AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Shurtleff v. City of Boston, Massachusetts, \_\_\_** **U.S. \_\_\_** (2022)

*Harold Shurtleff, the director of Camp Constitution, wished to hold a flag raising ceremony in Boston City Hall Plaza. Boston had previous allowed all interested groups to hoist the flag of their choosing on a flagpole next to flagpoles for the flag of the United States and Massachusetts state flag. The city, however, refused to allow Shurtleff to fly a Christian flag on the ground that such a flag on city property would violate the Establishment Clause of the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment. Shurtleff sued, claiming that the refusal violated his Free Exercise Clause rights, as incorporated by the due process clause of the Fourteenth Amendment. The local federal district court granted summary judgment to Boston and that decision was affirmed by the Court of Appeals for the First Circuit.*

 *The Supreme Court unanimously reversed the Court of Appeals. Justice Stephen Breyer’s opinion held that Boston had unconstitutionally discriminated against religious speech. Both the Breyer opinion and Samuel Alito’s concurring opinion focus on the distinction between government speech and private speech. How does each justice draw that line? Which line do you think is best (or do you have a better line)? Is there any line on which Shurtleff’s flag falls on the government speech side? If not, why did two lower courts reach a conclusion different from all nine Supreme Court justices? Is Justice Gorsuch correct that* Lemon v. Kurtzman *(1971) is to blame? What other reasons might you give?*

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)&analyticGuid=I34c0e1c1c9f111ecb484eb1aac89df82) delivered the opinion of the Court.

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The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. That must be true for government to work. Boston could not easily congratulate the Red Sox on a victory were the city powerless to decline to simultaneously transmit the views of disappointed Yankees fans. The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks..

The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program. In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers’ views?

In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. . . . Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression..

. . . .

The flying of a flag other than a government's own can . . . convey a governmental message. A foreign flag outside Blair House, across the street from the White House, signals that a foreign leader is visiting and the residence has “becom[e] a de facto diplomatic mission of the guest's home nation.” . . . Keeping with this tradition, flags on Boston's City Hall Plaza usually convey the city's messages. On a typical day, the American flag, the Massachusetts flag, and the City of Boston's flag wave from three flagpoles. Boston's flag, when flying there at full mast, symbolizes the city. When flying at halfstaff, it conveys a community message of sympathy or somber remembrance. When displayed at other public buildings, it marks the mayor's presence. . . .

. . . . Next, then, we consider whether the public would tend to view the speech at issue as the government's. In this case, the circumstantial evidence does not tip the scale. On an ordinary day, a passerby on Cambridge Street sees three government flags representing the Nation, State, and city. Those flags wave “in unison, side-by-side, from matching flagpoles,” just outside “ ‘the entrance to Boston's seat of government.’ . . . [T]he flags “play an important role in defining the identity that [the] city projects to its own residents and to the outside world.” . . . [T]he public seems likely to see the flags as “ ‘conveying some message’ ” on the government's “ ‘behalf.’ ”

But as we have said, Boston allowed its flag to be lowered and other flags to be raised with some regularity. These other flags were raised in connection with ceremonies at the flagpoles’ base and remained aloft during the events. Petitioners say that a pedestrian glimpsing a flag other than Boston's on the third flagpole might simply look down onto the plaza, see a group of private citizens conducting a ceremony without the city's presence, and associate the new flag with them, not Boston. Thus, even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here. with these flags.

. . . . But it is Boston's control over the flags’ content and meaning that here is key; that type of control would indicate that Boston meant to convey the flags’ messages. . . . Boston says that all (or at least most) of the 50 unique flags it approved reflect particular city-approved values or views. Flying flags associated with other countries celebrated Bostonians’ many different national origins; flying other flags, Boston adds, was not “wholly unconnected” from a diversity message or “some other day or cause the City or Commonwealth had already endorsed.” . . . But it is more difficult to discern a connection to the city as to, say, the Metro Credit Union flag raising, a ceremony by a local community bank.

In any event, we do not settle this dispute by counting noses—or, rather, counting flags. That is so for several reasons. For one thing, Boston told the public that it sought “to accommodate all applicants” who wished to hold events at Boston's “public forums,” including on City Hall Plaza. . . . The city's practice was to approve flag raisings, without exception. It has no record of denying a request until Shurtleff’s. . . .

Compare the extent of Boston's control over flag raisings with the degree of government involvement in our most relevant precedents. In [*Summum*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018207463&pubNum=0000780&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)), we emphasized that Pleasant Grove City always selected which monuments it would place in its park (whether or not the government funded those monuments), and it typically took ownership over them. [555 U.S. at 472–473, 129 S.Ct. 1125](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018207463&pubNum=0000780&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RP&fi=co_pp_sp_780_472&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)#co_pp_sp_780_472). In [*Walker*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476807&pubNum=0000780&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)), a state board “maintain[ed] direct control” over license plate designs by “actively” reviewing every proposal and rejecting at least a dozen. [576 U.S. at 213, 135 S.Ct. 2239](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476807&pubNum=0000780&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RP&fi=co_pp_sp_780_213&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)#co_pp_sp_780_213). Boston has no comparable record.

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All told, while the historical practice of flag flying at government buildings favors Boston, the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech—though nothing prevents Boston from changing its policies going forward.

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When a government does not speak for itself, it may not exclude speech based on “religious viewpoint”; doing so “constitutes impermissible viewpoint discrimination.” . . . Here, Boston concedes that it denied Shurtless’s request solely because the Christian flag he asked to raise “promot[ed] a specific religion.” App. to Pet. for Cert. 155a (quoting Rooney deposition). Under our precedents, and in view of our government-speech holding here, that refusal discriminated based on religious viewpoint and violated the Free Speech Clause.

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Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)&analyticGuid=I34c0e1c1c9f111ecb484eb1aac89df82), concurring.

. . . . As this Court has repeatedly made clear, however, a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like. On the contrary, a government *violates* the Constitution when (as here) it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like. Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)&analyticGuid=I34c0e1c1c9f111ecb484eb1aac89df82), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)&analyticGuid=I34c0e1c1c9f111ecb484eb1aac89df82) and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)&analyticGuid=I34c0e1c1c9f111ecb484eb1aac89df82) join, concurring in the judgment.

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The government-speech doctrine recognizes that the Free Speech Clause of the First Amendment “restricts government regulation of private speech” but “does not regulate government speech.”  That doctrine presents no serious problems when the government speaks in its own voice—for example, when an official gives a speech in a representative capacity or a governmental body issues a report. But courts must be very careful when a government claims that speech by one or more private speakers is actually government speech. When that occurs, it can be difficult to tell whether the government is using the doctrine “as a subterfuge for favoring certain private speakers over others based on viewpoint,”  and the government-speech doctrine becomes “susceptible to dangerous misuse.”

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To prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker. The ultimate question is whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the “regulation of private speech.”  But our precedent has never attempted to specify a general method for deciding that question. . . .

Consider first “the extent to which the government has actively shaped or controlled the expression.”  Government control over speech is relevant to speaker identity in that speech by a private individual or group cannot constitute government speech if the government does not attempt to control the message. But control is also an essential element of censorship. . . Censorship is not made constitutional by aggressive and direct application.

Next, turn to the history of the means of expression.  Historical practice can establish that a means of expression “*typically*represent[s] government speech.”  But in determining whether speech is the government's, the real question is not whether a form of expression is *usually*linked with the government but whether the speech*at issue*expresses the government's own message. Governments can put public resources to novel uses. And when governments allow private parties to use a resource normally devoted to government speech to express their own messages, the government cannot rely on historical expectations to pass off private speech as its own. . . . .

This case exemplifies the point. Governments have long used flags to express government messages, so this factor provides prima facie support for Boston's position under the Court's mode of analysis.  But on these facts, the history of flags clearly cannot have any bearing on whether the flag displays express the City's own message. The City put the flagpoles to an unorthodox use—allowing private parties to use the poles to express messages that were not formulated by City officials. Treating this factor as significant in that circumstance loads the dice in favor of the government's position for no obvious reason.

Now consider the third factor: “the public's likely perception as to who (the government or a private person) is speaking.” . . . Unless the public is assumed to be omniscient, public perception cannot be relevant to whether the government *is* speaking, as opposed merely *appearing* to speak. Focusing on public perception encourages courts to categorize private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government. This case once again provides an apt illustration. As the Court rightly notes, “[a] passerby on Cambridge Street” confronted with a flag flanked by government flags standing just outside the entrance of Boston's seat of government would likely conclude that all of those flags “conve[y] some message on the government's behalf.”  If that is the case, this factor supports the exclusion of private parties from using the flagpoles even though the government allows private parties to use the flagpoles to express private messages, presumably because those messages may be erroneously attributed to the government. But there is no obvious reason why a government should be entitled to suppress private views that might be attributed to it by engaging in viewpoint discrimination. The government can always disavow any messages that might be mistakenly attributed to it.

The factors relied upon by the Court are thus an uncertain guide to speaker identity.

**. . . .**

. . . . [G]overnment speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech. Defined in literal terms, “government speech” is “speech” spoken by the government. “Speech,” as that term is used in our First Amendment jurisprudence, refers to expressive activity that is “intended to be communicative” and, “in context, would reasonably be understood ... to be communicative.” . . . .For “speech” to be spoken by the government, the relevant act of communication must be government action. Governments are not natural persons and can only communicate through human agents who have been given the power to speak for the government. When individuals charged with speaking on behalf of the government act within the scope of their power to do so, they “are not speaking as citizens for First Amendment purposes.”  And because “speech” requires the purposeful communication of the speaker's own message, the message expressed must have been formulated by a person with the power to determine what messages the government will communicate. In short, the government must “se[t] the overall message to be communicated” through official action.

. . . . [T]he government-speech doctrine is not based on the view—which we have neither accepted nor rejected—that governmental entities have First Amendment rights. Instead, the doctrine is based on the notion that governmental communication—and the exercise of control over those charged by law with implementing a government's communicative agenda—do not normally “restrict the activities of ... persons acting as private individuals So government speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts private expression in a way that “abridges” the freedom of speech, as is the case with compelled speech. . . . .

It follows that to establish that expression constitutes government speech exempt from First Amendment attack, the government must satisfy two conditions. First, it must show that the challenged activity constitutes government speech in the literal sense—purposeful communication of a governmentally determined message by a person acting within the scope of a power to speak for the government. Second, the government must establish it did not rely on a means that abridges the speech of persons acting in a private capacity. It is only then that “the Free Speech Clause has no application.”

. . . . Our precedents recognize two ways in which a government can speak using private assistance. First, the government can prospectively “enlis[t] private entities to convey its own message. . . . So long as this responsibility is voluntarily assumed, speech by a private party within the scope of his power to speak for the government constitutes government speech. Second, the government can “adop[t]” a medium of expression created by a private party and use it to express a government message.  In that circumstance, private parties are not deputized by the government; instead a private person generates a medium of expression and transfers it to the government.

. . . .

This approach also explains the circumstances in which we have concluded that the government is *not*speaking. We have repeatedly held that the government-speech doctrine does not extend to private-party speech that is merely subsidized or otherwise facilitated by the government. . . . . For analogous reasons, private-party expression in any type of forum recognized by our precedents does not constitute government speech. A forum, by definition, is a space for private parties to express their own views. The government can of course speak as a participant in a forum, but the creation of a space for private discourse does not involve expressing a governmental message, deputizing private parties to express it, or adopting a private party's contribution as a vehicle of government speech. So when examination of the government's “policy and practice” indicates that the government has “intentionally open[ed] a nontraditional forum for public discourse,” a court may immediately infer that private-party expression in the forum is not government speech.  There is no need to consider history, public perception, or control in the abstract.

Analyzed under this framework, the flag displays were plainly private speech within a forum created by the City, not government speech. . . . The City did nothing to indicate an intent to communicate a message.  Nor did it deputize private speakers or appropriate private-party expressive content. The flags flown reflected a dizzying and contradictory array of perspectives that cannot be understood to express the message of a single speaker. Indeed, the City disclaimed virtually all messages expressed by characterizing the flagpoles as a “public forum” and adopting access criteria consistent with generalized public use. The City's policy and practice thus squarely indicate an intent to open a public forum for any private speakers who met the City's basic criteria. The requirement of viewpoint neutrality applies to any forum of this kind.

 . . . .

In briefing before this Court, counsel for the City argued that despite all appearances to the contrary, the City actually *did*intend to express a message through the flag-raising program: The City's support for “the diverse national heritage of the City's population. . . . This argument is a transparent attempt to reverse engineer a governmental message from facts about the flag raisings that occurred. It is true that many of the flag raisings from 2007 to 2015 celebrated nationalities. But these events were conducted by private organizations to express their own support for the relevant national communities. Neither the City's application guidance nor the 2018 written policy singled out a connection with a nationality commemoration as a condition of access to the flagpoles. The City never cited this purported requirement in its rejection of the applications it denied. And the City approved flags that had nothing to do with nationality or official holidays, such as the “Metro Credit Union Flag Raising” mentioned by the Court.

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Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)&analyticGuid=I34c0e1c1c9f111ecb484eb1aac89df82), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)&analyticGuid=I34c0e1c1c9f111ecb484eb1aac89df82) joins, concurring in the judgment.

. . . . How did the city get it so wrong? To be fair, at least some of the blame belongs here and traces back to *Lemon*v.*Kurtzman* (1971). Issued during a “ ‘bygone era’ ” when this Court took a more freewheeling approach to interpreting legal texts,  *Lemon* sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. That project bypassed any inquiry into the Clause's original meaning. It ignored longstanding precedents. And instead of bringing clarity to the area, *Lemon* produced only chaos. In time, this Court came to recognize these problems, abandoned *Lemon*, and returned to a more humble jurisprudence centered on the Constitution's original meaning. Yet in this case, the city chose to follow *Lemon* anyway. It proved a costly decision, and Boston's travails supply a cautionary tale for other localities and lower courts.

. . . .  *Lemon* held out the promise that any Establishment Clause dispute could be resolved by following a neat checklist focused on three questions: (1) Did the government have a secular purpose in its challenged action? (2) Does the effect of that action advance or inhibit religion? (3) Will the government action “excessive[ly] ... entangl[e]” church and state? . . . . But from the start, this seemingly simple test produced more questions than answers. How much religion-promoting purpose is too much? Are laws that serve both religious and secular purposes problematic? How much of a religion-advancing effect is tolerable? What does “excessive entanglement” even mean, and what (if anything) does it add to the analysis? Putting it all together, too, what is a court to do when *Lemon*’s three inquiries point in conflicting directions? More than 50 years later, the answers to all these questions remain unknown.

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From the birth of modern Establishment Clause litigation in [*Everson*v.*Board of Ed. of Ewing*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947115020&pubNum=0000780&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)) (1947), this Court looked primarily to historical practices and analogues to guide its analysis.  This approach fit, too, with this Court's usual course in other areas. Often, we have looked to early and long-continued historical practices as evidence of the Constitution's meaning at the time of its adoption. . . .

*Lemon* interrupted this long line of precedents. It offered no plausible reason for ignoring their teachings. And, as we have seen, the ahistoric alternative it offered quickly proved both unworkable in practice and unsound in its results. Nor is it as if *Lemon* vanquished the field even during its heyday. Often, this Court continued to look to history to resolve certain Establishment Clause disputes outside the context of religious displays. . . .

**\*19** Recognizing *Lemon*’s flaws, this Court has not applied its test for nearly two decades. In [*Town of Greece*v. *Galloway*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033317786&pubNum=0000780&originatingDoc=I34c0e1c1c9f111ecb484eb1aac89df82&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=a393766993254ce7b056e09519225eaf&contextData=(sc.Search)) (2014), this Court declined an invitation to use the *Lemon* test. Instead, the Court explained that the primary question in Establishment Clause cases is whether the government's conduct “accords with history and faithfully reflects the understanding of the Founding Fathers.” . . .

With all these messages directing and redirecting the inquiry to original meaning as illuminated by history, why did Boston still follow *Lemon*in this case? . . . . First, it's hard not to wonder whether some simply prefer the policy outcomes *Lemon* can be manipulated to produce. Just dial down your hypothetical observer's concern with facts and history, dial up his inclination to offense, and the test is guaranteed to spit out results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could sustain. . . . Second, it seems that *Lemon* may occasionally shuffle from its grave for another and more prosaic reason. By demanding a careful examination of the Constitution's original meaning, a proper application of the Establishment Clause no doubt requires serious work and can pose its challenges. *Lemon*’s abstract three-part test may seem a simpler and tempting alternative to busy local officials and lower courts. But if this is part of the problem, it isn't without at least a partial remedy. For our constitutional history contains some helpful hallmarks that localities and lower courts can rely on.

Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits.. First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. These traditional hallmarks help explain many of this Court's Establishment Clause cases, too. This Court, for example, has held unlawful practices that restrict political participation by dissenters, including rules requiring public officials to proclaim a belief in God. At the same time, it has upheld nondiscriminatory public financial support for religious institutions alongside other entities. The thread running through these cases derives directly from the historical hallmarks of an establishment of religion—government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not.

These historical hallmarks also help explain the result in today's case and provide helpful guidance for those faced with future disputes like it. As a close look at these hallmarks and our history reveals, “[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment.” For most of its existence, this country had an “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life.” . . .