First Amendment — Freedom of Speech — Government Speech Doctrine — Shurtleff v. City of Boston

In heraldry, descriptions of flags are to be "most concise, . . . always minutely exact, definite, and explicit."[1] The same cannot be said for the Free Speech Clause. A "jurisprudence of labels" involving categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums,"[2] free speech doctrine quickly devolves into a dizzying series of standards. Last Term, in *Shurtleff v. City of Boston*,[3] the Supreme Court concluded that Boston's refusal to fly a religious flag violated the Free Speech Clause because its flag-flying program encompassed private rather than government speech. Yet speech cannot be so easily categorized as wholly private or public. By ignoring this reality, the Court missed an opportunity to recalibrate the government-speech test with the more appropriate standard of intermediate scrutiny, or discard it altogether.

Three flagpoles stand outside Boston City Hall.[4] The first flies the flag of the United States; the second, of Massachusetts.[5] The third ordinarily flies Boston's flag, but the City would sometimes replace it with that of a third party upon request.[6] From June of 2005 to June of 2017, the City approved all 284 requests to raise these flags, which represented countries, civic organizations, and secular causes.[7] That streak ended when Camp Constitution applied to fly the Christian flag, a white field with a red Latin cross inside a blue canton.[8] Rejecting the request, Boston's Commissioner of Property Management explained that the City "maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles."[9] Harold Shurtleff, cofounder of Camp Constitution, filed suit for declaratory and injunctive relief in the U.S. District Court for the District of Massachusetts.[10]

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[1] CHARLES BOUTELL, A MANUAL OF HERALDRY, HISTORICAL AND POPULAR 14 (London, Winsor & Newton 1863).

[2] Pleasant Grove City v. Summum, 555 U.S. 460, 484 (2009) (Breyer, J., concurring).

[3] 142 S. Ct. 1583 (2022).

[4] Lane Turner, Photograph of Boston City Hall Flagpoles, *in* Jeff Jacoby, Opinion, *Does Free Speech Fly at City Hall Plaza?*, BOS. GLOBE (Jan. 12, 2022, 3:00 AM), https://www.bostonglobe.com/2022/01/12/opinion/does-free-speech-fly-city-hall-plaza [https://perma.cc/MD63-BL4W].

[5] *See* MASS. GEN. LAWS ch. 2, § 6 (2020). The first flagpole also flies the National League of Families Prisoner of War/Missing in Action flag. *See* Shurtleff v. City of Boston, 337 F. Supp. 3d 66, 70 (D. Mass. 2018).

[6] *Shurtleff*, 337 F. Supp. 3d at 70.

[7] Shurtleff v. City of Boston, 986 F.3d 78, 83–84 (1st Cir. 2021).

[8] *See* Hal Shurtleff, Photograph of Christian Flag, *in* Petition for Writ of Certiorari app. at 132a, *Shurtleff*, 142 S. Ct. 1583 (No. 20-1800).

[9] *Shurtleff*, 337 F. Supp. 3d at 71; *see id.* at 69.

[10] *See id.* at 69; Verified Complaint for Preliminary & Permanent Injunctive Relief, Declaratory Relief, and Damages ¶¶ 48–115, *Shurtleff*, 337 F. Supp. 3d 66 (No. 18-cv-11417), 2018 WL 3349059 [hereinafter Complaint].

He claimed, among other things, that Boston unconstitutionally impinged on private speech in a designated public forum and impermissibly discriminated against his religious viewpoints.[11]

The district court denied Shurtleff's motion for a preliminary injunction.[12] Judge Casper reasoned that the City's flag flying constituted government speech, and it could therefore select which views to express without running afoul of the Free Speech Clause.[13] Even if not government speech, she continued, the flag flying took place in a limited public forum, thereby requiring only a viewpoint-neutral, reasonable policy.[14] The court found the City's rejection to be both viewpoint neutral and reasonable, as it "exclude[d] religion as a subject matter, rather than as one perspective among many on other subjects" and reasonably sought to avoid Establishment Clause violations.[15]

The First Circuit affirmed.[16] Writing for a unanimous panel, Judge Torruella[17] applied the three factors the Supreme Court outlined in *Pleasant Grove City v. Summum*[18] and reaffirmed in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[19] — (1) traditional usage of the conduct to express the government's message, (2) the public's likely perception of the speech, and (3) the government's control over the speech — to assess whether Boston's flag flying was government speech.[20] He concluded that each factor strongly favored the City. First looking to history, Judge Torruella recounted the time-honored traditions of governments expressing messages through flags.[21] Regarding public perception, he identified that a public observer "could well see a City employee lower the Boston flag and replace it with a third party's flag."[22] Such a scene results in "'little chance that observers will fail to appreciate the identity of the speaker' as being the City," the First Circuit concluded.[23] Lastly, Judge Torruella determined that the City's

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[11] *See* Complaint, *supra* note 10, ¶ 43. Additionally, Shurtleff alleged that Boston violated the Establishment and Equal Protection Clauses, *see id.* ¶¶ 64–81, as well as the coextensive provisions of the Massachusetts Declaration of Rights, *see id.* ¶¶ 82–115.

[12] *Shurtleff*, 337 F. Supp. 3d at 69.

[13] *Id.* at 73.

[14] *See id.*

[15] *Id.* at 76.

[16] Shurtleff v. City of Boston, 928 F.3d 166, 169 (1st Cir. 2019).

[17] Judge Torruella was joined by Judges Selya and Lynch.

[18] 555 U.S. 460 (2009).

[19] 135 S. Ct. 2239 (2015).

[20] *Shurtleff*, 928 F.3d at 172.

[21] *Id.* at 172–73, 173 n.4 (citing 4 U.S.C. § 7(m) (memorial half-staff practices); *id.* § 8(j) (declaration by Congress); Proclamation No. 2605, 9 Fed. Reg. 1957 (Feb. 22, 1944) (declaration by President Franklin D. Roosevelt), *reprinted in* 4 U.S.C. § 10 app. at 713–14, *and in* 58 Stat. 1126–27 (1944)) (discussing memorial half-staff practices, as well as declarations of the American flag's symbolism by Congress and the President).

[22] *Id.* at 173–74.

[23] *Id.* at 174 (quoting *Summum*, 555 U.S. at 471).

ownership of the flagpole and system of review established control sufficient to satisfy the third *Summum*/*Walker* factor.[24]

For substantially the same reasons, the district court granted the City's motion for summary judgment,[25] which the First Circuit, with Judge Selya[26] writing for another unanimous panel, affirmed.[27] Shurtleff petitioned the Supreme Court for a writ of certiorari, which it granted.[28]

The Supreme Court reversed.[29] Writing for the Court, Justice Breyer[30] assessed the *Summum*/*Walker* factors and found that "some evidence favors Boston, and other evidence favors Shurtleff."[31] He suggested that the general history of flags, as symbols of civilizations, communities, and remembrance, often encompasses government speech.[32] Yet Justice Breyer emphasized that the Court "must examine the details of *this* flag-flying program" to deduce whether the City violated the Free Speech Clause.[33] Looking to public perception, Justice Breyer determined that the circumstantial evidence was not dispositive. While passersby could see the three flags waving together as a unified government message, so too might they find private citizens conducting these flag-raising ceremonies without any city officials, which would tend toward private speech.[34]

Ultimately, and most importantly, Justice Breyer looked to the lack of control Boston exercised over the flag-raising program as dispositive against the City.[35] While Boston handled scheduling, controlled the premises, and provided the hand crank, Justice Breyer concluded its lack of meaningful involvement in selecting flags required a classification of private speech.[36] Because the City itself conceded that it rejected the request due solely to Establishment Clause concerns over its religious

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[24] *Id.* Shurtleff had identified only fifteen instances of accepted flag-flying requests, yet the First Circuit later found 269. It reasoned that the lack of rejections pointed to self-selection and could not suggest that the City did not exercise meaningful control of its third flagpole. *See* Shurtleff v. City of Boston, 986 F.3d 78, 91–92 (1st Cir. 2021).

[25] Shurtleff v. City of Boston, No. 18-cv-11417, 2020 WL 555248, at *4–6 (D. Mass. Feb. 4, 2020).

[26] Judge Selya was joined by Judges Lynch and Lipez.

[27] *Shurtleff*, 986 F.3d at 98.

[28] *Shurtleff*, 142 S. Ct. at 1589.

[29] *Id.* at 1593; *see id.* at 1587.

[30] Justice Breyer was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, and Barrett.

[31] *Shurtleff*, 142 S. Ct. at 1590.

[32] *Id.* at 1590–91.

[33] *Id.* at 1591.

[34] *See id.*

[35] *Id.* at 1592.

[36] *Id.* at 1592–93. To support this conclusion, Justice Breyer drew on Justice Alito's opinion for the Court in *Matal v. Tam*, 137 S. Ct. 1744 (2017), which held that trademarks could not be considered government speech given that the Patent and Trademark Office is obliged to "register[] all manner of marks" and "normally [does] not consider their viewpoint." *Shurtleff*, 142 S. Ct. at 1592.

message, the Court held that Boston's refusal to fly Camp Constitution's flag amounted to impermissible viewpoint discrimination.[37]

Justice Kavanaugh briefly concurred to reiterate that the Constitution forbids the government from treating religious groups or speech as "second-class."[38]

Justice Alito concurred in the judgment.[39] He objected to the Court's usage of the *Summum*/*Walker* factors, which, in his view, obfuscated the true question: "[W]hether the government is *speaking* instead of regulating private expression."[40] He argued that the Court had never established the *Summum*/*Walker* triad of factors as the exclusive test for deciding government-speech cases.[41] Taking each factor in turn, Justice Alito first suggested that control smacks of censorship as well as government speech.[42] Historical practice is also imperfect, Justice Alito explained, as "the real question is not whether a form of expression is *usually* linked with the government but whether the speech *at issue* expresses the government's own message."[43] And he concluded that the public-perception factor encourages the government to funnel private speech it wishes to suppress into misleading forums that would cause the public to confuse private viewpoints for government speech.[44]

Instead, Justice Alito suggested that government speech occurs if and only if the government expresses its own message through authorized agents and does not abridge private speech.[45] Under this framework, Boston neither "indicate[d] an intent to communicate a message" nor "deputize[d] private speakers" to that end.[46] As such, Justice Alito agreed with the Court's conclusion that Boston's actions amounted to impermissible viewpoint discrimination.[47]

Justice Gorsuch concurred in the judgment as well, taking aim at the test developed in *Lemon v. Kurtzman*[48] used to analyze Establishment Clause claims.[49] He suggested that Boston's error ultimately stemmed from its use of the *Lemon* test, a three-part inquiry regarding whether "the government ha[d] a secular purpose"; whether the "action ad-

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[37] *Shurtleff*, 142 S. Ct. at 1593.

[38] *Id.* at 1595 (Kavanaugh, J., concurring).

[39] *Id.* (Alito, J., concurring in the judgment). Justice Alito was joined by Justices Thomas and Gorsuch.

[40] *Id.*

[41] *Id.*

[42] *See id.* at 1596 ("Censorship is not made constitutional by aggressive and direct application.").

[43] *Id.* at 1596–97.

[44] *See id.* at 1597.

[45] *Id.* at 1598.

[46] *Id.* at 1601.

[47] *Id.* at 1603.

[48] 403 U.S. 602 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[49] *Shurtleff*, 142 S. Ct. at 1603 (Gorsuch, J., concurring in the judgment). Justice Gorsuch was joined by Justice Thomas.

vance[d] or inhibit[ed] religion"; and whether such action would "'excessive[ly] . . . entangl[e]' church and state."[50] This unclear test trapped "risk-averse local officials . . . in an ironic bind," violating the Free Speech Clause for fear of violating the Establishment Clause, as here.[51] At the Founding, he explained, "[n]o one . . . argu[ed] that the use of religious symbols in public contexts was a form of religious establishment"[52] — and that simple fact offered better guidance to local officials than *Lemon*'s vague guidelines.[53]

Shurtleff demonstrates the unrealistic rigidity of the government-speech test, meriting a jurisprudential shift in free speech doctrine. Scholars have recognized that the bright line drawn between government and private speech is sometimes illusory.[54] By cramming speech into private or public boxes, the test ignores the ubiquity of "mixed speech" — speech with both private and governmental components.[55] Just as an overly capacious government-speech doctrine risks capturing private speech,[56] an overly narrow one risks stymying public speech.[57] Failing to recognize the middle ground of mixed speech allows judges to arbitrarily pick either pitfall. As mixed speech proliferates in virtual domains, the *Shurtleff* Court should have calibrated its government-speech doctrine to an alternative approach that adapts to this reality.

Though it defended Shurtleff's freedom of speech, the Court functionally limited all forms of speech in its ruling. Boston now faces three choices: fly every flag, no matter how objectionable the City or its citizens find it; fly just a few flags, exercising increased selectivity over applications; or wave the metaphorical white flag and discontinue the program. The first invites chaos. As Justice Kagan noted at oral argument, opening the floodgates by granting every application would require "a swastika or a KKK flag" to fly alongside the star-spangled banner upon request.[58] The second is counterintuitive. To avoid violating the Free Speech Clause, Boston must issue *stricter* conditions on

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[50] *Id.* at 1604 (omission and final two alterations in original) (quoting *Lemon*, 403 U.S. at 612–13).

[51] *Id.* at 1605.

[52] *Id.* at 1610 (quoting Michael W. McConnell, *No More (Old) Symbol Cases*, 2018–2019 CATO SUP. CT. REV. 91, 107 (2019)).

[53] *See id.*

[54] *See, e.g.*, Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 711 (2011) ("[G]overnment speech doctrine recognizes *either* private or public speech, but not a hybrid of the two . . . ."); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008).

[55] *See* Corbin, *supra* note 54, at 607–08.

[56] *See* Caroline Mala Corbin, Essay, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 226 (2021).

[57] *See* Corbin, *supra* note 54, at 656 ("[R]atcheting up First Amendment protection for speech that is not entirely private deprives the government of its ability to control its own messages.").

[58] Transcript of Oral Argument at 9, *Shurtleff* (No. 20-1800), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1800_5426.pdf [https://perma.cc/NGM8-UJT7].

flag speech to showcase its control.[59] And the third eliminates the forum altogether. Whether Boston picks option two or three (it presumably will not pick option one), the ironic result is less speech altogether.

This irony originates from the threads of private speech and government speech intertwined in Boston's flag-flying program. Justice Breyer conceded that the public *might* see flags as conveying the government's message but that the regular exchange of flags made this factor ambiguous.[60] Justice Gorsuch supplemented this point when comparing Boston's divergent reactions to the Bunker Hill flag and Christian flag, which both bear red crosses in their cantons.[61] But such an observant onlooker might also recall that on the annually flown[62] Bunker Hill flag, a pine tree is planted in its upper-left corner. For such a keen observer, the foliage of the Bunker Hill flag, though emblazoned with a cross, potentially roots it in a secular context, thereby conveying a governmental message rather than a religious one.[63] The plaintiff himself seemed to consider Boston's flying of the Chinese flag to speak for the city, not for the private organization that requested it.[64] The unpredictable public perception of Boston's flags underscores the government-speech test's inability to assess mixed speech.

The mixed speech that the Court is unprepared to recognize is, in fact, incredibly prevalent in our modern-day forums. Boston's flagpole stands upon the "vast middle ground of government/private speech interaction."[65] Government-subsidized broadcasts, artwork, and services

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Boston now faces a pending request to fly the Satanic Temple's flag on its third flagpole. *See* Nate Raymond, *Satanic Temple Asks Boston to Fly Flag Following U.S. Supreme Court Ruling*, REUTERS (May 5, 2022, 2:16 PM), https://www.reuters.com/legal/government/satanic-temple-asks-boston-fly-flag-following-us-supreme-court-ruling-2022-05-05 [https://perma.cc/2G9E-9VTT].

[59] *See Shurtleff*, 142 S. Ct. at 1596 (Alito, J., concurring in the judgment) (arguing that this control factor "flattens the distinction between government speech and speech tolerated by the censor").

[60] *Id.* at 1591 (majority opinion). *But see* Nicholas Goldberg, Opinion, *Of Course You Can't Fly a Banner with a Christian Cross on a Giant Flagpole Outside City Hall*, L.A. TIMES (Jan. 4, 2022, 3:00 AM), https://www.latimes.com/opinion/story/2022-01-04/supreme-court-1st-amendment-boston-city-hall-flags [https://perma.cc/7TXC-LCG7] ("Most reasonable people would obviously see a flag flying there as an expression of government speech.").

[61] *See Shurtleff*, 142 S. Ct. at 1611 (appendix to opinion of Gorsuch, J., concurring in the judgment). *But see id.* (featuring inverse color schemes and different cross designs); *cf.* BOUTELL, *supra* note 1, at 25, 32 (depicting both elements in heraldic imagery).

[62] *See* MASS. GEN. LAWS ch. 4, § 7 (2020) (commemorating June 17 as Bunker Hill Day in Suffolk County).

[63] *See* WILLIAM REA FURLONG & BYRON MCCANDLESS, SO PROUDLY WE HAIL: THE HISTORY OF THE UNITED STATES FLAG 41 (1981) ("A pine tree, added to the first quarter of the canton, presumably helped to secularize the flag."); *cf.* Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1214 (2016) ("Determining exactly who [the] reasonable observer is and what this person knows . . . is famously controversial.").

[64] Hal Shurtleff, Letter, *Chinese Flag Raising "Slap in the Face to the City,"* WICKED LOC. (Sept. 30, 2010, 11:06 PM), https://www.wickedlocal.com/story/transcript-tab/2010/09/30/letter-chinese-flag-raising-slap/38678227007 [https://perma.cc/5XWJ-AAK8] ("I was ashamed of Boston. What was once the Cradle of Liberty is now a Cradle of Oppression.").

[65] Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1358 (2001).

evoke private messages with public oversight, but the bounds of such oversight remain unclear.[66] Public officials indeed contain multitudes,[67] often speaking with a voice neither wholly public nor private.[68] And connected to Boston's tortured balance between the Free Speech and Establishment Clauses, "the Court's [E]stablishment [C]lause jurisprudence acknowledges that both private individuals and the government can speak simultaneously — something the current free speech jurisprudence, with its 'either-or' approach, generally does not."[69] Furthermore, just as the government provides a platform for private actors in parks and city halls, the reverse holds true in cyberspace: federal agencies have created over six thousand social media accounts to date.[70] Tweeting Presidents similarly pose classification headaches that have yet to be resolved[71]: Can blocking, reporting, and posting by @POTUS represent government speech if the account's functionality ultimately lies with a private platform?[72] As social media expands in this domain,[73] the line between government and private speech becomes blurrier, increasing

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[66] *See, e.g.*, *id.* at 1383–84 (describing the limits to government selectivity as less certain when the venue is not a public forum); Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 341 n.174 (2013) ("The Public Broadcasting System, or its employees, must engage in viewpoint discrimination every day in choosing its program schedule; likewise, the National Gallery, more accurately its curators, when selecting artworks.").

[67] *Cf.* WALT WHITMAN, *Song of Myself*, *in* LEAVES OF GRASS 28, 88 (Sculley Bradley & Harold W. Blodgett eds., W.W. Norton & Co. 1973) (1892).

[68] *See* Corbin, *supra* note 54, at 625; *cf.* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022) (considering whether a public school football coach's prayer on the field encompassed private religious exercise or government speech).

[69] Corbin, *supra* note 54, at 623. In such cases, the question is usually one of attribution rather than the identity of the speaker. *See id.*

[70] *See U.S. Digital Registry*, GEN. SERVS. ADMIN., https://usdigitalregistry.digitalgov.gov [https://perma.cc/82JW-4FTY] (select "Page Size" textbox, input any number, and press enter/return key to retrieve total results).

[71] *See* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019), *vacated as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.); *see also Knight First Amend. Inst.*, 141 S. Ct. at 1221 (Thomas, J., concurring) ("[A]pplying old doctrines to new digital platforms is rarely straightforward."); Recent Case, Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021)*, reh'g and reh'g en banc denied*, No. 19-2994, 2021 BL 76260 (8th Cir. Mar. 3, 2021)*, 135 HARV. L. REV. 1696, 1703 (2022) ("[T]he constitutional status of government officials' social media behavior is becoming troublingly opaque.").

[72] *See generally, e.g.*, *Case Decision 2021-001-FB-FBR*, OVERSIGHT BD. (May 5, 2021), https://www.oversightboard.com/sr/decision/2021/001/pdf-english [https://perma.cc/98NA-TU2Y] (upholding President Trump's suspension from Facebook); *Permanent Suspension of @realDonaldTrump*, TWITTER: BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/FG2Z-N2H7].

[73] *See* KAT DEVLIN ET AL., PEW RSCH. CTR., FOR GLOBAL LEGISLATORS ON TWITTER, AN ENGAGED MINORITY CREATES OUTSIZE SHARE OF CONTENT 6–7 (2020), https://www.pewresearch.org/global/wp-content/uploads/sites/2/2020/05/PG_05.18.20_globlegs_Full.Report.pdf [https://perma.cc/3NXE-HWQS] (documenting that every congressperson had a Twitter account at the time of the study, with about 86% tweeting weekly and 99% tweeting monthly). *Compare* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1231 (11th Cir. 2022) (finding provisions of Florida law regulating social media likely unconstitutional), *with* NetChoice, L.L.C. v. Paxton, No. 21-51178, 2022 WL 4285917, at *38–42 (5th Cir. Sept. 16, 2022) (parting with the Eleventh Circuit's approach in finding similar Texas law constitutional).

the need for the Court to clarify its oversimplified government-speech test.

Alternatives exist, especially for a doctrine as young as government speech.[74] Professor Frederick Schauer, for instance, advocates for an institution-specific approach to questions of free speech, pointing to the Court's variegated approach to other First Amendment categories.[75] Applying his suggestion to *Shurtleff*, the Court might have concluded that flags, as a category, pose different free speech implications from license plates or monuments. Even disregarding its tension with long-standing jurisprudence,[76] assigning certain "nonjuridical" categories varying levels of First Amendment protection would all but guarantee unpredictability.[77] Contemplating the flaws of this hypothetical approach, however, reveals how the triad of factors in *Shurtleff* similarly falls short. As Justice Alito indicated, the *Shurtleff* majority's "factorized analysis . . . cannot provide a principled way of deciding cases," as it inexplicably weighed one factor (control) over two (history and public perception).[78] Fine-tuning the contextual weight of each factor suffers from the same arbitrariness as the categorical approach that Schauer champions and Justice Holmes derides.[79] Though it could theoretically avoid the public-private dichotomy that binds the current doctrine, an institutionally minded approach is unsuccessful principally because it *mirrors* the *Shurtleff* approach's defects.

A more viable path would be to apply intermediate scrutiny, which would more properly balance Establishment Clause concerns with the implications of viewpoint discrimination than would a heavy-handed litmus test of identity or category.[80] In such an analysis, a reviewing

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[74] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (describing government-speech doctrine as "recently minted"); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise.").

[75] *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1263–64 (2005) ("The Court readily distinguishes incitement from advocacy, commercial speech from noncommercial speech, obscenity from indecency, public interest speech from personal interest speech, public forums from nonpublic forums and from 'designated' public forums, content-based from content-neutral regulations, and subject-matter from viewpoint-based discrimination." (footnotes omitted)).

[76] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 418 (1989) ("We decline . . . to create for the flag an exception to the joust of principles protected by the First Amendment.").

[77] *See generally* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) ("[T]o be a master of [law] means to look straight through all the dramatic incidents and to discern the true basis for prophecy." *Id.* at 475.). *Contra* Frederick Schauer, *The Supreme Court, 1997 Term — Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 118 (1998) ("Holmes was wrong."); *see id.* at 113–18 (explaining why).

[78] *Shurtleff*, 142 S. Ct. at 1598 (Alito, J., concurring in the judgment). This imbalance contrasts with history's outsized significance in other First Amendment cases this Term. *See supra* p. 329; *infra* p. 475.

[79] *See* Holmes, *supra* note 77, at 475 ("Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs . . . .").

[80] *See* Corbin, *supra* note 56, at 244.

court would determine whether a speech restriction is "narrowly tailored to serve a significant government interest."[81] Professor Caroline Mala Corbin, who coined the term "mixed speech," argues that "[i]ntermediate scrutiny shifts the inquiry from categorizing speech to examining the underlying values; it makes transparent the inevitable balancing of interests; and, as a consequence, it may improve the consistency of outcomes."[82] As applied to *Shurtleff*, the appearance of government endorsement along with the unavailability of less restrictive alternatives might have allowed Boston's program to prevail. Or perhaps nothing would have changed. Boston's Establishment Clause concerns might still have been unavailing in accordance with Justice Gorsuch's concurrence. Regardless of the outcome, intermediate scrutiny would avoid the counterintuitive private-speech label in *Shurtleff* while requiring a more straightforward assessment of competing interests.

Not only would intermediate scrutiny have provided a more principled analysis to *Shurtleff*, but it also is much better suited to addressing the problems that social media creates for free speech doctrine. To be sure, *Shurtleff* concerned flags, not Facebook. But the case represented a rare *analog* example of mixed-speech concerns prolific in *digital* realms. Just as Boston's policies obscured who was truly speaking from the heights of its eighty-three-foot-tall[83] flagpole, so too does social media often involve multiple parties — government and private alike — delivering (and, indeed, suppressing) speech.[84] And while "[d]eclaring these feeds government speech, subject to total government control, risks distorting the marketplace of political ideas,"[85] branding them private may well hamper government officials from communicating to their constituents on a channel "roughly on par with the printing press."[86] Intermediate scrutiny breaks this mold. The standard would enable judges to transparently examine the interests of the government, its citizens, and the digital platform that hosts them both.

Alternatively, and rather nihilistically, it may be high time for the Court to strike the colors when it comes to the government-speech test. Forum doctrine, which follows after a finding of private speech under

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[81] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1475 (2022) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[82] Corbin, *supra* note 54, at 676. *But see* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 831 (concluding that such a standard leads to unpredictable results and incoherent policy outcomes).

[83] *Shurtleff*, 142 S. Ct. at 1588.

[84] *See also* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2012 (2011) ("Any forced choice between government speech and private speech will inevitably mislabel a portion of that conversation [on social media] and, consequently, apply the wrong constitutional standard in judging the government's editorial decisions.").

[85] Corbin, *supra* note 56, at 239.

[86] Found. for Individual Rts. & Expression, *First Amendment Salon: "Trump, Twitter & the First Amendment*," YOUTUBE, at 15:55 (Feb. 12, 2020), https://youtu.be/o73Qdnf-u54?t=955 [https://perma.cc/PQ6Z-MGPL] (remarks of Professor Noah Feldman).

the government-speech test, subjects content restrictions in traditional and designated public forums to strict scrutiny.[87] Corbin suggests that "forum doctrine implicitly recognizes that speech in a government forum is actually mixed speech."[88] Along similar lines, Professor Steven Gey argues that this overlap between the forum and government-speech doctrines permits the government to enter its own forums when it otherwise has nothing to say, gaining constitutional clearance to censor opposing voices.[89] He therefore suggests minimizing the standard to identifying whether the government remains capable of communicating to the public, which, he says, effectively reduces the test to nothingness.[90] The ubiquity of "Web 2.0,"[91] however, belies his conclusion. Boston's choice of fabric to fly probably does not impede its operations. But control over its Twitter account, from which it has announced public emergencies,[92] press conferences,[93] and COVID testing sites[94] in the span of a week, is vital to aims of civic engagement and public safety. Properly accounting for these virtual networks would result in a doctrine that both avoids the public-private dichotomy that *Shurtleff* upholds and protects the government's ability to communicate to its citizens.

The government-speech test required refurbishment or retirement, but the Supreme Court offered neither. Instead, it proceeded full steam ahead with the test, leaving lower courts and city administrators lost at sea as they navigate a still-unclarified doctrine. As the middle ground of mixed speech accretes, especially in light of developments in social media, the Court should tailor its approach with a standard that more accurately reflects the public and the government's increasingly intertwined messaging.

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[87] *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983). Restrictions on nonpublic forums are permissible so long as they are viewpoint neutral and reasonable. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).

[88] Corbin, *supra* note 54, at 625.

[89] *See* Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1295 (2010).

[90] *See id.* at 1314. For a similar suggestion, see *The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 181, 229 (2015).

[91] Note, *Badging: Section 230 Immunity in a Web 2.0 World*, 123 HARV. L. REV. 981, 981 (2010) (describing Web 2.0 as "the internet of blogs, of wikis, of user-generated reviews and information").

[92] City of Bos. (@CityOfBoston), TWITTER (July 18, 2022, 1:42 PM), https://twitter.com/CityOfBoston/status/1549087317784027136 [https://perma.cc/UKY7-GE6X].

[93] City of Bos. (@CityOfBoston), TWITTER (July 13, 2022, 10:30 AM), https://twitter.com/CityOfBoston/status/1547226856767766529 [https://perma.cc/6772-RQ87].

[94] City of Bos. (@CityOfBoston), TWITTER (July 11, 2022, 12:15 PM), https://twitter.com/CityOfBoston/status/1546528503713112068 [https://perma.cc/6E5B-8M2R].