

CIVIL RELIGION AS CIVIL RIGHTS: THE NEW MISSISSIPPI FLAG

*Lisa Shaw Roy**

INTRODUCTION	875
I. THE ROAD TO THE “IN GOD WE TRUST FLAG”	878
A. <i>Confederate Symbols in Court</i>	878
B. <i>The Terms of Dixie’s Retirement</i>	880
II. CIVIL RELIGION AND CIVIL RIGHTS.....	882
A. <i>Religion and the Civil Rights Movement</i>	882
1. “A distinct rhetoric all their own”	882
2. “Our religion is very important to us...”	884
B. <i>Religion and State Symbols: “In God We Trust”</i>	885
III. “IN GOD WE TRUST” ON THE MISSISSIPPI FLAG.....	886
A. <i>An Old Phrase, a New Symbol</i>	886
B. <i>Whether the Flag Disrespects or Excludes Mississippians</i>	888
C. <i>The Mississippi Flag is an Unlikely Target</i>	890
CONCLUSION.....	891
APPENDIX.....	893

INTRODUCTION

In the Summer of 2020, after a cacophony of national events that led to renewed protests of the Mississippi state flag, the last in the nation to include the Confederate battle emblem, Mississippi legislators voted to remove the controversial symbol from the state’s flag. Observers heralded the vote as a major civil rights milestone, accomplishing in a few days what many thought could never be

* Professor of Law and Jessie D. Puckett, Jr., Lecturer, University of Mississippi School of Law. I thank the editors of the Mississippi Law Journal for inviting me to submit this Article.

achieved.¹ The Governor signed the bill, which officially retired the Mississippi flag and established a nine-member commission that would design and approve a flag to put before Mississippi voters in November.² The law contained only two requirements for what would become Mississippi's new flag: the flag may not contain the Confederate symbol, and the flag must contain the words, "In God We Trust."³

After receiving thousands of submissions, the Commission narrowed the decision to two flags, and ultimately settled on the final design presented to voters—a red and blue flag with gold bars flanking a magnolia, the state flower.⁴ Above the magnolia is a gold star designed to represent the Choctaw Indian tribe. The magnolia is encircled by twenty stars, reflecting Mississippi's entry as the twentieth state in the union. The national motto, "In God We Trust," appears below the magnolia, at the bottom of the circle. Mississippians approved the new flag by a vote of over 70%.⁵

The new Mississippi flag has two parts which work in tandem: the Confederate battle emblem is gone, and the flag now includes the words, "In God We Trust." The retirement of the Confederate symbol accomplished what years of lawsuits could not. Likewise, as government speech, Mississippi's decision to either fly or retire the Confederate emblem is not subject to First Amendment challenge. The new flag's only constitutional vulnerability is the addition of the words, "In God We Trust," which might be said to violate the First Amendment's Establishment Clause. Nevertheless, the U.S.

¹ Luke Ramseth, *126 Years Later, Mississippi Changed Its Confederate-themed Flag. This is How It Happened*, MISS. CLARION LEDGER (Dec. 2, 2020, 9:00 PM), <https://www.clarionledger.com/in-depth/news/2020/12/03/key-moments-led-mississippi-changing-its-confederate-themed-flag/6283669002/> [<https://perma.cc/QQP6-GWRM>]. The last movement on the issue of the flag came nearly twenty years earlier, when Mississippians voted against a referendum to change the Mississippi flag. *See infra* note 5. I began my academic career at the University of Mississippi that summer. A little more than thirty years before that, in the Summer of 1969, my mother enrolled in classes at the base campus of the University of Mississippi while my father was temporarily stationed at Keesler Air Force Base in Biloxi, Mississippi.

² H.B. 1796, 2020 Miss. Leg., Reg. Sess. (Miss. 2020).

³ *Id.*

⁴ *See infra* p. 893.

⁵ *See* Emily Wagster Pettus, *Mississippi's New Magnolia Flag Starting to Fly After Vote*, ASSOCIATED PRESS (Nov. 4, 2020), <https://apnews.com/article/election-2020-religion-race-and-ethnicity-mississippi-elections-3e31d01e0e0b8c062ea202b7d8424ecf> [<https://perma.cc/3AWS-NSW2>].

Supreme Court and lower courts have consistently rejected challenges based on the government's use of civil religion such as "In God We Trust" on the currency and in the national motto.

The Court's most recent Establishment Clause symbols decision leaves an opening to challenge newly adopted symbols with religious language or imagery. A good argument can be made that this caveat does not apply to new uses of "In God We Trust." Even if it does, however, given the history behind the new flag, any such challenge seems unlikely, and unlikely to be successful. More important than that, Mississippi's new flag offers the opportunity to reflect on the relationship between religious language and the pursuit of racial equality. The symbiotic relationship between the two has a rich history which provides a context in which to think about the new flag. I find this account more persuasive than claims that naysay the deployment of "In God We Trust" as an expedient which undercuts the new flag's claim to inclusivity. It is this lens which explains the relationship between civil religion and the retirement of the Confederate symbol.

Part One of this article recounts the history of the new Mississippi flag against the backdrop of failed lawsuits challenging Confederate symbols. Part Two reflects on religion in the civil rights movement, and describes lawsuits challenging religious symbols under the Establishment Clause. Finally, Part Three considers the role of "In God We Trust" on the Mississippi flag in light of the Supreme Court's recent Establishment Clause decisions.

I. THE ROAD TO THE “IN GOD WE TRUST FLAG”⁶A. *Confederate Symbols in Court*

Lawsuits challenging the Confederate battle flag have not enjoyed success in the courts.⁷ Challengers frequently lose on standing grounds; courts have held that the offense given by the state’s use of the Confederate symbol is not an injury in fact.⁸ In 1991, James Forman, Jr., then a law student at Yale, published an article which argued that Georgia’s, South Carolina’s, and Alabama’s decisions to fly the Confederate battle flag at their state capitols violate the Equal Protection Clause and the First Amendment.⁹ Forman advanced sophisticated legal arguments, but none took hold in the courts. Still, in time, the result he sought became a reality. Georgia changed its flag to remove the Confederate battle emblem, and added to its new flag the words, “In God We Trust.” Alabama and South Carolina retired the Confederate flag after a white supremacist shot and killed nine black congregants at the African Methodist Episcopal church in

⁶ At the end of the selection process, Commissioners dubbed the current flag the “In God We Trust Flag.” See Giacomo Bologna, *New Mississippi State Flag: Commission Has Made its Final Selection, Now It’s Up to Voters*, MISS. CLARION LEDGER (Sept. 2, 2020, 4:56 PM), <https://www.clarionledger.com/story/news/politics/2020/09/02/new-mississippi-state-flag-commission-final-design/3455475001/> [https://perma.cc/N9EJ-GCJM].

⁷ See, e.g., *Coleman v. Miller*, 117 F.3d 527, 530-31 (11th Cir. 1997) (per curiam) (rejecting constitutional challenges to Georgia state flag), *cert denied*, 523 U.S. 1011, 1011 (1998); *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) (rejecting constitutional and civil rights challenges to Alabama’s display of the Confederate battle flag).

⁸ See, e.g., *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017).

⁹ James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 505-06 (1991).

Charleston, South Carolina, during a Bible study.¹⁰ The attacker had posed in photos with the Confederate battle flag.¹¹

At the Supreme Court, the development of the government speech doctrine moved in a different direction than Forman had anticipated,¹² but nonetheless supports a state's decision to reject a Confederate symbol. In a 2015 decision, the Court held that the State of Texas personalized license plate program constitutes government speech; thus, the State's decision to deny the Sons of Confederate Veterans' application for a license plate with a Confederate symbol was not limited by the First Amendment.¹³ Texas worried that the Confederate symbol on license plates would offend motorists, and it did not want to be associated with the symbol's message.¹⁴ The Court held that Texas was free to deny the license plate because it disagreed with the message of the Confederate symbol.¹⁵ As the Court explained, "[I]t is the democratic electoral process that first and foremost provides a check on government speech."¹⁶ Government speech, whether in the

¹⁰ See Nathaniel Cary & Doug Stanglin, *South Carolina Takes Down Confederate Flag*, USA TODAY (July 10, 2015, 2:52 PM), <https://www.usatoday.com/story/news/nation/2015/07/10/south-carolina-confederate-flag/29952953/> [https://perma.cc/8N28-VL2Q]. In a previous legislative compromise, South Carolina had moved the Confederate battle flag from the capitol dome to a flagpole near a monument in front of the capitol. See Lisa Goddard, *South Carolina Gov Signs Confederate Flag Compromise*, STATELINE (May 24, 2000), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2000/05/24/south-carolina-gov-signs-confederate-flag-compromise> [https://perma.cc/P2WJ-5D7Q].

¹¹ Cary & Stanglin, *supra* note 10.

¹² Forman argued that the First Amendment places limits on what the government may say when it acts as a speaker. See Forman, *supra* note 9, at 519-523.

¹³ Walker v. Tex. Div., 576 U.S. 200, 220 (2015). The dissent discussed the controversial nature of the symbol. See *Id.* at 234 (Alito, J., dissenting) ("The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred.") (citation omitted).

¹⁴ *Id.* at 204-05.

¹⁵ *Id.* at 220-21.

¹⁶ *Id.* at 207. Justice Thomas joined the 5-4 liberal majority to find that the personalized license plate program was government speech. Although the legal issue presented was whether Texas had opened a forum for speech, Justice Thomas's vote aligns with his dissent in *Virginia v. Black*, where he argued that the symbol of a burning cross is a form of intimidation that should not enjoy First Amendment protection. See *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., concurring in judgment and dissenting in part).

form of discrimination against a message, as in *Walker*,¹⁷ or government advocacy in favor of it, such as flying a Confederate flag, does not violate the First Amendment.

Like other lawsuits over Confederate symbols, lawsuits challenging the Mississippi state flag did not succeed.¹⁸ In a recent decision denying the plaintiff's challenge on standing grounds, a federal district judge recounted a lengthy history of the Confederate battle flag's notorious career in the South and in Mississippi,¹⁹ but, like other courts,²⁰ noted that change to the flag could only come from elected officials.

B. The Terms of Dixie's Retirement

At various inflection points, Mississippi has confronted the controversy surrounding its flag. In 2000, a voter referendum gave Mississippians the opportunity to vote for a new flag that did not contain the Confederate battle emblem, but voters rejected the alternative in favor of the 1894 version.²¹ And in 2015, after the killings inside a historic AME church in South Carolina, pressure mounted for Mississippi lawmakers to consider a new flag. For the country, it was a moment of unity in mourning the lives of innocents taken down by hatred, evocative of church bombings from the civil

¹⁷ In a later case, the Court said that *Walker* likely marks the "outer bounds" of the government speech doctrine. See *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017).

¹⁸ See *Miss. Div. of United Sons of Confederate Veterans v. Miss. State Conf. of NAACP Branches*, 774 So. 2d 388, 389-90 (Miss. 2000); *Daniels v. Harrison Cnty. Bd. of Supervisors*, 722 So. 2d 136, 139 (Miss. 1998).

¹⁹ *Moore v. Bryant*, 205 F. Supp. 3d 834, 844 (S.D. Miss. 2016), *aff'd*, 853 F.3d 245 (5th Cir. 2017). The district judge found no ambiguity in the flag's message:

It should go without saying that the [Confederate battle] emblem has been used time and time again in the Deep South, especially in Mississippi, to express opposition to racial equality. Persons who have engaged in racial oppression have draped themselves in that banner while carrying out their mission to intimidate or do harm.

²⁰ See, e.g., *Coleman v. Miller*, 117 F.3d 527, 530-31 (11th Cir. 1997) ("... [B]ecause the Confederate battle flag emblem offends many Georgians, it has, in our view, no place in the official state flag. We regret that the Georgia legislature has chosen, and continues to display, as an official state symbol a battle flag emblem that divides rather than unifies the citizens of Georgia. As judges, however, we are entrusted only to examine the controversies and facts put before us.").

²¹ See Paul Duggan, *Mississippi Keeps Its State Flag*, WASH. POST (Apr. 18, 2001), https://www.washingtonpost.com/archive/politics/2001/04/18/mississippi-keeps-its-state-flag/0ad4a97e-946a-4e9b-8f62-bab6e6516424/?itid=lk_inline_manual_26 [<https://perma.cc/4SB8-J664>].

rights era. Nonetheless, though several flag bills were introduced, nothing came of those efforts.²²

Then in 2020, after a summer of racial justice protests across the country, activists again brought pressure to bear on Mississippi as the last remaining state to display the Confederate battle emblem.²³ Mississippi's flag received intense scrutiny in a moment of national reckoning with monuments and symbols from the Confederacy and the country's past.²⁴ The SEC, NCAA, collegiate athletics programs, and state religious and business leaders all called for the removal of the Confederate emblem from the state flag.²⁵ Mississippi Senator Derrick Simmons described the moment as "a chorus of everyone signing the same song," noting the largest protests in Jackson, Mississippi, since the civil rights movement.²⁶

A confluence of secular and religious forces exerted pressure on the Mississippi flag issue. Legislators extended their summer session to deliberate and ultimately vote in favor of changing the state flag to remove the Confederate emblem. The law represented a legislative compromise of sorts; it required both the removal of the Confederate battle emblem and the inclusion of the words, "In God We Trust," on the state's new flag. Legislative discussions at times turned to the teachings of scripture, such as the injunction to avoid "what offends our brother."²⁷ Lawmakers also discussed the significance of the new flag's words, "In God We Trust," for both religious Mississippians and nonbelievers.²⁸

²² See *Moore*, 205 F. Supp. 3d at 848-49.

²³ The state flags of Florida, Alabama, and Georgia all have Confederate imagery, but those images do not provoke the visceral reaction reserved for the Confederate battle emblem.

²⁴ See Rick Rojas, *Mississippi Lawmakers Vote to Retire State Flag Rooted in the Confederacy*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/28/us/mississippi-flag-confederacy.html> [<https://perma.cc/Q3BD-79MB>] (last visited Feb. 27, 2021).

²⁵ See Ramseth, *supra* note 1. The prominent Mississippi Baptist Convention joined the religious leaders who advocated for a change in the flag. See *id.*

²⁶ Vangela Wade, *Conversations with Vangela M. Wade*, FACEBOOK (Aug. 4, 2020), <https://www.facebook.com/MississippiCenterforJustice/videos/3312526445461008/> [<https://perma.cc/X84Y-7T6F>].

²⁷ See Miss. Legislature, *MS Senate Floor*, YOUTUBE (June 28, 2020), <https://www.youtube.com/watch?v=1yRUagTaWT4> [<https://perma.cc/2KKT-2V83>] (discussion on June 28, before the flag vote).

²⁸ See *id.* (discussion between Senators Hopson and McDaniel).

II. CIVIL RELIGION AND CIVIL RIGHTS

“This new flag boldly declares our trust in God, that we are all equal in his eyes . . .”

– Mississippi House Speaker Philip Gunn²⁹

“In God we trust for better harmony between races in Mississippi. In God we trust that we never go back to the Jim Crow laws, that we never go back to the Confederate flag and that every citizen of Mississippi—whether he’s Black or white—will be inclusive . . .”

– Rev. Isiac Jackson, Jr., President, General Missionary Baptist State Convention³⁰

The legislation that led to the new Mississippi flag might be viewed as a sort of religious opportunism, taking advantage of the momentum against the Confederate emblem to extract a concession to religion. But that explanation misses something: There is a thick connection between religion and civil rights which predates and provides context to contemporary debates about symbols such as the Mississippi flag.

A. Religion and the Civil Rights Movement

1. “A distinct rhetoric all their own”³¹

Civil religion infused the voices of the civil rights movement. Ministers, students, and protestors invoked their own blend of Bible

²⁹ For several years Speaker Gunn was the lone statewide GOP leader who supported changing the state flag to remove the Confederate symbol. Geoff Pender, *New Mississippi Flag Almost Official: Lawmakers Move for Final Ratification*, MISS. TODAY (Jan. 5, 2021), <https://mississippitoday.org/2021/01/05/new-mississippi-flag-almost-official-lawmakers-move-for-final-ratification/> [<https://perma.cc/66QV-DARP>]. Gunn continued, “May God bless our efforts, and may God bless Mississippi as we set sail under this new flag.” *Id.*

³⁰ Jack Jenkins, *Some Question Replacing Mississippi’s Confederate Symbol with ‘In God We Trust’*, RELIGION NEWS SERVICE (July 2, 2020), <https://religionnews.com/2020/07/02/as-mississippi-removes-confederate-symbol-questions-about-replacing-it-with-in-god-we-trust/> [<https://perma.cc/U2RP-72YH>].

³¹ HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 179 (1965) (describing the mass protests in *Edwards v. South Carolina* and *Cox v. Louisiana*) (“Whatever the power, pressure, and anxiety generated by such huge numbers, the

and flag to send an unimpeachable message to a national audience—a clear contrast between good and evil. The images of well-dressed students provoking arrest by singing the Star-Spangled Banner underscored the dignity of their cause.³² But civil religion was more than mere window dressing.³³ Many of the protestors had in mind a vision of an America living up to its most sacred commitments:

[Rev. Martin Luther] King articulated the inchoate hopes of black southerners, and black Baptists in particular, that America would live up to its calling to embody and exemplify to the world an ideal brotherhood. America had a special role in creating the brotherhood, noted Fred Shuttlesworth, for “once we got all the melting pot together here, and the hardest bite was to assimilate the blacks into it, then we could be an example for the world.” Such were blacks’ images of and hopes for America, not only before 1954, but throughout the civil rights struggle of the 1950s and sixties.³⁴

Theirs was not the civil religion of southern segregationists.³⁵ The movement’s invocation of civil religion echoed the national religious mood of the 1950s, which saw “under God” added to the Pledge of Allegiance, and “In God We Trust” officially adopted as the national motto.³⁶ President Eisenhower’s appeal to a civic faith that could enlist “spiritual weapons” to oppose “a materialistic philosophy of life”³⁷ offered an inclusive monotheism. The civil rights movement, elevated on the platform of black churches across

demonstrations showed a tact, a grace, a patience, and a distinct rhetoric all their own.”); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965).

³² *Edwards v. South Carolina*, 372 U.S. at 233 (1963) (arresting officer complained about protestors’ singing and minister’s “religious harangue”).

³³ See DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 100 (2004) (“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.”).

³⁴ ANDREW M. MANIS, *SOUTHERN CIVIL RELIGIONS IN CONFLICT: CIVIL RIGHTS AND THE CULTURE WARS* 84 (2002) (quoting author’s interview with Fred Shuttlesworth).

³⁵ *Id.* at 80-86 (based on the author’s interviews with Ralph Abernathy and Fred Shuttlesworth). On southern civil religion and segregation, see *id.* at 152.

³⁶ 36 U.S.C. § 172; 36 U.S.C. § 302.

³⁷ See MARK SILK, *SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II* 98 (1988) (quoting President Eisenhower’s remarks at the signing of the bill to amend the Pledge of Allegiance to include the words, “under God”).

the South, exploited and expanded on those themes to powerful effect.

2. “Our religion is very important to us...”

The civil rights movement’s religious vision was a pluralist one. Martin Luther King, Jr., openly dreamed of a “beloved community” that would be a model for the world.³⁸ King’s vision, and the movement, united “Jew and Christian, atheist and believer, southerner and northerner”³⁹ in the struggle for equality. Yet the specific religious tradition out of which that vision arose animated the movement and many of its personnel.⁴⁰

Civil rights activist Fannie Lou Hamer, for example, explained the importance of religion when communicating to the northern students who would volunteer in Mississippi:⁴¹

She warned the students that a basic reality they would have to deal with was a religious commitment among the masses they were trying to help, which would seem extreme to them. Hamer knew that the students were not evangelical Christians. If they had religious feelings, they were mostly of the modernist, liberal variety. She knew that many of the students were skeptics . . . Whatever the students’ own conception of their role, she told them that they represented an answer to the faith of black Mississippians like herself. “Faith is the substance of things hoped for, the evidence of things not

³⁸ See MANIS, *supra* note 34, at 84-85.

³⁹ CHARLES MARSH, *THE BELOVED COMMUNITY: HOW FAITH SHAPES SOCIAL JUSTICE, FROM THE CIVIL RIGHTS MOVEMENT TO TODAY* 6 (2005).

⁴⁰ *Id.* (“King’s vision of beloved community was grounded in a specific theological tradition, and no amount of postmodern complexity can remove that intention and claim.”); see also Brandon Paradise, *How Critical Race Theory Marginalizes the African American Christian Tradition*, 20 MICH. J. RACE & L. 117, 119 (2014) (“Although joined by secularists, the civil rights movement was fundamentally a religious movement: born in the Black church and powered by the Black prophetic tradition. Marching together in prayer and song, the brave women and men who confronted and overcame the evil of racial apartheid did so with confidence that God was on their side and that victory against the evil of racism would, whatever the cost, ultimately be won.”).

⁴¹ See CHAPPELL, *supra*, note 33 at 71-72 (speaking to a group of mostly white students in the Summer of 1964).

seen. . . . Our religion is very important to us— you’ll have to understand that.⁴²

The connection between religion and civil rights has a deep history. For that reason, many Mississippians may perceive the removal of the Confederate emblem and the addition of “In God We Trust” to be mutually reinforcing aspects of the new flag.⁴³

B. Religion and State Symbols: “In God We Trust”

A potential constitutional impediment facing the new flag’s inclusion of the words, “In God We Trust,” is the First Amendment’s Establishment Clause.⁴⁴ However, over the years several justices of the U.S. Supreme Court have opined that such “ceremonial deism” as “In God We Trust” on the currency, in government buildings, and in the national and state mottos do not violate the Establishment Clause.⁴⁵ In *Town of Greece v. Galloway*, a legislative prayer decision, the Court adopted a historically-oriented approach which again suggested that such references do not violate the Establishment Clause.⁴⁶

⁴² *Id.* See also Paradise, *supra* note 40, at 211 (quoting from the Fannie Lou Hamer anecdote cited in Chappell’s book).

⁴³ See, e.g., Jenkins, *supra* note 30 (quoting Rev. Jackson) (“Black folks, we’ve always been trusting God—that’s all we’ve had.”).

⁴⁴ For the argument that “In God We Trust” and similar references violate the Establishment Clause, see Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

⁴⁵ Van Orden v. Perry, 545 U.S. 677, 699-700 (2005) (Breyer, J., concurring); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 31-36, 36 n.* (2004) (O’Connor, J., concurring) (listing state mottos with religious references) (“Arizona (‘God Enriches’); Colorado (‘Nothing without Providence’); Connecticut (‘He Who Transplanted Still Sustains’); Florida (‘In God We Trust’); Ohio (‘With God All Things Are Possible’); and South Dakota (‘Under God the People Rule’)”); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (mentioning “In God We Trust” in the national motto); *Id.* at 693 (O’Connor, J., concurring); *Id.* at 716 (Brennan, J., dissenting) (describing “In God We Trust” as ceremonial deism); see also Aronow v. United States, 432 F.2d 242, 243-44 (9th Cir. 1970) (“In God We Trust” on currency does not violate the Establishment Clause) (citing Engel v. Vitale, 370 U.S. 421 (1962), McGowan v. Maryland, 366 U.S. 420 (1961), and Waltz v. Tax Comm’n, 397 U.S. 664 (1970)).

⁴⁶ Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) ([T]he “Establishment Clause must be understood ‘by reference to historical practice and understandings.’”) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (Kennedy, J., concurring in part and dissenting in part)); see also Lisa Shaw Roy, *The Unexplored Implications of Town of Greece v. Galloway*, 80 ALB. L. REV. 877 (2017).

And in *American Legion v. American Humanist Association*, a recent decision upholding the constitutionality of a World War I memorial cross on public land, a majority of the Supreme Court held that longstanding “religiously expressive monuments, symbols, and practices” enjoy a presumption of constitutionality.⁴⁷ Longstanding symbols, the Court reasoned, can become embedded in the culture and take on a meaning and value apart from their religious elements.⁴⁸ The Court’s decision in *American Legion* constitutes the strongest statement thus far in favor of the constitutionality of longstanding religious symbols.⁴⁹ The plurality included the war memorial within a category of Establishment Clause cases that involve “the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations.”⁵⁰ Longstanding uses of “In God We Trust” fit squarely within this category. Even before *American Legion*, cases challenging civil religion of this sort were not likely to be won, but after it, there is little doubt about the constitutionality of such symbols.⁵¹

III. “IN GOD WE TRUST” ON THE MISSISSIPPI FLAG

A. *An Old Phrase, a New Symbol*

American Legion leaves open the possibility that new religious monuments and symbols may not pass constitutional muster. The Court’s opinion does not extend its presumption of constitutionality beyond symbols that are “longstanding.”⁵² What qualifies as

⁴⁷ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2085 (2019) (30-foot war memorial cross on public property).

⁴⁸ *Id.* at 2084.

⁴⁹ The case was decided 7-2 in favor of the American Legion monument, with five justices recognizing a presumption and two Justices—Thomas and Gorsuch—who would have gone further by eliminating “offended observer” standing and all such Establishment Clause challenges. *Id.* at 2098-101 (Gorsuch, J., concurring). For an extended discussion of the law leading up to and including *American Legion*, see Lisa Shaw Roy, *The Replacement Campaign: Monuments and Symbols*, 56 TULSA L REV. 255 (2021).

⁵⁰ *Am. Legion*, 139 S Ct. at 2081.

⁵¹ See, e.g., *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020), cert. denied, No. 20-340, 2020 WL 6551790 (Nov. 9, 2020) (applying *American Legion* to uphold constitutionality of the phrase “so help me God” in the naturalization oath).

⁵² *Am. Legion*, 139 S Ct. at 2085.

longstanding? The memorial cross in *American Legion* was over ninety-five years old. In an earlier Ten Commandments case, Justice Breyer voted to uphold a Texas monolith on the state capitol grounds in part because it had survived for forty years without challenge.⁵³ At the national level, “In God We Trust” qualifies as longstanding when compared with the facts from the Court’s symbols cases: The use of “In God We Trust” on the coinage dates back to the Civil War.⁵⁴ “In God We Trust” on the paper currency and in the national motto trace their origin to President Eisenhower’s interfaith agenda to distinguish the United States from “materialistic” Communism in the 1950s.⁵⁵ By contrast, “In God We Trust” in Mississippi is only a few years old; it was added to the state seal in 2014 and appeared on license plates a few years later.⁵⁶

A clever argument can be made that “In God We Trust” on the Mississippi flag is new to *that* symbol, even if the phrase itself qualifies as longstanding; therefore, the flag should not enjoy *American Legion*’s presumption of constitutionality. Nevertheless, newer uses of culturally embedded phrases like “In God We Trust” are unlikely to be held unconstitutional under the historical approach of *Town of Greece*, or even under the Court’s older, more separationist approaches to the Establishment Clause.⁵⁷ “In God We Trust” and similar forms of ceremonial deism, unlike the Ten

⁵³ Van Orden v. Perry, 545 U.S. 677, 702 (2005) (Breyer, J., concurring).

⁵⁴ The first coins with the inscription “In God We Trust” were minted in 1864 after a request by Secretary of the Treasury Salmon P. Chase that a religious motto be inscribed on coins. ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 568 (1964).

⁵⁵ For a discussion of the postwar religious revival, see SILK, *supra* note 37, at 98-99; *but see* KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA 109 (2015) (arguing that the contrast with Communism was a belated development).

⁵⁶ See MISS. CODE ANN. § 3-3-42 (West, Westlaw through 2021 Reg. Sess.).

⁵⁷ *Cf., e.g.,* Lambeth v. Bd. of Comm’rs of Davidson Cnty., 407 F.3d 266, 271 (4th Cir. 2005) (upholding County’s installation of “In God We Trust” on the facade of a government building while acknowledging plaintiffs’ argument that the County’s action “goes beyond the traditional uses of the phrase . . . which have been limited to the phrase’s appearance on coins and currency, and as the national motto”) (applying *Lemon v. Kurtzman*, 411 U.S. 192 (1973), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)).

Commandments, a veterans' memorial cross, or a nativity display,⁵⁸ have survived unscathed through decades of court challenges.⁵⁹ Moreover, given its role as the national motto, the phrase was not unfamiliar to Mississippians when it was adopted in 2014.⁶⁰

B. Whether the Flag Disrespects or Excludes Mississippians

Two more observations are useful here—one doctrinal and one practical. First, the doctrinal point: *American Legion* can be read to suggest an exception to the presumption of constitutionality for symbols which disrespect or exclude. The opinion emphasizes “citizens living together harmoniously” and supports its holding with the observation that the memorial cross in that case did not deliberately exclude any veterans’ names from the monument.⁶¹ In its discussion of the Court’s legislative prayer decisions, the plurality focuses on the importance of inclusiveness, a point on which five justices agree.⁶² Following the teaching of *American Legion*, one lower court has inquired whether the inclusion of the

⁵⁸ See, e.g., *Lynch v. Donnelly*, 465 U.S. 688 (1984); *County of Allegheny*, 492 U.S. at 573.

⁵⁹ Compare, e.g., *Shurtleff v. City of Boston*, 986 F.3d 78, 94 (1st Cir. 2021) (denying Free Speech and Establishment Clause challenges to city’s refusal to fly Christian flag in the city’s flag rotation) (noting that the city could conclude that the raising of the Christian flag along with the Boston flag would be a new symbol not covered by the presumption of constitutionality in *American Legion*), cert. granted sub nom. *Shurtleff v. City of Bos.*, Massachusetts, 142 S. Ct. 55 (2021).

⁶⁰ Cf., e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36 n.* (2004) (O’Connor, J., concurring) (“Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those States as well. Georgia’s newly redesigned flag includes the motto ‘In God We Trust.’”).

⁶¹ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2070 (2019); see also *id.* at 2091 (Breyer, J., concurring) (“The case would be different . . . if there were evidence that the organizers had ‘deliberately disrespected’ members of minority faiths . . .”).

⁶² Justice Kagan did not join the plurality opinion of four justices, but she praised the following discussion of inclusiveness as a touchstone of constitutionality:

The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.

Am. Legion, 139 S. Ct. at 2089 (plurality opinion) (discussing legislative prayer and *Town of Greece*); see also *id.* at 2094 (Kagan, J., concurring).

words, “so help me God” in the naturalization oath amounted to “deliberate disrespect” of atheists.⁶³

On the criteria of respect and inclusion, the Mississippi flag passes with flying colors. Both the genesis of the flag and the long-running conversation about the Confederate battle emblem reveal an agenda to include all Mississippians in the state’s symbols. Lawmakers presented the new flag legislation to the state and the nation as an effort to heal old wounds during a particularly polarized racial moment. After the flag vote, former Mississippi Supreme Court Justice Reuben Anderson, chair of the flag commission, declared that “Mississippi voters sent a message to the world that we are moving forward together.”⁶⁴

This is not to discount the impact of “In God We Trust” on atheists, who may experience a sense of alienation from that phrase. In the words of Justice Sandra Day O’Connor, they are made to feel like “outsiders,” less than “full members of the political community.”⁶⁵ But *American Legion* recognizes that judicial edicts demanding removal of all vestiges of religion from public life may be “evocative, disturbing, and divisive” to many people.⁶⁶ There is no avoiding the conundrum that while some citizens are offended by religious symbols, others would view the act of striking them down as “aggressively hostile” to religion.⁶⁷ Most important after *American Legion*, the Mississippi legislature, in adopting the language of the national motto, did not set out to exclude or disrespect any group.⁶⁸ Lawmakers likely selected a symbol that they believed would be palatable to a majority of voters, and it was. Absent proof of intentional discrimination, the flag is not likely to be found unconstitutional.⁶⁹

⁶³ *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020), *cert. denied*, No. 20-340, 2020 WL 6551790 (Nov. 9, 2020).

⁶⁴ Pettus, *supra* note 5.*f* Anderson was the first black Justice of the Mississippi Supreme Court.

⁶⁵ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

⁶⁶ *Am. Legion*, 139 S. Ct. at 2084-85.

⁶⁷ *Id.*

⁶⁸ *Cf., e.g., Michael W. McConnell, No More (Old) Symbol Cases*, 2018–2019 CATO SUP. CT. REV. 91, 111 (reviewing *American Legion*) (“It is possible to endorse any number of beliefs, practices, people, places, or things, without casting aspersions on others.”).

⁶⁹ *Cf., e.g., Penkoski v. Bowser*, No. 20-CV-01519 (TNM), 2020 WL 4923620, at *9 (D.D.C. Aug. 21, 2020) (holding that white Christian pro se Plaintiffs, offended by the

C. The Mississippi Flag is an Unlikely Target

A practical observation flows from the earlier point about inclusivity: There are not likely to be many challengers to Mississippi's new flag. In the early days of lawsuits aimed at religious symbols, the professional separationist groups largely avoided bringing lawsuits against ceremonial deism such "under God" in the Pledge of Allegiance and "In God We Trust" on the currency, abandoning the field to individual plaintiffs.⁷⁰ When they did challenge religious symbols, professional separationist groups often leveraged the legitimacy of the civil rights movement to argue that religious minorities and nonconformists would be the beneficiaries of their efforts.⁷¹ Thus, it would seem that for many separationist and civil liberties groups, to attack the flag that replaced the Confederate battle emblem would pose a type of conflict of interest.⁷² Against the unique legacy of slavery and Jim Crow, it would be difficult to frame atheists as a persecuted minority.⁷³ Such a lawsuit would also exacerbate the differences

city's Black Lives Matter mural's "racially discriminatory message" lack standing to sue under the Equal Protection and Establishment Clauses).

⁷⁰ See, e.g., *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (per curiam) (lawsuit by Madeline Murray O'Hair) (upheld the constitutionality of statutes making "In God We Trust" the national motto and requiring the imprinting of the motto on the coin and currency of the United States); *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970) (upholding "In God We Trust" as the national motto) (pro se plaintiff Stefan Aronow); see also *Roy, Replacement Campaign*, *supra* note 49, at 264.

⁷¹ *Roy, Replacement Campaign*, *supra* note 49.

⁷² On the other hand, the Satanic Temple threatened to sue over the inclusion of "In God We Trust" on the flag. Lindsay Knowles, *Satanic Temple Threatens Lawsuit if "In God We Trust" Appears on New Mississippi Flag*, (July 10, 2020, 9:47 AM), <https://www.wtvy.com/2020/07/10/satanic-temple-threatens-lawsuit-if-in-god-we-trust-appears-on-new-mississippi-flag/>. In recent years, the Satanic Temple has assumed the role of public provocateur, threatening to install public monuments of Satanic figures if religious monuments are allowed to stand.

⁷³ Justice Gorsuch, arguing against offended observer standing in *American Legion*, juxtaposed racial and religious offense to critique what he deemed an "utterly unjustified result":

An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks *that* could be the law?

Am. Legion, 139 S. Ct. at 2099 (Gorsuch, J., concurring) (citing Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 34-35); see also *id.* at 2099 (Gorsuch, J., concurring) (describing equal protection claim in *Allen v. Wright*, 468 U.S. 737 (1984), as "arguably more sympathetic" than hypothetical Establishment Clause challenge to the

between civil liberties groups on the one hand, and many blacks on the other, over issues of church and state. The overlap of interests between southern conservatives and their black neighbors is reflected in the new Mississippi flag, which, as a practical matter, makes it an unattractive target for lawsuits.⁷⁴

What seems likely here—I can only guess—is a strategic forbearance on the part of civil liberties groups who celebrate the removal of the Confederate battle emblem as a victory for civil rights. It is conceivable that in the distant future, after the honeymoon has faded, challengers from the left flank may take aim at the religious element of the flag.⁷⁵ There are also rumblings that the issue is not settled for some who still want the chance to vote for the old flag with the Confederate symbol.⁷⁶ In the meantime, however, Mississippians can enjoy their new flag.

CONCLUSION

Mississippi's "In God We Trust" flag reflects the decision of the Mississippi legislature to retire the Confederate battle emblem to history. After their historic vote, legislators from across the aisle,

Confederate battle flag). The example was not entirely hypothetical; there was such a case. *See Briggs v. Mississippi*, 331 F.3d 499, 508 (5th Cir. 2003) (Mississippi state flag, which included the "St. Andrews Cross" as part of the Confederate battle emblem, did not violate the Establishment Clause), *cert. denied*, 540 U.S. 1108 (2004).

⁷⁴ This also explains why charges of "white Christian nationalism" (*see Sokol, infra*, note 75) don't make sense in light of the history of either the national motto or the new Mississippi flag—in the latter case, a recent history which includes images of black and white legislators embracing. *See infra* note 75.

⁷⁵ *See, e.g.,* Samantha Sokol, *Mississippi Trades Confederate Emblem for 'In God We Trust' on State Flag*, AMERICANS UNITED FOR THE SEPARATION OF CHURCH & STATE, WALL OF SEPARATION BLOG, July 2, 2020, <https://www.au.org/blogs/mississippi-new-flag> [<https://perma.cc/49BB-HUY4>] (arguing that the new flag trades "white nationalism" for "Christian nationalism"). It may be that separationist groups opted instead for a narrower challenge to the compelled display of "In God We Trust" on Mississippi license plates. *See 'In God We Trust'? Lawsuit Says Not on These Mississippi License Plates*, MISS. CLARION LEDGER, June 24, 2021, <https://www.clarionledger.com/story/news/2021/06/24/atheists-humanists-mississippi-license-plates-lawsuit/5333794001/>.

⁷⁶ *See, e.g.,* Luke Ramseth & Giacomo Bologna, *Mississippi Lawmakers Vote to Change State Flag: No Confederate Emblem*, MISS. CLARION LEDGER (June 28, 2020, 4:19 PM), <https://www.clarionledger.com/story/news/politics/2020/06/28/mississippi-state-flag-lawmakers-vote-state-law-remove-confederate-emblem/3273336001/> [<https://perma.cc/4JYF-ZSZ9>].

black and white, hugged each other and posed for pictures.⁷⁷ The Mississippi flag's design was approved by a majority of voters, which for many symbolizes racial reconciliation and hope for a way forward at a particularly polarized time. The flag's religious language, "In God We Trust," is not unusual for government mottos or symbols, and not likely to be struck down as a violation of the Establishment Clause. To the contrary, the connection between racial equality and religious language has a historical resonance that adds context to the new Mississippi flag.

⁷⁷ See *id.* (photo gallery).

APPENDIX

The Mississippi State Flag



|

