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Shurtleff v. City of Boston: One Case, Two Frames, and Three Flagpoles

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Three 83-foot flagpoles tower over Boston City Hall, the seat of local government. On most days, the American flag flies on the first pole, the Massachusetts state flag flies on the second pole, and the City of Boston flag flies on the third pole. On special occasions, the City lowers its banner and raises a flag selected to celebrate a day of observance, a public institution, or a moment of civic pride. In addition to these displays, private citizens, groups, and organizations can apply to host a flag raising event on City Hall Plaza. When Harold Shurtleff and Camp Constitution sought permission to fly the Christian Flag during an event, the City of Boston denied their application. Pressed for an explanation, local officials claimed flying a religious flag on the third flagpole might be perceived as "an endorsement of a particular religion," which would be "contrary to the concept of separation of church and state or the constitution's establishment clause." Shurtleff and Camp Constitution challenged this decision in federal court, but a federal district judge and the First Circuit Court of Appeals framed the selection of flags as a form of government speech. Since the City was speaking, officials could choose not to display religious flags. Unhappy with this result, Shurtleff and Camp Constitution appealed to the Supreme Court, arguing that the First Circuit's decision "unconstitutionally expands the government speech doctrine." As an alternative, their Petition for Writ of Certiorari framed the third flagpole as a designated public forum, meaning city officials had engaged in unconstitutional viewpoint discrimination when they

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refused to fly the Christian Flag. In a unanimous decision, the Supreme Court rejected the government speech frame, holding the City of Boston did not exercise meaningful institutional control over flag raising events. Since the government was not speaking, the majority held officials violated the First Amendment when they denied the request submitted by Shurtleff and Camp Constitution. As a result of the decision, the Christian Flag flew over the City Hall Plaza for two hours, and the City of Boston adopted a new flag raising policy. While the decision's immediate effect was limited, Shurtleff v. City of Boston is worthy of analysis because it refined the test used to distinguish between government speech and a forum maintained by the government.

Boston's Government Center, completed in the 1960s, remains an enduring site of controversy. To create the space necessary for construction, the Boston Redevelopment Authority leveled Scollay Square and most of the old West End, displacing businesses and residents to revitalize the economy and usher in a new era in Boston's history. To justify the destruction of 1,000 buildings and the displacement of 20,000 residents, officials portrayed the old neighborhood as a site of "moral decay and social deviance."1 In its place, the City of Boston constructed a grand plaza, reportedly modeled after the Piazza del Campo in Siena, Italy, one of the great squares in medieval Europe. While the vision was grand, the result was disappointing. Describing City Hall Plaza, Bill Wasik observed, "it is as if the space were calibrated to render futile any gathering, large or small, attempted anywhere on its arid expanse. All the nearby buildings seem to be facing away, making the plaza's 11 acres (45,000 m2) of concrete and bricks feel like the world's largest back alley."2

Another controversial feature of the Government Center is Boston City Hall, a famous example of Brutalist (Heroic) architecture.3 The building's design emphasized the openness and accessibility required for a democracy to thrive, with the most heavily used spaces situated on the lower levels connected to the plaza. While some lauded the modern look and feel of the building,4 commentators and politicians derided the structure. Boston Globe columnist Paul McMorrow was especially harsh: "City Hall is so ugly that its insane upside-down wedding-cake columns and windswept plaza distract

from the building's true offense. Its great crime isn't being ugly; it's being anti-urban. The building and its plaza keep a crowded city at arm's length."5 Mayor Tom Menino went even further, complaining, "the building is unfriendly, cold, and the way it's structured, it has a third floor only on one side and it doesn't have a fourth floor."6 Menino later proposed selling City Hall and the surrounding plaza to a private developer and using the proceeds to relocate the seat of local government to a more conventional building constructed on a waterfront site in South Boston.7

The latest Government Center controversy does not involve urban renewal, the barren plaza, or the unfortunate design of Boston City Hall. Instead, it involves an element traditionally found on public property: flagpoles. Near the Northwest entrance to City Hall, three 83-foot-high poles tower over Government Center. The decision to install massive flagpoles was deliberate, as the design of the plaza created a majestic space to display the American flag (and a smaller black flag honoring prisoners of war (POW) and soldiers missing in action (MIA)), the Massachusetts state flag, and the City of Boston flag. The flagpoles' height and placement dramatically project the presence of three different levels of government—federal, state, and local.

"The overwhelming majority of the time," the City of Boston flies its flag alongside the United States and Massachusetts flags.8 However, the government lowers its banner and raises another flag on special occasions. So, for example, the third pole has been used to display flags that honor days of observance (e.g., Veterans Day), public institutions (e.g., branches of the military), or moments of civic pride (e.g., when the Boston Renegades were champions of the Woman's Football Alliance).9 Some of the City's flag raisings are more whimsical. To settle a friendly wager between the mayors of Boston and Montreal, the team flag of the Montreal Canadians flew over Boston City Hall in 2014.10 In addition to these displays, the City of Boston "will from time to time replace its flag with another flag for a limited period of time. Such requests are typically made by a third party in connection with an event taking place within the immediate area of the flagpoles."11 By flying these flags, the City's website proclaims that the City seeks to "*commemorate flags from many countries and communities at Boston City Hall Plaza during the year*."12 (emphasis in original)

The current dispute began on July 28, 2017, when Harold Shurtleff and Camp Constitution, a group founded "to enhance understanding of our Judeo-Christian moral heritage," filed a request to fly the Christian Flag, consisting of a white field with a red Latin cross inside a blue canton, during an event.13 Gregory Rooney, Commissioner of the City of Boston's Property Management Division, denied the application as flying the Christian Flag over City Hall Plaza might constitute "an endorsement of a particular religion," which would be "contrary to the concept of separation of church and state or the constitution's establishment clause."14 Shurtleff and Camp Constitution challenged Rooney's decision in court, but a federal district judge ruled for the City of Boston.15 On appeal, the First Circuit Court affirmed the lower court's decision. Disappointed with this result, Shurtleff and Camp Constitution appealed to the United States Supreme Court. To the surprise of many commentators, the Justices granted certiorari on September 30, 2021.16 Oral arguments were heard on January 18, 2022.

The speech at issue—briefly flying a Christian Flag over Government Center during an event—may seem trivial. However, Shurtleff v. City of Boston raises a series of questions worthy of a law school hypothetical: Does the City of Boston engage in government speech when it replaces its flag with another banner? Is the third flagpole in front of Boston City Hall a public forum available to all speakers? Would it violate the Establishment Clause to fly the Christian Flag over City Hall Plaza? Can the City of Boston modify its flag raising policy to withstand constitutional scrutiny? This analysis attempts to answer these questions. Toward the end, the first section briefly explains the significance of framing in legal arguments. The second section expands on the facts in Shurtleff. The two sections that follow explain the competing frames of analysis. The First Circuit adopted the City of Boston's frame for the case, which characterized flag raising as a form of government speech. In its Petition for Writ of Certiorari, Shurtleff and Camp Constitution offered a different frame, arguing that the city administered the flagpole as an all-purpose public forum. The fifth section explains the Supreme Court's decision and what it means for government speech doctrine. The final section describes how the City of Boston responded to the Supreme Court decision and why its new flag raising policy will likely withstand constitutional scrutiny.

Framing the Issue

The influential legal scholar, Karl Llewellyn, elucidated the importance of framing in legal arguments in "A Lecture on Appellate Advocacy."17 The most important thing, he advised his audience, is to frame the legal issue "so that if your framing is accepted the case comes out your way."18 This move is crucial, Llewellyn continued, "because your opponent will be framing an issue very differently. You have got to frame yours . . . so that it 'sells the Court' . . . [or] 'captures the field.'"19 Llewellyn added that it is also essential to offer a "phrasing of your issue which not only will help you capture the Court, but which will stick your capture into the Court's head to that it can't forget it."20 The goal is to "put the facts into a frame that would fit a body of law available and . . . emotionally comfortable to the Court."21 Building on this analysis, Garner concludes, "whoever does [this] well is most likely to win. Indeed, a well-framed issue can often become the starting point for the majority opinion." 22

Many works on appellate advocacy highlight the importance of framing the issue in a case.23 To appreciate the significance of this advice, it is necessary to say a bit more about the underlying theory. Many scholars, including Lakoff and Johnson, recognize the power of language. The words we use, they note, "structure what we perceive, how we get around in the world, and how we relate to other people."24 This explains why, in a legal context, Solon notes, "the lawyer representing an individual in a deportation hearing is more likely to refer to her client as an undocumented worker, while the government lawyer may speak of an illegal alien."25 Or, in the case of a man charged with raping a woman, "the prosecutor is more likely to refer to the woman as 'the victim,' the defense lawyer to refer to her as 'the complaining witness."26 Skilled advocates select words to frame ideas because they know these simple choices are consequential.

Gamson and Modigliani define "frames as 'a central organizing idea or story line that provides meaning to an unfolding strip of events . . . the frame suggests what the controversy is about, the essence of the issue.'"27 The act of "framing," Entman (1993) explains, "involves selection and salience. To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as

to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described."28 The selection of the frame provides context that informs the underlying issue. Salience is important, Entman adds, as it makes certain pieces of information more "noticeable, meaningful, or memorable to audiences within the chosen frame. An increase in salience enhances the probability that receivers will perceive the information, discern meaning and thus process it, and store it in memory."29

The Supreme Court's decision in two cases involving the Pledge of Allegiance illustrates the importance of framing.30 In Minersville School District v. Gobitis (1940), the Justices considered a case involving two school-age Jehovah's Witnesses expelled from a public school in Pennsylvania for refusing to participate in a mandatory flag salute.31 In an 8-to-1 decision issued in 1940, Justice Felix Frankfurter framed the case as a dispute over religious liberty. In his majority opinion, he reaffirmed the principle that this liberty had never included an "exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good."32 Applying the religious liberty frame, the majority held that the flag salute was constitutional because the state had a legitimate interest in "national cohesion" and that "national unity was the basis of national security."33

In his dissenting opinion in Minersville, Justice Harlan Fiske Stone offered a different frame for assessing the student's behavior, arguing that the Constitution guarantees the "freedom of the individual from compulsion as to what he shall think and what he shall say."34 Three years later, in West Virginia State Board of Education v. Barnette (1943), the Justices reversed ground and ruled in favor of the Barnette children, even though the facts in the case were nearly identical to those in Minersville.35 In an elegant opinion by Justice Robert H. Jackson, the majority embraced the compelled free speech frame in Justice Stone's dissent.36 "If there is any fixed star in our constitutional constellation," Justice Jackson opined, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."37

This example demonstrates the importance of framing in legal arguments. The choice of frame dictates what will be discussed, how it will be discussed, and just as important, what will not be discussed. Not surprisingly, both parties in Shurtleff followed Llewellyn's advice and selected a frame with the goal of securing a favorable outcome. When arguing the case, the parties described the facts to highlight the salient information, with the City of Boston focusing on its flag raising program and Shurtleff and Camp Constitution emphasizing the application process. These choices were strategic, as the competing parties sought to frame the legal issue to their advantage. Before discussing the frames that the parties selected, it is appropriate to delve more deeply into the facts of the case.

Facts of the Case

Harold "Hal" Shurtleff describes himself as "a U.S. Army Veteran, co-founder and director of Camp Constitution, and a member of the Sons of the American Revolution."38 Camp Constitution was formed in 2009, and it offers classes and workshops on various topics related to American history, the Constitution, and current events. "The mission of Camp Constitution," according to the organization's web website, "is to enhance understanding of our Judeo-Christian moral heritage, our American heritage of courage and ingenuity, including the genius of our United States Constitution, and the application of free enterprise, which together gave our nation an unprecedented history of growth and prosperity, making us the envy of the world."39 In support of its mission, the organization runs a week-long summer camp held this year at Singing Hills Christian Camp in Plainfield, New Hampshire. 40 In addition to the traditional outdoor activities, the camp features classes dealing with the Bill of Rights, the Electoral College, the Second Amendment, COVID-19, and other issues.41

The City of Boston allows public events at six locations near Government Center: "Faneuil Hall, Sam Adams Park, City Hall Plaza, the lobby of City Hall, at the City Hall Flag Poles, and the North Stage."42 The guidelines on the City's website state that interested parties need permission to hold an event on city-owned property. The guidelines also note that applications may be denied if the proposed events "involve

illegal or dangerous activities, or if the applicants lack insurance certification, lie, have histories of damaging City property or failing to pay City fees, or fail to comply with other administrative requirements."43

On July 28, 2017, Shurtleff and Camp Constitution telephoned and emailed Lisa Menino, a special events officer (who also happened to be the daughter-in-law of the former mayor), and applied for permission to fly their flag over City Hall Plaza. In their application, the group proposed to "raise the Christian Flag" as part of an event celebrating Constitution Day and Citizenship Day.44 The City of Boston had no formal flag raising policy at the time, so Menino forwarded the request to Rooney and asked him to ensure it was consistent with the City's message, policies, and practices.45 By his own account, Rooney was "concerned," as "he considered it to be the first request that he had received related to a religious flag."46 Before making a final decision, Rooney conducted a thorough review of flag-raising requests and confirmed that the City had "no past practice of flying a religious flag."47 Based on this finding, he denied the request because the "City's policy was to refrain respectfully from flying non-secular third-party flags in accordance with the First Amendment's prohibition of government establishment of religion."48 Rooney did, however, offer to fly a non-religious flag during the organization's proposed event.

Shurtleff and Camp Constitution submitted a second request on September 13, 2017. The revised application was titled "Camp Constitution Flag Raising Event" and described an event that would "celebrate and recognize the contributions Boston's Christian community had made to our city's cultural diversity, intellectual capital and economic growth."49 In that spirit, the request described the "Christian flag" as "an important symbol of our country's Judeo-Christian heritage."50 In addition to the flag raising, the event (to be held on October 19 or 26, 2017) would feature three speakers: "Reverend Steve Craft (who would speak on the need for racial reconciliation), Pastor William Levi (who would speak on 'the blessings of religious freedom in the U.S.'), and Shurtleff himself (who would present a Boston-centric historical overview)."51

The second application forced the issue and placed the City of Boston in a dilemma. If the City approved the request, the Christian Flag would fly over City Hall

Plaza during Camp Constitution's event. That might be unpopular with residents, and the City of Boston would be vulnerable to a lawsuit claiming it had violated the Establishment Clause when it displayed the Christian Flag on public property. On the other hand, if the City of Boston denied the request, Shurtleff and Camp Constitution would likely file suit in federal court, claiming the denial violated their constitutional rights. Whatever it decided, the City of Boston would likely find itself in court. Given the choices, fighting Shurtleff and Camp Constitution might be preferable, as city officials could blame the courts if they were compelled to raise the Christian Flag.

The City of Boston did not respond to the second application, and Shurtleff and Camp Constitution sued in federal court on July 6, 2018. The lawsuit sought injunctive relief, a declaratory judgment, and monetary damages.52 While this move was expected, what happened next was a surprise: The dog caught the bus it was chasing.53 A federal district judge ruled in favor of the City of Boston. Shurtleff and Camp Constitution appealed the decision, but the First Circuit Court of Appeals affirmed the district court. To explain this unexpected result, it is helpful to consider the two distinctly different ways the opposing sides framed the case.

The First Frame: Flag Raising as Government Speech

The government speech doctrine originated with Rust v. Sullivan (1991), a controversial Supreme Court decision that held the government could constitutionally prohibit doctors who received federal funds for family planning services from discussing abortion with their patients.54 In his majority opinion, Chief Justice William Rehnquist reasoned, "Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing," he continued, "the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."55 This preference was necessary, the Chief Justice added, or else the government would be unable to function. He offered the following example to prove this point: "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic

principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."56

In the government speech cases that followed, the Supreme Court offered more examples to prove that government could not function absent the ability to control its message. In one decision, the majority opinion posed two rhetorical questions: "How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?"57 In light of the COVID-19 pandemic, the second rhetorical question now seems prescient: "How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?"58 In another government speech case, the majority developed a detailed historical example to prove the same point: "During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources."59 These posters took a clear position on the war effort, "but the First Amendment did not demand that the government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities."60

Two subsequent Supreme Court decisions extended the government speech doctrine to include monuments in public parks and specialty license plates.61 In Pleasant Grove City v. Summum (2009), a small religious group offered to donate a religious monument celebrating Summum's Seven Aphorisms to a city park that displayed 15 donated monuments, including a Christian monument that listed the Ten Commandments.62 The Supreme Court held that "permanent monuments displayed on public property typically represent government speech," which meant Pleasant Grove City could constitutionally welcome the Ten Commandments while refusing the Seven Aphorisms.63 "The Free Speech Clause restricts government regulation of private speech," the majority explained, "it does not regulate government speech."64

The Supreme Court reached a similar conclusion in Walker v. Texas Division, Sons of Confederate Veterans (2015). In this case, the Sons of Confederate Veterans claimed the Texas Department of Motor Vehicles had engaged in unconstitutional viewpoint discrimination when it refused to issue a specialty license plate for the group, even though the state had approved dozens of plates for other groups. The majority held license plates were a form of government speech, a finding that meant Texas could reject a design incorporating two images of the Confederate battle flag.65 "When the State is speaking on its own behalf," the majority concluded, "the First Amendment strictures that attend the various types of government-established forums do not apply."66

In the Pleasant Grove City decision, the Supreme Court acknowledged it might be "difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.67 The Justices identified three factors to help courts determine whether speech should be attributed to the government, a private organization, or an individual. The factors set out in Pleasant Grove City and Summum include (1) the history of the use of the program, medium, or venue in or on which the speech takes place, (2) whether a reasonable observer would conclude that the speech comes from the government, and (3) whether the government maintained effective control over the messages conveyed.68 Applying these factors to the facts in Shurtleff, the federal district court and the First Circuit held that the City of Boston was speaking when it flew nongovernmental flags over City Hall.

Concerning the first factor, the First Circuit noted that "governments have used flags throughout history to communicate messages and ideas."69 To prove the point, the First Circuit cited West Virginia v. Barnette (1943), a landmark free speech case that held "the use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."70 The court added that "government engages in speech when if flies its own flag over a national cemetery, and that its choice of which flags to fly may favor one viewpoint over another."71 It was clear, the First Circuit concluded, "That a government flies a flag as a 'symbolic act' and signal of a greater message to the public is indisputable."72

The City of Boston echoed this argument in the Respondent's Brief it submitted to the Supreme Court: "It is important to appreciate the strong historical connection between a government and the flagpole at its government seat, which then illuminates why the City would deem it a powerful message *by the City* to fly on special days of celebration the flags associated with the diverse nationalities from which Boston's resident's come."73 (emphasis in original) When choosing which flags to display, the City attempts to "create an environment...where everyone feels included and is treated with respect,...to raise awareness in Greater Boston and beyond about the many countries and cultures around the world,...[and] to foster diversity and build and strengthen connections among Boston's many communities."74 The Brief continued, "The message is not that of any individual community, but instead the *City's* message of celebrating diversity by flying *all* those flags at different times through the year."75 (emphasis in original) Simply put, "the City used the 'bully pulpit' of its flagpole to engage in precisely the kind of civic promotion that is central to the government function."76

Moving to the second factor, the First Circuit said it was likely that an observer would attribute the message of a third-party flag to the City of Boston. On this point, the court found that "the three flags are meant to be—and in fact are—viewed together. The City Hall display of three flags in close proximity communicates the symbolic unity of the three flags."77 It "strains credulity," the court continued, to believe that an "observer would partition such a coordinated three-flag display (or a four-flag display if one counts the POW/MIA flag) into a series of separate yet simultaneous messages (two that the government endorses and another as to which the government disclaims any relation)."78 It might be different, the First Circuit added, if the case involved "a lone Christian Flag, nowhere near City Hall."79 In this instance, however, the court concluded that "a City Hall display that places such a flag next to the flag of the United States and the flag of the Commonwealth of Massachusetts communicates a far different message to an observer: that the city flies all three flags."80

The third factor was satisfied, the First Circuit noted, as the "City maintains control over the messages conveyed by third-party flags."81 The decision noted that a permit is required to use the flagpole, that the City of Boston reviews all flag-raising

applications, and that all displays must be consistent with the City's messages, policies, and practices.82 A city employee is also present at all flag raisings. "What is more," the First Circuit added, "the City limits physical access to the flagpole: the flagpole is restricted government property, and the City restricts access to it by providing only parties whose requests are approved with a hand crank. All in all, the decision to fly a flag fails squarely on the City, and not on any other entity or person."83 When a third-party flag flies over City Hall, the First Circuit concluded, "it flies only because the City chose to fly it. And in reserving this final approval authority, the City 'has effectively controlled the message conveyed' in the flag display."84

Shurtleff and Camp Constitution argued that all previous flag-raising applications had been approved to demonstrate that the City of Boston did not exercise meaningful control. However, the First Circuit was not persuaded by this argument "because the exercise of the authority to reject is necessarily case-specific and limited by the kinds of requests the City receives. Since the City had never rejected a request, the flag raisings in the record are, in effect, a record of the requests received."85 Moreover, the fact that no requests had been denied did not prove that the City of Boston had opened a public forum. On the contrary, the First Circuit argued, "government creates a public forum 'only by intentionally opening a nontraditional forum for public discourse. Government inaction or permission for limited discourse cannot establish a public-forum designation."86 Citing the Supreme Court's decision in Arkansas Education Television v. Forbes, the First Circuit concluded the "City's permission procedures evince selective access to the third flagpole, and 'the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'"87

In the Brief for Respondents submitted to the Supreme Court, the City of Boston emphasized that past approvals did not demonstrate that a public forum had been created: "If the City flagpole had truly been designated 'a public forum for the private speech of all comers,' one would expect petitioners to point to scores of truly private events, requested for purely private reasons, similar to the full range of purely private speech—wedding proposals, birthday wishes, advertisements of new business, or

promotion of political candidates or causes—that surely would occur in true public forums around City Hall."88 The conspicuous absence of this sort of private activity demonstrates, the City of Boston argued, that it "did not convert" the third flagpole into a "public forum open to any and all messages."89

The decision to frame flag raising as government speech is dispositive because it anticipates and negates Shurtleff and Camp Constitution's claim that the City of Boston violated their free speech rights. "When the government is the speaker," Erwin Chemerinsky noted, "the First Amendment does not provide a basis for challenging the government's action."90 Echoing this sentiment, David Ardia added, "the government speech doctrine . . . grants the government nearly cart blanche ability to exclude speakers and speech on the basis of viewpoint so long as the government can show that it 'effectively controlled' the message being conveyed."91 This legal doctrine is evident in the First Circuit decision. "Because the City engages in government speech when it raises a third party flag on the third flagpole at City Hall," the First Circuit held, "the Free Speech Clause does not circumscribe that speech. The City is, therefore 'entitled' to 'select the views that it wants to express.'"92 "When the government speaks," Joseph Blocher observed, "it can say what it wants, even if that means discriminating on the basis of viewpoint."93 In this instance, the City of Boston spoke when it displayed secular flags while declining to display the Christian Flag. If residents of Boston object to the City's secular flag policy, the First Circuit added, they are free to elect different officials who share their concerns.94

The Second Frame: The Third Flagpole is a Designated Public Forum

The public forum doctrine traces its roots to Hague v. Committee for Industrial Organization (1939), a case involving a Jersey City, New Jersey, ordinance requiring a permit for all assemblies, leafleting or picketing in any public place without a permit from the city.95 Major Frank Hague repeatedly refused to approve requests submitted by the CIO, claiming he had the power to deny a permit "for the purpose of preventing riots, disturbances, or disorderly assembly."96 The CIO sued, and the Supreme Court held Jersey City was constrained by the Constitution when it administered public property. In

his plurality opinion, Justice Owen Roberts wrote, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."97 He continued, "Such use of the streets and public parks has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."98 In an influential law review published in 1965, Harry Kalven argued that "the streets, the parts, and other places are an important facility for discussion and political process."99 They are, he continued, "a *public forum* that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom."100 (emphasis added) The Supreme Court introduced the concept into First Amendment jurisprudence in the early 1970s.101 It took another decade, however, for the Supreme Court to fully embrace the term and label the public forum "a fundamental principle of First Amendment doctrine."102

In Perry Education Association v. Perry Local Educators' Association (1983), the Supreme Court identified three distinct categories of government property that might be used for expressive activities: traditional, or quintessential, public forums; limited, or designated, public forums; and nonpublic forums.103 Traditional public forums include public property traditionally available for assembly and debate. In these spaces, Perry held, "the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."104 A designated public forum "consists of public property which the government has opened for use by the public as a place for expressive activity."105 An example of a designated public forum would be a function room at a public library available to residents for holding meetings. "Although a state is not required to indefinitely retain the open character of the facility," Perry noted, "as long as it does so it is bound by the same standards as apply in a traditional public forum," the decision explained.106 "Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."107 Finally, a nonpublic forum is a "space that is not by tradition or designation a forum for public

communication."108 Over the years, the Supreme Court has identified a variety of public spaces that function as nonpublic forums: military bases,109 a school's internal mail system,110 airport terminals,111 polling places,112 and more. "In addition to time, place, and manner regulations," Perry declared, "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."113

While the City of Boston highlighted instances in which it has used its flagpole to communicate the government's preferred message, Shurtleff and Camp Constitution focused on how the City administered the flagpole. 114 This emphasis was deliberate, as it framed the third flagpole as a designated public forum. In the Petition for Writ of Certiorari, Shurtleff and Camp Constitution noted that the guidelines for submitting a request stated that the City "seeks to accommodate all applicants seeking to take advantage of the City of Boston's *public forums*" (emphasis added).115 Additional evidence about the administration of the third flagpole was uncovered during the pretrial discovery process.116 As documented in Appendix A, between June 2005 and July 2017, the City of Boston received 284 requests to display a nongovernmental flag.117 Until the request from Shurtleff and Camp Constitution was denied, the City had approved all 284 requests.118 "The City's express policies and documented practices," the Petition argued, "establish that the City intended to open a designated public forum for flag raisings on the City Hall Flag Poles."119 To Shurtleff and Camp Constitution, the flagpole functioned as a designated public forum, not a place where the local government communicated carefully curated messages.

Framing the third flagpole as a public forum is essential, as it allows Shurtleff and Camp Constitution to claim that the City of Boston violated their free speech rights. "When the government excludes from its own property private expression subject to the protections of the First Amendment," the Petition for Writ of Certiorari asserted, "this Court's precedents require a 'forum based approach' for assessing the constitutionality of the speech restriction."120 The state may regulate a designated public forum, but only if "the regulation on speech is reasonable and not an effort to suppress expression merely

because public officials oppose the speaker's view."121 Since the flag raising was denied due to the religious content of the speech and the viewpoint it expressed, the City violated the First Amendment rights of Shurtleff and Camp Constitution. To close the circle and complete the argument, the Petition dismissed the City of Boston's claim that flying the Christian Flag would run afoul of the Establishment Clause. Under current precedents, Shurtleff and Camp Constitution argued, it is unconstitutional to exclude religious speech from otherwise neutral forums created by the government.122

Given their interests, it is not surprising that the City of Boston would invoke the government speech frame or that Shurtleff and Camp Constitution would counter with the public forum frame. What is interesting, however, is that the Biden Administration and the U.S. Department of Justice (DOJ) filed an amicus brief in support of Shurtleff and Camp Constitution.123 "There is an important distinction," the DOJ noted, "between the government's own speech—including government speech involving private actors—and private speech that the government has merely chosen to approve or otherwise favor."124 "The Court had long held," the DOJ brief continued, "that the government-speech doctrine is inapplicable (and viewpoint-based distinctions are not allowed) when the government 'does not itself speak or subsidize the transmittal of a message it favors' but instead seeks to encourage a diversity of views from private speakers."125

Working from the same evidentiary record as Shurtleff and Camp Constitution, the DOJ brief argued that the flagpole functioned as a designated public forum that the City of Boston made available for private speech. To prove this point, the brief noted, "the City generally has not exercised any meaningful control over, or selectively chosen among, the flags flown during flag-raising events."126 The lack of control was proven by the fact that the City of Boston approved every flag-raising application it received.127 Even if flags communicate messages, the DOJ brief contended that a reasonable observer would not attribute the messages conveyed on the third flagpole to the government.128 Finally, the DOJ brief highlighted the fact that "the City does not own the flags displayed under the flag-raising program; they remain the property of the private parties holding the events."129 Given all this, it was clear to the DOJ that the City of Boston treated the

third flagpole as a designated public forum, not a place where the City communicated its messages. During oral arguments, a lawyer for the Department of Justice offered the following analogy: "Government speech is like a curated symposium, while a public forum is like an open-mic night."130

Identifying the two frames is important, as it highlights the issue before the Supreme Court. To decide Shurtleff v. City of Boston, Adam Liptak notes, the Supreme Court will need to explore the "fine line between the government soliciting messages from third parties to help shape its own message on the one hand and serving as a conduit for the third parties to express their own messages on the other."131 James Walraven was more pointed in his description of the case, noting that "the law is unsatisfyingly blurry for courts attempting to distinguish the doctrines and unsatisfyingly permissive to the government for those concerned with free expression and government accountability."132 To address this problem, he encouraged the justice to "take advantage of the opportunity to add clarity and predictability to the [government speech] doctrine."133

The Supreme Court Decision

In a unanimous decision, the Supreme Court ruled in favor of Shurtleff and Camp Constitution on May 2, 2022. Writing for the majority, Justice Steven Breyer noted that the case required the Court to distinguish between government speech and private expression in a public forum created by the government. His approach, he explained, was a "holistic inquiry" that involved three elements: "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."134

When Justice Breyer applied this framework to the record, he found "that some evidence favors Boston, and other evidence favors Shurtleff."135 He quickly disposed of the first element, noting that the history of flag raising supported the city, as flags "have long conveyed important messages about government."136 The second element was more ambiguous, as it was less clear how a passer-by would view the flags since the City

occasionally allowed private parties to display their banners over Boston City Hall. Even if "the public would ordinarily associate a flag's message with Boston," a viewer might not believe all flags conveyed the city's preferred message.137

The most "salient" consideration, Justice Breyer noted, is "the extent to which Boston actively controlled these flag raisings and shaped the messages the flag sent."138 On this issue, he concluded, "Boston's record is thin."139 The application for requesting permission to fly a flag "asked only for contact information and a brief description of the event, with proposed dates and times."140 Justice Breyer added that "the city employee who handled applications testified by deposition that he had previously 'never requested to review a flag or requested changes to a flag in connection with approval'; nor did he even see flags before the events. The city's practice was to approve flag raisings, without exception. It has no record of denying a request until Shurtleff's. Boston acknowledges it 'hadn't spent a lot of time really thinking about' its flag-raising practices until this case."141 The absence of control was confirmed, Justice Breyer concluded, by the fact that "the city had nothing—no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate."142

Having dispensed with the government speech frame, Justice Breyer needed a single paragraph to conclude that the city's denial of the request to raise the Christian flag constituted unconstitutional viewpoint discrimination. On this point, he noted, the evidence was clear, as "Boston concedes that it denied Shurtleff's request solely because the Christian flag he asked to raise promot[ed] a specific religion."143 Under "our precedents," Justice Breyer concluded, "that refusal discriminated based on religious viewpoint and violated the Free Speech Clause."144

Chief Justice John Roberts and Justices Sonia Sotomayor, Elena Kagan, Brett Kavanaugh, and Amy Coney Barrett joined the Breyer opinion. Justice Samuel Alito agreed with the result, but disagreed with Justice Breyer's reasoning. In a concurring opinion (joined by Justices Clarence Thomas and Neil Gorsuch), he rejected the "holistic approach" and the multi-factor test in the majority opinion. "To prevent the government-speech doctrine from being used as a cover for censorship," Justice Alito warned, "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.'"145

Justice Gorsuch also filed a concurring opinion that Justice Thomas joined. "The real problem in this case," he wrote, "doesn't stem from Boston's mistake about the scope of the government speech doctrine or its error in applying our public forum precedents. That trouble here runs deeper than that."146 The city's error was grounded in its fear that flying the Christian flag would violate the Establishment Clause. "How," Justice Gorsuch asked, "did the city get is so wrong?"147 He assigned the blame to the Supreme Court's decision in Lemon v. Kurtzman (1971), a case that set out a multi-factor test for determining whether a law or practice violates the Constitution.148 The Lemon test, he concluded, was the product of "a 'bygone era' when this Court took a more freewheeling approach to interpreting legal texts."149 Two months later, in Kennedy v. Bremerton School District (2022), Justice Gorsuch authored the majority opinion that overturned Lemon v. Kurtzman.150

The Future of the Third Flagpole

Shurtleff and Camp Constitution held an event on City Hall Plaza on Wednesday, August 3, 2022. The Christian flag was raised during the event while "Amazing Grace" was performed on violin accompanied by a trumpet. After five years of litigation, the banner flew alongside the U.S. and Massachusetts state flags for two hours while speakers and a small crowd celebrated the Supreme Court's decision. When the event finished, the crowd sang "God Bless America," and organizers lowered the Christian flag. "No City Hall dignitaries joined the speakers on the stage," the Boston Globe reported, "a departure from some past flag-raising ceremonies."151

Before the Supreme Court announced its decision, the City of Boston announced changes to its flag raising policy. On October 18, 2021, three weeks after the justices granted certiorari, the city posted that it was "no longer accepting applicating flag-raising applications" on its website. The statement explained, "We're re-evaluating the program in light of the U.S. Supreme Court's recent decision to consider whether the program as currently operated complies with Constitutional requirements."152 This announcement

was expected, as the City recognized that a decision for Shurtleff and Camp Constitution would set a precedent beyond the Christian Flag. "If the flagpole is subject to the rule against viewpoint discrimination," Ian Millhiser explained in Vox, "then this rule is absolute. Not only would Boston be forbidden from excluding religious flags, but it would also be forbidden from rejecting swastikas, Confederate flags, or flags endorsing the failed January 6 effort to install former President Donald Trump as an unelected leader."153 "It requires little imagination," Massachusetts and other states warned in an amicus brief submitted to the Supreme Court, "to foresee that, if the City's flagpole is a designated public forum, deeply offensive flags could soon be flying above City Hall Plaza next to the flags of the United States and the Commonwealth of Massachusetts."154 This was more than posturing, as the Satanic Temple in Salem, Massachusetts, had announced it was seeking permission to fly its flag on the third flagpole.155

Since it did not want to create an open forum available to any organization or cause, the City of Boston had two options. The easy solution would be for the City to "'un-designate' the public forum by rewriting its policy, being careful to spell out that it was not 'intentionally opening a nontraditional forum for public discourse' on the flagpole."156 Justice Breyer hinted at this option in his majority opinion, observing that "nothing prevents Boston from changings its [flag raising] policies going forward."157 Declaring the third flagpole to be a nonpublic forum would be consistent with precedent, as the Supreme Court's decision Perry Education Association held the "state is not required to indefinitely retain the open character of the facility."158 There is, moreover, already a First Circuit decision holding the government may close nontraditional forums such as an advertising program on public transportation.159 Under these precedents, the City could announce that the reevaluation announced in October 2021 was complete, declare that the third flagpole was a nonpublic forum, and publicize that the City flag would fly over the plaza. Such a policy would be easy to enforce, as the City could lock the flagpole and hide the crank used to hoist a different banner. While this option would be constitutional, the Boston Globe editorialized, "there's something rather sad about a civic space without a banner to recognize the event or group being honored on the plaza."160

The second option would be for the City of Boston to adopt a flag raising policy crafted to "ensure there is no question that is engaged in government speech."161 Toward that end, three city council members proposed an ordinance that set out a new flag raising policy on August 2, 2022.162 "It's urgent," Councilor Kenzie Bok explained, "that we at the City of Boston codify a formal policy to use our flagpoles in ways that express our City's values and intended messages, as the Supreme Court decision allows us to do."163 Echoing this sentiment, City Council President Ed Flynn added, "the flags that we raise at City Hall Plaza should reflect and celebrate our City's values, and this ordinance lays out a formal process that will allow us to do that."164

The proposed measure, which the City Council unanimously passed, effectively integrated the two options.165 To regain control over flag raisings, the ordinance declares that the third flagpole is not a public forum. The ordinance also codifies the flag raising process. Under the new policy, "a City Council resolution or mayoral proclamation will be required for a flag to be raised." In a statement explaining the new policy, the sponsors noted, the "ordinance will enable the city to continue to celebrate flag raisings while complying with the recent U.S. Supreme Court decision on the city's previous process, which clarified the affirmative role required of the city government in maintaining the flag pole as a site for expressing the city's values and ideals."166 The ordinance also contains a list of acceptable flags, which is limited to "flags of governments recognized by the United States," flags displayed in conjunction with mayoral proclamations or council resolutions, and flags of professional sports teams.167

The new ordinance will likely withstand constitutional scrutiny, as the proclamation/resolution requirement makes it clear when the City is speaking. By design, Councilor Ruthzee Louijeune explained, the "flag-raising ordinance clarifies and codifies the process for flag-raisings and the messages that we as a city want to convey each time a ceremonial flag is raised."168 It will also be a modest change in policy, as nearly all of the flag raising events in recent years feature banners on the acceptable list. While the City received 284 applications to raise a flag between 2005 and 2017, Appendix A reveals that 260 of these requests (91.5%) involved national flags. There were only 24 instances of a flag raising not involving a national flag. Of that total, 7 involved a holiday or day of

observance (such as Bunker Hill Day, Juneteenth Day, or Veteran's Day), and 17 involved an issue or cause (such as Gay Pride or Emergency Medical Services).169

A flag flying over Government Center is a powerful symbol. The Supreme Court has ruled on five cases that involved flag-related issues. Two of these cases dealt with a compulsory flag salute, and three focused on laws that criminalized the desecration of the American flag. In West Virginia v. Barnette (1943), the Justices held that a West Virginia law requiring public school students to start the day with a compulsory flag salute was unconstitutional as it constituted a form of compelled speech.170 In another landmark decision, Texas v. Johnson (1989), the Supreme Court held that the First Amendment protected the desecration of an American flag.171 The decision in Shurtleff v. City of Boston in not a landmark, but the Supreme Court did strengthen First Amendment jurisprudence by requiring proof that the government is speaking before it asserts a government speech defense. As such, it makes a substantive contribution to government speech doctrine.

Appendix A

City of Boston Flag Raisings

2005 to 2017[172]

Year	Flags	National Holidays or Days of Observance	Issues or Causes	Total Flag Raisings
2017	12	2	3	17
2016	29	2	3	34
2015	18	0	2	20
2014	18	0	1	19
2013	18	0	1	19
2012	23	0	1	24
2011	23	1	1	25
2010	27	0	1	28
2009	20	0	1	21
2008	16	1	1	18
2007	18	0	0	18
2006	21	0	1	22
2005	17	1	1	19
Total	260	7	17	284
Percentage	91.5%	2.5%	6.0%	100%

[1]Daniel A. Gilbert, "'Why Dwell on a Lurid Memory?' Deviance and Redevelopment in Boston's Scollay Square," *Massachusetts Historical Review* 9 (2007): 103.

[2]Bill Wasik, *And Then There's This: How Stories Live and Die in Viral Culture* (New York, NY: Viking, 2006), 61. The Project for Public Spaces was equally critical, denouncing the plaza as "bleak, expansive, and shapeless . . . It conveys nothing in the way of information about Boston, its history, or its sense of place." Project for Public Spaces, "Hall of Shame Archive: City Hall Plaza (Boston, MA)," January 7, 2002. https://www.pps.org/places/city-hall-plaza.

[3]See Nick Carlson, "10 Iconic Examples of Brutalist Architecture," *Creative Bloq*, August 30, 2017. https://www.creativebloq.com/features/10-iconic-examples-of-brutalist-architecture.

[4]"I am glad this building is controversial," Senator Ted Kennedy told the crowd that gathered for the dedication of Boston City Hall. "Every important building is controversial. The Parthenon was called 'remote' because it was set upon a hill; and Faneuil Hall was called 'a scar upon the landscape.' I think we owe a debt of gratitude to those who had the vision to design this city hall and those who had the courage to accept the design." Eric Randall, "Throwback Thursday: When Boston's City Hall Was New (and Already Unloved," *Boston Magazine*, February 13, 2014. https://www.bostonmagazine.com/news/2014/02/13/throwback-thursday-bostons-city-hall-new-already-unloved/.

[5]Paul McMorrow, "Boston City Hall Should Be Torn Down," *Boston Globe*, September 24, 2012. https://www.bostonglobe.com/opinion/2013/09/23/boston-city-hall-should-torn-down/oVs2ywpJg1qHZkmmmZIYIL/story.html.

[6]Kate Zezima, "Fighting City Hall, Specifically Its Boxy Design and Empty Plaza," *New York Times*, December 25, 2006. https://www.nytimes.com/2006/12/25/us/25boston.html.

[7]See Leon Neyfakh, "How Boston City Hall Was Born," *Boston Globe*, February 12, 2012. https://www.bostonglobe.com/ideas/2012/02/12/how-boston-city-hall-was-born/DtfspyXVbKBIKi8iSXHX6J/story.html. See also Nik DeCosta Klipia, "Why Is Boston City Hall the Way It Is?" *Boston Globe*, July 25, 2018. https://www.boston.com/news/history/2018/07/25/boston-city-hall-brutalism/.

[8]Brief for Respondents, *Shurtleff v. City of Boston*, December 15, 2021, 20. https://www.supremecourt.gov/DocketPDF/20/20-1800/205184/20211215140356941_20-1800%20Respondents%20Brief.pdf

[9]Brief for Respondents, 2.

[10]During the hockey playoffs in 2014, Montreal Mayor Denis Coderre and Boston Mayor Marty Walsh made a friendly wager on a series between the Montreal Canadians and the Boston Bruins. The losing city's mayor agreed to wear the winning team's jersey, fly the winning team's flag at city hall, and visit the winning city. The Canadians won Game 7 of the series, defeating the Bruins on a 3-1 score, and Walsh dutifully paid off the bet. "Montreal Canadians Flag to Fly in Front of Boston City Hall," *CBC News*, May 15, 2014. https://www.cbc.ca/news/canada/montreal/montreal-canadiens-flag-to-fly-in-front-of-boston-city-hall-1.2643698.

[11]*Shurtleff v. City of Boston*, 986 F.3rd 78, 82-83 (1st Cir. 2021).

[12]986 F.3rd 78, 83 (1st Cir. 2021).

[13]The decision to refer to the "Christian Flag" in the application is interesting on two counts. First, the City of Boston did not inspect flags before approving the applications. Absent the reference to "Christian" on the application, City officials would have been unaware of the

religious dimension of the event. Second, in their brief urging the Supreme Court not to hear the case, the City of Boston suggested the event itself was a pretext for flying the Christian flag over Boston City Hall. "It can be inferred from the circumstances," the City argued, that Shurtleff and Camp Constitution "are not seeking permission to present their flag as part of an event celebrating the Christian religion or to engage in private speech, but are instead seeking to use the flagpole to obtain the powerful image of City approval of their religious views." Brief in Opposition, *Shurtleff v. City of Boston*, July 23, 2021, 12.

[14]Brief for Respondents, 14-15. When the lawsuit was filed, Rooney was Commissioner of the City of Boston Property Management Department. By the time the case reached the Supreme Court, Robert Melvin had replaced Rooney, and under Supreme Court rules, he was automatically substituted as the named party.

[15]*Shurtleff v. City of Boston*, 337 F. Supp. 3d 66 (D. Mass. 2018).

[16]Stanford Levinson speculated which of the Justices voted to hear the case. "I would be astonished if the four votes for cert [to hear the case]—or maybe I should say the first four votes for cert—didn't come from [Justices] Alito, [Clarence] Thomas, [Neil] Gorsuch, and [Brett] Kavanaugh. I find it hard to believe that [Chief Justice] Roberts thinks this is a case of genuine national importance." See Jeff Neal, "Supreme Court Preview: *Shurtleff v. Boston*," *Harvard Law Today*, January 7, 2022. https://hls.harvard.edu/today/supreme-court-preview-shurtleff-v-boston/

[17]Karl N. Llewellyn, "A Lecture on Appellate Advocacy," *University of Chicago Law Review* 29 (1961): 627-639.

[18]Llewellyn, "A Lecture on Appellate Advocacy," 630.

[19]Llewellyn disliked references to the marketplace, so he preferred the "captures the field" to "sells the Court." Llewellyn, "A Lecture on Appellate Advocacy," 630.

[20]Llewellyn, "A Lecture on Appellate Advocacy," 630.

[21]Llewellyn, "A Lecture on Appellate Advocacy," 633.

[22]Brian A. Garner, "The Deep Issue: A New Approach to Framing Legal Questions," *Scribes Journal of Legal Writing* 5 (1994-1995): 15.

[23]See, for example, Marcia L. McCormick, "Selecting and Framing the Issues on Appeal: A Powerful Persuasive Tool," *Illinois Bar Journal* 90 (2002): 203-205; Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts*, 2nd. (New York, NY: Oxford University Press, 2004), 55; and Ralph Adam Fine, *The How-to-Win Appeal Manual: Winning Appellate Advocacy in a Nutshell*, 2nd ed. (Huntington, NY: JurisNet, 2008), 28. While these citations deal with appellate advocacy, framing has implications for most legal arguments.

[24]George Lakoff & Mark Johnson, "Conceptual Metaphor in Everyday Language," *Journal of Philosophy* 77 (1980): 454.

[25]Lawrence M. Solan, "Patterns in Language and Law," *International Journal of Language and Law* 6 (2017): 63.

[26]Solan, "Patterns in Language and Law," 63.

[27]William A. Gamson and Andre Modigliani, "The Changing Culture of Affirmative Action," in *Research in Political Sociology,* vol 3., edited by Richard G. Braungart and Margaret M. Braungart (Greenwich, CT: JAI Press, 1987), 143.

[28]Robert M. Entman, "Framing: Toward Clarification of a Fractured Paradigm*," Journal of Communication* 43.4 (1993): 52.

[29]Entman, "Framing," 53.

[30]This example is drawn from Douglas R. Rice, "Issue Divisions and US Supreme Court Decision Making," *Journal of Politics* 79.1 (2016): 210.
[31]*Minersville School District v. Gobitis*, 310 U.S. 586 (1940).
[32]310 U.S. 586, 593 (1940).
[33]310 U.S. 586, 595 (1940).
[34]310 U.S. 586, 604 (1940).
[35]*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[36]This example does not account for changes in judicial personnel in the intervening years, evolving public attitudes toward World War 2, widespread reaction to the mistreatment of Jehovah's Witnesses after the *Gobitis* decision, and the efforts of President Franklin Roosevelt. For a more nuanced explanation, see Robert L. Tsai, "Reconsidering *Gobitis*: An Exercise in Presidential Leadership," *Washington University Law Review* 86 (2008): 363-443.
[37]319 U.S. 622, 642 (1943).
[38]Shurtleff offered this biographical sentence in a statement arguing against an Article V Constitutional Convention. See http://stategovernment.pasenategop.com/wp-content/uploads/sites/30/2018/10/shurtleff-harold.pdf. For a different perspective on Shurtleff, see Brian Kaylor and Beau Underwood, "The Man Behind *Shurtleff v. City of Boston*," *Public Witness*, January 21, 2021. https://publicwitness.wordandway.org/p/the-man-behind-shurtleff-v-city-of
[39]"Camp Constitution Mission Statement." https://campconstitution.net/mission-statement/
[40]See Brian MacQuarrie, "The Constitution and the Ten Commandments: A Christian Group Plants Its Flag," *Boston Globe*, February 21, 2022. https://www.bostonglobe.com/2022/02/21/metro/constitution-ten-commandments-christian-group-plants-its-flag/. "Camp Registration" information is available at http://campconstitution.net/camp-registration/.
[41]The website also includes information about camps run by the organization and links to resources on various topics. "Camp Constitution Downloads." http://campconstitution.net/downloads/.
[42]Petition for Writ of Certiorari, 133a-135a.
[43]Brief for Respondents, 6-7.
[44]986 F.3rd 78, 84 (1st Cir. 2021).
[45]The City of Boston codified its past practice in a formal Flag Raising Policy adopted in September 2018 that includes seven flag raising rules. The first rule forbids the "display [of] flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements." 986 F.3rd 78, 84 (1st Cir. 2021).
[46]986 F.3rd 78, 84 (1st Cir. 2021). The First Circuit noted that several flags previously flown over City Hall included religious images. So, for example, the Portuguese flag "contains 'dots inside blue shields representing the five wounds of Christ when crucified' and 'thirty dots that represent the coins Judas received for having betrayed Christ.' . . . Indeed, the City's own flag includes a Latin inscription ['SICUT PATRIBUS, SIT DEUS NOBIS'], which translates as 'God be with us as he was with our fathers.' However, none of the flags that the City had previously approved came with a religious description." 986 F.3rd 78, 84 (1st Cir. 2021).
[47]986 F.3rd 78, 84 (1st Cir. 2021).
[48]986 F.3rd 78, 84 (1st Cir. 2021). When Shurtleff asked for an explanation, Rooney consulted with the City's attorneys and then responded: "I am writing to you in response to your inquiry as to the reason for denying your request to raise the 'Christian Flag.' The City of Boston

maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles. This policy and practice is consistent with well-established First Amendment jurisprudence prohibiting a local religion from 'respecting an establishment of religion.' This policy and practice is also consistent with the City's legal authority to choose how a limited government resource, like the City Hall flagpoles, is used." Petition for Writ of Certiorari, 153a-154a.

[49]986 F.3rd 78, 84 (1st Cir. 2021).

[50]Brief for Respondents, 15.

[51]986 F.3rd 78, 84 (1st Cir. 2021).

[52]986 F.3rd 78, 84-85 (1st Cir. 2021).

[53]After offering the dog chasing a car analogy, Levinson continued, "What do you do next? Having won the case, they [the City of Boston] had to defend it when it was appealed to the Circuit. And having won again in that venue—to my mild surprise—they now have to argue it before the Supreme Court." See Neal, "Supreme Court Preview."

[54]In his dissenting opinion in *Johanns v. Livestock Marketing Association*, Justice Souter complained, "The government-speech doctrine is relatively new, and correspondingly imprecise." 544 U.S. 550, 574 (2005).

[55]*Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

[56]500 U.S. 173, 195 (1991).

[57] *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015).

[58]576 U.S. 200, 207-208 (2015).

[59]*Matal v. Tan*, 137 S. Ct. 1744, 1758 (2017).

[60]137 S. Ct. 1744, 1758 (2017).

[61]See Caroline Mala Corbin, "Government Speech and First Amendment Capture," *Virginia Law Review Online* 108 (August 2021): 224-245. https://www.virginialawreview.org/wp-content/uploads/2021/08/Corbin_Book_107.pdf

[62]The Seven Aphorisms are psychokinesis, correspondence, vibration, opposition, rhythm, cause and effect, and gender.

[63]*Pleasant Grove City v. Summum*, 555 U.S. 460, 460 (2009).

[64]555 U.S. 460, 467 (2009).

[65]"At the bottom of the proposed plate were the words 'SONS OF CONFEDERATE VETERANS.' At the side was the organization's logo, a square Confederate battle flag framed by the words 'Sons of Confederate Veterans 1896.' A faint Confederate battle flag appeared in the background on the lower portion of the plate." 576 U.S. 200, 206 (2015).

[66]576 U.S. 200, 215 (2015).

[67]555 U.S. 460, 470 (2009)

[68]Space does not permit a substantive discussion of the three-factor test. Clay Calvert describes some of these problems: " *Walker's* five-to-four split on government speech, with majority and dissent focusing on different factors from Summum and analyzing one seemingly agreed-upon factor—history—in very different ways, fails to add rigor, clarity or predictability for deciphering when, in future cases, expression amounts to government or private speech." Clay Calvert, "The Government Speech Doctrine in *Walker's* Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression," *William & Mary Bill of Rights Journal* 25 (2016-2017): 1254.

[69]986 F.3rd 78, 88 (1st Cir. 2021). The First Circuit did not provide historical examples. However, it might have cited the iconic images of George Washington and the flag crossing the Delaware River (1776), defenders raising a flag over Fort McHenry to signal victory in the Battle of Baltimore (War of 1812), marines raising the flag over Iwo Jima (1945),

astronauts displaying the flag on the Moon (1969), or firefighters raising the flag over Ground Zero in New York City (2001).

[70]986 F.3rd 78, 88 (1st Cir. 2021), citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943).

[71]986 F.3rd 78, 88 (1st Cir. 2021).

[72]986 F.3rd 78, 88 (1st Cir. 2021).

[73]Brief for Respondents, 26-27.

[74]Brief for Respondents, 13.

[75]Brief for Respondents, 27.

[76]Brief for Respondents, 2.

[77]986 F.3rd 78, 89 (1st Cir. 2021).

[78]986 F.3rd 78, 89 (1st Cir. 2021). An amicus brief filed by the National Council of the Churches of Christ in the USA supported the First Circuit. "Individuals who saw the Christian flag flying on the city's flagpole would naturally assume that it conveys Boston's own message; passers-by and causal viewers would have no way to know that the Flag was hoisted at the request of a private party." Brief for National Council of the Churches of Christ in the USA, et al., *City of Boston v. Shurtleff*, December 2021, 28.

[79]986 F.3rd 78, 89 (1st Cir. 2021).

[80]986 F.3rd 78, 89 (1st Cir. 2021).

[81]986 F.3rd 78, 90 (1st Cir. 2021).

[82]986 F.3rd 78, 90 (1st Cir. 2021).

[83]986 F.3rd 78, 91 (1st Cir. 2021).

[84]986 F.3rd 78, 91 (1st Cir. 2021).

[85]986 F.3rd 78, 91 (1st Cir. 2021).

[86]986 F.3rd 78, 93 (1st Cir. 2021).

[87]986 F.3rd 78, 93 (1st Cir. 2021), citing *Arkansas Educational Television Commission v. Forbes*, 524 U.S. 666, 679 (1998).

[88]Brief for Respondents, 3-4.

[89]Brief for Respondents, 4. The City added, "Petitioners have pointed to no prior flag raising wholly unconnected with either the City's diversity message or some other day or cause the City or Commonwealth had already endorsed. Such a purely private flag raising—for the private proponent's own, purely private message, that might even include protest or other speech antithetical to the government's message—is precisely what one would expect to see if, as petitioners contend, the City had given up control over flag raisings. But petitioners point to no such event. That silence speaks volumes." Brief for Respondents, 35.

[90]Erwin Chemerinsky, "Not a Free Speech Court," *Arizona Law Review* 53 (2011): 730.

[91]David S. Ardia, "Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites," *Brigham Young University Law Review* 2010 (2010): 1983-1984.

[92]986 F.3rd 78, 90 (1st Cir. 2021).

[93]Joseph Blocher, "New Problems for Subsidized Speech," *William and Mary Law Review* 56 (2015): 1096.

[94]This reasoning echoes the Supreme Court's decision in *Walker*. "It is the democratic electoral process that first and foremost provides a check on government speech." 576 U.S. 200, 207.

[95]*Hague v. Congress of Industrial Organizations Hague*, 307 U.S. 496 (1939).

[96]307 U.S. 496, 502 (1939).

[97]307 U.S. 496, 515 (1939).

[98]307 U.S. 496, 515 (1939).
[99]Harry Kalven, Jr., "The Concept of the Public Forum: *Cox v. Louisiana*," *Supreme Court Law Review* 1965 (1965): 11-12.
[100]Kalven, "The Concept of the Public Forum," 12.
[101]See, for example, cases like *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Spence v. Washington*, 418 U.S. 405 (1974); *CBS v. Democratic National Committee*, 412 U.S. 94 (1973); *Police Department v. Mosley*,408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972).
[102]*Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984).
[103]*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).
[104]460 U.S. 37, 45 (1983), quoting *Hague v. CIO* (1939).
[105]460 U.S. 37, 45 (1983).
[106]460 U.S. 37, 45 (1983).
[107]460 U.S. 37, 45 (1983).
[108]460 U.S. 37, 46 (1983).
[109]*Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).
[110]460 U.S. 37, 46-47 (1983).
[111]*International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 682-384 (1992).
[112]*Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1886 (2018).
[113]460 U.S. 37, 46 (1983).
[114]The City of Boston highlighted this omission in the Brief for Respondents: "The record included references to flag raisings beyond the Flag Raising List compiled for Commissioner Rooney in 2017. Petitioners do not rely on these other events—and for good reason, because they further confirm the City's use of the City's flagpole to communicate the City's own message." Brief for Respondents, 10.
[115]Guidelines for any Person or Group Requesting the Use of Faneuil Hall, Sam Adams Park, City Hall Plaza, City Hall Lobby, North Stage or the City Hall Flag Poles," quoted in Petition for Writ of Certiorari, i. "For a Supreme Court that is particularly sensitive to claims of religious discrimination these days, those details might be damning for Boston's case." Matt Ford, "The Supreme Court Will Settle Boston's Religious Flag War," *The New Republic*, November 19, 2021. https://newrepublic.com/article/164483/supreme-court-religious-freedom-flag
[116]986 F.3rd 78, 91 (1st Cir. 2021).
[117]In the 12 months preceding the request from Shurtleff and Camp Constitution, the City of Boston received 39 flag-raising requests. This works out to an average of three requests a month.
[118]After denying the request from Shurtleff and Camp Constitution, the City of Boston denied a second request involving a "Straight Pride" flag. Sean Philip Cotter, "Straight Pride Parade Gets Permit to March in Boston—But Flag Won't Fly at City Hall," *Boston Herald*, June 4, 2019. https://www.bostonherald.com/2019/06/26/straight-pride-parade-receives-permit-to-march-in-boston-but-flag-wont-fly-at-city-hall/
[119]Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, June 21, 2021, 28. https://www.supremecourt.gov/DocketPDF/20/20-1800/182191/20210621143022313_Cert%20Petition%20-%20FINAL.pdf
[120]Petition for Writ of Certiorari, 23.
[121]460 U.S. 37, 45 (1983).
[122]Petition for Writ of Certiorari, 14-15, referring to *Peck v. Upshur County Board of Education*, 155 F.3d 274, 284 (4th Cir. 1998); *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581, 592-593 (7th Cir. 1995); *Good News/Good Sports Club v. School*

District, City of Ladue, 28 F.3d 1501, 1508-1510 (8th Cir.1994); and *Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1389 (11th Cir. 1993).

[123]Rachel Laser and Brian Kaylor, "Boston Was Right to Refuse to Fly Christian Flag," *Boston Globe*, January 15, 2022. https://www.bostonglobe.com/2022/01/15/opinion/boston-was-right-refuse-fly-christian-flag/

[124]Brief for the United States as Amicus Curiae Supporting Reversal, *Shurtleff v. Boston*, November 22, 2021, 13. https://www.supremecourt.gov/DocketPDF/20/20-1800/201010/20211122165123662_20-1800tsacUnitedStates.pdf

[125]Brief for the United States, 13.

[126]Brief for the United States, 15.

[127]Brief for the United States, 16.

[128]Brief for the United States, 18.

[129]Brief for the United States, 19-20.

[130]See Adam Liptak, "Supreme Court Appears Skeptical of Boston's Refusal to Fly Christian Flag," *New York Times*, January 18, 2021. https://www.nytimes.com/2022/01/18/us/supreme-court-boston-flag-free-speech.html

[131]Liptak, "Supreme Court Appears Skeptical of Boston's Refusal to Fly Christian Flag."

[132]James Walraven, "The *Shurtleff* Conundrum: Resolving the Conflict in Government-Speech and Public Forum Analysis," *Duke Journal of Constitutional Law & Public Policy* 18 (2022): 18.

[133]Walraven, "The *Shurtleff* Conundrum," 19.

[134]*Shurtleff v. City of Boston*, 142 S.Ct. 1583, 1589-1590 (2022).

[135]142 S.Ct. 1583, 1590 (2022).

[136]142 S.Ct. 1583, 1590 (2022).

[137]142 S.Ct. 1583, 1591 (2022).

[138]142 S.Ct. 1583, 1592 (2022).

[139]142 S.Ct. 1583, 1592 (2022).

[140]142 S.Ct. 1583, 1592 (2022).

[141]142 S.Ct. 1583, 1592 (2022).

[142]142 S.Ct. 1583, 1592 (2022).

[143]142 S.Ct. 1583, 1593 (2022).

[144]142 S.Ct. 1583, 1593 (2022).

[145]142 S.Ct. 1583, 1596 (2022).

[146]142 S.Ct. 1583, 1603 (2022).

[147]142 S.Ct. 1583, 1603 (2022).

[148]*Lemon v. Kurtzman*, 403 U.S. 602 (1971). For a statute to withstand constitutional scrutiny, *Lemon* requires that (1) it "must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster an excessive government entanglement with religion."403 U.S. 602, 612-613 (1971).

[149]142 S.Ct. 1583, 1603 (2022).

[150]*Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022).

[151]Danny McDonald, "After Supreme Court Decision, a Once-Denied Christian Flag is Raised at Boston City Hall," *Boston Globe*, August 3, 2022. https://www.bostonglobe.com/2022/08/03/metro/after-supreme-court-decision-once-denied-christian-flag-is-raised-boston-city-hall/

[152]City of Boston, "How to Hold an Event Near City Hall," October 19, 2021. https://www.boston.gov/departments/property-management/how-hold-event-near-city-hall

[153]Ian Millhiser, "The Christian Right Brings a Supreme Court Case It Actually Deserves to Win," *Vox*, January 16, 2022. https://www.vox.com/2022/1/16/22880393/supreme-court-religion-christian-right-shurtleff-boston-flagpole-free-speech-first-amendment

[154]Amicus Brief for Massachusetts, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Minnesota, New York, Oregon, and Virginia as Amici Curiae, *Shurtleff v. City of Boston*, December 22, 2021, 27. https://www.supremecourt.gov/DocketPDF/20/20-1800/201010/20211122165123662_20-1800tsacUnitedStates.pdf

[155]Lucien Greaves, the spokesman for the Satanic Temple, issued the following statement: "It's important to us to fly our flag where public forums allow flags of religious expression because religious liberty is dependent upon pluralism and government viewpoint neutrality." Danny McDonald, "Christian Flag at Heart of Supreme Court First Amendment Case is Scheduled to Fly at Boston City Hall," *Boston Globe*, August 1, 2022. https://www.bostonglobe.com/2022/08/01/metro/christian-flag-heart-scotus-first-amendment-case-scheduled-fly-boston-city-hall/

[156]Amicus Brief for Massachusetts et al., 28.

[157]142 S.Ct. 1583, 1593 (2022).

[158]Brief for Respondents, 47, quoting *Perry Education Association*, 460 U.S. 37, 46 (1983).

[159]In *Ridley v. Massachusetts Bay Transportation Authority*, the First Circuit held, "The government is free to change the nature of any nontraditional forum as it wishes." 390 F.3d 65, 77 (1st Cir. 2004).

[160]Editorial Board, "How to Keep City Hall From Becoming a Battleground Over Flags," *Boston Globe*, August 8, 2022. https://www.bostonglobe.com/2022/08/08/opinion/how-keep-city-hall-plaza-becoming-battleground-over-flags/

[161]Brief for Respondents, 46.

[162]The ordinance was co-sponsored by Councilor Kenzie Bok, Council President Ed Flynn, and Councilor Ruthzee Louijeune.

[163]"City of Boston Files Ordinance to Update Flag Raising Policy," *City of Boston News*, August 2, 2022. https://www.boston.gov/news/city-boston-files-ordinance-update-flag-raising-policy

[164]"City of Boston Files Ordinance to Update Flag Raising Policy."

[165]"Boston City Council Unanimously Passes Ordinance Establishing New Flag Raising Policy," *Beacon Hill Times*, August 18, 2022. https://beaconhilltimes.com/2022/08/18/boston-city-council-unanimously-passes-ordinance-establishing-new-flag-raising-policy/

[166]Mark Pratt, "After a Supreme Court Battle, Cristian Flag Flies, Briefly, Over Boston," WBUR, August 4, 2022. https://www.wbur.org/news/2022/08/04/christian-flag-flies-boston

[167]Editorial Board, "How to Keep City Hall From Becoming a Battleground Over Flags."

[168]"City of Boston File Ordinance to Update Flag Raising Policy," August 2, 2022. https://www.boston.gov/news/city-boston-files-ordinance-update-flag-raising-policy

[169]A complete "2022 City of Boston Holidays" list is available on the city's website. https://www.boston.gov/departments/311/2022-city-boston-holidays

[170]319 U.S. 624, 632 (1943). The other Pledge of Allegiance case is *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[171] *Texas v. Johnson*, 491 U.S. 397 (1989). The other flag desecration cases are *Smith v. Goguen*, 415 U.S. 566 (1974), and *United States v. Eichmann*, 496 U.S. 310 (1990).

[172]This table is based on City of Boston Flag Raisings, 2005-2017, included in Petition for Writ of Certiorari, 173a-187a.