralism and religion in the public square.

II. RELIGION IN THE PUBLIC SQUARE: THE CIVIL RIGHTS MOVEMENT

A. Civil Rights Movement Era Religion

In their brief in support of Boston in *Shurtleff*, the National Council of Churches argues that the Christian Flag is a prominent symbol of the Christian community.[67] To support its assertion that the Christian Flag was widely accepted and used in Christian churches, the National Council of Churches' brief cites a 1942 church notice in a Black Ohio newspaper.[68] This supports the argument that the flag would be

64. *See id.* at 1603 (Gorsuch, J., concurring) ("To avoid a spurious First Amendment problem, Boston wound up inviting a real one. Call it a *Lemon* trade.").

65. *Id.* at 1610 (Gorsuch, J., concurring) ("This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.").

66. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) ("[T]he 'shortcomings' associated with this 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot."). In *Kennedy*, the Court says of *Shurtleff*: "In fact, just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test." *Id.* at 2427. Notably, the *Kennedy* decision opens with a statement about pluralism: "The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Id.* at 2416.

67. *See* Brief for Nat'l Council of the Churches of Christ in the USA, et al. as Amici Curiae Supporting Respondents at 23–24, Shurtleff v. Boston, 142 S. Ct. 1583 (2022) (No. 20-1800), 2021 WL 6144096 [hereinafter "Brief for National Council"] (arguing that the Latin cross is not simply a "generic religious symbol" but is "associated with particular branches of Christianity").

68. *See generally id.* at 25 (citing *2nd Mt. Olive Baptist Church*, CLEVELAND CALL & POST (Dec. 12, 1942)); *see also About Us*, CALL & POST, https://www.callandpost.com/about [https://perma.cc/LRz7-QJCC] (last visited Nov. 14, 2022) ("[I]n 1932, the Call & Post established

recognized as a symbol of Christianity, but it also points to something else—the significance of religion in the Black community. It was this religion that was on full display during the Civil Rights Movement.

Many civil rights protestors carried familiar religious symbols outside the church and into the streets. Civil rights reformers often deployed the images and rhetoric of civil religion to press for social change.[69] As historian David Chappell observed:

> Civil rights activists were more forthright about the source of their moral sentiments than other reformers, at the time and since. They frequently said things like, "I carry my battle with the Bible in one hand and the United States Constitution in the other." The civil rights' protestors' patriotism was as sincere as their religious devotion, and they did not see any danger in making the state conform to their religious vision.[70]

The religious vision of the civil rights reformers of that era was a pluralist one:

> Martin Luther King, Jr., openly dreamed of a "beloved community" that would be a model for the world. King's vision, and the movement, united "Jew and Christian, atheist and believer, southerner and northerner" in the struggle for equality. Yet the specific religious tradition out of which that vision arose animated the movement and many of its personnel.[71]

It is well known that many civil rights reformers were Christians, and their religious beliefs shaped their advocacy.[72] The use of Christian

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itself as the most influential voice for African Americans in all metropolitan regions throughout Ohio."). Of the flag, the notice from the Second Mt. Olive Baptist Church states that "[t]he Sunday school purchased two beautiful large silk flags for the church, the American flag and the Christian flag. They were dedicated with prayer by the pastor." *Id.*

69. For a similar discussion, see Lisa Shaw Roy, *Civil Religion as Civil Rights: The New Mississippi Flag*, 90 MISS. L. J. 875, 883 (2022).

70. DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 154 (2004).

71. *See* Roy, *supra* note 69, at 884 (quoting CHARLES MARSH, THE BELOVED COMMUNITY: HOW FAITH SHAPES SOCIAL JUSTICE, FROM THE CIVIL RIGHTS MOVEMENT TO TODAY 6 (2005)).

72. *See, e.g.*, RHETORIC, RELIGION, AND THE CIVIL RIGHTS MOVEMENT 1954-1965 VOL. 2 1 (Davis W. Houck & David E. Dixon eds., 2014) ("Since time immemorial rhetoric and religion have conspired to cocreate reality. Nowhere was this creation more central than in the American [M]ovement of the mid-twentieth century. Many leaders of that movement were ordained clergy; others were lay ministers or faithful congregants. All used the resources of rhetoric to move a nation."); *see generally* CHAPPELL, *supra* note 70. For a perspective on religion's role from a prominent voice in the movement, see *Multimedia Course: The First Amendment and the Civil Rights Movement How First Amendment History Shapes Our Present and Future*, FREEDOM F. INST., https://www.freedomforuminstitute.org/first-amendment-center/course-the-first-amendment-and-the-civil-rights-movement [https://perma.cc/YWL4-D4GH] (last visited Nov. 14, 2022) (interviewing Rev. C.T. Vivian, a Civil Rights Movement leader and close ally of Rev. Martin Luther King, Jr.).

symbols, rhetoric, and imagery, however, did not detract from the inclusive, pluralist message of the overall movement. To the extent that civil rights reformers equated citizenship with religious identity, it was in a bid for inclusion in the American fabric.

B. Not Strict Separation, but Pluralism

The Civil Rights Movement made public religious appeals for equality. Those public appeals, in turn, had little in common with calls for and litigation seeking to achieve strict separationist outcomes. Though the movement included many secularists and nonbelievers, civil rights reformers often supported their claims for social justice with scripture.[73] On the other hand, Southern clergy who resisted those claims often argued for their own version of separation—maintaining that the church should not concern itself with social issues.[74] The framing of equal rights in religious terms contradicted the broader claim of what would become strict separationism, later encapsulated in the *Lemon* dictum, in which Chief Justice Burger wrote for the Court: "The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice . . . ."[75]

In hindsight, it would seem that Establishment Clause litigation seeking strict separation was one thing, and civil rights litigation and rhetoric another: the two campaigns differed in their animating principles.[76] Nonetheless, it can be argued that some of the achievements of Establishment Clause litigation fulfilled the ambitions of the Civil Rights Movement, even if that movement seldom reflected the principle of separation in practice. This perhaps explains, for example, Martin Luther King, Jr.'s support of the Supreme Court's school prayer decision in *Engel v. Vitale*. In 1962, less than a month after *Engel*, King answered a question about the decision at the National Press Club:

> I know that this decision has received a great deal of criticism. I would say simply that this decision was a sound and good decision reaffirming

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73. One of the most famous speeches from that era was perhaps King's speech during the March on Washington. *See Read Martin Luther King Jr.'s 'I Have A Dream' Speech in Its Entirety,* NPR (Jan. 14, 2022, 1:53 PM), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety [https://perma.cc/DTu5-BG7V] (transcribing Martin Luther King. Jr.'s seventeen-minute speech delivered on August 28, 1963).

74. *See* ANDREW M. MANIS, SOUTHERN CIVIL RELIGIONS IN CONFLICT: CIVIL RIGHTS AND THE CULTURE WARS 131 (2002).

75. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

76. There was some overlap; some of the lawyers who brought Establishment Clause claims also provided legal work for the Civil Rights Movement. *See, e.g.*, Leo Pfeffer, *An Autobiographical Sketch*, *in* RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 503–07 (James E. Wood, Jr. ed., 1985).

> something that is basic in our constitution, namely separation of church and state. . . . I mean the criticisms have been centered on issues that were nowhere in the decision. For those who believe in God, he is still on his throne and the Supreme Court decision did nothing to dethrone God and it did nothing to say that prayer is wrong. It simply reaffirmed this great principle of the separation of church and state.[77]

To be sure, King's defense of *Engel* also showed his support of the U.S. Supreme Court in the wake of great resistance to *Brown v. Board of Education*.[78] In a later interview, King opined that Court critics were trying to "nullify" *Engel* to embarrass the Supreme Court.[79] When King reiterated his support for *Engel* a few years later, he justified his position by pointing to the decision's segregationist critics.[80]

A few years earlier, civil rights icon and stalwart separationist, Thurgood Marshall, expressed similar concerns about the legitimacy of the Supreme Court and the future prospect of integration. Even Thurgood Marshall, however, touted the importance of religious advocacy to combat segregation:

> I, for one, believe that even in the separation of church and state, there are certain matters that are of such high moral purpose as to demand and require support from the organized church. Certainly the Fourteenth Amendment was brought about by, written by, and adopted in Congress in the interest of that old Judeo-Christian ethic based upon the equality of man. The Fourteenth Amendment either has high moral ground or it has no basis or foundation in fact. I think we have waited as long as we can to get this along without the support of the church. The condemnation of the U.S. Supreme Court, the condemnation of the NAACP, the condemnation of anybody who opens his mouth about integration must be met or there won't be any more integration.[81]

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77. Martin Luther King, Jr., Address Delivered to the National Press Club (July 19, 1962), *in* MARTIN LUTHER KING JR., THE PAPERS OF MARTIN LUTHER KING, JR., VOL. VII: TO SAVE THE SOUL OF AMERICA, JANUARY 1961–AUGUST 1962 (Clayborne Carson & Tenisha Armstrong eds., 2014).

78. *See, e.g.*, MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961 247–56 (1994) (describing the "massive resistance" to *Brown* from 1955 through 1961).

79. *See Alex Haley Interviews Martin Luther King, Jr.*, ALEX HALEY (July 22, 2020), https://alexhaley.com/2020/07/26/alex-haley-interviews-martin-luther-king-jr.
[https://perma.cc/MF28-74D3] (recounting a 1965 interview in which King stated: "I am strongly opposed to the efforts that have been made to nullify the decision. They have been motivated, I think, by little more than the wish to embarrass the Supreme Court.").

80. *See* Haley, *supra* note 79 ("When I saw Brother [George] Wallace going up to Washington to testify against the decision at the Congressional hearings, it only strengthened my conviction that the decision was right.").

81. Thurgood Marshall, The Good People Sat Down (Apr. 29, 1957) (speech to a Methodist Church in Detroit, Michigan), *in* RHETORIC, RELIGION, AND THE CIVIL RIGHTS MOVEMENT, *supra* note 72, at 267.

The religiously inflected advocacy on display during the Civil Rights Movement suggests a positive, constitutive role for religion in the public square. What King and other civil rights reformers spoke of as the beloved community could not have existed in the absence of a shared religious ethic.[82] That prominent civil rights leaders, protestors, and reformers used religious language and made religious appeals was a feature of the Civil Rights Movement. That movement was religious in nature yet pluralist in tone and vision. To the extent that separationist Establishment Clause litigation sought a secularized public square, it was out of step with the religious emphasis of that movement. In terms of the Supreme Court's response to that litigation, what remains in the Court's Establishment Clause doctrine are concerns about tolerance, inclusivity, and pluralism.

III. ACCOMMODATION AND PLURALISM

A. Majority and Minority Symbols

In its recent cases, the Supreme Court has included majoritarian symbols and practices within the canopy of religious and cultural pluralism.[83] To some observers, this means that the Court has approved of an exclusionary religious vision.[84] This argument, however, overlooks the possibility that the Court's accommodationist turn may benefit not only majority religious practices and symbols, but minority ones as well.[85] As others have argued, the presence of minority religious symbols makes those practices and the individuals who engage in them more familiar to the larger community, staving off suspicion and discrimination.[86] By contrast, even the old-versus-new formulation of

82. *See* Haley, *supra* note 79.

83. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 579 (2014) ("The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today."); *see also* Roy, *supra* note 27, at 885 (discussing *Town of Greece*).

84. *See, e.g.*, Erwin Chemerinsky, *No, It Is Not a Christian Nation, and It Never Has Been and Should Not Be One*, 26 ROGER WILLIAMS U. L. REV. 404, 406 (2021) ("I fear that we have a majority of justices on the Supreme Court who reject the idea of separating church and state. I do not believe that they will declare the United States officially to be a Christian nation, but I am afraid that is the lens through which they will decide cases."); Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 852 (2019) ("In short, government-approved Christian symbols and Christian prayers create an in-group (Christians) and an out-group (non-Christians). 'Those who aren't Christian—or who aren't the right kind of Christian—can never be full citizens of the country the Christian nationalists want to create.'" (quoting MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM 31 (2006))).

85. *See, e.g.*, Roy, *supra* note 33, at 276.

86. *See, e.g.*, Asma Uddin & Greg Dolin, *Opinion: Minority Religions Need Public Presence*,

American Legion made it less likely that a minority religious symbol would pass constitutional muster, since minority symbols are more likely to be new.[87] A strict separationist approach closes the door to public symbols of minority religions, legally and practically.[88]

Professor Angela Carmella makes the same point in the context of public commemoration, protest, and collective expressions of grief.[89] Professor Carmella focuses on minority representation rather than majoritarian symbols.[90] Contrary to the separationist assumption that accommodation harms religious and racial minorities, Carmella argues that the opposite may be true.[91] She observes that decisions like *Town of Greece* and *American Legion* "conclude that *political equality is achievable by inviting more, not less, religion in sacred civic expression*."[92] Hence, she argues, "the jurisprudential move toward accommodation rather than enabling majoritarian exclusion of minority faiths and races will facilitate the inclusion of underrepresented and historically disenfranchised groups into our sacred civic expression."[93]

An approach that would require the elimination of public religious symbols threatens to negatively impact minority communities and their symbols, and it is not clear how this kind of separation advances pluralism.[94]

DETROIT NEWS (Feb. 26, 2019, 11:00 PM), https://www.detroitnews.com/story/opinion/2019/02/27/opinion-minority-religions-need-public-presence/2992646002 [https://perma.cc/C7C7-V6DF]) ("Their participation sends a message that adherents of a minority faith are full members of the community and that their religious practices are welcome and not deserving of suspicion.").

87. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080, 2085 (2019).

88. *See, e.g.*, Uddin & Dolin, *supra* note 86 ("In the U.S. today, even if we banish Christian symbols from public spaces, Americans will still come across Christian symbols, history, imagery, and narrative. Minority religions in America do not enjoy this same pervasiveness.").

89. *See generally* Angela C. Carmella, *Pandemic, Protest, and Commemoration: Sacred Civic Expression in Times of National Grief*, 22 RUTGERS J. L. & RELIGION 20 (2021).

90. *See id.* at 76 ("[A] separationist approach would have the unintended consequences of excluding the narratives of religiously and racially marginalized groups, to their detriment.").

91. *See id.* ("[The separationist argument] supports the exclusion of religious symbols from government property in order to protect minorities, but it ignores the fact that *permitting* the entrée of minority narratives can disrupt that social context and power structure.").

92. *Id*. at 79 (emphasis in original).

93. *Id.* She explains, "This relaxed jurisprudence, grounded in inclusivity and nondiscrimination, is expansive enough to accommodate far more than traditional religious prayers and symbols. It can encompass the sacred civic expression of underrepresented communities whose narratives have been, and continue to be, deeply rooted in faith traditions." *Id.* at 82.

94. In some cases, strict separation conflicts with the sensibilities of those communities on issues of church and state. *Cf.*, *e.g.*, Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1377 (2007) (discussing church and state issues raised in community policing where "[t]here is little concern about, or even attention to, the potential

B. Religion in the Public Forum

As the Court held in *Shurtleff*, the Free Speech Clause imposes an equality rule on Boston's flagpole, so that under the Court's holding, the government must grant all speakers access pursuant to the rules of the forum.[95] This rule potentially benefits other religious speakers who might seek to raise flags with religious symbols in the future, including those of minority faiths. The First Circuit opined that raising Shurtleff's flag would represent a "pioneering elevation" of a religious symbol and would risk repeated interactions between "religious hierarchs" and government personnel to coordinate the use of the flagpole.[96] The Supreme Court was correct to push back against this reasoning, and to frame the First Amendment issue as one of discrimination, not establishment.[97]

If in the future, however, religion tends to dominate the forum, or if a hate group seeks to raise a flag, or if the city simply wants to exclude certain symbols from its flagpole, then the city may choose to close the forum.[98] The city can be intentional about converting future flag-raisings into government speech, which in fact appears to have been Boston's policy response to the Supreme Court's decision in *Shurtleff*.[99] As to Shurtleff's and Camp Constitution's flag, it did eventually fly on

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dangers that outsiders see regarding close church-state relationships exhibited by representative African-American institutions; perhaps this is not surprising, particularly in light of the centrality of church-like norms, religious language, and other social practices readily flowing from the towering institutions of African-American cultural life"). In Henry Louis Gates, Jr.'s PBS project on *The Black Church,* Rev. Calvin Butts, III of the Harlem Abyssinian Baptist Church, puts it succinctly: "In our experience as a people, there is no separation of church and state . . . our political strength and our forward movement in this country has always been led by people of deep spirituality." HENRY LOUIS GATES, JR. THE BLACK CHURCH: THIS IS OUR STORY, THIS IS OUR SONG 93 (2021).

Likewise, in other contexts such as funding, for example, strict separation does not advance the interests of minority religions. *See, e.g.*, Press Release, Union of Orthodox Jewish Congregations of America Applauds US Supreme Court Decision Requiring School Aid Programs to Include Religious Schools; "This is the Culmination of Decades of Determined Advocacy," ORTHODOX UNION ADVOCACY CTR. (June 21, 2022), https://advocacy.ou.org/carson-makin [https://perma.cc/33PL-ZCXB] (discussing Carson v. Makin, 142 S. Ct. 1987 (2022)).

95. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022).

96. *See* Shurtleff v. City of Boston, 986 F.3d 78, 96–97 (1st Cir. 2021), *cert. granted sub nom.* Shurtleff v. City of Boston, 142 S. Ct. 55 (2021), *rev'd and remanded sub nom*. Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022).

97. *See Shurtleff*, 142 S. Ct. at 1593.

98. *See id.* at 1592–93 (explaining that nothing prevents Boston from changing its policies going forward).

99. *See* Sean Philip Cotter, *Boston Looking to Change Flag-Raising Rules After "Christian Flag" to Fly Following Supreme Court Ruling*, BOSTON HERALD (Aug. 3, 2022), https://www.bostonherald.com/2022/08/02/camp-constitution-christian-flag-to-fly-over-boston/ [https://perma.cc/EM4N-NJRP].

Boston's third flagpole for a couple of hours.[100] As this shows, and as I have argued elsewhere, the move to accommodation does not "backslide on society's commitment to pluralism. Nor does it assume that religion will, in this day and age, receive more than a place at the table alongside the community's other members, ideas, and influences."[101] Outside metropolitan centers like Boston, in places where religious symbols may be expected to have a more prominent presence, those symbols can be used to achieve inclusive ends.[102]

CONCLUSION

Pluralism has been a consistent theme in the Supreme Court's Religion Clause jurisprudence, which is informed by the legacy of the Civil Rights Movement. As the Court's Establishment Clause doctrine moves away from strict separation toward an accommodationist approach, that doctrine continues to emphasize mutual respect, tolerance, and pluralism. It would be a mistake to assume that strict separation is the only path to achieve these lofty goals.

100. *See* Mark Pratt, *After A Supreme Court Battle, Christian Flag Flies, Briefly, Over City Hall*, ASSOC. PRESS (Aug. 4, 2022), https://www.wbur.org/news/2022/08/04/christian-flag-flies-boston [https://perma.cc/U27A-33D7]; *see also* Danny McDonald, *Christian Flag at Heart of Supreme Court First Amendment Case is Scheduled to Fly at Boston City Hall*, BOSTON GLOBE (Aug. 1, 2022), https://www.bostonglobe.com/2022/08/01/metro/christian-flag-heart-scotus-first-amendment-case-scheduled-fly-boston-city-hall/ [https://perma.cc/W625-RGPW].

101. *See* Roy, *supra* note 33, at 279–80.

102. *See, e.g.*, Roy, *supra* note 69 (discussing the new Mississippi state flag, which removes the Confederate battle emblem and includes the words, "In God We Trust").