SHURTLEFF V. CITY OF BOSTON, MASSACHUSETTS: A LOST OPPORTUNITY TO ADDRESS THE GOVERNMENT SPEECH DOCTRINE

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INTRODUCTION

Since its inception in the early 1990s, the government speech doctrine has become the subject of much litigation and heavily critiqued by legal scholars.[1] The doctrine allows the government to discriminate against viewpoints when the government is speaking.[2] In contrast, when the

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[1] *See* Daniel J. Hemel & Lisa L. Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 39–52 (2017) (discussing the history and origin of the government speech doctrine); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 374–78 (2009) (examining the start of the government speech doctrine and the cases that relied on the government speech doctrine); Helen Norton, *Government Speech 2.0*, 87 DENV. U.L. REV. 899, 900–03 (2010) (examining how the government communicating through emerging forms of technology could impact the government speech doctrine and arguing that communication in these forms could increase transparency when the government speaks); Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 114–15 (2009-2010) (examining the competition for use by courts between the government speech doctrine and public forum doctrine and explaining that the public forum doctrine is rooted in egalitarian principles while the government speech doctrine is rooted in democratic principles); Caroline M. Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U.L. REV. 605, 605 (2008) (discussing the government speech doctrine and arguing for mixed speech analysis).

[2] Shurtleff v. City of Boston, Massachusetts, 142 S. Ct. 1583, 1589 (2022) (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–69 (2009)); Hemel, *supra* note 1, at 33; Lauren Beausoleil, *Is Trolling Trump a Right or a Privilege?: The Erroneous Finding in* Knight First Amendment Institute at Columbia University v. Trump, 60 B.C.L. REV. E-SUPPLEMENT II.-31, II.-42 (2019) ("The purpose of the government speech doctrine is to allow the government to clearly express its messages, which can be done through the exclusion of alternative viewpoints and through private speakers."); Jason Zenor, *Viewpoint Endorsement Equals Viewpoint Neutrality? The Circular Logic of Government Speech Doctrine*, 46 CAP. U.L. REV. 1, 13 (2018) ("In the end, the government speech doctrine 'rewards what the rest of the First Amendment forbids: viewpoint discrimination against private speech.").

government is regulating private speech, such regulation is subject to the full scrutiny of the First Amendment, and the government may not discriminate against a speaker's viewpoint.[3] Thus, in many First Amendment and Establishment Clause cases, the determinative question is whether the government is speaking.[4]

The government speech doctrine has a short but confusing history.[5] The Supreme Court has applied changing and unclear tests to resolve government speech cases.[6] This has led to circuit courts creating numerous clarifying tests that have reached inconsistent results.[7] Additionally, scholars have critiqued the consistent expansion of the doctrine and its potential for misuse.[8] Recently, the Court has relieved some of this

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[3] *See* Olree, *supra* note 1, at 367; Corbin, *supra* note 1, at 613-14 ("[W]hile the government may regulate some aspects of private speech (such as its time, place, and manner), the inviolable rule of the First Amendment is that viewpoint discrimination is prohibited."); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1996) (finding a First Amendment violation where a university withheld student activity funds from a student organization based on religious association because the university impermissibly discriminated based on viewpoint); Gerlich v. Leath, 861 F.3d 697, (4th Cir. 2017) (determining that the University created a limited public forum by allowing on-campus groups to use its trademarks, and that denial of the use of the trademarks to a group based on their viewpoint about marijuana legalization constituted viewpoint discrimination).

[4] *See e.g.*, *Shurtleff*, 142 S. Ct. at 1589; Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 210–11 (2015); Delano Farms Co. v. Ca. Table Grape Com'n, 586 F.3d 1219, 1220 (9th Cir. 2009); Ranchers Cattlemen Action Legal Fund United Stockgrowers Am. v. Vilsack, 6 F.4th 983 (9th Cir. 2021).

[5] *See* Olree, *supra* note 1, at 374–79; Hemel, *supra* note 1, at 39–52; Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1199–1204 (2016); Will Soper, *A Purpose-and-Effect Test to Limit the Expansion of the Government Speech Doctrine*, 90 U. COLO. L. REV. 1237, 1244–54 (2019); Park, *supra* note 1, at 122–29.

[6] *See id.*

[7] Olree, *supra* note 1, at 379–95 (summarizing the different tests circuit courts have used to resolve government speech cases); Catherine R. Rodgers, *The Impact of Walker's Government Speech Extension on Public Transit Advertising*, 43 TRANSP. L.J. 51, 74–80 (2016) (discussing different circuit court's approaches to government speech cases); Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What it Licenses*, B.U. PUB. INT. L.J. 85, 114–23 (2011) (examining circuit court cases involving the government speech doctrine and license plates).

[8] *See e.g.*, Caroline M. Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 224, 231–40, 242–45 (2021) (arguing that the expansion of the government speech doctrine allows for an increasing occurrence of First Amendment Capture, or "categorizing contested speech as government speech and then eliminating contrary viewpoints."); Carl G DeNigris, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach*, 60 AM. UNIV. L.

confusion by using a more consistent approach, but the test is still largely unclear because the operative part of the test depends on each case's unique set of facts.[9] In *Shurtleff v. City of Boston, Massachusetts*, the Court applied the government speech doctrine in a manner consistent with the most recent cases but emphasized facts that differed from those past cases.[10] Furthermore, *Shurtleff* failed to provide further clarity; the Court did not alter the test or address any issues the test has caused circuit courts.[11] This Article will present the history of the government speech doctrine and then summarize the Court's opinion in *Shurtleff*. This Article will then argue that the government speech test should be altered to provide more clarity, consistent results, and account for potential misuse. Finally, this Article will argue that the Court missed an excellent opportunity to address Establishment Clause concerns and the Clause's connection to the government speech doctrine.

I. BACKGROUND

The government speech doctrine is a recent development; it is not explicitly mentioned in the Constitution and was not officially recognized by the Supreme Court until the 1990s.[12] The doctrine is significant because First Amendment scrutiny and protections differ when the government is speaking as opposed to when it is regulating private speech.[13] When the government is speaking, it is allowed to discriminate against particular viewpoints. In contrast, the government may not discriminate against particular viewpoints when it regulates private speech in public forums.[14] The

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REV. 133, 151–52 (2010) (summarizing the issues surrounding the potential misuse of the government speech doctrine).

[9] *See* Hemel, *supra* note 1, at 47–52.

[10] *See Shurtleff*, 142 S. Ct. at 1589–93.

[11] *Id.*

[12] *See* Keller v. State Bar, 496 U.S. 1, 10 (1990); Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a "Jurisprudence of Labels"*, 2010 B.Y.U.L. REV. 2071, 2072–74; Hemel, *supra* note 1, at 30; Olree, *supra* note 1, at 374.

[13] *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C.L. REV. 695, 702 (2011); Hemel, *supra* note 1 at 33–34.

[14] *Walker*, 576 U.S. at 207 (government statements . . . do not normally trigger the First Amendment rules designed to protect the marketplace of ideas."); *Rosenberger*, 515 U.S. at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); Hemel, *supra* note 1 at 33; Blocher, *supra* note 13 at 702 ("[The] government may not restrict speech simply because it disagrees with a particular viewpoint; and yet if it

government speech doctrine is a primary issue in two situations: (1) when the government is the speaker and it's speech allegedly violates the Establishment Clause[15] and (2) when the government is regulating private speech and is allegedly discriminating against a citizen's viewpoint.[16] In the first situation, government speech analysis is necessary because the government cannot violate the Establishment Clause when it is not speaking.[17] In contrast, in the second situation, government speech analysis is necessary because the government is allowed to discriminate against a viewpoint when it is speaking.[18]

A. An Inconsistent Start to the Government Speech Doctrine

The Supreme Court first addressed the government speech doctrine in *Keller v. State Bar of California*.[19] In *Keller*, a group of attorneys sued the California Bar Association, claiming that the Bar's use of mandatory dues to finance political and ideological activities violated the First Amendment.[20] The Bar argued that the spending of the dues constituted government speech and was thus free from the scrutiny of the First Amendment.[21] The Court, however, held that a Bar Association was not a traditional government entity, and therefore, there was no reason to further explore the Bar Association's government speech argument.[22] Nonetheless, for the first time, the Court implied that government speech might be a

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characterizes such a restriction as being the government's own [speech], it may be completely exempt from constitutional scrutiny.").

[15] The first Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. "At its core, the Establishment Clause enshrines the principle that government may not act in ways that aid one religion, aid all religions, or prefer one religion over another." Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1029 (10th Cir. 2008) (citing Snyder v. Murray City Corp., 159 F.3d 1227, 1230 (10th Cir. 1998)).

[16] *See* Olree, *supra* note 1, at 367.

[17] *Id.* at 368–69; Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760–62 (1995) (discussing how private speech, unlike government speech, cannot violate the Establishment Clause).

[18] Olree, *supra* note 1, at 368; Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 792 (4th Cir. 2004) ("[W]hen the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint.").

[19] *Keller*, 496 U.S. at 10–11; *see* also Hemel, *supra* note 1, at 40–41; McDonald, *supra* note 12, at 2073–75; Strasser, *supra* note 7, at 98–99.

[20] *Keller*, 496 U.S. at 4.

[21] *Id.* at 10–11.

[22] *Id.* at 12–13.

defense to certain claims involving First Amendment protections.[23]

A year after *Keller*, the Court decided its second government speech case, *Rust v. Sullivan*.[24] In this case, the plaintiff sued the government for passing a law that stopped the distribution of federal funds to pro-choice entities[25] on the grounds that the law discriminated against a viewpoint in violation of the First Amendment.[26] The Court held that the program did not violate the First Amendment because the government not funding or supporting a certain viewpoint is not the same as "suppressing a dangerous idea," "interfere[ing] with a protected activity[,]" or "singling out a disfavored group on the basis of [viewpoint] . . . ."[27] The Court reasoned that the funding decision was essentially the government deciding the scope of its project and making "a value judgment favoring childbirth over abortion[,]" which are both necessary functions of government.[28] This reasoning laid the groundwork for the idea at the center of the government speech doctrine: If the government could not discriminate against viewpoints, then the "government would not work."[29]

In subsequent cases, the Court continued to determine that the government speech doctrine would be the deciding factor when the government was alleged to discriminate against a viewpoint.[30] In *Legal Services Corporation v. Velasquez*, the plaintiff challenged a government provision that prevented federally-funded legal aid attorneys from

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[23] *See Id.* at 11; Hemel, *supra* note 1, at 40–41 (summarizing the holding and dicta of *Keller*, 496 U.S. at 12–13).

[24] 500 U.S. 173, 203 (1991) (holding that a federal health care funds' condition that doctors agree not to counsel abortion did not violate the First Amendment). It is important to note that, although this case never specifically refers to the government speech doctrine, many scholars consider this to be the first government speech case. *See e.g.*, Blocher, *supra* note 13 at 708–09; Norton, *supra* note 1 at 904–05. It is not clear why scholars disagree about whether *Rust* or *Keller* was the first government speech case, but it is not significant.

[25] Title X of the Public Health Service Act, 71 A.L.R. Fed. 961 (Originally published in 1985), provided funds to family planning projects, however, "Section 1008 of the act" prohibited funds to be given to "programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178–79.

[26] *Id.* at 192.

[27] *Id.* at 193–95.

[28] *Id.* at 192, 194.

[29] *Walker*, 576 U.S. at 207.

[30] *See e.g.*, Legal Servs. Corp. v. Velasquez, 531 U.S. 533 (2001); Johanns v. Livestock Marketing Ass'n, 554 U.S. 550 (2005); *see also* Olree, *supra* note 1, at 375–78 (summarizing government speech cases after the inception of the doctrine); Hemel, *supra* note 1, at 43–46 (summarizing government speech cases between the 1990s and 2000s).

challenging welfare laws.[31] In contrast to *Rust*, however, the Court held that a legal aid attorney does not speak for the government, and thus, cannot invoke the government speech doctrine because an attorney acts on behalf of the client, not the government.[32] In both *Rust* and *Velasquez*, the government was funding a program, but in *Rust*, the funding was held to be government speech while in *Velasquez*, the funding was not considered government speech and consequently subject to First Amendment Scrutiny.[33]

The next big government speech case was *Johanns v. Livestock Marketing Association*.[34] In *Johanns*, two groups sued on behalf of beef producers and challenged legislation requiring the producers to use the proceeds of a cattle tax to fund an advertising campaign.[35] The Court held that the legislation constituted government speech and therefore did not infringe on the beef producers' First Amendment rights.[36] The Court distinguished the case from *Keller* and ignored whether the legislator-created ad campaign was a traditional government entity because in *Keller*, unlike in *Johanns*, the speaker was "an entity other than the government itself."[37] The Court also determined that public perception of the ad campaign was irrelevant to the question of whether the campaign constituted government speech.[38] After the *Johanns* decision, many scholars became concerned about the seemingly endless limits of the government speech doctrine and its potential misuse.[39]

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[31] *Velasquez*, 531 U.S. at 542–43.

[32] *Id.* ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.").

[33] *See* Hemel, *supra* note 1, at 44 (comparing the holding in *Velasquez*, 531 U.S. at 542–43 with the holding in *Rust*, 500 U.S. at 194).

[34] 544 U.S. 550 (2005); Andrew J. Marshall, Johanns v. Livestock Marketing Association-*Government Speech: It's What's For Dinner!*, 53 S.D.L. REV. 364, 365–75 (2008).

[35] *Johanns*, 544 U.S. at 550.

[36] *Id.*

[37] *Id.* at 557–59.

[38] *Id.* at 562–65.

[39] *See* Helen Norton, *Government Speech in Transition*, 57 S.D.L. REV. 421, 422–24 (2012) (arguing the *Johanns* provided the clearest articulation of the government speech doctrine to date but created another problem by failing to identify the limits of the doctrine); *Government Speech Doctrine – Compelled Support for Agricultural Advertising*, 119 HARV. L. REV. 277, 278–283 (2005) (examining the Court's decision in *Johanns* and arguing that although there needs to be some allowance of government speech, the government speech doctrine could threaten the First Amendment's ability to protect against the government in the market of speech); Marshall, *supra* note 34, at 364–66 (arguing that

This series of cases gave Circuit Courts confusing guidance on how to resolve government speech cases which led to the development of many different tests.[40] For example, the Sixth Circuit developed a one-factor test that found speech to be either government or private speech; the only factor this test used was the extent to which the government had editorial control over the message of the speech.[41] The Tenth Circuit developed a similar test, but with four factors to consider: "(1) whether the central purpose of the governmental program facilitating the message is to promote private views; (2) who exercises editorial control over the content of the message; (3) who is the literal speaker of the message; and (4) who bears ultimate responsibility for the content of the message."[42] Additionally, the Ninth and Fourth Circuits adopted tests that were similar to the Tenth Circuit's four-factor test to resolve issues regarding customized license plates.[43] In contrast, some judges and scholars have suggested using a hybrid or mixed speech approach to resolve government speech cases when the speech is

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the Court should have used *Johanns* to set the outer limits of the government speech doctrine and that its holding allows the government to infringe on citizens' free speech by merely invoking the doctrine).

[40] Olree, *supra* note 1, at 377–79; Strasser, *supra* note 7, at 85–86, 120–26; Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1403 (2001); Rodgers, *supra* note 7, at 74–77 (examining how different circuit courts have handled government speech cases revolving around public transit advertising).

[41] ACLU of Tenn. v. Bredesen, 441 F.3d 370, 371-72, 375 (6th Cir. 2006) (holding that specialty license plates are government speech because of the control the government has over the program, and thus, the license plate program is not subject to a viewpoint neutrality requirement); Olree, *supra* note 1, at 379–81 (analyzing Sixth Circuit government speech cases and the test that was applied); Scott W. Gaylord, *Licensing Facially Religious Government Speech: Summum's Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315, 350–51 (2010).

[42] Wells v. City & Cnty. of Denver, 257 F.3d 1132, 1141–44 (10th Cir. 2001) (using a four-prong mixed-speech test to determine that a holiday display constituted government speech and thus the city and county could exclude a winter solstice sign); Olree, *supra* note 1, at 386–87; Blocher, *supra* note 13, at 746–47.

[43] *See e.g.*, Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000) (applying a four factor test similar to the one used in *Wells*, to determine that postings on school bulletin boards constituted government speech); *Rose*, 361 F.3d at 792–93 (using a four-factor test derived from *Wells* to determine that specialty license plates are both government and private speech, and thus, the "Choose Life" license plate constituted impermissible viewpoint discrimination.); *see also* Olree, *supra* note 1, at 388–92 (summarizing the Fourth and Ninth Circuits government speech case holdings); M. Todd Carroll & Kevin A. Hall, *A Survey of the Fourth Circuit's Developing Government-Speech Jurisprudence*, 61 S.C.L. REV. 549, 556–61 (2010) (examining how the fourth circuit has determined when the government is speaking and what role forum analysis has played in such cases).

simultaneously government and private.[44] In this approach, the court would first determine whether the speech is mixed, private, or governmental by analyzing five factors: (1) the literal speaker; (2) the control of the message; (3) the context of the speech; (4) the public perception of the speech; and (5) the financer of the speech.[45] When the speech is deemed to be mixed, the court would then apply an intermediate level scrutiny, allowing the government to restrict that speech if "(1) it has a closely tailored, substantial interest that is clearly and publicly articulated; (2) it has no alternate means of accomplishing the same goal; and (3) private speakers have alternate means of communicating to the same audience."[46] The numerous and varying approaches to government speech cases led to inconsistent results for similar cases across the country.[47]

B. Clarifying the Doctrine

In recent years, the Supreme Court has ruled on a trio of government speech cases that clarified the government speech doctrine test and resolved

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[44] *See* Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 305 F.3d 241, 244–45 (4th Cir. 2002) (Lutting, J., respecting denial of rehearing en banc) ("my colleagues have struggled with this case because they have assumed, in oversimplification, that all speech must be either that of a private individual or that of the government, and that a speech event cannot be *both* private and governmental at the same time."); David A. Anderson, *Of Horses, Donkeys, and Mules*, 94 TEX. L. REV. 1, 2–3 (2015) (arguing that vanity license plates are a mix of private and government speech and that cases which involve speech that is collaboratively private and governmental should not be examined using the binary approach developed in Walker); Corbin, *supra* note 1, at 605–08, (2008) (arguing that the Court should recognize speech that is both private and governmental as mixed speech and that this category of speech should "subject viewpoint restrictions to intermediate scrutiny"); Alysha L. Bohanon, *Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages*, MINN. L. REV. 341, 373–77, 381 (2016) (examining how the failure to recognize mixed speech is very relevant to the government's use of social media platforms, and arguing that, in such cases, courts should first analyze whether the speech at issue can be separated, if so, like in the case of government social media pages then the binary approach in *Walker* is appropriate, if not, like in the case of vanity license plates, then the courts should use an intermediate scrutiny approach instead of the binary approach.).

[45] Corbin, *supra* note 1, at 627.

[46] *Id.* at 675.

[47] *See* Hemel, *supra* note 1, at 46–47; Rodgers, *supra* note 7, at 74–77; Stephanie S. Bell, *The First Amendment and Specialty License Plates: The "Choose Life" Controversy*, 73 MO. L. REV. 1279, 1280–81 (2008) (reviewing the different approaches and results of circuit courts determining whether specialty license plates are government speech); Jessica Pagano, *The Elusive Meaning of Government Speech*, 69 ALA. L. REV. 997, 1014–18, (2018) (cataloguing different ideas about how to resolve the issues and confusions of the government speech doctrine including the fundamental purpose of the First Amendment test, the literal speaker test, and the multifactor test).

many of the issues that Circuit Courts had been experiencing.[48] The trilogy started with *Pleasant Grove City v. Summum*, when the Historic District of Pleasant Grove City rejected the religious organization Summum's request to erect a religious statue in a public park that already had a Ten Commandments statue.[49] The Court held that the park statues constituted government speech even though they were privately funded, primarily because the city had editorial control over the statues.[50] Importantly, this was the first government speech case where the Court mentioned the importance of public perception; in his majority opinion, Justice Alito noted that people would generally perceive statues in public parks to be government speech.[51] Justice Souter's concurring opinion furthered the public perception discussion by arguing that the only test for government speech should be "whether a reasonable and fully informed observer would understand the expression to be government speech[.]"[52]

The next case in the trilogy was *Walker v. Texas Division, Sons of Confederate Veterans*.[53] In *Walker*, the Court considered a government program that allowed private parties to submit designs for state license plates.[54] When the Texas Department of Motor Vehicles Board rejected the Sons of Confederate Veterans' proposed design containing a Confederate

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[48] *See* Hemel, *supra* note 1, at 47; Clay Calvert, *Beyond Trademarks and Offense: Tam and the Justices' Evolution on Free Speech*, 2017 CATO SUP. CT. REV. 25, 43–46 (2017); *Summum*, 555 U.S. at 460; *Walker*, 576 U.S. at 274; Matal v. Tam, 13 S. Ct. 1744 (2017).

[49] *Summum*, 555 U.S. at 464–66. Many religious display cases are argued as Establishment Clause violations as opposed to government speech cases. *See generally* Lynch v. Donnelly, 465 U.S. 668 (1984); McCreary Cnty., Ky. v. Am. C.L. Union Ky., 545 U.S. 844 (2005); Lemon v. Kurtzman, 403 U.S. 602 (1971). When the government publicly displays a religious symbol, the display can either be some form of public forum or government speech. If it is a public forum, then the display is not subject to the Establishment Clause, but regulation of such displays is subject to viewpoint neutrality requirements. On the other hand, if the display is government speech, the display is subject to the Establishment Clause but there are no viewpoint neutrality requirements. As a result, if the party's goal is to get the display removed then they will likely argue that it violates the Establishment Clause and constitutes government speech. But if the party's goal is to get their own symbol displayed, religious or not, they will likely argue that not allowing their display is impermissible viewpoint discrimination, which will lead the government to argue that the display is government speech and not a public forum.

[50] *Id.* at 472–73.

[51] *Id.* at 472 ("Public parks are often closely identified in the public mind with the government unit that owns the land.").

[52] *Id.* at 487 (Souter, J., concurring).

[53] 576 U.S. at 200.

[54] *Id.* at 204–05.

flag, the Sons of Confederate Veterans sued the government entity, claiming that the rejection constituted impermissible viewpoint discrimination under the First Amendment.[55] After applying the three-factor test from *Summum*, the Court held that the license plate program was government speech, not private speech.[56] The three factors that the Court considered were (1) the history of the medium being used; (2) public perception of the speech; and (3) the extent of editorial control that the government has over the message.[57] The Court determined that all three factors weighed in favor of the license plate program being government speech.[58] Similar to *Johanns*, this case raised concerns among many scholars about the Court's handling of the ever expanding government speech doctrine.[59]

The last and most recent case in the trilogy, *Matal v. Tam*, considered whether trademarks were government speech.[60] In *Matal*, the Patent and Trademark Office denied a band's attempt to register their derogatory band name as a trademark.[61] The band brought action, claiming that the rejection was a violation of the First Amendment.[62] The government responded that trademark registration was a form of government speech.[63] The Court applied the same test used in *Walker* and *Summum* to determine that trademark registration was not government speech.[64] The Court held that none of the factors from the test weighed in favor of trademarks being government speech.[65] Furthermore, the Court expressed fear about the

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[55] *Id.* at 206.
[56] *Id.* at 208–10.
[57] *Id.* at 209–10
[58] *Id.* at 210–14.
[59] *See* Papandrea, *supra* note 5, at 1195–97, 1232–34 (discussing the potentially dangerous implications of the expansive view of the government speech doctrine that the court espoused in *Walker* and arguing that the *Walker* holding will negatively impact student and government employee's free speech protections); Zenor, *supra* note 2, at 2 (2018) (arguing that the most significant implication of *Walker* was that "the government is allowed to discriminate against viewpoints it does not like if it endorses another viewpoint."); Morgan E. Creamer, *Walker v. Texas Division, Sons of Confederate Veterans, Inc. and License Plate Speech: A Dangerous Roadblock for the First Amendment*, 65 AM. U.L. REV. 1461, 1461–62 (2016) (arguing that the court reached the wrong decision in *Walker* and that the decision negatively impacted citizens' First Amendment rights); Rodgers, *supra* note 7, at 86–87 (arguing that the holding in *Walker* failed to clarify the distinction between the government speech and public forum doctrines).
[60] *Matal*, 137 S. Ct. at 1751–55.
[61] *Id.* at 1751.
[62] *Id.*
[63] *Id.* at 1751, 1757.
[64] *Id.* at 1758–60.
[65] *Id.* ("[N]one of the[] factors [in *Walker*] are present in this case.")

consequences of ruling that trademarks constitute government speech.[66] It explained that if trademarks are government speech, then so are copyrights, which would mean that the government would have editorial control over copyrighted material.[67] The Court also reasoned that trademark registration could not constitute government speech because trademarks had inconsistent and contradictory views that could not come from one speaker.[68] In response, scholars have praised the *Matal* decision for not expanding the doctrine.[69]

The constantly changing government speech doctrine has drawn a wide array of criticism.[70] Some attack the doctrine at its core, arguing that there is no direct legal or historical basis for the doctrine and that the Supreme Court cases have freshly minted a "speech right" for the government, protecting the government from the threat of infringing upon or being restricted by the First Amendment despite having no basis in the Constitution.[71] Others argue that the court should have included government speech cases within existing public forum analysis.[72] Another frequent concern is that while the doctrine continues to expand, its outer limits or

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[66] *Id.*

[67] *Id.*

[68] *Id.* at 1758–59.

[69] Calvert, *supra* note 48, at 43–46 (arguing that *Matal* was used by the Court to reel in the government speech doctrine).

[70] *See e.g.*, Brian C. Castello, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking* Meese v. Keene, 1989 DUKE L.J. 654, 676–81 (1989) (explaining the negative effects of government speech, including government coercion of consent, suppression of minority viewpoints, and allowing the government to participate in the marketplace of ideas with advantageous amounts of bargaining power).

[71] *See e.g.*, Steven G. Gey, *Why Should the First Amendment Protect Government Speech when the Government has Nothing to Say?*, 95 IOWA L. REV. 1259, 1263–64 (2010) (arguing that there should be no government speech doctrine at all because the function of the First Amendment is to limit government power which implies that the government does not have a First Amendment Right to speak); Steven H. Goldberg, *The Government-Speech Doctrine: "Recently Minted;" But Counterfeit*, U. LOUISVILLE L. REV. 21, 23–24 (2010) (arguing that there is no basis for the government speech doctrine as described in *Summum*, that the doctrine is unnecessary to protect monuments, and that its potential for misuse will "debase First Amendment Jurisprudence."); Norton, *supra* note 39, at 422–24 ("[T]he Court's imprecision has led many inaccurately to understand the Court to have created a 'right' for the government to speak . . . .")..

[72] *See e.g.*, Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 810–11 (2010) (arguing that government speech should be considered a type of forum where the government may exclude any unwelcomed speech).

boundaries are unclear.[73] But the most common critiques of the doctrine focus on its potential misuse. Some examples of this misuse include the possibility of the government using the doctrine to interfere with elections,[74] to buy out or crowd out private speakers from the marketplace of ideas,[75] to suppress minority views,[76] and to favor chosen viewpoints.[77] Many scholars

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[73] *See* Richard C. Schragger, *What is "Government" "Speech"? The Case of Confederate Monuments*, 108 KY. L.J. 665, 693–794 (2020) (arguing that the boundaries of the government speech doctrine in relation to distinctions between "speech and conduct, public and private, and coercive and non-coercive government activity" are contested and unclear); David L. Hudson Jr., *Government Speech Doctrine*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/962/government-speech-doctrine (examining government speech doctrine cases and arguing that the doctrine is constantly expanding and imprecise).

[74] *See* Zenor, *supra* note 2, at 13 (contending that the government speech doctrine allows the government to be a participant in the marketplace of ideas and that this participation can be used to coerce voters even though the ballot box is supposed to be the control on government speech); Helen Norton, *The Government's Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342, 346–48 (2017) (examining how the government as a speaker can attempt to manufacture doubt through lies, attack on critics, and information control); Alyssa Graham, *The Government Speech Doctrine and Its Effect on the Democratic Process*, 44 SUFFOLK U.L. REV. 703, 719 (2011) ("protection from government interference [in elections] can be found in, and should be based on, the Constitution and the Bill of Rights, which were adopted to restrain federal powers and prevent tyranny by the majority. The courts should take an active role in limiting government speech based on constitutional grounds, as opposed to passively allowing the electoral process to set limits, as they do with other free speech issues.").

[75] *See* David S. Day, *Government Speech: An Introduction to a Constitutional Dialogue*, 57 S.D. L. Rev. 389, 391–93 (2012) (discussing concerns about the government speech doctrine used for the "crowding out of protected private speech," from the marketplace of ideas); McDonald, *supra* note 12, at 2072 (arguing that an expanded government speech doctrine could lead to situations where the government controls the marketplace of ideas because the public is unable to determine that the speech in question is government speech) *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2432 (2004) ("The Court's answer in Rust v. Sullivan and in cases that have subsequently identified Rust as the fountainhead of the government speech doctrine was that, whatever limits exist on government speech, they are not to be found in the First Amendment. The unsettling potential result of this doctrinal framework is that, with few obvious limitations, the government could essentially buy out large amounts of private speech simply by funding private enterprises.").

[76] *See* Castello, *supra* note 70, at 676-79.

[77] *See* Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 Green Bag 2d 413, 426–27 (2009) (arguing that the Court in *Summum* did not explain how to prevent the government speech doctrine from being used as "a subterfuge for favoring certain private speakers over others based on viewpoint"); Park, supra note 1, at 145 ("The outer limit of the government speech doctrine, where the government's advocacy turns into a 'subterfuge for favoring certain private speakers over others based on viewpoint,' has not

suggest that a transparency requirement, or requiring the government to claim its speech in order to evoke the protection of the doctrine, is the best solution to these criticisms.[78]

In *Shurtleff v. City of Boston, Massachusetts*, the most recent government speech case, the Court continues to apply the test it had developed and used in *Summum*, *Walker*, and *Matal* while simultaneously failing to address any concerns of the doctrine's potential misuse.[79]

II. *SHURTLEFF V. CITY OF BOSTON, MASSACHUSETTS*

A. Facts

Boston designed Boston City Plaza as a public forum that would be used for public events and ceremonies.[80] The city intended to accommodate as many requests as possible from citizens of Boston to use the plaza.[81] On the edge of the plaza sat Boston City Hall and three flag poles; the flag poles regularly flew the United States flag, the Massachusetts flag, and the Boston flag.[82] Since at least 2005, Boston had a program that allowed groups to temporarily replace the Boston flag with their chosen flag during a corresponding event or ceremony.[83] In July 2017, Harold Shurtleff, the director of the Camp Constitution organization, asked to hold an event

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yet been defined, so we can only guess as to where the Court might draw a line, if a line is to be drawn at all.").

[78] Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 988–90, 1031 (2005) (arguing that government speech should be required to be transparent because of the "constitutional commitment to pollical accountability") ("Transparency plays an essential role in enabling the accountability, and hence legitimacy, of government communications. Thus, as the First Amendment implicitly protects the rights of private parties to speak anonymously, the Constitution as a whole implicitly suggests governments should not so speak."); Sheldon Nahmod, *Justice Souter on Government Speech*, 2010 B.Y.U.L. REV. 2097, 2109 (2010) (In *Johanns*, "Justice Souter, referring to "the requirement of effective public accountability," emphasized the importance of government clearly holding itself out as the speaker; the primary justification for exempting government speech from First Amendment scrutiny is that the political process keeps the speech in check."); Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61, 67 (2015) (arguing for the government speech doctrine to include transparency requirement).

[79] *See* 142 S. Ct. at 1589–93.

[80] *Id.* at 1588.

[81] *Id.*

[82] *Id.*

[83] *Id.*

celebrating the Christian community's civic and social contributions.[84] The event included using the flag program to hoist the Christian flag.[85] Despite consecutively approving the previous 284 approvals made, the city denied Mr. Shurtleff's request because the commissioner of Boston's Property Management Department feared that hoisting the Christian flag could violate the Constitution's Establishment Clause.[86] As a result, the commissioner informed Shurtleff that the event would be approved only if the flag was changed, but Shurtleff refused.[87]

B. Procedural History

Shurtleff and Camp Constitution sued Boston and the commissioner, alleging that the denial of the event request violated the First Amendment's Free Speech Clause.[88] The district court granted Boston's motion for summary judgment, holding that the denial was within Boston's constitutional authority because the flag program constituted government speech.[89] Shurtleff appealed to the First Circuit Court of Appeals, which affirmed the district court's judgment.[90] Shurtleff appealed again, and the United States Supreme Court granted certiorari.[91]

C. Majority Opinion

Justice Breyer authored the majority opinion.[92] Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, and Barrett joined Justice Breyer.[93] The Court reversed the First Circuit's ruling and held that the flag program did not constitute government speech. Instead, the program constituted a public forum, and denying Shurtleff's event amounted to impermissible viewpoint discrimination in violation of Shurtleff's First Amendment rights.[94]

Justice Breyer's majority opinion began by determining that the case centered around the government speech doctrine and deciding whether the flag program was government speech or the government regulating private

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 1589.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 1586.
[93] *Id.*
[94] *Id.* at 1593.

speech.[95] He explained that government speech was immune from First Amendment scrutiny because it is checked by voting, not the First Amendment, meaning the government was allowed to discriminate against viewpoints.[96] Justice Breyer reasoned that the government speech doctrine is essential to government function because when the government implements programs, formulates policies, or speaks for the community, it must be able to "choose[] what to say and what not to say."[97] Moreover, Justice Breyer argued that forcing the government to express all viewpoints would lead to paradoxical results, like forcing the City of Boston to give condolences to upset Yankees fans whenever it congratulates the Red Sox for beating them.[98]

Next, Justice Breyer laid out the current test to determine whether the government is "speaking."[99] He explained that the test is a context and fact-based inquiry with three flexible factors that "guide the analysis."[100] These factors are "[1] the history of the expression at issue; [2] the public's likely perception as to who . . . is speaking; and [3] the extent to which the government has actively shaped or controlled the expression."[101] Lastly, Justice Breyer offered a trio of cases to help steer the analysis: *Summum*; *Walker*; and *Matal*.[102]

Justice Breyer applied the test, factor by factor, to the case and determined that the flag program did not constitute government speech.[103] First, he held that the history factor weighed in favor of the program being government speech.[104] He explained that historically flags have been associated with and reflect the governments they represent, and they are often used to convey government messages, like flying a flag at half-mast to pay respect to or mourn the dead.[105] Second, Justice Breyer determined that the public perception factor did not aid in determining whether the flag program was government speech.[106] He reasoned that while it seems likely that the public would interpret the flags as a government message, the

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[95] *Id.* at 1589.
[96] *Id.*
[97] *Id.* (citing *Walker*, 576 U.S. at 207–08).
[98] *Id.*
[99] *Id.* at 1589–90.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 1590.
[103] *Id.* at 1590–93.
[104] *Id.* at 1590.
[105] *Id.* at 1590–91.
[106] *Id.* at 1591.

connected celebrations or ceremonies happening on the plaza and at the base of the flag could make the public believe otherwise.[107]

Finally, Justice Breyer determined that the third factor, the extent of government control factor, was crucial in this case and played a significant role in the Court concluding that the flag program was not government speech.[108] Justice Breyer held that Boston had very little control over the flag program because while Boston controlled the date and time of the events, the physical premises, and the flag-raising tools, it had no control over the content or meaning of the flags.[109] Boston had approved all fifty previous unique flags that had been requested without reviewing them, had no policy to approve or reject flags, and had the goal of "accomodat[ing] all applicants."[110] Justice Breyer then compared the flag program to the types of speech considered in *Summum*, *Walker*, and *Matal* and found it most analogous to *Matal*, where the Court held that trademarks were not government speech because the government had little editorial control over trademarks.[111] Thus, the Court held that although the first history factor weighed in favor of the program being government speech, the third factor, marked by Boston's complete lack of editorial control over the program, meant that the flag-raising program was private speech, not government speech.[112]

Because Boston denied the flag-raising request out of fear that the flag promoted religion, the city's refusal was related to the religious viewpoint that the flag represented. Additionally, because the Court had held that the flag-raising constituted government regulated private speech, Justice Breyer determined that "Boston's refusal to allow Shurtleff . . . to raise the [Christian] flag amounted to impermissible viewpoint discrimination" because it violated the Free Speech Clause.[113]

D. Justice Kavanaugh's Concurring Opinion

Justice Kavanaugh's brief concurrence focused on the commissioner's fear of violating the Establishment Clause.[114] Justice Kavanaugh reasoned that the government would not violate the

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[107] *Id.*
[108] *Id.* at 1592–93.
[109] *Id.* at 1592.
[110] *Id.*
[111] *Id.* at 1592–93 (citing *Matal*, 137 S. Ct. at 1758, 1762–63).
[112] *Id.* at 1593.
[113] *Id.*
[114] *Id.* at 1594 (Kavanaugh, J., concurring).

Establishment Clause if it had treated religious groups equally with nonreligious groups.[115] However, the government violated the Constitution because it excluded religious groups from public programs because of the religion's viewpoint.[116]

E. Justice Alito's Concurring Opinion

Justice Alito's concurring opinion, which Justices Thomas and Gorsuch joined, argued that the test the majority applied was inappropriate because of the involvement of private speakers in the flag program.[117] Justice Alito argued that a new test should instead be used in this situation that would arrive at the same result.[118] He began by pointing out that the majority acknowledged that the factor test is not always applicable.[119] He explained that, in this instance, using the three factors obscured the question of "whether the government is speaking instead of regulating private expression."[120]

Next, Justice Alito reasoned that when private actors are involved in government speech cases, a concern arises about governments using the doctrine for censorship.[121] To exemplify the potential abuse of the government speech doctrine, he explained that in *Matal*, the government argued that trademarks were government speech.[122] Accepting this argument, Justice Alito reasoned, would have the dangerous consequence of allowing the government to use copyrights to gain editorial control over private citizens' works.[123]

Further, Justice Alito argued that, when applied to this case, all three factors had serious flaws and that analyzing the factors "[could] lead a court astray."[124] He argued that (1) the extent of government control factor could not account for the misuse of the government speech doctrine to censor citizens; (2) the history factor was inapplicable because, in this case, flags were not being used in a historical context; and (3) the public perception factor was unhelpful because the public is not informed enough to determine

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[115] *Id.*
[116] *Id.*
[117] *Id.* at 1595, 1598 (Alito, J., concurring).
[118] *Id.* at 1598.
[119] *Id.* at 1595.
[120] *Id.*
[121] *Id.* at 1595–96.
[122] *Id.* at 1595.
[123] *Id.*
[124] *Id.* at 1596.

who is speaking but only who appears to be speaking.[125] Justice Alito concluded that there must be a better alternative because the factor test provided uncertainty and allowed the government to mask its censorship as government speech.[126]

Finally, Justice Alito proposed a different government speech test.[127] In reference to First Amendment jurisprudence, he argued that only an agent can communicate government speech.[128] This analysis led to the first part of his new proposed test: "Government speech [requires] the purposeful communication of a governmentally determined message by a person exercising a power to speak for a government."[129] Next, Justice Alito explained that the First Amendment could restrict government speech when it is used to control private speech.[130] Thus, the second part of the test required "the government [to] establish it did not rely on a means that abridges the speech of persons acting in a private capacity."[131] Finally, Justice Alito identified and analyzed the two scenarios where private citizens can be involved in government speech: (1) when the government enlists a private party to speak as an agent and (2) when the government adopts a medium created by a private party.[132] Justice Alito explained that when the government enlists a private party to speak as its agent, the speech is government speech if the agency is voluntary and the speech is within the scope of the agency.[133] Conversely, when the government creates a forum, speech is only the government's when the speaker utilizing the forum alienates "control over the medium of expression and transfers it to the government."[134]

Justice Alito then applied the facts of the case to his newly created test and determined that the flag program was not government speech.[135] He reasoned that Boston was not trying to communicate a message, that the flags that were flown had contradictory messages, and that the city's stated policy was "consistent with generalized public use."[136] As a result, Justice

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[125] *Id.* at 1596–97.
[126] *Id.* at 1597–98.
[127] *Id.* at 1598–1600.
[128] *Id.* at 1598.
[129] *Id.*
[130] *Id.* at 1598–99.
[131] *Id.* at 1599.
[132] *Id.* at 1600.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 1601.
[136] *Id.*

Alito determined that Boston's refusal of Shurtleff's application constituted viewpoint discrimination.[137] To conclude, he analyzed Boston's updated written policy that forbid flags supporting religious viewpoints and determined that it would still not constitute government speech because "it simply codified the City's prior exclusion of speakers expressing a religious viewpoint."[138]

F. Justice Gorsuch's Concurring Opinion

Justice Gorsuch's concurrence, joined by Justice Thomas, argued that the commissioner's confusion about the Establishment Clause stemmed from the Supreme Court's 1971 decision in *Lemon v. Kurtzman*.[139] Justice Gorsuch explained that in this case, the Court created a new but flawed "one-size-fits-all test for resolving Establishment Clause disputes."[140] He argued that this "*Lemon* test" led to an influx of new litigation regarding the Establishment Clause and that the results from these cases were inconsistent. He pointed out that the test's reliance on "reasonable observers" created confusion and that the test was inconsistent with precedent.[141] Further, this new one-size-fits-all test would lead to more First Amendment litigation by putting governments in a position where they have to choose between potentially violating the Establishment Clause or the Free Speech Clause when dealing with religious speech.[142]

Justice Gorsuch then examined how the Court has repeatedly declined to use the *Lemon* test in recent years and instead resolved Establishment Clause cases by receiving direction from "historical practices and understandings."[143] Next, Justice Gorsuch examined why some governments still rely on the *Lemon* test.[144] First, he explained that the government could easily manipulate the *Lemon* test to obtain favorable results.[145] Second, Justice Gorsuch argued that the *Lemon* test is easier to apply and more accessible than looking at the historical context and precedent of the Establishment Clause.[146] Justice Gorsuch concluded by

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[137] *Id.* at 1601–02.
[138] *Id.* at 1602.
[139] *Id.* at 1603-04 (Gorsuch, J., concurring) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).
[140] *Id.*
[141] *Id.* at 1604–07.
[142] *Id.* at 1605.
[143] *Id.* at 1608 (citing Town of Greece, New York v. Galloway, 572 U.S. 565, 576 (2014)).
[144] *Id.*
[145] *Id.* at 1608–09.
[146] *Id.* at 1609.

identifying historical situations where the government has violated the Establishment Clause and implying that even if the flag program were government speech, flying the Christian flag would not violate the Establishment Clause.[147]

III. ANALYSIS

In *Shurtleff*, the Supreme Court correctly applied the three-factor test crafted in *Summum*, *Walker*, and *Matal* by heavily relying on the extent of government control factor of the test to decide the case.[148] However, the insignificance of the history and public perception factors in this case will likely confuse circuit courts attempting to apply the test.[149] Additionally, the majority opinion failed to address the commissioner's concern that flying the Christian flag would violate the Establishment Clause.[150] The Court did not likely address this concern because the Court held that the flag program was private speech, and when the government regulates private speech, there can be no Establishment Clause violation.[151] This section will start by arguing that the three-factor test could be improved by modifying the factors and accounting for potential misuse of the government speech doctrine. As a result, the new test would be easier to apply, reach more consistent results, and prevent misuse by setting the limits of the doctrine. Next, this section will argue that the Court should have addressed the defendant's Establishment Clause concerns to prevent future litigation and to guide local governments.

A. Proposing an Altered Version of the Three-Factor Test

The Supreme Court should alter the current three-factor test to resolve government speech cases. This "altered test" would rely on the same fact driven, totality-of-the-circumstances foundation of the current three-factor test, but would use different factors and would be followed by a check for potential misuse when the speech at issue is determined to be government speech.[152] Compared to the current three-factor test, this altered test should reach more consistent results, be easier to apply, and set the outer limits of the doctrine by limiting the potential misuse of the government speech

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[147] *Id.* at 1609–10.
[148] *Id.* at 1592–93.
[149] *See id.* at 1590–93.
[150] *See id.* at 1589–93.
[151] *See id.*
[152] *See id.* at 1589–90.

doctrine.[153] Specifically, it relies on the same context and fact driven inquiry to determine whether the government or a private party is speaking, but focuses on three different factors: (1) public perception; (2) the extent of government control; and (3) the government's intent to speak. Unlike the current test, these new factors would all carry equal weight; therefore, if two of the factors point towards a certain type of speech, those two factors would automatically outweigh the third factor without having to consider the weight of each factor relative to the others.

Finally, if the Court determines that the speech in question is government speech, the Court would analyze the speech by considering three additional factors: (1) whether the speech impermissibly involves private citizens, (2) whether the government is using the government speech doctrine as a means of censorship, and (3) whether the speech is being used to interfere in elections. If any of these issues are present, then the court would not afford the speech the protections of the doctrine and would instead apply traditional public forum analysis.

1. Private or Government Speech? Considering Public Perception, Government Control, & Government Intent

The first factor for the altered test is public perception. This factor is used in the current test, but the altered test seeks to address specifically how importance of public perception has varied throughout the history of government speech cases.[154] Some scholars and justices have gone as far as to argue that public perception should be the only factor considered by the Court.[155] On the other hand, Justice Alito argued that public perception is completely irrelevant to the inquiry because perception is not reality and, therefore, unhelpful in determining whether the government is speaking.[156]

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[153] *See* DeNigris, *supra* note 8, at 151–52 (2010) (summarizing the issues surrounding the potential misuse of the government speech doctrine); *id* at 1599–1601 (Alito, J., concurring).

[154] *See* Hemel, *supra* note 1, at 42–52 (summarizing the use of public perception throughout government speech cases).

[155] *See id.* at 53–58 (arguing for a government speech test that only uses public perception as a factor); DeNigris, *supra* note 8, at 160–64 (arguing for a reasonable observer-based government speech test); *Summum*, 555 U.S. at 487 (Souter, J., concurring) (suggesting the court move to a reasonable observer test).

[156] *Shurtleff*, 142 S. Ct. at 1597–98 (Alito, J., concurring). Some scholars have criticized a public perception test for other reasons. *See* Soper, *supra* note 5, at 1266–67 (arguing that issues with a reasonable observer or public perception focused test include it being overly flexible, it not limiting the government speech doctrine any further than the current test, and it likely finding government speech in situations where the government did not

This analysis is shortsighted. Many politicians and government actors speaking for the government operate with the political ideology that perception *is* reality.[157] In fact, in many instances, perception matters more than reality.[158] For example, it is common knowledge that all Presidents have speech writers, but citizens still wholeheartedly attribute presidential speech to the President. It is irrelevant to the population whether the President believes the subject is more nuanced or even holds a different personal view. For all intents and purposes, this speech is the President's actual speech. The real issue with public perception is not whether it is real, but that public perception is very subjective and hard to quantify.[159] To

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intend to speak, allowing the government to regulate what it had not originally intended to).

[157] *See* Jane Mayer, *The Secret Papers of Lee Atwater, Who Invented the Scurrilous Tactics that Trump Normalized*, NEW YORKER, May 6, 2021, https://www.newyorker.com/news/news-desk/the-secret-papers-of-lee-atwater-who-invented-the-scurrilous-tactics-that-trump-normalized (discussing how Lee Atwater's political ideology centered around perception being reality was further explained in previously unknown papers and how the modern Republican party has used these tactics); Simon Kelner, *Perception is Reality: The Facts Won't Matter in Next Year's General Election*, INDEPENDENT, Oct. 30, 2014, https://www.independent.co.uk/voices/comment/perception-is-reality-the-facts-won-t-matter-in-next-year-s-general-election-9829132.html (discussing Lee Atwater's political strategy based around the idea that perception is reality and how it will be used in the 2016 election to make facts not matter to some of the voting public).

[158] *See* Jaynie L. Gaskin et. al., *Perception or Reality of Body Weight: Which Matters to the Depressive Symptoms*, 150 J. AFFECTIVE DISORDERS 350, 355 (2013) (concluding that perceived weight may be more important than actual weight in relation to depression); Christopher L. Ambrey et. al., *Perception or Reality, What Matters Most When it Comes to Crime in Your Neighborhood?*, 119 SOCIAL INDICATORS RESEARCH 877, (2014) (examining how perceptions of crime influence an individual's well-being and concluding that people perceive more local crime than actually exists and that "perceived rates of crime have an adverse impact on life satisfaction beyond those associated with real crime."); Terry Coonan, *When Perception is Reality: 287(g) – A solution in Search of Problem*, 12 AM. SOC. CRIM. 283, 283 (2013) (examining how public perceptions about illegal immigration drive policy decisions even though those perceptions are not support by empirical findings); David Blitz, *The Optics: Perception Matters More Than Reality in Business*, FORBES BUSINESS COUNCIL, (Sept. 14, 2020), https://www.forbes.com/sites/forbesbusinesscouncil /2020/ 09/14/ the-optics-perception-matters-more-than-reality-in-business/?sh=132eb5ea3726 (arguing that the optics of how a business is being ran is more important and impactful to the public than how a business is actually being ran); Olga V. Mack, *Perception is Reality: The Benefits of Understanding Perception*, ABOVE THE L., (May 2, 2022), https://abovethelaw.com/2022/05/perception-is-reality-the-benefits-of-understanding-perception/ (arguing that understanding client's perception is a vital part of being an effective lawyer).

[159] *See* Hemel, *supra* note 1, at 50, 53–55, 58–59 (summarizing issues with the public perception factor); *see also* Soper, *supra* note 5, at 1266–67; *Shurtleff*, 142 S. Ct. at 1597–98 (Alito, J., concurring).

resolve this, the Court should use the current history factor as an objective component of public perception. For example, in *Shurtleff*, the Court could conclude that public perception weighs in favor of government speech because of the historical use of flags to communicate government messages.[160] Additionally, Courts should use blind surveys to gauge public perception even though it could be burdensome. Similar surveys have been used in trademark infringement cases.[161] These changes would make the public perception factor more objective, thus ensuring that it is of equal importance as intent and control.

The second factor of the altered test is the extent of editorial control the government has over the speech. Control has been critical in government speech precedent and a determinative factor in several cases.[162] The Court cannot consider the government as a speaker communicating a message if it

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[160] *See Shurtleff*, 142 S. Ct. at 1591. The use of history and public perception is also present in the effect prong of the *Lemon* test that is used to determine whether government has violated the Establishment Clause. Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1117 (10th Cir. 2010) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)). The effect prong requires the court to analyze whether a religious display has the effect of endorsing or disapproving of a religion through the lens of an objective observer who is knowledgeable about the history, purpose, and context of the religious symbol. *Id.* at 1119. However, history should be more persuasive for Establishment Clause cases than government speech cases because unlike the government speech doctrine, there is an explicit constitutional basis, meaning that historical practices were always beholden to the Establishment Clause. *See Id.* at 1120.

[161] *See* Hemel, *supra* note 1, at 61–66 (arguing that courts should use survey evidence in government speech cases); *id.* at 66–77 (offering a potential methodology for using survey evidence in government speech cases); Katie Brown et. al., *An Empirical Examination of Consumer Survey Use in Trademark Litigation*, 39 LOY. L.A. ENT. L. REV. 237, 237–38 (2019) (examining the use of consumer surveys in trademark cases); Hazel Mae B. Pangan, *Likelihood-of-Confusion Surveys as Evidence in Trademark Litigation*, 4 INTELL. PROP. & TECH. L.J. 19, 19 (2012) (discussing factors contributing to the admissibility of consumer surveys in trademark cases).

[162] *See e.g.*, *Shurtleff*, 142 S. Ct. at 1592–93; *Summum*, 555 U.S. at 472–74; New Hope Fam. Services, Inc. v. Poole, 966 F.3d 145 (2d Cir. 2020) (determining that a state-authorized faith-based adoption agency that violated state regulations prohibiting discrimination was not protected by the government speech doctrine because of historical context and the state's lack of involvement with and control over the agency); International Women's Day March Planning Committee v. City of San Antonio, 619 F.3d 346 (5th Cir. 2010) (finding that a city's financial support of marches celebrating civil rights leaders was not government speech because the city did not exercise control over the messaging of the marches); Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) (finding that memorial crosses erected by the highway patrol association were government speech even if they were privately financed because they were on government land and the government controlled them).

does not have editorial control over the message or mode of speech.[163] Similarly, when the government is regulating private speech, it will likely not have editorial control over the messaging.[164] However, the control factor should not solely determine government speech because it is susceptible to misuse.[165] When the government wants to censor private speech, it could easily invoke the government speech doctrine to assert control over the speech.[166] This issue is resolved, as explained later, by assigning factors equal weight and adding a follow-up analysis focused on potential misuse.

The third factor of the new test is the intent of the government. This factor determines whether the government intends to communicate a message as the government. Courts have never used this factor in previous government speech cases, but it has been mentioned and implicitly referenced.[167] Additionally, the intent of the government already plays a key

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[163] Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TULANE L. REV. 571, 575 (2011) (arguing that "'effective control' over speech is the primary distinguishing factor in assigning responsibility for speech" as governmental or private).

[164] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1775, 1782 (1987) (arguing that state should have more control over speech when acting as manager of its own institutions, as opposed to when governing general public).

[165] *See Shurtleff*, 142 S. Ct. at 1596 (Alito, J., concurring) (analogizing the potential misuse of the government speech doctrine to a 1765 English law that required plays to be approved by the king); DeNigris, *supra* note 8, at 152–56 (summarizing fears about using the government speech doctrine for censorship); Papandrea, *supra* note 5, at 1221 ("a 'control test' for government speech 'could incentivize the government to increase its control over speech, thereby deem the speech its own, and then use its freedom from First Amendment constraints to discriminate against disfavored speakers and messages at will.").

[166] *See id.* Additionally, this would allow the government to spread propaganda without fear of violating the First Amendment. See Caroline M. Corbin, *The Unconstitutionality of Government Propaganda*, OHIO ST. L.J. 815, 825 (2020) ("Because the Free Speech Clause does not reach government speech, it also does not reach government propaganda."); *see also* Carlo M. Horz, *Propaganda and Skepticism*, 65 AM. J. POL. SCI. 717, 731–32 (2021) (examining literature on how repression, diversion, and crisis effect the effectiveness of propaganda and providing "a theoretical framework that is able to explain a wide range of empirical findings on the relationships between repression, diversion, and crises, on the one hand, and propaganda, on the other.").

[167] *See e.g.*, *Shurtleff*, 142 S. Ct. at 1601 (Alito, J., concurring) ("The city did nothing to indicate an intent to communicate a message."); *Matal*, 137 S. Ct. at 1748 ("Tam has presented nothing showing congressional intent. . . ."); Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 280–82, 288 (4th Cir. 2008) (determining that the school denying Page access to its information distribution systems which it used to spread information about its opposition to the Put Parents in Charge Act did not violate Page's First

role in public forum and religious display cases.[168]

Logically, when the government demonstrates intent to speak, the Court will likely find that it is government speech. While intent is a separate factor, some of the analysis and facts identified when considering the control and public perception factors may help determine the government's intent. However, the policy related to the speech and the relationship between the person communicating the government's message and the government would primarily determine the government's intent. Importantly, this intent factor is relevant in preventing potential misuse of the doctrine.

In implementing the altered test, the Court would weigh these three factors and determine if the government is speaking. All factors have equal weight, so if two of the factors lean towards a type of speech, then the speech constitutes that type of speech, regardless of how convincingly the third factor says otherwise. As a result, intent will likely prove the deciding factor in the altered test because it relies on important components of the other two factors: perception and control.

2. Determining Misuse

If the Court determines that the speech at issue is government speech, and thus, free from First Amendment scrutiny, then it should determine whether the government is using the doctrine as pretext to

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Amendment rights because it constituted government speech because of the government's intent behind and control of the information distribution systems).

[168] James Walraven, *The Shurtleff Conundrum: Resolving the Conflict in Government-Speech and Public Forum Analysis*, 18 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 6–7, (2022) (explaining how the government's intent plays a key role in forum analysis); David S. Day, *The Public Forum Doctrine's "Government Intent Standard": What Happened to Justice Kennedy?*, 2000 L. REV. MICH. ST. U. DET. C.L. 173, 177 (2000) ("Under the modern public forum doctrine, the incompatibility standard has been largely replaced by a government intent standard. Under it, government property is a nonpublic forum and closed to free speech as long as the government intends it to be closed."); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."); Hopper v. City of Pasco, 241 F.3d 1067, 1075 (9th Cir. 2001) ("As the Supreme Court observed in *Cornelius,* government intent is the essential question in determining whether a designated public forum has been established."); Corp. Presiding Bishop Church Jesus Christ Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) ("Rather, *Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."); McCreary Cnty., Ky. v. Am. C.L. Union Ky., 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause.").

interfere with either elections or private individuals' speech rights. Justice Alito's concerns about government speech utilizing private actors for censorship purposes and scholar's general concerns about the potential misuse of the doctrine are insightful.[169]

The Court should first consider whether the government speech interferes with or is related to elections. If so, then the Court should not allow the speech to be shielded from the First Amendment and should instead undergo public forum analysis.[170] Election related interference must be held to this standard because voting provides a check on government speech; if the Court allows the government to use the government speech doctrine as a shield from voting interference, then the foundation of the doctrine itself erodes.[171]

Next, the court should determine whether the government speech was intended to interfere with private citizen's speech rights. Governments most commonly involve private actors when the government enlists them to help shape or deliver its message.[172] Governments can easily abuse this form of speech to censor other parties. Therefore, courts should carefully examine this type of government speech to determine the exact nature of the involvement of private citizens. Similarly, the government could also use the doctrine as a form of propaganda to either buy out or crowd out private citizens from the marketplace of ideas.[173] If there is evidence that the

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[169] *See supra* notes 65–67, 111 and accompanying text.

[170] Public forum analysis begins with the court determining the category of the forum: (1) traditional; (2) designated; and (3) nonpublic. *See* Day, *supra* note 168 at 175; Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 625 (2d Cir. 2005). The type of forum determines what are permissible speech regulations. See id. For example, in a public forum the government can only suppress speech if it furthers a compelling state interest. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45-46 (1983). Importantly, regardless of forum designation, the government may not discriminate based on viewpoint when restricting speech in a public forum. *Rosenberger*, 515 U.S. at 828–29 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) ("The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint.**").**

[171] *See* Zenor, *supra* note 2, at 13; Norton, *supra* note 1, at 904 ("Political accountability mechanisms such as voting and lobbying then provide the sole recourse for those displeased by their government's expressive choices."); *Shurtleff*, 142 S. Ct. at 1589 ("The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.").

[172] *Shurtleff*, 142 S. Ct. at 1599–600 (Alito, J., concurring).

[173] *See* sources cited *supra* note 71; Corbin, *supra* note 166, at 818–20 (arguing that government speech analysis should include a determination of whether the speech is

government's intent in speaking was to silence an idea or to promote its own idea via excessive messaging, then the Court should also apply public forum analysis. Finally, in situations where the government took efforts to conceal that it is the speaker, the court would also apply forum analysis.[174] In effect, these checks for misuse of the doctrine would set its outer limits and ease critics' concerns.

In conclusion, the altered test would be insightful for courts. It would be easier to apply because each factor is equally important, unlike the current test. This would lead to more consistent results and less litigation. Finally, having courts actively look for misuse would preemptively solve potentially grave problems and by effectively setting the outer limits of the doctrine.

B. The Court Should Have Addressed Boston's Establishment Clause Concerns

In the majority opinion, Justice Breyer missed an opportunity to address the Boston Property Management Department's Establishment Clause concerns.[175] Instead, the majority opinion only focused on whether the flag program constitutes government speech or private speech.[176] The Court determined that the program was private speech, which cannot violate the Establishment Clause, and thus, found it unimportant to address any concerns about the Establishment Clause.[177] However, Justices Kavanaugh and Gorsuch considered this issue important enough to write concurring opinions solely addressing Boston's misunderstanding of the Establishment

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propaganda which interferes with First Amendment tenants, and if so then the speech should be subject to strict scrutiny).

[174] This is essentially the reverse of the transparency requirement that has been suggested by many scholars. *See* sources cited *supra* note 78. Instead of requiring that the government transparently claim the speech as its own to invoke the doctrine, the court should look to see if the government intentionally obfuscated the source of the speech. When this is the case it should be presumed that there was nefarious intent, and thus, the speech should not be protected by the doctrine.

[175] *See Shurtleff*, 142 S. Ct. at 1587–93. However, since this comment was written there has been a case clarifying the Establishment Clause. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022) (holding that the school district violated Kennedy's rights by punishing him for praying during school football games and replacing the Lemon and endorsement Establishment Clause tests with "analysis focused on original meaning and history").

[176] *Id.* at 1589–93.

[177] *See id.* at 1593.

Clause.[178] The concurrences implied that even if the flag program was government speech, flying a Christian flag would not be unconstitutional.[179] Additionally, other Justices addressed Boston's misunderstanding of the Clause during oral arguments.[180] Even though it was unnecessary to resolve the case, the majority opinion should have addressed the subject.

The interplay between the government speech doctrine and the Establishment Clause has caused a plethora of litigation and left local governments with unclear guidelines.[181] Both the doctrine and the Establishment Clause have led to constantly changing tests and guidelines, making it difficult for circuit courts to reach consistent decisions and for local governments to act in accordance with the law.[182] *Shurtleff* would have been the perfect case to clarify this area of the law because Boston's actions

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[178] *Id.* at 1594–95 (Kavanaugh, J., concurring); *id.* at 1603–10 (Gorsuch, J., concurring). Scholars have found the intersect important and unclear as well. *See* Nahmod, *supra* note 78, at 2097-98 (discussing Justice Souter's concerns about "the definition and scope of government speech, the closely related question of political accountability, and the interplay between the government speech doctrine and the Establishment Clause."); Kelly S. Terry, *Shifting Out of Neutral: Intelligent Design and the Road to Nonpreferentialism*, 18 B.U. PUB. INT. L.J. 67 (2008) (arguing that Chief Justice Roberts and Justice Alito are likely to join Justices Scalia, Thomas, and Kennedy to create the 5-4 majority needed to overturn decades of Establishment Clause precedent and institute a new standard of "nonpreferentialism").

[179] *See id.* (implying that the even if the flag program was government speech the Establishment Clause would not have been violated by referring to the commissioner's concerns as mistaken and wrong).

[180] Transcript of Oral Argument at 80, 81–82, Shurtleff v. City of Boston, Massachusetts, 142 S. Ct. 1583 (2022) (No. 20-1800) (Justices Kagan and Sotomayor asking about the defendant's Establishment Clause concerns).

[181] *See* David W. Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 91–92 (2004) ("[T]he inconsistency in the Court's Establishment Clause jurisprudence permeates far beyond the walls of the Court. Lower courts are left clueless as to which test should be employed, much less how to apply a given test."); Olree, *supra* note 1, at 371–73, 377–78, 428–29; *see also* Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003) (holding that the Establishment Clause was violated when the chief justice of the state supreme court erected a Ten Commandments monument, built with private funds, in a state judicial building); ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772, 776–78 (8th Cir. 2005) (holding that the city's display of a Ten Commandments monument did not violate the Establishment Clause because the monument made passive use of the Commandments "to acknowledge the role of religion in our Nation's heritage); Books v. City of Elkhart, 235 F.3d 292, 307–08 (7th Cir. 2000) (holding that a Ten Commandments monument on city property improperly advanced or endorsed religion in violation of the Establishment Clause).

[182] *See id.*; *Shurtleff*, 142 S. Ct. at 1608–10 (Gorsuch, J., concurring).

were motivated by fear of violating the Establishment Clause, and the case hinged on whether the flag program was government speech.[183] If it had addressed these concerns, the Court would have prevented litigation that burdens lower courts. Additionally, circuit courts would have received more explicit instructions and been able to reach more consistent results.[184] Moreover, addressing concerns about the Establishment Clause would have alleviated local governments' concerns about the potential consequences of future policy decisions. By failing to address these concerns, even if Boston alters its flag program to be consistent with government speech, it is still unclear whether flying religious flags will violate the Establishment Clause.[185] Thus, it would have been tremendously helpful to circuit courts and local governments if the majority chose to address Boston's Establishment Clause concerns.

IV. CONCLUSION

In *Shurtleff*, the Supreme Court continued to use the three-factor test from *Summum* and *Walker* to resolve government speech cases. Unfortunately, this test creates inconsistencies and does not account for potential misuse, and the Court missed a valuable opportunity to improve upon it. The Court should consider changing the factors of the test to consider (1) history; (2) public perception; and (3) the intent of the government. If the test determines that the speech at issue is government speech, the court should look for specific types of misuse. If that misuse is present, the speech should not be protected from the First Amendment. This would result in more consistent decisions, less confusion for circuit courts, and would set an outer limit for the doctrine aimed at preventing misuse, censorship, and election interference. Furthermore, the Court had the opportunity but failed to clarify the relationship between the government speech doctrine and the Establishment Clause.

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[183] *See Shurtleff*, 142 S. Ct. at 1588–89.

[184] *See* sources cited *supra* note 167; Olree, *supra* note 1, at 386–410 (summarizing the different circuit court tests for government speech cases and examining how the circuits have reached different results for cases with similar facts).

[185] However, it is important to note that the majority opinion might have not addressed this issue because it would be dictum, as it is not necessary to resolve the case.