

Flags Over Boston



By Paul Engel

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- When is flying a flag government speech, and when is it personal.
- Can a government official deny someone a public accommodation simply because it is religious?
- How can the opinion in this case impact freedom of speech across the nation?

When is flying a flag government speech? That was the question before the Supreme Court in the case of *Shurtleff, et al. V. City Of Boston et al.* Could the City of Boston refuse to fly a Christian flag? Was the city required to do so? Or did Harold Shurtleff have the right to fly the flag of his choice on public property? What does this mean for other Freedom of Speech cases around the country?

Background

This case all started with a policy the City of Boston adopted in 2005.

Just outside the entrance to Boston City Hall, on City Hall Plaza, stand three flagpoles. Boston flies the American flag from the first pole and the flag of the Commonwealth of Massachusetts from the second. Boston usually flies the city's own flag from the third pole. But Boston has, for years, allowed groups to hold ceremonies on the plaza during which participants may hoist a flag of their choosing on the third pole in place of the city's flag. Between 2005 and 2017,

Boston approved the raising of about 50 unique flags for 284 such ceremonies. Most of these flags were other countries', but some were associated with groups or causes, such as the Pride Flag, a banner honoring emergency medical service workers, and others.

[Shurtleff, et al. V. City Of Boston et al. Opinion](#)

Sounds like a nice public relations program. Allow groups to hold ceremonies in the plaza and raise a flag on one of the flagpoles. For twelve years, everything was fine.

In 2017, Harold Shurtleff, the director of an organization called Camp Constitution, asked to hold an event on the plaza to celebrate the civic and social contributions of the Christian community; as part of that ceremony, he wished to raise what he described as the "Christian flag."

[Shurtleff, et al. V. City Of Boston et al. Opinion](#)

Sure enough, once someone asked to raise that scary Christian flag, the problems started.

The commissioner of Boston's Property Management Department worried that flying a religious flag at City Hall could violate the Establishment Clause and found no past instance of the city's having raised such a flag. He therefore told Shurtleff that the group could hold an event on the plaza but could not raise their flag during it. Shurtleff and Camp Constitution (petitioners) sued, claiming that Boston's refusal to let them raise their flag violated, among other things, the First Amendment's Free Speech Clause.

[Shurtleff, et al. V. City Of Boston et al. Opinion](#)

Like many in governments from the federal to the local, including the Supreme Court of the United States, Boston's Property Management Department has a serious misunderstanding not only of the Establishment Clause, but of the First

Amendment as a whole.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

U.S. Constitution, Amendment I

Let's start with the first five words, "Congress shall make no law...". "Congress" is the proper noun for the national legislature, as established by Article I, Section 1, Clause 1 of the Constitution of the United States:

All legislative Powers herein granted shall be vested in a Congress of the United States,

U.S. Constitution, Article I, Section 1, Clause 1

Since the law allowing the flying of flags over the Boston City Hall Plaza was not created by Congress, and since the City of Boston is not a part of the federal government, it cannot violate the Establishment Clause of the First Amendment. What the City of Boston should have been concerned with was Article's II and XLVI of the Massachusetts Constitution:

It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Massachusetts Constitution, Article II

Section 1. No law shall be passed prohibiting the free exercise of religion.

Massachusetts Constitution, Article XLVI

Since Mr. Shurtleff claimed a violation of the Constitution of the United States, his case was heard in federal court.

The District Court held that flying private groups' flags from City Hall's third flagpole amounted to government speech, so Boston could refuse petitioners' request without running afoul of the First Amendment. The First Circuit affirmed.

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Which brings us to the case we're reviewing today.

Government Speech

The question the Supreme Court was reviewing is whether or not the District Court was correct. Was flying a flag from City Hall's flagpole government speech or not? If it was government speech, then the government had the right to control what was being said. If it was not government speech, then the City of Boston had violated Mr. Shurtleff's rights by denying him his Freedom of Speech.

The boundary between government speech and private expression can blur when, as here, the government invites the people to participate in a program...

Applying this government-speech analysis here, the Court finds that some evidence favors Boston, and other evidence favors Shurtleff. The history of flag flying, particularly at the seat of government, supports Boston...

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.

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In general, when a government fly's a flag it is expressing a

message. For example, flying the flag of another country means a foreign leader is visiting, while flying a flag at half-staff conveys a message of sympathy or somber remembrance. However, what happens when the government is not the one choosing the flag?

The circumstantial evidence of the public's perception does not resolve the issue. The most salient feature of this case is that Boston neither actively controlled these flag raisings nor shaped the messages the flags sent. To be sure, Boston maintained control over an event's date and time to avoid conflicts, and it maintained control over the plaza's physical premises, presumably to avoid chaos. But the key issue is whether Boston shaped or controlled the flags' content and meaning; such evidence would tend to show that Boston intended to convey the flags' messages as its own. And on that issue, Boston's record is thin.

[Shurtleff, et al. V. City Of Boston et al. Opinion](#)

Boston had told the public that it sought "to accommodate all applicants", though apparently that did not extend to religion applicants.

Because the flag-raising program did not express government speech, Boston's refusal to let petitioners fly their flag violated the Free Speech Clause of the First Amendment. When the government does not speak for itself, it may not exclude private speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination."

[Shurtleff, et al. V. City Of Boston et al. Opinion](#)

Since the City of Boston had, among other things, specifically sought to accommodate all applicants, denying one simply because of their religious viewpoint violates the Free Speech Clause. Not of the First Amendment as Justice Breyer claims, but Article LXXVII of the Massachusetts Constitution:

The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Massachusetts Constitution, Article LXXVII

Conclusion

I'm happy for Mr. Shurtleff. He got the correct answer, even if it was based on the wrong law. The City of Boston had violated Mr. Shurtleff's freedom of speech. It's just that since it was the City of Boston and not Congress who passed the law, it was a violation of the Constitution of Massachusetts and not the United States that Boston violated.

What does this mean for the rest of the country? Once again, the Supreme Court has substituted their own opinion for the supreme law of the land. While the outcome may have been the correct one, how can we trust that the court will get it right the next time? In the meantime, other government facilities should see that viewpoint discrimination is a violation of a person's Freedom of Speech. This opinion was focused on the participation of religious viewpoints in public displays. The City of Boston uses flags, but what other public displays could this impact? If a city park can be used by groups to put up displays, can they deny a church the right to put up a nativity scene? Can a public school deny the saying of the Pledge of Allegiance because of the words "One nation under God" or the singing of Christmas carols? If the critical distinction is who controls the display, then the use of public property for religious displays shouldn't raise a constitutional issue. I only hope that future government actors will recognize this fact.

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E-Mail Paul Engel: paul@constitutionstudy.com