OPINION | COMMENTARY

Should a Religious Flag Fly Over a Government Building?

The Supreme Court takes up a case that could further undermine the ‘Lemon test’ that prohibits government-religion interaction.

By William J. Haun
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A religious volunteer group in Boston, Camp Constitution, asked permission to fly a flag with the Latin cross to commemorate the signing of the U.S. Constitution and the city’s religious history. Although Boston had approved 284 flag-raising requests without a single rejection in the preceding 12 years, city officials denied this request because the flag was described as religious. Does religion not belong in public life? This question underlies Shurtleff v. City of Boston, which will be argued before the Supreme Court on Tuesday. The justices’ answer to that question should be based on America’s longstanding religious pluralism—not on confused legal doctrines.

For decades Boston has flown various flags over City Hall. According to the city’s website, it does so to “foster diversity” and “strengthen connections among Boston’s many communities.” The city says it welcomes “all applicants.” Flags from many foreign countries have been raised, as have those of organizations such as the Chinese
Progressive Association, the Juneteenth Observance Foundation and Boston Pride, and banners reflecting the city’s cultural heritage, such as the Bunker Hill flag, which contains St. George’s cross.

Boston’s refusal does more than single out religion for disparate treatment. Boston’s commissioner of property management said the city must deny requests to fly “non-secular flags” to comply with “well-established First Amendment jurisprudence.” In other words, Boston’s leaders think the Constitution requires excluding religious flags.

The problem is bigger than Boston bureaucrats. Maine officials, in another case before the Supreme Court this term, think the Constitution requires excluding religious schools from a tuition-assistance program. New York City administrators think the Constitution requires prohibiting religious groups from renting public-school spaces after school hours for religious activities. Some city transit boards think the Constitution requires banning religious advertisements on public transportation. And some state courts invoke the Constitution when they deny historic houses of worship the same preservation grants available to other historic structures.

The court’s decision in Lemon v. Kurtzman (1971) is chiefly responsible for conflating religious censorship with neutrality. The “Lemon test” strove for neutrality toward religion by empowering the court to determine subjectively what might constitute an endorsement of religion, or excessive government-religion interaction. That confused the law, which has led to local governments insisting on censoring religion in the name of religious neutrality.

Justices of diverse interpretive philosophies have disparaged Lemon as divorced from the myriad ways in which government and religion interact in a pluralistic society. A few years ago, seven of the nine justices endorsed a “more modest” approach—one rooted in our national history and cultural expressions of religious traditions. Applying that historical approach here wouldn’t only end Boston’s religious censoring; it would put the law back in line with American traditions of religious pluralism.

The stakes of the ruling in Shurtleff are as much about American culture as about the law. Boston’s behavior is a result of a misunderstanding of church-state separation. Lemon fostered the idea that true neutrality toward religion requires the same governments that celebrate everything from National Catfish Day to Presidents Day to pretend that the religious roots of American culture don’t belong in polite society. But ignoring the religious dimension of American life isn’t neutral—it is unnatural. It furthers the notion
that religion is at best unimportant to our culture, or worse, a source of shame. Denying or concealing the religious traditions of America’s communities distorts who we are, where our rights come from, and how we understand ourselves.

Not everyone will approve of Camp Constitution’s flag—just as others may be offended by seeing the Chinese or Cuban flag flying outside Boston’s City Hall. But those who celebrate the city’s religious heritage are as much a part of Boston as its other communities are, and we have the First Amendment to ensure government can reflect its peoples’ religious culture, not sanction its erosion.

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