Shurtleff v. City of Boston (2022)

Justice Breyer delivered the opinion of the Court.

When the government encourages diverse expression—say, by creating a forum for debate—the First Amendment prevents it from discriminating against speakers based on their viewpoint. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.* (1995). But when the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to "promote a program" or "espouse a policy" in order to function. *Walker* v. *Texas Div.*, *Sons of Confederate Veterans*, *Inc.* (2015). The line between a forum for private expression and the government's own speech is important, but not always clear.

This case concerns a flagpole outside Boston City Hall. For years, Boston has allowed private groups to request use of the flagpole to raise flags of their choosing. As part of this program, Boston approved hundreds of requests to raise dozens of different flags. The city did not deny a single request to raise a flag until, in 2017, Harold Shurtleff, the director of a group called Camp Constitution, asked to fly a Christian flag. Boston refused. At that time, Boston admits, it had no written policy limiting use of the flagpole based on the content of a flag. The parties dispute whether, on these facts, Boston reserved the pole to fly flags that communicate governmental messages, or instead opened the flagpole for citizens to express their own views. If the former, Boston is free to choose the flags it flies without the constraints of the First Amendment's Free Speech Clause. If the latter, the Free Speech Clause prevents Boston from refusing a flag based on its viewpoint.

We conclude that, on balance, Boston did not make the raising and flying of private groups' flags a form of government speech. That means, in turn, that Boston's refusal to let Shurtleff and Camp Constitution raise their flag based on its religious viewpoint "abridg[ed]" their "freedom of speech." U. S. Const., Amdt. I.

I

A

. . . On the plaza, near City Hall's entrance, stand three 83-foot flagpoles. Boston flies the American flag from the first pole . . . . From the second, it flies the flag of the Commonwealth of Massachusetts. And from the third, it usually (but not always) flies Boston's flag . . . .

Boston makes City Hall Plaza available to the public for events. Boston acknowledges that this means the plaza is a "public forum." . . . .

For years, since at least 2005, the city has allowed groups to hold flag-raising ceremonies on the plaza. Participants may hoist a flag of their choosing on the third flagpole (in place of the city's flag) and fly it for the duration of the event, typically a couple of hours. Most ceremonies have involved the flags of other countries—from Albania to Venezuela—marking the national holidays of Bostonians' many countries of origin. But several flag raisings have been associated with other kinds of groups or causes, such as Pride Week, emergency medical service workers, and a community bank. All told, between 2005 and 2017,

Boston approved about 50 unique flags, raised at 284 ceremonies. Boston has no record of refusing a request before the events that gave rise to this case. We turn now to those events.

B

In July 2017, Harold Shurtleff, the director of an organization called Camp Constitution, asked to hold a flagraising event that September on City Hall Plaza. The event would "commemorate the civic and social contributions of the Christian community" and feature remarks by local clergy. As part of the ceremony, the organization wished to raise what it described as the "Christian flag." To the event application, Shurtleff attached a photo of the proposed flag: a red cross on a blue field against a white background.

The commissioner of Boston's Property Management Department said no. The problem was "not the content of the Christian flag," but "the fact that it was the Christian flag or [was] called the Christian flag." The commissioner worried that flying a religious flag at City Hall could violate the Constitution's Establishment Clause and found no record of Boston ever having raised such a flag. He told Shurtleff that Camp Constitution could proceed with the event if they would raise a different flag. Needless to say, they did not want to do so. . . .

II

A

The first and basic question we must answer is whether Boston's flag-raising program constitutes government speech. If so, Boston may refuse flags based on viewpoint.

The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. See *Pleasant Grove City* v. *Summum* (2009). When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. See *Walker*. That must be true for government to work. Boston could not easily congratulate the Red Sox on a victory were the city powerless to decline to simultaneously transmit the views of disappointed Yankees fans. The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks. See *Board of Regents of Univ. of Wis. System* v. *Southworth* (2000).

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

In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. See *Walker*.

Considering these indicia in *Summum*, we held that the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. In *Walker*, we explained that license plate designs proposed by private groups also amounted to government speech because, among other reasons, the State that issued the plates "maintain[ed] direct control over the messages conveyed" by "actively" reviewing designs and rejecting over a dozen proposals. In *Matal* v. *Tam* (2017), on the other hand, we concluded that trademarking words or symbols generated by private registrants did not amount to government speech. Though the Patent and Trademark Office had to approve each proposed mark, it did not exercise sufficient control over the nature and content of those marks to convey a governmental message in so doing. These precedents point our way today.

B

Applying the government-speech analysis to this record, we find that some evidence favors Boston, and other evidence favors Shurtleff.

To begin, we look to the history of flag flying, particularly at the seat of government. Were we to consider only that general history, we would find that it supports Boston.

Flags are almost as old as human civilization. . . . Other contemporary flags, both state and local, reflect their communities. . . . The flying of a flag other than a government's own can also convey a governmental message. . . . Keeping with this tradition, flags on Boston's City Hall Plaza usually convey the city's messages. On a typical day, the American flag, the Massachusetts flag, and the City of Boston's flag wave from three flagpoles. . . .

While this history favors Boston, it is only our starting point. The question remains whether, on the 20 or so times a year when Boston allowed private groups to raise their own flags, those flags, too, expressed the city's message. So we must examine the details of *this* flag-flying program.

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

Finally, we look at the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent. The answer, it seems, is not at all. And that is the most salient feature of this case.

To be sure, Boston maintained control over an event's date and time to avoid conflicts. It maintained control over the plaza's physical premises, presumably to avoid chaos. And it provided a hand crank so

that groups could rig and raise their chosen flags. But it is Boston's control over the flags' content and meaning that here is key; that type of control would indicate that Boston meant to convey the flags' messages.

On this issue, Boston's record is thin. Boston says that all (or at least most) of the 50 unique flags it approved reflect particular city-approved values or views. Flying flags associated with other countries celebrated Bostonians' many different national origins; flying other flags, Boston adds, was not "wholly unconnected" from a diversity message or "some other day or cause the City or Commonwealth had already endorsed." That may well be true of the Pride Flag raised annually to commemorate Boston Pride WeekBut it is more difficult to discern a connection to the city as to, say, the Metro Credit Union flag raising, a ceremony by a local community bank.

In any event, we do not settle this dispute by counting noses—or, rather, counting flags. That is so for several reasons. For one thing, Boston told the public that it sought "to accommodate all applicants" who wished to hold events at Boston's "public forums," including on City Hall Plaza. The application form asked only for contact information and a brief description of the event, with proposed dates and times. 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. True to its word, the city had nothing—no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate. . . .

Compare the extent of Boston's control over flag raisings with the degree of government involvement in our most relevant precedents. In *Summum*, we emphasized that Pleasant Grove City always selected which monuments it would place in its park (whether or not the government funded those monuments), and it typically took ownership over them. In *Walker*, a state board "maintain[ed] direct control" over license plate designs by "actively" reviewing every proposal and rejecting at least a dozen. Boston has no comparable record.

The facts of this case are much closer to *Matal* v. *Tam*. There, we held that trademarks were not government speech because the Patent and Trademark Office registered all manner of marks and normally did not consider their viewpoint, except occasionally to turn away marks it deemed "offensive." Boston's come-one-come-all attitude—except, that is, for Camp Constitution's religious flag—is similar. . .

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

III

Last, we consider whether Boston's refusal to allow Shurtleff and Camp Constitution to raise their flag amounted to impermissible viewpoint discrimination.

Boston acknowledges that it denied Shurtleff's request because it believed flying a religious flag at City Hall could violate the Establishment Clause. And it admits this concern proceeded from the premise that raising the flag would express government speech. But we have rejected that premise in the preceding pages. We must therefore consider Boston's actions in light of our holding.

When a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination." *Good News Club* v. *Milford Central School* (2001). Applying that rule, we have held, for example, that a public university may not bar student-activity funds from reimbursing only religious groups. See *Rosenberger*. Here, Boston concedes that it denied Shurtleff's request solely because the Christian flag he asked to raise "promot[ed] a specific religion." Under our precedents, and in view of our government-speech holding here, that refusal discriminated based on religious viewpoint and violated the Free Speech Clause.

***

For the foregoing reasons, we conclude that Boston's flag-raising program does not express government speech. As a result, the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment. We reverse the First Circuit's contrary judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Kavanaugh, concurring.

This dispute arose only because of a government official's mistaken understanding of the Establishment Clause. A Boston official believed that the City would violate the Establishment Clause if it allowed a religious flag to briefly fly outside of City Hall as part of the flag-raising program that the City had opened to the public. So Boston granted requests to fly a variety of secular flags, but denied a request to fly a religious flag. As this Court has repeatedly made clear, however, a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like. See, *e.g., Zelman* v. *Simmons-Harris* (2002). On the contrary, a government *violates* the Constitution when (as here) it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like. See, *e.g., Espinoza* v. *Montana Dept. of Revenue* (2020); *Good News Club* v. *Milford Central School* (2001); *McDaniel* v. *Paty* (1978). Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, concurring in the judgment.

I agree with the Court's conclusion that Boston (hereafter City) violated the First Amendment's guarantee of freedom of speech when it rejected Camp Constitution's application to fly what it characterized as a "Christian flag." But I cannot go along with the Court's decision to analyze this case in terms of the triad

of factors—history, the public's perception of who is speaking, and the extent to which the government has exercised control over speech—that our decision in *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.* (2015), derived from *Pleasant Grove City* v. *Summum* (2009). As the Court now recognizes, those cases did not set forth a test that always and everywhere applies when the government claims that its actions are immune to First Amendment challenge under the government-speech doctrine. And treating those factors as a test obscures the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression.

I

The government-speech doctrine recognizes that the Free Speech Clause of the First Amendment "restricts government regulation of private speech" but "does not regulate government speech." *Summum*. That doctrine presents no serious problems when the government speaks in its own voice—for example, when an official gives a speech in a representative capacity or a governmental body issues a report. But courts must be very careful when a government claims that speech by one or more private speakers is actually government speech. When that occurs, it can be difficult to tell whether the government is using the doctrine "as a subterfuge for favoring certain private speakers over others based on viewpoint," and the government-speech doctrine becomes "susceptible to dangerous misuse," *Matal* v. *Tam*, (2017). . . .

To prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker. The ultimate question is whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the "regulation of private speech." *Summum*. But our precedent has never attempted to specify a general method for deciding that question, and the Court goes wrong in proceeding as though our decisions in *Walker* and *Summum* settled on anything that might be considered a "government-speech analysis." In both cases, we employed a fact-bound totality-of-the-circumstances inquiry that relied on the factors that appeared helpful in evaluating whether the speech at issue was government or private speech. We did not set out a test to be used in all government-speech cases, and we did not purport to define an exhaustive list of relevant factors. And in light of the ultimate focus of the government-speech inquiry, each of the factors mentioned in those cases could be relevant only insofar as it sheds light on the identity of the speaker. When considered in isolation from that inquiry, the factors central to *Walker* and *Summum* can lead a court astray.

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

Next, turn to the history of the means of expression. Historical practice can establish that a means of expression "*typically* represent[s] government speech." *Summum*. But in determining whether speech is the government's, the real question is not whether a form of expression is *usually* linked with the government but whether the speech *at issue* expresses the government's own message. Governments can put public resources to novel uses. And when governments allow private parties to use a resource normally

devoted to government speech to express their own messages, the government cannot rely on historical expectations to pass off private speech as its own. . . .

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

Now consider the third factor: "the public's likely perception as to who (the government or a private person) is speaking." Our earlier government-speech precedents recognized that "the correct focus" of the government-speech inquiry "is not on whether the ... reasonable viewer would identify the speech as the government's," *Johanns* v. *Livestock Marketing Assn.* (2005), and with good reason. Unless the public is assumed to be omniscient, public perception cannot be relevant to whether the government *is* speaking, as opposed merely *appearing* to speak. Focusing on public perception encourages courts to categorize private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government. . . . But there is no obvious reason why a government should be entitled to suppress private views that might be attributed to it by engaging in viewpoint discrimination. The government can always disavow any messages that might be mistakenly attributed to it.

The factors relied upon by the Court are thus an uncertain guide to speaker identity. But beyond that, treating these factors as a freestanding test for the existence of government speech artificially separates the question whether the government is speaking from whether the government is facilitating or regulating private speech. Under the Court's factorized approach, government speech occurs when the government exercises a "sufficient" degree of control over speech that occurs in a setting connected with government speech in the eyes of history and the contemporary public, regardless of whether the government is actually merely facilitating private speech. This approach allows governments to exploit public expectations to mask censorship.

And like any factorized analysis, this approach cannot provide a principled way of deciding cases. The Court's analysis here proves the point. The Court concludes that two of the three factors—history and public perception—favor the City. But it nonetheless holds that the flag displays did not constitute government speech. Why these factors drop out of the analysis—or even do not justify a contrary conclusion—is left unsaid. This cannot be the right way to determine when governmental action is exempt from the First Amendment.

II

A

I would resolve this case using a different method for determining whether the government is speaking. In my view, the minimum conditions that must be met for expression to count as "government speech" can be identified by considering the definition of "government speech" and the rationale for the

government-speech doctrine. Under the resulting view, government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech.

Defined in literal terms, "government speech" is "speech" spoken by the government. "Speech," as that term is used in our First Amendment jurisprudence, refers to expressive activity that is "intended to be communicative" and, "in context, would reasonably be understood ... to be communicative." *Clark* v. *Community for Creative Non-Violence* (1984). Our government-speech precedents have worked with largely the same definition. And although this definition of "speech" is not fully precise, the purposeful communication of the speaker's own message generally qualifies as "speech."

For "speech" to be spoken by the government, the relevant act of communication must be government action. Governments are not natural persons and can only communicate through human agents who have been given the power to speak for the government. When individuals charged with speaking on behalf of the government act within the scope of their power to do so, they "are not speaking as citizens for First Amendment purposes." *Garcetti* v. *Ceballos* (2006). And because "speech" requires the purposeful communication of the speaker's own message, the message expressed must have been formulated by a person with the power to determine what messages the government will communicate. In short, the government must "se[t] the overall message to be communicated" through official action. *Johanns*.

Government speech is thus the purposeful communication of a governmentally determined message by a person exercising a power to speak for a government. But not all governmental activity that qualifies as "government speech" in this literal and factual sense is exempt from First Amendment scrutiny. For although we have said that the Free Speech Clause "has no application" when a government is "engaging in [its] own expressive conduct," *Summum*, we have also recognized that "the Free Speech Clause itself may constrain the government's speech" under certain conditions, as when a "government seeks to compel private persons to convey the government's speech." *Walker*; see also *Wooley* v. *Maynard* (1977); *West Virginia Bd. of Ed.* v. *Barnette* (1943).

That is because the government-speech doctrine is not based on the view—which we have neither accepted nor rejected—that governmental entities have First Amendment rights. Instead, the doctrine is based on the notion that governmental communication—and the exercise of control over those charged by law with implementing a government's communicative agenda—do not normally "restrict the activities of ... persons acting as private individuals." *Rust* v. *Sullivan* (1991). So government speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts private expression in a way that "abridges" the freedom of speech, as is the case with compelled speech. Were it otherwise, virtually every government action that regulates private speech would, paradoxically, qualify as government speech unregulated by the First Amendment. Naked censorship of a speaker based on viewpoint, for example, might well constitute "expression" in the thin sense that it conveys the government's disapproval of the speaker's message. But plainly that kind of action cannot fall beyond the reach of the First Amendment.

It follows that to establish that expression constitutes government speech exempt from First Amendment attack, the government must satisfy two conditions. First, it must show that the challenged activity constitutes government speech in the literal sense—purposeful communication of a governmentally

determined message by a person acting within the scope of a power to speak for the government. Second, the government must establish it did not rely on a means that abridges the speech of persons acting in a private capacity. It is only then that "the Free Speech Clause has no application." *Summum*. . . .

For analogous reasons, private-party expression in any type of forum recognized by our precedents does not constitute government speech. A forum, by definition, is a space for private parties to express their own views. The government can of course speak as a participant in a forum, but the creation of a space for private discourse does not involve expressing a governmental message, deputizing private parties to express it, or adopting a private party's contribution as a vehicle of government speech. So when examination of the government's "policy and practice" indicates that the government has "intentionally open[ed] a nontraditional forum for public discourse," a court may immediately infer that private-party expression in the forum is not government speech. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802 (1985). There is no need to consider history, public perception, or control in the abstract.

B

Analyzed under this framework, the flag displays were plainly private speech within a forum created by the City, not government speech. The record attests that the City's application materials—which were the only written form of guidance available on the program prior to the adoption of a written policy in 2018—characterized the flagpoles as one of the City's "public forums." The application guidelines did not enumerate any criteria for access to the flagpoles that go beyond those typical of a resource that has been made generally available to the public. The first rejection of an application was the denial of Camp Constitution's application in 2017. Prior to then, the City never rejected any request to raise a flag submitted by any private party. And private speakers accounted for 78% of the flag-raising applicants.

A program with this design cannot possibly constitute government speech. The City did nothing to indicate an intent to communicate a message. *Clark*. Nor did it deputize private speakers or appropriate private-party expressive content. The flags flown reflected a dizzying and contradictory array of perspectives that cannot be understood to express the message of a single speaker. For example, the City allowed parties to fly the gay pride flag, but it allowed others to fly the flag of Ethiopia, a country in which "homosexual act[s]" are punishable by "imprisonment for not less than one year." Indeed, the City disclaimed virtually all messages expressed by characterizing the flagpoles as a "public forum" and adopting access criteria consistent with generalized public use. The City's policy and practice thus squarely indicate an intent to open a public forum for any private speakers who met the City's basic criteria. The requirement of viewpoint neutrality applies to any forum of this kind.

As the Court rightly holds, denying Shurtleff's application to use that forum constituted impermissible viewpoint discrimination. The City's stated reason for rejecting Camp Constitution's application was an unwritten "policy and practice" of "'refrain[ing] from flying non-secular flags on the City Hall flagpoles.'" But as we have recognized, religion constitutes a viewpoint, and "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious point of view." *Good News Club* v. *Milford Central School* (2001); *Rosenberger*.

The City's decision was grounded in a belief that "[e]stablished First Amendment jurisprudence" prohibits a government from allowing a private party to "fly a [r]eligious flag on public property." But "[m]ore than once," this Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U. S., at 839; see also *Good News Club*; *Lamb's Chapel* v. *Center Moriches Union Free School Dist*. Indeed, excluding religious messages from public forums that are open to other viewpoints is a "denial of the right of free speech" indicating "hostility to religion" that would "undermine the very neutrality the Establishment Clause requires." *Rosenberger*. . . .

On this record, . . . the only viable inference is that the City had no policy restricting access to the forum apart from the modest access conditions articulated in the application materials. Having created a forum with those characteristics, the City could not reject Shurtleff's application on account of the religious viewpoint he intended to express. For that reason, I agree with the Court's ultimate conclusion and concur in the judgment.

Justice Gorsuch, with whom Justice Thomas joins, concurring in the judgment.

The real problem in this case doesn't stem from Boston's mistake about the scope of the government speech doctrine or its error in applying our public forum precedents. The trouble here runs deeper than that. Boston candidly admits that it refused to fly the petitioners' flag while allowing a secular group to fly a strikingly similar banner. And the city admits it did so for one reason and one reason only: It thought displaying the petitioners' flag would violate "'the [C]onstitution's [E]stablishment [C]lause.'" That decision led directly to this lawsuit, all the years of litigation that followed, and the city's loss today. Not a single Member of the Court seeks to defend Boston's view that a municipal policy allowing all groups to fly their flags, secular and religious alike, would offend the Establishment Clause.

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

*

To see how all this unfolded, start with *Lemon* itself. *Lemon* held out the promise that any Establishment Clause dispute could be resolved by following a neat checklist focused on three questions: (1) Did the government have a secular purpose in its challenged action? (2) Does the effect of that action advance or

inhibit religion? (3) Will the government action "excessive[ly] ... entangl[e]" church and state? But from the start, this seemingly simple test produced more questions than answers. How much religion-promoting purpose is too much? Are laws that serve both religious and secular purposes problematic? How much of a religion-advancing effect is tolerable? What does "excessive entanglement" even mean, and what (if anything) does it add to the analysis? Putting it all together, too, what is a court to do when *Lemon*'s three inquiries point in conflicting directions? More than 50 years later, the answers to all these questions remain unknown.

The only sure thing *Lemon* yielded was new business for lawyers and judges. Before *Lemon*, this Court had never held a flag or other similar public display to constitute an unconstitutional "establishment" of religion. After *Lemon*, cases challenging public displays under the Establishment Clause came fast and furious. And just like the test itself, the results proved a garble. May a State or local government display a Christmas nativity scene? Some courts said yes, others no. How about a menorah? Again, the answers ran both ways. What about a city seal that features a cross? Good luck.

If anything, the confusion grew with time. In the years following *Lemon*, this Court modified its "effects" test by requiring lower courts to ask whether a "reasonable observer" would consider the government's challenged action to be an "endorsement" of religion. See, *e.g.*, *County of Allegheny* v. *American Civil Liberties Union*, *Greater Pittsburgh Chapter* (1989). But rather than fix *Lemon*'s problems, this new gloss compounded them. Some argued that any reasonable observer worthy of the name would consider all the relevant facts and law, just as a judge or jury must. Others suggested that a reasonable observer could make mistakes about the law or fail to consider all the facts. And that suggestion only raised even more questions. Just how mistake-prone might an observer be and still qualify as reasonable? On what authority may courts exercise the awesome power of judicial review to declare a duly enacted law unconstitutional thanks only to (admitted) errors about the relevant facts or law?

Ultimately, *Lemon* devolved into a kind of children's game. Start with a Christmas scene, a menorah, or a flag. Then pick your own "reasonable observer" avatar. In this game, the avatar's default settings are lazy, uninformed about history, and not particularly inclined to legal research. His default mood is irritable. To play, expose your avatar to the display and ask for his reaction. How does he *feel* about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he *feels* it "endorses" religion. If so, game over.

Faced with such a malleable test, risk-averse local officials found themselves in an ironic bind. To avoid Establishment Clause liability, they sometimes felt they had to discriminate against religious speech and suppress religious exercises. But those actions, in turn, only invited liability under other provisions of the First Amendment. The hard truth is, *Lemon*'s abstract and ahistoric test put "[p]olicymakers ... in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other." *Pinette*.

Our case illustrates the problem. The flags of many nations bear religious symbols. So do the flags of various private groups. Historically, Boston has allowed them all. The city has even flown a flag with a cross nearly identical in size to the one on petitioners' flag. It was a banner presented by a secular group to commemorate the Battle of Bunker Hill. Yet when the petitioners offered their flag, the city flinched.

Perhaps it worried: Would the assigned judge's imagined "reasonable observer" bother to learn about its generous policy for secular groups? Would this observer take the trouble to consult the long tradition in this country allowing comparable displays? Or would he turn out to be an uninformed passerby offended by the seeming incongruity of a new flag flying beside those of the city, State, and Nation? Who could tell. Better to err on the safe side and reject the petitioners' flag. As it turned out, though, that route only invited years of litigation and a unanimous adverse decision because no government may discriminate against religious speech in a public forum. To avoid a spurious First Amendment problem, Boston wound up inviting a real one. Call it a *Lemon* trade.

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

From the birth of modern Establishment Clause litigation in *Everson* v. *Board of Ed. of Ewing*, this Court looked primarily to historical practices and analogues to guide its analysis. . . . And, in the years following *Everson*, the Court followed this same path when interpreting the Establishment Clause. Agree or disagree with the conclusions in these cases, there can be little doubt that the Court approached them in large part using history as its guide . . . .

Lemon interrupted this long line of precedents. It offered no plausible reason for ignoring their teachings. And, as we have seen, the ahistoric alternative it offered quickly proved both unworkable in practice and unsound in its results. Nor is it as if *Lemon* vanquished the field even during its heyday. Often, this Court continued to look to history to resolve certain Establishment Clause disputes outside the context of religious displays. And several early decisions applying *Lemon* were themselves rapidly overruled in part or in whole. All of which in time led Justice after Justice to conclude that *Lemon* was "flawed in its fundamentals," "unworkable in practice," and "inconsistent with our history and our precedents." *County of Allegheny*, (Kennedy, J., concurring in judgment in part and dissenting in part).[1]

Recognizing *Lemon*'s flaws, this Court has not applied its test for nearly two decades. In *Town of Greece* v. *Galloway*, this Court declined an invitation to use the *Lemon* test. Instead, the Court explained that the primary question in Establishment Clause cases is whether the government's conduct "accords with history and faithfully reflects the understanding of the Founding Fathers." The Court observed that this

[1] FN9: See also, *e.g.*, *Salazar* v. *Buono* (2010) (plurality opinion of Kennedy, J., joined in full by Roberts, C. J., and in part by Alito, J.); *Van Orden* v. *Perry*, (2005) (Breyer, J., concurring) (noting "*Lemon*'s checkered career in the decisional law of this Court" (internal quotation marks omitted)); *id.* (Thomas, J., concurring) ("This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges"); *McCreary County* v. *American Civil Liberties Union of Ky*. (Scalia, J., joined in full by Rehnquist, C. J., and Thomas, J., and in part by Kennedy, J., dissenting) ("[A] majority of the Justices on the current Court ... have, in separate opinions, repudiated the brain-spun '*Lemon* test' "); *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet* (1994) (O'Connor, J., concurring in part and concurring in judgment); *Committee for Public Ed. and Religious Liberty* v. *Regan* (1980) (Stevens, J., dissenting) (disparaging "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

form of analysis represents the rule rather than "an exception" within the "Court's Establishment Clause jurisprudence."

In *American Legion* v. *American Humanist Association* we underscored the message. Again we expressly refused to apply *Lemon*, this time in a challenge to a public display—the very kind of dispute *Lemon*'s test ushered into existence and where it once held sway. Again we explained that "[i]f the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met." And again we stressed that the right place to look for guidance lies in " ' "historical practices and understandings."'"

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With all these messages directing and redirecting the inquiry to original meaning as illuminated by history, why did Boston still follow *Lemon* in this case? Why do other localities and lower courts sometimes do the same thing, allowing *Lemon* even now to "si[t] up in its grave and shuffl[e] abroad"? *Lamb's Chapel* v. *Center Moriches Union Free School Dist.* (1993) (Scalia, J., concurring in judgment). There may be other contributing factors, but let me address two.

First, it's hard not to wonder whether some simply prefer the policy outcomes *Lemon* can be manipulated to produce. Just dial down your hypothetical observer's concern with facts and history, dial up his inclination to offense, and the test is guaranteed to spit out results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could sustain. *Lemon* may promote an unserious, results-oriented approach to constitutional interpretation. But for some, that may be more a virtue than a vice.

There is more than a little in the record before us to suggest this line of thinking. As city officials tell it, Boston did not want to "'display flags deemed to be inappropriate or offensive in nature or those supporting discrimination, prejudice, or religious movements.'" Instead, the city wanted to celebrate only "a particular kind of diversity." And if your policy goal is to lump in religious speech with fighting words and obscenity, if it is to celebrate only a "particular" type of diversity consistent with popular ideology, the First Amendment is not exactly your friend. Dragging *Lemon* from its grave may be your only chance. . .

Second, it seems that *Lemon* may occasionally shuffle from its grave for another and more prosaic reason. By demanding a careful examination of the Constitution's original meaning, a proper application of the Establishment Clause no doubt requires serious work and can pose its challenges. *Lemon*'s abstract three-part test may seem a simpler and tempting alternative to busy local officials and lower courts. But if this is part of the problem, it isn't without at least a partial remedy. For our constitutional history contains some helpful hallmarks that localities and lower courts can rely on.

Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. See M. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105 (2003) (Establishment and Disestablishment). First, the government exerted control over the

doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. Most of these hallmarks reflect forms of "coerc[ion]" regarding "religion or its exercise." *Lee* v. *Weisman* (1992).

These traditional hallmarks help explain many of this Court's Establishment Clause cases, too. . . . The thread running through these cases derives directly from the historical hallmarks of an establishment of religion—government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not.

. . . The simple truth is that no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to "roa[m] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine." *American Legion*. Our Constitution was not designed to erase religion from American life; it was designed to ensure "respect and tolerance."

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To justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave. It was a strategy as risky as it was unsound. *Lemon* ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game. This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.