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Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test

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INTRODUCTION

The treatment of Establishment Clause challenges to displays of religious symbolism by the Supreme Court and the lower courts is notoriously unpredictable: a crèche is constitutionally acceptable if it is accompanied by a Santa Claus house and reindeer, a Christmas tree, and various circus figures,[1] but unacceptable if it is accompanied by poinsettias,[2] a "peace tree,"[3] or a wreath, a tree, and a plastic Santa Claus.[4] A menorah may be displayed next to a Christmas tree,[5] or next to Kwanzaa symbols, Santa Claus, and Frosty the Snowman,[6] but not next to a crèche and a Christmas tree.[7] A number of commentators have suggested that this disarray can be blamed largely on the chaotic state of the Supreme Court's Religion Clauses doctrine.[8]

Since the 1980s the Supreme Court has recognized that the public display of religious symbols may, in some circumstances, violate the Establishment Clause.[9] The Supreme Court's guidance as to when such a display will violate the Establishment Clause has been vague, however; in applying what has come to be known as the "endorsement test," the Court has essentially declared that public displays of religious symbols are impermissible if they convey a message of endorsement of religion.[10] Yet,

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1. Lynch v. Donnelly, 465 U.S. 668, 671, 679–85 (1984).

2. County of Allegheny v. ACLU, 492 U.S. 573, 598–600 (1989).

3. ACLU v. County of Delaware, 726 F. Supp. 184, 189–90 (S.D. Ohio 1989).

4. Amancio v. Town of Somerset, 28 F. Supp. 2d 677, 678, 681 (D. Mass. 1998).

5. *Allegheny*, 492 U.S. at 614–20 (plurality opinion).

6. ACLU v. Schundler, 168 F.3d 92, 95, 107 (3d Cir. 1999).

7. ACLU v. Schundler, 104 F.3d 1435, 1438, 1446–50 (3d Cir.), *cert. denied*, 520 U.S. 1265 (1997).

8. *See, e.g.*, Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 722–26 (2001); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117–34 (1992); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 276–301 (1987); *cf.* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 701–02 (1986) (discussing the "disarray" of the Court's religion cases).

9. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). The first Supreme Court case to consider the constitutionality of a display of religious symbolism was *Stone v. Graham*, 449 U.S. 39 (1980). *Stone* was a brief, per curiam opinion holding unconstitutional a Kentucky law requiring the posting of the Ten Commandments in public schools. *Id.* at 41–43. Because the opinion included very little reasoning to explain that result, the 1984 case of *Lynch v. Donnelly*, 465 U.S. 668 (1984), may perhaps be seen as the true starting point for the Court's religious symbolism jurisprudence. The Supreme Court revisited some of the issues raised by *Stone*, albeit not in public schools, last Term in *Van Orden v. Perry*, 125 S. Ct. 2854 (plurality opinion) (2005) (upholding constitutionality of Ten Commandments Display on the grounds of the Texas State Capitol) and *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (holding unconstitutional a Ten Commandments display on the walls of two county courthouses).

10. In its two most recent cases involving religious symbols—specifically the Ten Commandments—the Supreme Court did not explicitly apply the endorsement test, but its analysis in those cases was functionally the same as the endorsement test analysis. In *McCreary County*, the Court held that two counties' display of the Ten Commandments in their courthouses evinced a religious purpose and therefore violated the Establishment Clause. 125 S. Ct. at 2745. This holding

beyond stating that it is necessary to examine the context of the display, the Supreme Court has failed to provide a satisfactory way of determining what message a given religious symbol or set of symbols actually conveys. This failure has led to a widely recognized inconsistency, confusion, and apparent subjectivity in the Supreme Court and lower court cases dealing with public displays of religious symbolism.

This Article draws upon linguistic theory to explain why the task of discerning the meaning of a display of religious symbolism has proven so unmanageable. In particular, it draws on the branch of linguistic theory known as "speech act theory," as well as some postmodern critiques of, and elaborations on, speech act theory.[11] The defining feature of speech act theory, as I use the term here, is that it emphasizes the *effects* of linguistic utterances and the *contextual features* that give rise to those effects, rather than the intent behind the utterances. These features of speech act theory make this branch of linguistic theory particularly relevant to the analysis of meaning in religious symbol cases, because the endorsement test is similarly concerned primarily with the (endorsing) effect of religious symbolism and with the contextual features that may create or negate an endorsement effect.

Approaching the endorsement test through the lens of speech act theory leads to the conclusion that any constitutional test that is concerned with determining the "meaning" of religious displays will ultimately fail to produce a stable, predictable jurisprudence. This is because meaning, in those cases, must rely on the context of the display, yet context, itself, is inherently unstable, elusive, and incapable of formulation into clear legal rules. Moreover, the difficulties stemming from the endorsement test's reliance on

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is consistent with the endorsement test, which includes a purpose prong. *Cf.* Russelburg v. Gibson County, No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, at *2 (S.D. Ind. Sept. 7, 2005) (noting that the Court in *McCreary County* "affirmed the lower courts' use of the *Lemon* test"). In *Van Orden*, Justice Rehnquist's plurality opinion did not apply any particular test but instead looked to "the nature of the monument and . . . our nation's history." 125 S. Ct. at 2861 (plurality opinion). Justice Breyer, whose concurrence provided the necessary fifth vote, also did not apply the endorsement test but engaged in a fact-intensive, contextual analysis to discover whether a religious message was conveyed by the display. *Id.* at 2868–70 (Breyer, J., concurring in judgment). This analysis was functionally almost identical to the endorsement test. In the wake of *Van Orden*, lower courts have applied the endorsement test or a similar contextual analysis to Establishment Clause challenges to religious symbols. *See, e.g.*, ACLU Nebraska Found. v. City of Plattsmouth, 419 F.3d 772, 776 (8th Cir. 2005); O'Connor v. Washburn Univ., 416 F.3d 1216, 1224 (10th Cir. 2005).

The Supreme Court has occasionally applied the endorsement test outside the context of religious symbols, in cases where the alleged governmental support for religion was primarily symbolic or intangible rather than financial. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305–10 (2000) (applying the endorsement test to student-led prayer at a high school football game); Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 837–46 (1995) (applying the endorsement test to funding by state university of a proselytizing religious student organization); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (applying the endorsement test to use of school facilities by a religious organization).

11. I employ the term "speech act theory" for simplicity, but it is both underinclusive and overinclusive as I use it here. The theory of language set out in this paper draws most heavily on the writings of John Searle and J.L. Austin, while, in the interest of conciseness, ignoring many nuances of, and qualifications to, speech act theory elaborated by other important theorists. This paper also draws heavily on the writings of Jacques Derrida, Stanley Fish, and Jonathan Culler, which comment on, and are influenced by, Austin, but which may best be understood as fitting under the general rubric of poststructuralist or postmodernist theory, rather than of speech act theory per se.

context are aggravated in cases involving religious symbolism by two factors: first, the absence of any meaningful role for the potentially stabilizing element of subjective intent in the vast majority of religious symbol cases; and second, the diversity of religious perspectives, accompanied by an extreme lack of societal consensus regarding the appropriate degree of governmental acknowledgement of religion.

This critique of the endorsement test is unique in its linguistic focus and in its emphasis on the specific problem of context. Unlike most existing critiques, the analysis set out in this Article suggests that the indeterminacy and unpredictability in the application of the endorsement test are not a result of doctrinal incoherence, thinly veiled politics, or unconscious bias; rather, they are inherent in the problem of attempting to determine the social meaning of symbolic government action against the backdrop of extreme viewpoint plurality, without the potentially stabilizing element of subjective intent to guide the inquiry. This approach thus differs from existing critiques of the endorsement test, which have primarily focused on the problematic construct of the "reasonable observer," established by the Court as the perspective from which the meaning of a symbolic act or display is to be judged.[12]

Additionally, because this critique reveals difficulties inherent in any highly context-dependent inquiry into meaning, it may suggest a more general critique of attempts to build a jurisprudence based on the symbolic dimensions of government action. Such attempts have been the focus of the philosophy known as "expressivism," which has been the subject of intense scholarly consideration in recent years.[13] This Article is thus primarily an argument about one aspect of Establishment Clause doctrine; at the same time, however, it is situated within the literature on "expressivism" and "social meaning," examining the extent to which the central hermeneutic questions raised by those strains of thought have gone unanswered in the literature, just as they have in the specific context of the endorsement test. Nonetheless, this Article does not intend to question—as several recent and

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12. *See infra* Part II. *But see* STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF SEPARATION OF CHURCH AND STATE 246–82 (1997); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506 (2001); Smith, *supra* note 8.

13. The first presentation of an expressive theory of law is Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). Pildes and Anderson later articulated the theory most fully in Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) [hereinafter Anderson & Pildes, *Expressive Theories*]. In 2001, the Maryland Law Review sponsored a symposium on expressivism, which featured a number of fine articles on the subject. Symposium, *The Expressive Dimension of Governmental Action: Philosophical and Legal Perspectives*, 60 MD. L. REV. 465 (2001). Several articles have applied expressivism to specific issues or doctrinal areas. *See, e.g.*, Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000). For a critique of expressivism, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

important commentaries have done[14]—whether it is truly meaningful to understand the government to be "sending messages," whether it is accurate to view official action as having "expressive dimensions," or whether it is proper for Establishment Clause doctrine to be concerned with governmental "messages"; instead, this Article assumes that, at least in the narrow class of cases dealing with public displays of religious symbols, the endorsement test's focus on the symbolic or "expressive" harm caused by religious symbols is entirely appropriate. In other words, whatever the merits of expressivism generally, this Article takes the position that the religious symbolism cases, with their near-exclusive focus on symbolic or stigmatic harm, are the paradigmatic cases for applying the expressivist model.[15]

Part I of this Article introduces the endorsement test through a summary of the two principal Supreme Court cases dealing with religious symbols, *Lynch v. Donnelly*[16] and *County of Allegheny v. ACLU*,[17] as well as of *Capitol Square Review & Advisory Board v. Pinette*,[18] a case involving a religious symbol on public property in which the Court did not apply the endorsement test. Part I notes, and seeks to explain, the relatively insignificant role played by subjective intent in the endorsement test as it has been applied by the Supreme Court. Part II reviews the existing critiques of the endorsement test and one prominent defense of it—namely, the expressivist approach. Part III sets out the theoretical framework that this Article contends is most useful to understanding the failures of the endorsement test: speech act theory and its postmodern elaborations. It also explains in greater detail why these theories are relevant to the endorsement test. Part III leads to the central conclusion of this Article, which is that the instability and unmanageability of the endorsement test are attributable to its inevitable dependence on context. Part IV then demonstrates how the Supreme Court has struggled with context in its religious symbol cases. Finally, in Part V, this Article asks whether the problem of context can ever be satisfactorily resolved and, concluding that it cannot, proposes an incremental change that would help to regularize and rationalize the Supreme Court's jurisprudence in this area.

I. The Supreme Court's Analysis of Religious Displays under the Endorsement Test

A. Lynch, Allegheny, *and* Capitol Square

The two key Supreme Court cases establishing the test for determining the constitutionality of religious symbols are *Lynch v. Donnelly* and *County of Allegheny v. ACLU*. In *Lynch v. Donnelly*, the Supreme Court considered

14. A sharp and careful critique of expressivism was laid out in Adler, *supra* note 13; *see also* Smith, *supra* note 12.

15. *See infra* text accompanying note 91.

16. 465 U.S. 668 (1984).

17. 492 U.S. 573 (1989).

18. 515 U.S. 753 (1995).

the constitutionality of a nativity scene erected by the City of Pawtucket, Rhode Island as part of a Christmas display. According to the opinion of the Court, written by then-Chief Justice Burger, the display comprised, in addition to the crèche at issue in the case,

> many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that read[] "SEASONS GREETINGS."[19]

After conducting a historical review of the various ways in which the government has officially acknowledged religion or celebrated religious holidays in America, the majority found that the display, "viewed in the proper context of the Christmas Holiday season," was constitutional.[20] In particular, the Court stated that the display did not represent an attempt by the government to advocate for one particular religion, but rather merely celebrated the national holiday and depicted the historical origins of Christmas; as a result, the Court found that a secular purpose animated the display, that the display did not have the effect of impermissibly advancing religion, and that it did not lead to excessive entanglement of religion and government.[21]

Although the majority did not apply the (as yet unformulated) "endorsement test" in *Lynch*, Justice O'Connor, in her concurrence, outlined the analytical framework that would come to be known as the endorsement test. She concluded, for her part, that in this particular context, surrounded by secular symbolism and understood as part of a larger government celebration of the holiday season, the crèche did not represent a governmental endorsement of religion.[22] She then set forth the endorsement test, which, she stated, requires a determination whether the challenged display "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[23] In determining

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19. *Lynch*, 465 U.S. at 671.

20. *Id.* at 680.

21. *Id.* at 680–85. The majority in *Lynch* thus applied the Establishment Clause test set out by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), according to which a governmental act is unconstitutional if it has a primarily religious purpose or effect, or if it results in excessive entanglement between religion and government. *Lynch*, 465 U.S. at 679.

22. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

23. *Id.* at 688 (O'Connor, J., concurring). O'Connor's articulation of the endorsement test would also require a finding of unconstitutionality if the challenged government conduct conveys a message of *disapproval* of religion. *Id.* at 688–89 (O'Connor, J., concurring). The Court has not yet had occasion to apply this aspect of the endorsement test, however, and it has largely been ignored by commentators. It is likewise not discussed in this Article. *But cf.* O'Connor v. Washburn Univ., 416 F.3d 1216, 1221 (10th Cir. 2005) (considering an Establishment Clause challenge to a sculpture displayed at a public university, on the ground that the sculpture conveyed disapproval of the Roman Catholic Religion).

the meaning conveyed by a display under the test, Justice O'Connor explained, courts should examine both what the government "intended to communicate" and "what message the . . . display actually conveyed"; these subjective and objective components of the message correspond to the purpose and effect prongs of the *Lemon* test.[24]

In *County of Allegheny v. ACLU*, the Supreme Court considered the constitutionality of two different displays. The first was a crèche scene, which the county had permitted a private religious group to place on the "Grand Staircase" of the county courthouse during the Christmas holiday season.[25] In addition to the crèche itself, the display included a wooden fence surrounded by red and white poinsettias, two small evergreen trees decorated with red bows, and an angel holding a banner inscribed with the words "Gloria in Excelsis Deo."[26] The exhibit was accompanied by a sign that read, "This Display Donated by the Holy Name Society."[27] Each year the county sponsored a Christmas carol program, which was performed against the backdrop of the crèche scene.[28]

The second challenged display was an eighteen-foot-tall menorah, also owned by a private group, which was placed outdoors at the entrance to a government building, next to a forty-five-foot-tall Christmas tree owned by the city.[29] At the foot of the Christmas tree was a sign that read, "Salute to Liberty," and then continued: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."[30]

In a set of fragmented opinions, the Supreme Court in *Allegheny* held that the crèche display violated the Establishment Clause, whereas the menorah did not.[31] Although a majority of the Court signed on to Justice Blackmun's application of the endorsement test to declare the crèche display unconstitutional, there was no majority rationale for finding the menorah constitutional.

The most important aspect of the *Allegheny* case for purposes of this Article is the Justices' emphasis on the importance of context in determining whether the crèche display had the effect of endorsing religion. While asserting that "[t]here is no doubt . . . that *the crèche itself* is capable of communicating a religious message,"[32] the Court proceeded to examine the physical setting of the display to determine whether such a message actually

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24. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

25. County of Allegheny v. ACLU, 492 U.S. 573, 579 (1989) (plurality opinion).

26. *Id.* at 580 (plurality opinion).

27. *Id.*

28. *Id.* at 581 (plurality opinion).

29. The Christmas tree itself was not challenged as violating the First Amendment.

30. *Allegheny*, 492 U.S. at 582 (plurality opinion).

31. *Id.* at 601–02; *id.* at 619 (plurality opinion); *id.* at 636 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 655 (Kennedy, J., concurring only in judgment on the menorah).

32. *Id.* at 598 (emphasis added).

was conveyed. Because this crèche, unlike the crèche that was found to be constitutional in *Lynch v. Donnelly*, was displayed alone, without any countervailing secular symbols that might help to negate the endorsement effect, the Court found that it did, in context, endorse Christianity. The Court also pointed out that the poinsettia "frame" surrounding the crèche, "like all good frames, serve[d] only to draw one's attention to the message inside the frame. The floral decoration surrounding the crèche contribute[d] to, rather than detract[ed] from, the endorsement of religion conveyed by the crèche."[33] Thus, in *Allegheny*, the Court relied on the physical context of the religious symbol to determine that it had the effect of endorsing religion, whereas in *Lynch*, it had found that certain contextual features—that the display was surrounded by a Santa Claus, several reindeer figures, and other relatively secular elements—gave it a primarily secular, non-endorsing effect.

Similarly, in evaluating the constitutionality of the menorah, Justice Blackmun's opinion emphasized the presence of the Christmas tree nearby, which made the display into a generic holiday celebration, rather than a sectarian Jewish display celebrating Chanukah.[34] Justice Blackmun also noted that the sign saluting liberty further detracted from any possible inference of endorsement.[35] Finally, drawing on the historical context to better understand the meaning of Chanukah, Justice Blackmun pointed out that Chanukah, like Christmas, had both secular and religious dimensions;[36] in Justice Blackmun's view, this fact further lent credibility to the notion that the display was a nonsectarian holiday tribute rather than a governmental endorsement of religion. Justice O'Connor, in her concurrence, argued that the menorah is "the religious symbol of a religious holiday," thus disagreeing with Justice Blackmun's emphasis on the secular aspects of Chanukah, but nonetheless found the menorah display to be constitutional based on largely the same contextual factors that Justice Blackmun had highlighted.[37]

Both Justices Blackmun and O'Connor agreed that it is the perspective of the "reasonable observer" that must be taken into account in determining whether a given display conveys a message of endorsement.[38] As Justice

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33. *Id.* at 599. The frame had this effect, in part, because poinsettias are the "traditional flowers of the [Christmas] season." *Id.*

34. *Id.* at 614–18 (plurality opinion).

35. *Id.* at 619 (plurality opinion).

36. *Id.* at 613–20 (plurality opinion).

37. *Id.* at 634 (O'Connor, J., concurring).

38. *Id.* at 620 (plurality opinion) (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring)); *id.* at 635–36 (O'Connor, J., concurring). Justice Brennan, joined by Justices Marshall and Stevens, also emphasizing contextual factors but not exactly applying the endorsement test, argued that the menorah display was unconstitutional. *Id.* at 640–43 (Brennan, J., concurring in part and dissenting in part). Justice Stevens, joined by Justices Marshall and Brennan, wrote separately to express his view that there should be a presumption against the display of religious symbols on public property. *Id.* at 646–55 (Stevens, J., concurring in part and dissenting in part). Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, rejected the majority's endorsement approach altogether in favor of an approach that considers whether the display coerces or proselytizes; Justice Kennedy argued that both displays

O'Connor later formulated it, the concept of the reasonable observer is intended to reflect the fact that the Establishment Clause is concerned with "the political community writ large"; as such, the endorsement inquiry does not focus on "the actual perception of individual observers," but on a kind of idealized reasonable person.[39] This idealized person is assumed to know the religious meaning of the symbol at issue, whether the property where it is situated is public or private, and how the relevant forum has historically been used.[40]

But how, in practice, is one to determine or prove what the reasonable observer would perceive? Justice O'Connor has stated that the question whether the government has endorsed religion, while it may be partly elucidated by evidentiary submissions, is "in large part a legal question to be answered on the basis of judicial interpretation of social facts."[41] She has therefore emphasized that the endorsement test should not focus on real individuals, "who naturally have differing degrees of knowledge."[42] Thus, the reasonable observer's perception is not to be gleaned merely from surveying individuals in the community; beyond this, though, it is not easy to say how a judge is to put herself in the position of the reasonable observer. One can only conclude, perhaps, that one element of the "context" to which the endorsement test looks is the understanding or consensus of the society as a whole.

The result in *Capitol Square Review and Advisory Board v. Pinette*, another recent case examining the constitutionality of a religious symbol on public property, did not depend on application of the endorsement test, but all of the Justices still considered whether the relevant symbol, in its particular physical context, conveyed an endorsement of religion. In *Capitol Square*, the Supreme Court considered whether the Establishment Clause was violated by the display of an unattended cross by a private group in a traditional public forum, near the seat of government.[43] The Latin cross at issue was erected by the Ku Klux Klan in Capitol Square, "a 10-acre, state-owned plaza surrounding the statehouse in Columbus, Ohio."[44] The Capitol Square Review and Advisory Board, which was charged with regulating public access to the forum, had initially denied the Klan a permit to erect the structure in Capitol Square, because it believed that to allow erection of the

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were constitutional under a "proselytizing" approach. *Id.* at 655–79 (Kennedy, J., concurring in part and dissenting in part).

39. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in judgment). The objective observer may thus be analogized to the "reasonable person" in tort law. The difference, however, is that the "reasonable observer" is a device for interpreting symbols, not for determining what is negligent or nonnegligent conduct.

40. *Id.* at 780–81 (O'Connor, J., concurring in part and concurring in judgment).

41. Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

42. *Capitol Square*, 515 U.S. at 779 (O'Connor, J. concurring in part and concurring in judgment).

43. *Id.* at 757.

44. *Id.*

cross would result in an Establishment Clause violation.[45] The Board thus justified its content-based prohibition of the Klan's symbolic speech with its claimed compelling state interest of complying with the Establishment Clause.[46] While apparently recognizing that the Supreme Court had previously determined, in *Lamb's Chapel v. Center Moriches Union Free School District*[47] and *Widmar v. Vincent*,[48] that no Establishment Clause violation results when the state permits private religious speech in a true public forum, the Board had argued that in this case, the proximity of the forum to the "seat of government" might lead to the perception that the cross was sponsored by the state; a message of endorsement therefore might be conveyed if the cross were permitted.[49]

The Court disagreed with the Board's reasoning, holding that that the Board had violated the Klan members' free speech rights.[50] In so concluding, a plurality of the Court, composed of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, categorically stated that private religious speech in a true and properly administered public forum cannot violate the Establishment Clause, no matter what the proximity to the traditional seat of government or the likelihood of "mistaken" perceptions of government endorsement of religion by observers.[51] Justice O'Connor, by contrast, would have applied the endorsement test even in the context of private religious speech in a public forum, but she concurred in the judgment on the ground that no inference of endorsement was reasonable, given the public forum context.[52] Justice O'Connor opined that, because the "reasonable observer" should be presumed to know that the forum at issue was traditionally a public forum, open to all comers, that observer would not perceive an endorsement of religion in the City's decision to allow the Klan to use the space on the same terms as all other groups; she declined, however, to join the categorical assertion that there would be no set of circumstances under which private religious speech in a public forum could violate the Establishment Clause.[53]

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45. *Id.* at 758–59. The lower courts had found Capitol Square to be a traditional public forum, and the Supreme Court appeared to accept that finding. *Id.* at 759, 761.

46. *Id.* at 761.

47. 508 U.S. 384 (1993).

48. 454 U.S. 263 (1981).

49. *Capitol Square*, 515 U.S. at 763 (plurality opinion).

50. *Id.* at 770 (plurality opinion).

51. *Id.* (plurality opinion).

52. *Id.* at 772–73 (O'Connor, J., concurring in part and concurring in judgment).

53. *Id.* at 776–82 (O'Connor, J., concurring in part and concurring in judgment). As an example of a case in which private religious speech in a public forum could violate the First Amendment, O'Connor stated that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval," and then went on to suggest, somewhat vaguely, that "the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue" might result in an impermissible endorsement effect. *Id.* at 777–78.

Justices Stevens and Ginsburg dissented.[54] Justice Stevens believed that a message of endorsement was conveyed by the cross display due to the cross's proximity to the seat of government and the nature of unattended religious symbols on public property, which are easily taken to be supported by the government entity that controls the property.[55] Justice Ginsburg similarly found that the unattended nature of the cross near the statehouse, in the absence of a sufficient disclaimer, created an inference of endorsement.[56]

Although the result in *Capitol Square* did not involve an application of the endorsement test,[57] the central question in the case, and the dispute among the Justices, still revolved around whether the symbol of the cross, in its particular physical context, connoted an endorsement of religion. Thus, Justice Scalia, writing for the plurality, essentially held that the public forum context always negates any possible message of endorsement that might otherwise be derived from private religious speech on public property.[58] The concurrence and dissent, on the other hand, rejected the majority's per se rule but differed in whether they viewed the particular features of the physical context in the case at hand as supporting or negating an inference of governmental endorsement of religion.

Finally, in *Van Orden v. Perry*,[59] decided last Term, the Supreme Court did not explicitly apply the endorsement test to a display of the Ten Commandments on the grounds of the Texas State Capitol.[60] Instead, disavowing the appropriateness of any particular test, Justice Rehnquist, writing for the plurality, stated that the display had to be considered in light of "the nature of the monument and . . . our Nation's history" of official acknowledgement of religion.[61] Justice Breyer concurred in the judgment, providing the fifth vote to uphold the display.[62] In his concurrence, he also declined to apply the

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54. *Id.* at 797–815 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting).

55. *Id.* at 800–02 (Stevens, J., dissenting).

56. *Id.* at 817–18 (Ginsburg, J., dissenting). Justice Souter, joined by Justices O'Connor and Breyer, argued that although the City was not within its rights in denying the Klan a permit, the City could have more appropriately accommodated both Establishment Clause concerns and free speech concerns by requiring a disclaimer or erecting its own disclaimer making it sufficiently clear that the City did not endorse the message of the cross on its property. *Id.* at 793–94 (Souter, J., concurring in part and concurring in judgment).

57. Five justices in *Capitol Square*—some in concurrence and some in dissent—did, however, apply the endorsement test. *Id.* at 773–83 (O'Connor, J., joined by Souter, J., and Breyer, J., concurring in part and concurring in judgment); *id.* at 786–94 (Souter, J., concurring in part and concurring in judgment); *id.* at 799–803, 807–12 (Stevens, J., dissenting); *id.* at 817–18 (Ginsburg, J., dissenting).

58. *See id.* at 764–65 (plurality opinion) (distinguishing County of Allegheny v. ACLU, 492 U.S. 573 (1989), which also involved private speech, but not in a public forum).

59. 125 S. Ct. 2854 (2005) (plurality opinion).

60. *See id.* at 2859–64. *McCreary County v. ACLU*, the companion case to *Van Orden*, struck down two Ten Commandments displays on the ground that "the reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message." McCreary County v. ACLU, 125 S. Ct. 2722, 2738 (2005).

61. *Id.* at 2861 (plurality opinion).

62. *Id.* at 2868 (Breyer, J., concurring in judgment).

endorsement test, but he analyzed the display in light of the physical and historical context in order to determine whether a religious or secular message was conveyed—an analysis that is functionally equivalent to the endorsement inquiry.[63]

B. *The Role of Intent in the Religious Symbol Cases*

In outlining her version of the endorsement test, Justice O'Connor explained that a display may violate the Establishment Clause if it has the effect of endorsing religion (or a particular religion), or if the government has the intent of endorsing religion in erecting or permitting the erection of the display.[64] As Justice O'Connor observed in *Lynch*:

> [F]or [some listeners] the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message.[65]

For those who receive the former message, in other words, it seems no less accurate to say that that message is the "meaning" of the display. A demonstrable intent on the part of government actors to endorse religion may thus render a display unconstitutional, but the absence of religious intent will not be dispositive.

In practice, however, the role of intent in deciding the religious symbol cases has been decidedly minimized. When the Supreme Court held the crèche display unconstitutional in *Allegheny*, and when lower courts have held religious displays to be unconstitutional, they have usually done so based on the display's effect—the message "actually conveyed" by the display—and not based on the message the display was intended to convey.[66]

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63. *Id.* at 2868–70 (Breyer, J., concurring in judgment).

64. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring) ("[W]e must examine both what [the government] intended to communicate in displaying the crèche and what message the city's display actually conveyed.").

65. *Id.*

66. William M. Howard, Annotation, *First Amendment Challenges to Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1, §§ 11[b], 12[b], 13[b], 15[b], 16[b] (2003) (collecting cases). A notable exception is the line of Ten Commandments cases, which have often been decided on purpose grounds, perhaps due to the influence of *Stone v. Graham*, 449 U.S. 39 (1980). In *Stone*, the first Ten Commandments case decided by the Supreme Court, the Court held the display of the Ten Commandments in public school classrooms to be unconstitutional due to a lack of secular purpose. Indeed, the Court might be understood to have implied in that case that any unaccompanied display of the Ten Commandments would have an inherently religious purpose. *Id.* at 41–42 (noting that this was not a case in which the study of the Ten Commandments was integrated into a secular curriculum and that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact"). More recently, the Court struck down a Ten Commandments display as manifesting a religious governmental purpose in *McCreary County*, 125 S. Ct. at 2745.

There are most likely a number of reasons for the de-emphasis on subjective governmental intent in the religious symbol cases.[67] When discussing religious displays, it is usually difficult to talk about subjective intent in any meaningful way. First, as several other commentators have pointed out, it often seems strange, if not completely pointless, to talk about the intent of "the government," a body that is in fact composed of a variety of individuals who often have different and even conflicting motivations—indeed, some of those individuals might themselves have multiple motivations for acting as they do.[68] In the context of religious symbol displays, in particular, there is rarely even a written record of any such motivations, or anything akin to the legislative history from which courts may attempt to discern the purposes of those displays.[69] Second, even if there were such a record, a jurisprudence that focuses on governmental intent may invite officials to disguise or revise their "true" motives in order to create the appearance that they are acting in accordance with constitutional standards.[70] Third, as Steven Smith has lucidly pointed out, the question of what a given government official "intended to communicate" by her actions is often simply unanswerable: by passing legislation or approving a permit, an official often does not intend to communicate anything at all—she intends to effect a particular state of affairs. "Indeed," Smith argues, "it seems more plausible to think of legislators and executive officers as wielders of power than as mere senders of messages, and thus as primarily concerned with the substantive consequences of their acts rather than with the messages which such acts may happen to communicate."[71] Fourth, courts and commentators have pointed out that

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67. The problems created by a jurisprudence based on intent have been explicated by many commentators. *See, e.g.*, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Smith, *supra* note 8, at 284–86 (summarizing the "standard" problems inherent in requiring an inquiry into intent in constitutional law).

68. *See, e.g.*, Adler, *supra* note 13, at 1389 ("[L]egislatures, courts, agencies, and other legal institutions do not possess mental states, independent of the mental states of the persons that make up these institutions."); Ely, *supra* note 67, at 1212–14; Smith, *supra* note 8, at 284.

69. A rare but salient counterexample would be the recent decision of former Chief Justice Roy Moore of the Alabama Supreme Court to place the Ten Commandments in the courthouse. *See* Glassroth v. Moore, 335 F.3d 1282, 1286–87 (11th Cir. 2003). Indeed, cases involving Ten Commandments displays, in contrast to those involving other religious symbols, often tend to center on the purpose of the governmental actors in espousing, permitting, or requiring the display. *See, e.g.*, *McCreary*, 125 S. Ct. at 2737–41; Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771–72 (7th Cir. 2001); Books v. City of Elkhart, 235 F.3d 292, 302–04 (7th Cir. 2000).

Another case involving demonstrable governmental intent to endorse religion is *Doe v. Small*, 934 F.2d 743 (7th Cir. 1991), *vacated*, 964 F.2d 611 (7th Cir. 1992) (en banc) (reversing the district court's injunction as overbroad but not reversing the finding of unconstitutionality). In that case, the City Council of the City of Ottawa, Illinois officially passed a resolution stating, with respect to a privately owned religious holiday display, "NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Ottawa . . . that the Council *endorse* the activities of the Ottawa Jaycees in maintaining, erecting, dismantling, and storing" several large religious paintings that constituted the holiday display. *Id.* at 760. Unsurprisingly, the Seventh Circuit court of appeals found that the city's actions constituted an unconstitutional endorsement of religion. *Id.* at 746.

70. *See, e.g.*, Ely, *supra* note 67, at 1214–15; Smith, *supra* note 8, at 284–85.

71. Smith, *supra* note 8, at 286–87. One could, of course, counter that in the case of religious symbol displays, it is hard to imagine what "substantive result" a government official could have intended, other than conveying a particular message through the use of symbols.

some legislators are religious individuals, and that those individuals are often motivated to act, at least in part, in accordance with their religious beliefs; to suggest that legislation is unconstitutional merely because it is in part reflective of those religious beliefs is thus, in a sense, to deny religious individuals the right to participate in public life.[72]

Finally, the nature of religious displays, as physical structures often standing alone and thus "left to speak for themselves,"[73] dictates that the subjective intent of the party responsible for the symbol will figure less into the interpretive equation than it does when one is trying, for example, to interpret meaning in the context of a face-to-face conversation. Although all of the Supreme Court cases dealing with religious symbols illustrate this principle, perhaps the most striking example is *Capitol Square*. In contrast to Justice Scalia's insistence that "mistaken" perceptions—even reasonable ones—were not relevant to the Establishment Clause analysis,[74] the concurring and dissenting Justices argued that the privately owned religious symbol on public property strongly lent itself to an inference of endorsement, irrespective of whether the government intended to endorse religion or merely to maintain a public forum, because it stood alone—because, as Justice Ginsburg said, "[n]o human speaker was present to disassociate the religious symbol from the State," and because there was no other accompanying sign or symbol to elucidate its meaning.[75] In other words, the concurrences and dissents suggest that, in interpreting the meaning of a bare symbol, without any indicators of the motive or mindset of the party responsible for it, subjective intent is simply less relevant, not to mention less discernible.

Indeed, the very fact that *Capitol Square* was treated as a case involving a religious symbol at all demonstrates that subjective intent is relatively unimportant in religious symbol cases. The Latin cross at issue in that case was erected by the Ku Klux Klan, and the governmental actors involved were naturally aware of the Klan's sponsorship. Accordingly, the cross was undoubtedly more a symbol of a political viewpoint than of religious belief. Justice Thomas, the only Justice to discuss this fact in any detail, noted that, while he agreed with the majority's decision due to the way in which the case was presented—as an Establishment Clause case—the message of the cross was primarily political, not religious.[76] In fact, Justice Thomas demon-

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72. *See, e.g.*, Diamond & Koppelman, *supra* note 8, at 743 & nn.152–53 (citing Edwards v. Aguillard, 482 U.S. 578, 615 (1987), and McConnell, *supra* note 8, at 144).

73. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 801 (1995) (Stevens, J., dissenting).

74. *Id.* at 763–69 (plurality opinion); *see also id.* at 787 (Souter, J., concurring in part and concurring in judgment) (criticizing Justice Scalia's opinion on the ground that "[u]nless we are to retreat entirely to government intent and abandon consideration of effects, it makes no sense to recognize a public perception of endorsement as a harm only in that subclass of cases in which the government owns the display").

75. *Id.* at 817 (Ginsburg, J., dissenting); *see also id.* at 786–87 (Souter, J., concurring in part and concurring in judgment); *id.* at 801–02 (Stevens, J., dissenting).

76. *Id.* at 770–72 (Thomas, J. concurring).

strated through a brief recapitulation of the history of the symbol that the connotations of the cross, as used by the Klan, were only marginally religious.[77] The subjective intent of the Klan members who erected the cross on Capitol Square was not predominantly religious at all. In *Capitol Square*, subjective intent was thus arguably irrelevant in determining the meaning of the symbol, and to some extent, "mistaken" interpretations of it were indeed relevant—otherwise, it would be inexplicable that even Justice Scalia, in his plurality opinion, was willing to treat the cross as a religious symbol for purposes of the constitutional analysis.

Intent is therefore far less central to the task of discerning the meaning of religious displays than it is for discerning what one's conversation partner means in a face-to-face discussion, or perhaps even for understanding the legislative intent behind a statute based on its legislative history. As a result, context—the only other guidepost the Supreme Court has given to tell us how religious displays should be interpreted—comes to play a much more important role than intent in the religious symbolism cases.[78]

One might object that intent is always involved in discerning meaning, and in some sense this is true, though it is not the kind of subjective intent that I am referring to here. Whenever the government is understood to be sending a "message," it must be understood to have the intention of conveying that message. Similarly, Searle explains:

> When [someone] takes a noise or a mark on paper to be an instance of linguistic communication, as a message, one of the things that is involved in his so taking that noise or mark is that he should regard it as having been produced by a being with certain intentions. He cannot just regard it as a natural phenomenon, like a stone, a waterfall, or a tree.[79]

Indeed, according to one widely accepted understanding, to "mean" something is simply to intend that one's utterance cause the listener or reader to

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77. *Id.* (explaining that the cross was primarily associated with cross burning, which was a tool of intimidation, and that, although the cross briefly took on some religious significance, it was primarily a nonreligious symbol of hate).

78. Again, there is always a counterexample. In *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987), several city residents sued under the Establishment Clause to enjoin the City's use of a seal containing the word "Christianity" in its official stationery. The issue was whether the plaintiffs had standing to sue. Although the plaintiffs had come into contact with the seal through official mailings from the city, the city argued that the plaintiffs lacked standing, because the word "Christianity" was smudged and therefore illegible in the form in which it appeared on all the city stationery. The district court, reasoning that the plaintiffs could not be injured by the word if they could not read it, agreed that the plaintiffs did not have standing. The court of appeals reversed, however, stating that "the fact is that the word *is* still part of the seal." *Id.* at 691. The court continued, "[t]he fact remains that the word 'Christianity' with all of its connotations is part of the official city seal, and these appellants are reminded of that fact every time they are confronted with the city seal—smudged or not smudged." *Id.* at 692. In this case, the subjective intent of the individual who wrote the word "Christianity," or who placed it on the city seal, controlled the meaning of the smudge. Otherwise, it would be incoherent to state that an illegible smudge could cause injury to the plaintiffs' right to be free from governmental endorsement of religion.

79. J.R. Searle, *What Is a Speech Act?*, *in* THE PHILOSOPHY OF LANGUAGE 39, 40 (J.R. Searle ed., 1971); *see also* Paul F. Campos, *This Is Not a Sentence*, 73 WASH. U. L.Q. 971, 977–78 (1995).

understand or recognize what one intends to say.[80] Thus, since the endorsement inquiry focuses on determining what the display "means"—that is, what the viewer of the display would understand the intention of the government to be when it erected the display—this "constructed" or hypothesized intent is involved in the endorsement inquiry. Yet this audience construction of the government speaker's intent is not the same as the government speaker's actual, subjective intent. As Jamin Raskin has explained, "The question is not whether the decisionmaker, in his or her own mind, intended to endorse religion, but whether the government has [erected a] display that can most plausibly be understood as having the purpose and function of endorsing religion."[81] This question, of course, is answerable primarily by reference to the display's context.[82] This understanding of intent (commonly referred to as purpose, rather than intent) corresponds to the objective meaning of a display, or the message "actually conveyed" by a display—as opposed to the subjective message, or the message intended to be conveyed—in Justice O'Connor's terminology.[83]

II. Existing Critiques (and One Prominent Defense) of the Endorsement Test

The endorsement test in general and the approach taken by the Court in the religious symbol cases in particular have been repeatedly criticized in what has become a large and diverse body of legal scholarship. These critiques primarily take the Court to task for the subjectivity and unpredictability of the endorsement test, arguing that "the test provides few clear guidelines, and appears to turn on judges' inevitably subjective assessments of a hypothetical reasonable observer's perceptions about the cultural significance of state practices."[84]

As Jesse Choper has set out in a recent article,[85] the inherent subjectivity and unpredictability of the endorsement test have been criticized primarily on two grounds. The first focuses on the heuristic of the "reasonable observer," noting that this imaginary construct is too easily manipulable, with

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80. Paul Grice, *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, *in* Studies in the Way of Words 117, 123 (1989) [hereinafter Grice, *Utterer's Meaning*]; H.P. Grice, *Meaning*, 66 Phil. Rev. 377, 377–88 (1957). As Grice has stated, "intensionality seems to be embedded in the very foundations of the theory of language." Grice, *Utterer's Meaning*, *supra*, at 137; *see also* John R. Searle, Speech Acts: An Essay in the Philosophy of Language 43 (1969).

81. Jamin B. Raskin, *Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause—Commentary on* Measured Endorsement, 60 Md. L. Rev. 761, 764 (2001).

82. *Id.*

83. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). One might also add that this corresponds to the "sentence-meaning," rather than the "speaker's meaning" of the display, to use Gricean terminology. *See, e.g.*, Grice, *Utterer's Meaning*, *supra* note 80, at 124–26.

84. David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. Cal. L. Rev. 559, 584 (2002).

85. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & Pol. 499 (2002).

the result of each case depending largely on the characteristics and knowledge attributed to that personage.[86] Commentators have also criticized the Court for largely failing to identify whether the reasonable observer is a member of the religious mainstream or a religious minority or atheist, arguing that the outcome of a given case usually turns on this distinction.[87] Some have noted that the reasonable observer heuristic, as applied, tends to embody a majoritarian perspective and therefore favors majority religions over minority religions.[88] The second line of criticism takes issue with the notion that courts should be asking the endorsement question at all, arguing that the symbolic injury on which the endorsement test is centered should not constitute constitutionally cognizable injury, or that the injury involved—the injury to individuals' sensibilities—is too subjective to produce a meaningful and predictable jurisprudence.[89]

An account of the criticisms of the endorsement test would not be complete, however, without a counterbalancing description of what might be considered a prominent line of scholarship defending that doctrine. Indeed, it would be almost impossible to discuss the religious symbolism cases, in particular, without making reference to expressivism.[90] With its focus on the meaning, or symbolic dimension, of government conduct, expressivism naturally has much to say about the precise problem raised by public displays of religious symbols.

Expressivism, as a branch of constitutional theory, has been much discussed, elucidated, critiqued, and even subjected to "general restatement" in recent years, and it is not my intention here to replicate the extremely useful work of other scholars.[91] Moreover, while I suggest that this Article may have some critical implications for expressivism generally, I accept expressivism's overall approach, as it applies to religious symbol cases, because I

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86. *Id.* at 510–21; *see also* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 478–82.

87. Choper, *supra* note 85, at 511; Diamond & Koppelman, *supra* note 8, at 719–20; William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 536–37 (1986).

88. *See, e.g.*, Gey, *supra* note 86, at 481.

89. Choper, *supra* note 85, at 521–35; Smith, *supra* note 8, at 305–13; *cf.* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 356–66 (1991) (criticizing the notion that offense to individual sensibilities is relevant to the Establishment Clause by analogizing to the Court's treatment of offense in the free speech context, but arguing that the endorsement test is not actually concerned with offense to individual sensibilities).

90. Not all defenses of the endorsement test arise from the expressivist line of scholarship; indeed, the array of scholarly defenses of the endorsement test is at least as diverse as the criticisms of it. *See, e.g.*, Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 845 n.38, 847–51 (2001) (defending the endorsement test's focus on equality and citing other sources defending it on similar grounds); Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 80–83 (1990) (praising the endorsement test for its emphasis on "political standing" but suggesting that its application could be clarified).

91. *See* sources cited *supra* notes 13 and 14.

believe that its tenets have forceful application for the specific, narrow doctrinal problem of public displays of religious symbolism. Because the stakes in such cases are largely, if not solely symbolic, expressivism is, as explained further below, a uniquely suitable tool for analyzing the doctrine in this area. Defending expressivism beyond its application in this area is outside the scope of this Article, however, since my focus here is specifically on the problem of *how* the meaning of religious symbols is actually to be determined—a problem that in my view has not received sufficient attention from courts or commentators.

Expressivism is concerned with the notion that conduct can have "expressive" dimensions—that is, that "actions speak."[92] In the realm of constitutional theory, it has been argued that certain constitutional provisions are aimed in part at regulating the expressive dimensions of government conduct.[93] This expressive dimension of conduct is often referred to as "social meaning," which can be defined as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context."[94] The term "social meaning," as it is used in the literature, often appears to refer to the connotations of a law or official action—as opposed to the literal meaning of the language of the official directive itself—and it usually involves the expression of values or attitudes, as opposed to other sorts of messages.[95] The term usually also entails a notion of societal consensus—the notion that certain conduct is generally understood to carry certain meanings within a particular social context.[96]

Perhaps most famously, several commentators have discussed the case of *Brown v. Board of Education*[97] in terms of social meaning, pointing out that legalized segregation was so offensive to notions of equality in large

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92. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993) (articulating a theory of "expressive rationality"); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996) ("Actions have *meanings* as well as consequences."); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021 (1996) ("Actions are expressive; they carry meanings."). The expressivist school of thought has been associated with scholars such as Elizabeth Anderson, Deborah Hellman, Dan Kahan, Charles Lawrence, Lawrence Lessig, Richard Pildes, and Cass Sunstein, among others.

93. *See, e.g.*, Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998) ("Public policies can violate the Constitution not only because they bring about concrete costs but because the meaning they convey expresses inappropriate respect for relevant constitutional norms."); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993). *But see* Smith, *supra* note 12, at 510–14 (questioning whether government actions send messages in any meaningful sense); *id.* at 519–23 (questioning the normative claims of expressivism).

94. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995).

95. *See, e.g.*, Anderson & Pildes, *Expressive Theories*, *supra* note 13, at 1504.

96. ANDERSON, *supra* note 92, at 25; Lessig, *supra* note 94, at 958–59 ("It is not enough that individuals understand that a particular idea along with a given action may yield a given meaning. For it to function as a 'social meaning,' the individuals in this context must also accept it."). This concept of societal consensus is discussed further below.

97. 347 U.S. 483 (1954).

part because it connoted the inferiority of African Americans—in other words, because of its "social meaning."[98] Of course, if racial segregation had existed within a social context in which the balance of political and social power between blacks and whites were reversed, segregation could be understood as signifying just the opposite: the inferiority of whites. Thus, the social meaning of segregation was dependent upon the social and political context. And, at least by the time *Brown* was decided, there was a broad societal consensus regarding what segregation "meant" in that social context.[99]

The treatment of religious displays under the Establishment Clause of the First Amendment is perhaps the prototypical case in which the expressive dimensions of law, or of official action, are of central concern.[100] In analyzing religious displays under the endorsement test, the Court considers whether the government has endorsed religion—that is, whether the challenged display "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[101] The endorsement test is thus primarily concerned with the social or cultural meaning of the religious display.[102]

Expressivist scholars make both descriptive and normative claims about the Court's Establishment Clause jurisprudence.[103] The descriptive claim is that government actions often express certain values, whether intentionally

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98. Charles Black was perhaps one of the earliest constitutional commentators to speak of *Brown* explicitly in terms of "social meaning." *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–27 (1960) (discussing the "social meaning" of segregation); *see generally* Adler, *supra* note 13, at 1370 n.32 (citing sources discussing expressivist theories for the antidiscrimination principle). Proponents of the "colorblindness" theory of equal protection might not agree with this view, however. They would instead argue that the offensiveness of segregation stemmed from the mere fact that government classified individuals on the basis of race. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J. concurring).

99. That consensus probably existed much earlier, of course. As Justice Harlan pointed out in his famous dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), even in 1896, "*[e]very one kn[ew]* that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." *Id.* at 557 (Harlan, J., dissenting) (emphasis added); *cf.* Raskin, *supra* note 81, at 774–75 (describing Justice Harlan's statement as a "nineteenth century way of stating that *any reasonable person* would understand [conveying a message of racial inferiority] to be the objective purpose and function of segregation").

100. The first scholar to recognize that the religious symbol cases implicate social meaning appears to be Charles Lawrence. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 359 (1987); *see also* Pildes & Niemi, *supra* note 93, at 511–13.

101. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

102. Pildes & Niemi, *supra* note 93, at 512; *cf.* Smith, *supra* note 8, at 286 (noting that the endorsement test "does not ask simply what government *intended*; it asks what government *intended to communicate*"); Smith, *supra* note 12, at 519 ("In her 'endorsement' opinions, Justice O'Connor argued that the constitutionality of a law under the Establishment Clause should depend not so much on the material effects of the law, but on what 'message' the law sends . . . .").

103. *See* Anderson & Pildes, *Expressive Theories*, *supra* note 13, at 1506–07, 1520–27; Smith, *supra* note 12, at 510; *see also* Adler, *supra* note 13, at 1376–77 (noting that expressive theories of law are primarily normative or moral).

or not, and that these expressions can have very real effects on social relationships.[104] The normative claim, put simply, is that courts should attend to these value expressions and that, indeed, what a law expresses may render it unconstitutional, regardless whether any of its tangible or material effects are constitutionally troubling.[105]

One could consider William Marshall's much-cited article[106] defending the Supreme Court's focus on the symbolic aspects of government action to be an early precursor to the expressivist line of defense of the endorsement test.[107] Professor Marshall has argued that, difficult though they may be to answer, the endorsement test asks exactly the right questions in Establishment Clause cases. He has defended the "symbolic" approach—the Court's focus on the message sent by government conduct—on the grounds that it most accurately and consistently describes the Court's Establishment Clause decisions and that it allows for accommodation of important competing interests, such as recognition of our cultural heritage, free exercise, and free speech rights, better than other understandings of the Establishment Clause.[108] Professor Marshall has proposed dealing with the interpretive difficulties and subjectivity inherent in the symbolic approach through a jurisprudence that espouses different perspectives—that of the ardent separationist, the accommodationist, or somewhere in between—depending on the particular context in which the Establishment Clause issue arises. Marshall's approach thus recognizes that "similar actions convey different meanings depending on the context in which they arise."[109]

More recently, David Cole has argued for an "expressivist model of the Establishment Clause."[110] Espousing the view that government-sponsored religious messages are more constitutionally problematic than material aid to religious entities,[111] Cole argues that the constitutionality of faith-based

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104. Anderson & Pildes, *Expressive Theories*, *supra* note 13, at 1506–07, 1520–27.

105. *Id.*; Smith, *supra* note 12, at 519–23. There are variations on expressivism not captured by this very rough sketch; for example, as Steven Smith has pointed out, Cass Sunstein and Lawrence Lessig appear to espouse a more consequentialist version of expressivism, asserting that government messages and the perception of those messages by individuals are among the effects of government action that should be taken into account in evaluating that action. *Id.* at 521–22 & n.49 (citing Lessig, *supra* note 94, and Sunstein, *supra* note 92, at 2047). Expressive theories of law have typically been subjected to the most criticism when they appear to claim that, despite net positive "material" consequences, a law might be invalidated because of its nonmaterial, nonconsequential, expressive dimensions. Professor Smith takes issue with this notion, for example. *Id.* at 522–23. In the religious symbolism cases, however, it seems that the "expressive" dimension of government conduct is the only one involved—there are generally no (or negligible) *material* consequences to the government's decision to erect a holiday display. I would therefore contend that expressivism is less problematic as applied to those cases.

106. Marshall, *supra* note 87.

107. Steven Smith views it as such. Smith, *supra* note 12, at 508.

108. Marshall, *supra* note 87, at 522–32.

109. *Id.* at 550.

110. Cole, *supra* note 84, at 559.

111. *Id.* at 585–86 (citing KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 148–49 (1993), and Ira C. Lupu,

social services funding programs should be judged according to whether they express government approval of religion.[112] He then suggests some general principles by which endorsement can be identified in the government funding context.[113]

Defenders of the expressivist approach to the Establishment Clause essentially argue that government actions convey messages of some sort—that is, they have social meanings. They further contend that those messages matter for purposes of constitutional doctrine, and may constitute constitutionally cognizable injuries. The expressivists have not, however, given more than cursory attention to the question of how those messages can be deciphered.[114] Since I have accepted the validity of expressivism as applied to the problem under consideration here, my focus in this Article is on the largely unaddressed problem of deciphering social meaning from mute religious symbols.

III. THE EXPRESSIVE AND THE PERFORMATIVE: SPEECH ACT THEORY AND BEYOND

A. *Speech Act Theory and Its Relevance*

While constitutional doctrine and theory have become increasingly concerned with the fact that conduct can have expressive dimensions—that is, that actions speak—in the field of philosophy of language, one of the central insights of the past half-century has been that language has "performative" dimensions—that is, that language acts. Traditionally, philosophers had conceived of language as describing states of affairs in a way that was subject to verification and thus as primarily consisting of statements, which were either true or false.[115] More modern philosophers of language such as

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Government Messages and Government Money: Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 773 (2001)).

112. *Id.* at 583–86.

113. Cole argues that, in a government program that is itself a form of speech, an appearance of endorsement will occur if religious entities are funded to engage in "government speech" but not if the government is simply funding private speakers, some of whom are religious entities, on a viewpoint-neutral basis. *Id.* at 587–93. With respect to nonspeech programs, he contends that endorsement may arise if the program, while formally neutral, is structured so that religious entities receive the majority of the benefits or so that the government directly funnels money to religious entities rather than allowing a private individual to spend the money on services offered by religious entities. *Id.* at 593–600.

114. *But see* Diamond & Koppelman, *supra* note 8, at 736–60 (proposing that social meaning be determined through survey data and expert testimony, as consumer perceptions are proven in trademark cases). A few scholars outside the expressivist vein have focused somewhat on this problem. *See, e.g.*, Feigenson, *supra* note 90, at 94–101 (arguing, by analogy to defamation law, that whether government action conveys an impermissible message should be determined by whether any "segment" of the community that is not "totally irrational" actually perceives such a message); Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. (forthcoming 2005 or 2006).

115. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 1–4 (J.O. Urmson ed., 1962). Austin calls the view of language as describing states of affairs "the 'descriptive' fallacy." *Id.* at 3.

J.L. Austin and John Searle, however, began focusing on the fact that linguistic utterances often do not describe something, but rather do something: for example, to say, "I promise you I will be there," is not to describe a state of affairs but to perform an act—namely, the act of promising.[116] Such utterances, called "performatives" or "speech acts," are evaluated not in terms of their meaning (what they describe or refer to) but rather in terms of their force (what they accomplish).[117] As such, they are not true or false but rather successful or unsuccessful: to take a classic example, it would be meaningless to describe the utterance "I do [take this woman to be my lawfully wedded wife]" as true or false. To utter those words is to perform an act (the act of marrying), not to describe (accurately or inaccurately) a state of affairs.[118] That utterance could be unsuccessful, however. Under certain circumstances or in certain contexts, it could fail to bring about the result it purports to achieve, for example, if the speaker is already married to someone else, the words are not spoken before the proper state or religious official, or the words are spoken in a play.[119] Thus, one objective of speech act theory is to specify the context that must exist for a performative utterance to be successful.[120]

Speech act theory is a useful lens for critically viewing the endorsement inquiry in religious symbol cases for a number of reasons. First, the endorsement test is concerned not with the truth or falsehood of the messages conveyed by symbols but rather with *effects*—with the capacity of government conduct to stigmatize or endorse certain types of persons or behaviors.[121] This is similar to speech act theory's focus on the "successfulness" or "unsuccessfulness" of speech acts rather than on the speech acts' ability to describe a state of affairs. Furthermore, both speech act theory and the endorsement test, as applied in the religious symbol cases, focus on the

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116. *See id.* at 4–6; Searle, *supra* note 79.

117. *See* AUSTIN, *supra* note 115, at 99–100. Initially, Austin contrasted these "performative" utterances with "constative" utterances, which supposedly do describe or refer to a state of affairs. Ultimately, however, Austin concluded that the distinction between performative and constative is illusory. Rather, the constative is merely a subset of the performative. *See generally id.* at 94–120.

118. A familiar example of this concept can be found in the "verbal act doctrine" in the law of evidence. "Verbal acts" are not considered to be hearsay because they are not admitted for their truth or falsity, but rather because they demonstrate that a certain act was performed. For instance, an offer to sell something at a particular price that might otherwise be inadmissible hearsay could be offered into evidence, not to show that the person actually intended to make a sale for that price, nor to show that the sale was actually consummated, but rather to show that an oral contract was formed. *See, e.g.*, 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.5 (4th ed. 1996); 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7005 (4th ed. 2000).

119. This example is taken from AUSTIN, *supra* note 115, at 5, 15–17.

120. *See* SEARLE, *supra* note 80, at 41–42.

121. *Cf.* Lessig, *supra* note 94, at 958–59 (describing the stigmatizing "force" of some messages in certain contexts); Sunstein, *supra* note 92, at 2047 ("[W]ithout desirable effects on social norms, there is not much point in endorsing expressively motivated law."); *cf.* Lessig, *supra* note 94, at 1036–39 (discussing the possibility that messages will help to construct the reality they describe).

ontext of utterances,[122] recognizing that the force and efficacy of certain nessages derive from their being uttered under certain conditions, when ertain requirements are met.[123] What follows from this is that, as discussed bove with respect to the endorsement test, the role of the speaker's subjective intent is de-emphasized. As Jonathan Culler explains, describing one asic principle of speech act theory:

> If in appropriate circumstances I say "I promise to return this to you," I have made a promise, whatever was running through my mind at the time, and conversely, when earlier in this sentence I wrote the words "I promise to return this to you" I did not succeed in making a promise, even if the thoughts in my mind were similar to those that occurred on an occasion when I did make a promise.[124]

The speech act of promising, then, depends not on the speaker's intent ut primarily on the context in which certain words are spoken.[125] Additionlly, it is worth noting that endorsing is one kind of speech act or erformative utterance—that is, according to the classic definition of a peech act, endorsing is an act that may be performed by (or in) saying omething.[126]

There is a final reason why it is appropriate to analyze displays of religious symbols in particular—as opposed to other governmental actions that

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122. Throughout this Article, the term "utterances" is used in a very broad sense to encompass linguistic communication as well as nonlinguistic communication (in the form of expressive conduct nd of symbols).

123. Lessig, *supra* note 94, at 958–61; *see also* JONATHAN CULLER, ON DECONSTRUCTION: HEORY AND CRITICISM AFTER STRUCTURALISM 111 (1982) ("What makes an utterance a command r a promise or a request is not the speaker's state of mind at the moment of utterance but conventional rules involving features of the context.").

124. CULLER, *supra* note 123, at 111. Similarly, theorists of social meaning have downplayed he relevance of subjective intent in discerning the expressive content of conduct, especially government conduct. *See, e.g.*, Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting: A Comment on the Symposium*, 106 YALE L.J. 2505, 2537–47 (1997) (discussing why motive should be irrelevant in gerrymandering cases, which are largely concerned with the expressive effect, or social meaning, of certain forms of redistricting); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936, 975 (1991); Smith, *supra* note 14, t 510–11. *But see* ANDERSON, *supra* note 92, at 33 (asserting that expressive norms are intentional). For example, a law that imposes only a fine rather than imprisonment as the punishment for committing murder would express disrespect for the victims of those crimes, whether or not the government intended this disrespect; the purpose of the law might simply be to increase revenues, but this purpose is not capable of dictating or exhausting the social meaning of the law. *See* Kahan, *upra* note 92, at 620–24. Elizabeth Anderson and Richard Pildes have recently backed away from his nonintentionalist view, however, arguing instead, in a recent article, for a concept of collective ntention in government action. Anderson & Pildes, *Expressive Theories*, *supra* note 13, at 1520–27.

125. One might analogize to the "objective theory of contract formation and interpretation," according to which "the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions." Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000).

126. *See* Searle, *supra* note 79, at 39 ("Some of the English verbs and verb phrases associated with illocutionary acts [i.e., speech acts] are: state, assert, describe, warn, remark, comment, command, order, request, criticize, apologize, *censure*, *approve*, welcome, promise, *express approval*, and express regret." (emphasis added)).

may unconstitutionally create an inference of governmental endorsement of religion, such as, for example, school-sponsored prayer[127] or the use of public school facilities by a religious after-school club[128]—using the tools of speech act theory, as if those symbols were linguistic utterances. Linguistic theory may be a useful tool for analyzing the religious symbol cases because erecting a display of holiday symbols in a public place is usually a purely symbolic act. Since it rarely implicates the expenditure of any meaningful sum of public funds, for example, it tends not to have any potential effects beyond that of simply expressing governmental approval of religion. In other words, in cases involving religious symbolism, the only relevant question is what the symbolic display means, in a rather literal sense, since symbolic displays generally do not do anything other than convey a message or attitude.[129] The only real harm caused by the displays seems to be symbolic in nature.[130] Indeed, even one prominent critic of the endorsement test agrees that in cases involving challenges to religious symbolism, the question whether a message of governmental endorsement of religion has been conveyed is the correct one.[131]

For all of these reasons, the perspective of speech act theory is a useful one for approaching the interpretive problems posed by the endorsement test, with its attention to the expressive dimensions of government conduct, and particularly in the narrow set of cases pertaining to public displays of religious symbols.

B. *The Dependence of Meaning on Context, and the Inability of Context to Delimit Meaning*

Explaining one of J.L. Austin's central insights in delineating a theory of speech acts, Jonathan Culler states:

> to mean something by an utterance is not to perform an inner act of meaning that accompanies the utterance. . . . What makes an utterance a command or a promise or a request is not the speaker's state of mind at the moment of utterance but conventional rules involving features of the *context*.[132]

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127. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

128. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

129. *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("There is no doubt that . . . the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.").

130. This conception of the religious symbol cases, however, is not beyond dispute. Frank Ravitch espouses a very different understanding of the effect of government-sponsored religious symbolism. Ravitch, *supra* note 114; *see generally* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 439 (2004) (setting forth a theory of government facilitation of religion). Ravitch theorizes that the governmental connection lends power to the symbol, and hence to the religion.

131. McConnell, *supra* note 8, at 155.

132. CULLER, *supra* note 123, at 111 (emphasis added).

Particularly when the speaker's subjective intent is inaccessible to us, ambiguous, or otherwise irrelevant,[133] we look to the context of the utterance for some conventional features that will help us identify its meaning and thereby construct for ourselves what we believe to have been the speaker's intent.[134]

Context, however, is itself an extremely unstable device for discerning meaning. Although meaning is dependent on context, it is usually impossible to fully describe or delimit the relevant context: "Meaning is context-bound, but context is boundless."[135] As Culler proceeds to explain, context is boundless in two senses. First, context can always be further specified.[136] This idea is familiar to lawyers: indeed, it is inherent in the exercise of distinguishing precedent. For example, in *Elewski v. City of Syracuse*,[137] the Second Circuit Court of Appeals held that the City of Syracuse's crèche display passed Establishment Clause muster, because, like the constitutionally permissible crèche in *Lynch* and unlike the impermissible crèche in *Allegheny*, it was surrounded by several secular holiday symbols.[138] The dissent, however, would distinguish Syracuse's display from the display in *Lynch* on the ground that in *Lynch*, "a single park display contained numerous festive secular decorations," whereas in the *Elewski* case, most of the secular decorations were at some distance from the crèche.[139] Thus, the dissent further specified the context by highlighting an element of it that the majority had found irrelevant: the physical distance between the religious and secular decorations.

Context is boundless in a second way as well. As Culler explains, "any attempt to codify context can always be grafted onto the context it sought to describe, yielding a new context which escapes the previous formulation."[140]

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133. The deconstructionist view would argue that the quality of inaccessibility or displacement always characterizes the subjective intent that is supposed to give meaning to an utterance, but it is not necessary to delve into the truth or falsity of that claim here. For our purposes, it seems a much less controversial statement that subjective intent is not entirely relevant or useful for the analysis of the social meaning of religious displays. *See generally* STANLEY FISH, *With the Compliments of the Author: Reflections on Austin and Derrida*, *in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 37 (1989).

134. This is essentially the Gricean definition of "meaning." GRICE, *Utterer's Meaning*, *supra* note 80; Paul Grice, *Meaning*, *supra* note 80, at 377–88.

135. CULLER, *supra* note 123, at 123. Culler is summarizing Derrida. *Cf.* Amy Adler, *What's Left: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1541–44 (1996) (applying Culler's and Derrida's insights to postmodern political art).

136. CULLER, *supra* note 123, at 123–24.

137. 123 F.3d 51 (2d Cir. 1997).

138. *See Elewski*, 123 F.3d at 54.

139. *Id.* at 59 (Cabranes, J., dissenting). At least one commentator agreed with Judge Cabranes, finding the court's decision to "consider[] decorations hundreds of feet away from the crèche as part of the relevant context" to be out of line with Supreme Court and Second Circuit precedent. Recent Cases, 111 HARV. L. REV. 2462, 2466 (1998). This objection certainly seems sensible. However, it raises an obvious question: if "hundreds of feet away" is too far for a decoration to be considered part of the same display, how close must the decoration be? This is the kind of question that inevitably arises whenever one attempts to delimit the relevant context.

140. CULLER, *supra* note 123, at 124.

For example, one might attempt to formulate a rule that displaying the words "Gloria in Excelsis Deo"[141] on government property, with or without any countervailing secular symbols, is per se an endorsement of religion and therefore unconstitutional. But certainly if those words were displayed in a religious painting in a government-sponsored display of medieval art or in a poster intended to inform the citizenry about what kinds of religious displays are unacceptable on city property, one could not seriously argue that the city had endorsed religion.[142]

These insights lead to the conclusion that a legal rule dependent on context will inevitably result in a highly fact-specific, subjective process of adjudication.[143] They also explain why this is so. Moreover, this feature of the endorsement test—its dependence on contextual analysis—is arguably a limitation inherent in any attempt to formalize an inquiry into social meaning.[144]

The indeterminacy of context with respect to religious symbols is aggravated, however, by the impossibility of using the potentially stabilizing element of subjective intent to fix meaning. If to "mean" something is simply to intend that one's utterance cause the audience to recognize what one *intends* to say,[145] it stands to reason that if governmental "intent" were discernible in any meaningful way—as it is in cases where there is an accessible legislative history or at least statutory language that is easier to "read" than a symbolic display—the "meaning" of the display would similarly be more easily discernible and less dependent on contextual clues. But, as discussed above, it often is not possible to discern the government's intent.

Despite this irreducible indeterminacy, meaning is unavoidably context dependent. If we are to determine the meaning or message conveyed by a

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141. This Latin phrase, which means "Glory to God in the highest," comes from Luke 2:13–14 and was exhibited on the (constitutionally impermissible) crèche in *Allegheny*. County of Allegheny v. ACLU, 492 U.S. 573, 580 & n.5 (1989) (plurality opinion).

142. Larry Alexander makes a similar point in explaining the difficulty of distinguishing "high-value speech" from "low-value speech" for First Amendment purposes:

> [T]here is no principled way to demarcate what is to count as a unit or item of speech for purposes of assessing whether the speech is high or low value. Consider (1) a photograph of two people fornicating (2) found within a medical textbook (3) being viewed by voyeurs (4) who are being studied by psychologists.

Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 21 n.2 (1995). With each iteration specified by Professor Alexander, one context is grafted onto another, eluding the prior attempt to fix the context.

143. *Elewski*, 123 F.3d at 57 (Cabranes, J., dissenting); *cf. Allegheny* 492 U.S. at 674–76 (Kennedy, J., dissenting) (arguing that the endorsement test results in a "jurisprudence of minutiae").

144. The principles elucidated here hold true for conduct as much as for speech. If anything, the meaning and context of expressive conduct are probably less determinate than linguistic meaning and context. *Cf.* ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 561–62 (1974) (discussing indeterminacy and contextual "framing" in everyday experience and activity).

145. *See supra* text accompanying note 79.

display of religious symbols, then we have no choice but to look to the context for the answer.[146]

C. *Context and Consensus*

One aspect of context, in particular, deserves attention. The concept of context extends beyond the particular physical or historical situation in which the speech act is uttered; it also includes the "social" context. The social context may be defined, in Lawrence Lessig's terms, as the "collection of understandings or expectations shared by some group at a particular time and place."[147] Similarly, Stanley Fish has discussed "the shared assumptions which enable [observers] to make the same kind of sense" of what they see or hear.[148] Thus, a speech act also takes on meaning, in part, by virtue of a sort of consensus of those who observe it. Moreover, this consensus is a part of the "conventional context" of the display—meaning the context of linguistic conventions that create the conditions for the successful performance of a speech act.[149] Thus, although meaning is, at least in part, an act of discerning intent, it is also a conventional form of behavior; "[m]eaning is more than a matter of intention, it is also at least sometimes a matter of convention."[150]

This concept of social context has already arisen in the foregoing discussion of the endorsement test and of social meaning.[151] The "social meaning" of segregation—that blacks were considered to be inferior to whites—was possible only within the particular social context, in which "[e]very one kn[ew]"[152] what segregation was supposed to signify. Indeed, Justice O'Connor's heuristic of the reasonable observer may incorporate this concept of consensus to some extent: the "reasonable observer" seems, in part, intended to look to the views of the broader society and exclude the views of hypersensitive "eggshell plaintiffs."[153]

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146. *But see* FELDMAN, *supra* note 12, at 256–65 (arguing that power, and hence a message of domination or subordination, may inhere in the symbolic discourse itself); Ravitch, *supra* note 114 (arguing that religious symbols themselves have certain qualities that make them more or less "purely" religious, and therefore more or less likely to convey a religious message).

147. Lessig, *supra* note 94, at 958. Lessig suggests that social meaning must be uncontested to be effective; thus, social meaning in Lessig's view appears to be highly consensus-driven.

148. FISH, *supra* note 133, at 52.

149. *Cf.* Lawrence, *supra* note 100, at 356 (explaining that the symbolic message conveyed by government conduct can be determined "by considering evidence regarding the historical and social context in which" the official action occurred in order to determine whether "*a significant portion of the population* thinks of the governmental action" in a particular way (emphasis added)).

150. SEARLE, *supra* note 80, at 12–13, 45.

151. *See supra* text accompanying notes 96–99.

152. Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

153. *Cf.* John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in* Brown v. Board of Education *and* Loving v. Virginia, 15 CONST. COMMENT. 215, 221–23 (1998) (concluding that the stigmatic harm alleged by segregation and anti-miscegenation laws is not one requiring empirical proof, except perhaps to rule out the possibility of hypersensitive plaintiffs, and arguing that the citation of social science evidence in *Brown v. Board of Education*

The notion that societal consensus plays a role in the interpretation of speech acts poses particular problems in religious symbol cases. There is much reason to doubt that a high degree of consensus is to be found regarding the meaning of a particular display, that is, regarding whether or not that display constitutes endorsement of religion. The religious pluralism of our society, combined with the easily observable range of disagreement about the proper role of religion in civil society, likely means that observers do not bring with them many "shared assumptions . . . [enabling them] to make the same kind of sense" of a given display of religious symbols.[154] Thus, Stanley Fish states that "the occurrence of successful performatives is not assured, because those who hear with different assumptions will be making a different kind of sense."[155] The lesser the degree of societal consensus, the less likely it is that religious displays will be understood in the same way by all observers.

The diversity of religious beliefs and of attitudes toward the role of religion in society is thus another factor that, together with the reduced role of subjective intent,[156] makes the religious symbol cases unique in the level of interpretive difficulties they pose. In this way, cases involving the interpretation of religious symbol displays are starkly unlike cases revolving around interpretation of the tax code, for example: although hermeneutic quibbles certainly arise in cases involving interpretation of the tax code, there is a large degree of consensus about the meaning of commonly used terms among those interpreting the code. The interpretive disagreements that do arise, while occasionally leading to litigation, do not render tax jurisprudence as unstable and unpredictable as the jurisprudence of religious symbolism.

But even if such consensus could be found to exist in religious symbol cases, how, exactly, is this consensus to be discovered? Jacques Derrida has described the social consensus that gives meaning to utterances as "implicit but structurally vague."[157] Is the "consensus meaning" of an utterance to be discovered by surveying individuals and adding up the responses, with the

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primarily served to exclude the possibility that the plaintiffs were hypersensitive); Feigenson, *supra* note 90, at 98 (asserting that "establishment clause doctrine need not recognize 'totally irrational' perceptions"). *But cf.* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion) (criticizing the endorsement test because it would require governmental entities trying to avoid an Establishment Clause violation "to guess whether some undetermined critical mass of the community might . . . perceive the [governmental entity] to be advocating a religious viewpoint").

154. FISH, *supra* note 133, at 52. Steven Smith has masterfully demonstrated not only that there is currently no consensus regarding the meaning of the "principle" of "religious liberty," but also that such consensus has historically never existed. STEVEN D. SMITH, FOREORDAINED FAILURE 11, 19–22 (1995). He ultimately concludes from this fact that the project of formulating a theory of the religious liberty protected by the Constitution is doomed to failure. *Id.* at 119.

155. FISH, *supra* note 133, at 52.

156. *See supra* text accompanying notes 64–78.

157. JACQUES DERRIDA, *Signature Event Context*, *in* LIMITED INC 1, 2 (Samuel Weber & Jeffrey Mehlman trans., Gerald Graff ed., 1988).

correct meaning being the one garnering the greatest number of votes?[158] The answer is almost certainly no. Attempting to view social meaning as a purely empirical matter would inevitably raise the questions of how many people must agree on the meaning of a display and of how those individual views can be meaningfully compared and aggregated. Moreover, intuition tells us that a display cannot come to "mean" something just because a certain number of people say it does. Such "private" meanings, no matter how many people share them, cannot make the display a religious one. If a tiny cult suddenly begins worshipping an abstract sculpture in the town square, for example, it seems unlikely that this worship would be sufficient to render the symbol a "religious" one, vulnerable to Establishment Clause challenge.[159] Thus, while it is true that social meaning is interpreted with reference to societal consensus, it is undeniable that there is also a certain structure, a set of rules, involved in determining meaning that exists beyond this consensus and constrains the number of possible meanings it can produce.[160]

As John Searle has explained, language is a "rule-governed form of behavior."[161] According to Searle, discerning the meaning of an utterance does not involve an empirical judgment but rather a judgment based on knowledge of those rules:

> It is possible . . . that other people in what I suppose to be my dialect group have internalized different rules and consequently my linguistic characterizations would not match theirs. But it is not possible that my linguistic characterizations of my own speech [i.e., such as saying, as a definitional matter, that "women are female"] are false statistical generalizations from insufficient empirical data, for they are not statistical, nor other kinds of empirical generalizations, at all. That my idiolect matches a given dialect group is indeed an empirical hypothesis . . . but the truth that in my idiolect "oculist" means eye doctor is not refuted by evidence concerning the behavior of others . . . .[162]

In the context of the endorsement test, Justice O'Connor's emphasis on the "judicial interpretation of *social facts*," as well as her insistence that the

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158. *See* Diamond & Koppelman, *supra* note 8, at 736–60 (proposing that the endorsement effect of religious displays be measured like the consumer confusion element in trademark cases, using statistical survey data).

159. If continued for many years, however, this practice likely would turn the sculpture into a religious symbol. At some point, the symbol would probably become widely recognized as a particular group's object of worship, and eventually a critical mass of people would agree that the symbol qualifies as religious.

160. *Cf.* Frank S. Ravitch, *Struggling with Text and Context: A Hermeneutic Approach to Interpreting and Realizing Law School Missions*, 74 ST. JOHN'S L. REV. 731, 734–38 (2000) (discussing the notion that although individuals bring personal and societal predispositions to reading a text, which influence their interpretation of the text, "the horizon of the text will limit the range of pre-understandings the interpreter can consistently project" (citing HANS-GEORG GADAMER, TRUTH AND METHOD 265–307, 369–75 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed., Crossroad Publ'g Corp. 1989) (1960))).

161. SEARLE, *supra* note 80, at 12.

162. *Id.* at 13.

perceptions of individual observers (some of whom, perhaps, may be outliers) are not particularly relevant, indicate that she, too, is acknowledging that the consensus the Court seeks is not necessarily discoverable through empirical research.[163] Justice Scalia's statement that only the views of the "the community" and not of "individual members of the community" are relevant in religious symbol cases likewise draws on this intuition.[164]

Finally, as some language theorists have pointed out, expression and linguistic convention are inextricably bound up with power and authority.[165] Pierre Bourdieu describes speech acts as "*acts of authority*, or, what amounts to the same thing, *authorized acts*."[166] What he means by this is that speech acts must be societally "authorized," that is, they must fulfill certain societally-mandated conditions in order to be successful. For the words "I now pronounce you man and wife" to effectuate a marriage, for example, they must be spoken by a person with the proper legal or religious authority and under various other institutional conditions. These conditions—the conditions under which a speech act is recognized as what it intends to be—are the conditions of "legitimate usage."[167] The speech act must be uttered by a legitimate person, before legitimate receivers, according to legitimate forms.[168] The conditions of legitimacy are dictated partly by law, partly by informal norms, and partly by language itself. Some of these are more obviously political than others—ranging, for example, from the requirement (in most states) that the two individuals who are to be married be of different sexes to the requirement that a specified number of witnesses be present. These external controls exercise a coercive power over us; they control meaning to a greater extent than any intent on our part can, and we are not free to disregard them.[169]

Therefore, even if the "consensus meaning" of a display can be discovered, empirically or otherwise, it is not entirely clear that it should be the

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163. Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (emphasis added).

164. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 765 (1995) (plurality opinion). Nonetheless, in considering the constitutionality of religious displays, the Justices have occasionally taken the divisiveness caused by the display into account. *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2871 (2005) (Breyer, J., concurring); *Lynch*, 465 U.S. at 702–04 (Brennan, J., dissenting). Perhaps this reference to divisiveness, demonstrated by actual conflict within a community, indicates a concern with the empirical question of how individual members of the community actually view the display.

165. *See, e.g.*, PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 107–16 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., Harvard Univ. Press 1991); JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 47–49 (1997).

166. BOURDIEU, *supra* note 165, at 111.

167. *Id.* at 111–13.

168. *Id.* at 113.

169. This is not, however, to deny the possibility of transforming these conventions and creating new social meanings. *See, e.g.*, BUTLER, *supra* note 165, at 36–41 (discussing the possibility of changing meaning through introducing speech into new contexts); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929–30 (1996) (arguing that "norm entrepreneurs" can help create or remove a stigma, thereby changing the social meaning associated with a particular behavior).

constitutionally relevant meaning. This is because the social context that produces meaning reflects the power structure of the larger society; this means that, as many observers have pointed out, the meaning discerned from those displays will contain a majoritarian bias.[170] Some have explained, for example, that the Court has failed to recognize that there is no "neutral" observer position from which to judge the endorsement effect.[171] Because the observer's beliefs will most likely affect her perspective, "actions that reasonably offend non-adherents may seem so natural and proper to adherents as to blur into the background noise of society."[172] This "background noise of society" is the societal power structure referred to by Bourdieu, which makes the religious symbols and practices of dominant groups seem natural, and therefore dictates that the speech act of endorsement is only successful when it appears to exceed what is considered a "normal" amount of government approval of religion. This "normal" amount of approval is likely to be greater with respect to majority, mainstream religions, whose practice and culture are more closely tied to the history and culture of the United States, than with respect to minority religions.[173] By refusing to take into account the differences between majority and minority religions, the Court's endorsement test analysis threatens simply to reproduce unconsciously the majority perspective and to reinforce majority religious power.[174] This has struck some as particularly inappropriate in the Establishment Clause context, where the rights of religious minorities are arguably of paramount concern.[175]

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170. *See, e.g.*, Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 861–63 (1996) (book review); McConnell, *supra* note 8, at 154.

171. McConnell, *supra* note 8, at 148.

172. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–15, at 1293 (2d ed. 1988).

173. *See, e.g.*, FELDMAN, *supra* note 12. The Court's approach to the reality of political power differentials between minority and majority religious groups is in line with its treatment of equality issues generally. The Court's religion clauses jurisprudence is largely religion-blind, just as its equal protection jurisprudence is largely color-blind. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 266 (1993) (noting the Court's increasing concern with formal equality in Establishment Clause adjudication). This is not, of course, the only possible approach to equality. *Cf.* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 136 (1976) (arguing that the Equal Protection Clause should be understood as "asymmetrical," that is, as aiming to protect certain disadvantaged groups rather than to treat all individuals the same).

174. Thus, Justice Scalia's statement in *Capitol Square* that, in considering whether government endorsement of private religious speech can occur in a public forum, the Court has been concerned only with "what would be thought by 'the community'—not *by outsiders* or individual members of the community [who may be uninformed about the openness of the Capitol Square forum]," Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 765 (1995) (plurality opinion) (emphasis added), seems to reinforce a majoritarian approach to determining the presence or absence of religious endorsement. Feldman, *supra* note 170 (critiquing the Court's entire religion jurisprudence on this ground).

175. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1178–79 (1988); *see also* Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679 (6th Cir. 1994). *But see* Noah Feldman, *From Liberty to Equality: The Transformation of the*

To summarize, the social context—in the form of societal consensus—plays an important role in interpretation. In the context of displays of religious symbols, however, this role is problematic for two reasons. First, it is doubtful that any such consensus can be found, given the diversity of religious beliefs and attitudes toward religion in U.S. society. Second, the notion of societal consensus appears to be a majoritarian one, drawing upon and reflecting the power structure of society. As such, reliance upon societal consensus will tend to warp the jurisprudence of religious symbolism toward the perspective of adherents to majority—that is, Christian—religions.

IV. Context and Consensus in the Courts

As one might expect, based on this theoretical framework, the Supreme Court's attempts to turn context into a manageable concept have largely failed in the religious symbol cases. This Part delineates the Court's struggles with the concept of context in the religious symbol cases. The Justices have tried to use three different definitions of context, each of which failed, ultimately, to lend analytic clarity to the endorsement inquiry. First, in *Allegheny*, the dominant definition of context was the immediate physical setting of the display. Second, in *Lynch*, the majority defined context as the overall holiday context. Third, at various points in *Lynch* and *Allegheny* the Justices also struggled to incorporate the concept of historical context. There is one kind of context that the Court has been particularly reluctant to confront, however—the social context.

A. *The Supreme Court's Struggles with Context*

1. *Immediate Physical Setting*

In *Allegheny*, the Court attempted to limit the relevant context to the immediate physical setting of the display. In considering whether the crèche displayed on the interior steps of the county courthouse impermissibly endorsed religion, the Court refused to consider the crèche in connection with the menorah displayed a block and a half away.[176] The Court found that the display's "floral frame" conveniently demarcated the borders of its context and turned the crèche into "its own display distinct from any other decorations or exhibitions in the building."[177]

Establishment Clause, 90 Cal. L. Rev. 673 (2002) (questioning the validity of the premise that religious minorities are the special concern of the Establishment Clause).

176. *See* County of Allegheny v. ACLU, 492 U.S. 573, 598–600 (1989); *cf. id.* at 597 (stating that the Court's task is "to determine whether the display of the crèche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs"); *Elewski v. City of Syracuse*, 123 F.3d 51, 59 (2d Cir. 1997) (Cabranes, J., dissenting) (describing the *Allegheny* Court's limitation of its inquiry to the crèche and its immediate surroundings as "the only explicit Supreme Court teaching addressing how broadly we ought to delineate or define the display under review").

177. *Allegheny*, 492 U.S. at 598 n.48.

Even this most innocuous and natural attempt to delimit the context becomes unmanageable in its application, however. The Court concluded that the floral frame, while delineating the borders of the display, compounded the endorsement effect because it drew attention to what was inside the frame, and because the frame itself was composed of poinsettias, which are traditional Christmas flowers.[178] Thus, the Court's contemplation of the immediate physical context swept in the display's frame or border, as well. Yet this fact seems to undermine the very notion of a neutral border that demarcates the space where the display ends. If the frame, too, is part of the display context, it seems that only the space immediately outside the frame could be the real border of the display. But what is to keep the Court from taking this "frame" into account as well? As in *Elewski*, discussed above, the question becomes just how much space the immediate physical context should be understood to comprise—or how, exactly, to determine what that immediate physical context is.[179]

2. *Overall Holiday Context*

In *Lynch*, both the majority and the dissent appeared to view the relevant context as the overall holiday season—they only disagreed over whether this context was itself religious or secular. The majority explained that the crèche should be considered "in the context of the Christmas season," because "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."[180] As long as the crèche was deployed merely to "celebrate the Holiday" and "to depict the origins of that Holiday," it served a legitimate secular purpose.[181] The majority did note that the Christmas holiday has religious aspects—indeed, it went so far as to acknowledge that "[e]ven the traditional, purely secular displays extant at Christmas . . . inevitably recall the religious nature of the Holiday."[182] The Court's logic nonetheless tacitly assumes that Christmas is fundamentally a secular holiday, because it stated that celebrating that holiday is a secular purpose.

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178. *See id.* at 599.

179. *See supra* text accompanying notes 137–143. The Court's notion of context also arguably includes that which has been *excluded* from the display. Arguing that the menorah display was constitutional, Justice Blackmun, who wrote the majority opinion in *Allegheny*, suggested that the menorah was acceptable because the city had no less religious alternatives: "It is difficult to imagine a predominantly secular symbol of Chanukah that the city could place next to its Christmas tree. An 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah." *Allegheny*, 492 U.S. at 618 (plurality opinion). Thus, one could argue that the (nonexistent) 18-foot dreidel, too, is part of the context for Justice Blackmun.

180. Lynch v. Donnelly, 465 U.S. 668, 679–80 (1984); *see also Allegheny*, 492 U.S. at 666 (Kennedy, J., dissenting) ("[T]he relevant context is not the items in the display itself but the season as a whole."). The majority in *Lynch* did not actually apply the endorsement test, but, as Justice Blackmun pointed out in *Allegheny*, the majority's analysis was functionally very similar to the endorsement test. *Allegheny*, 492 U.S. at 594–95 (plurality opinion).

181. *Lynch*, 465 U.S. at 681.

182. *Id.* at 685.

Justice Brennan's dissent pointed out the incoherence of the majority's assumption: "The vice of this dangerously superficial argument is that it overlooks the fact that the Christmas holiday in our national culture contains both secular and sectarian elements."[183] Justice Brennan at first noted, for example, that the crèche's "symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah."[184] Justice Brennan looked to the overall holiday context, as well, distinguishing the holiday crèche display from other uses of religious symbols—such as in a museum setting. "In [a museum] setting," Justice Brennan argued, "we would have objective guarantees that the crèche could not" endorse any single religion.[185] "In the absence of any other religious symbols or of any neutral disclaimer, the inescapable effect of the crèche will be to remind the average observer of the religious roots of the celebration he is witnessing . . . ."[186]

This last statement suggests that Justice Brennan assumed that Christmas was primarily a religious holiday, just as the majority assumed it was secular, and that the religious nature of this holiday dictated that a crèche in a holiday display would also necessarily be religious. Otherwise, why would "the absence of any other religious symbols" and of a "neutral disclaimer" necessarily convey a religious message? Thus, Justice Brennan's argument, like the majority's, considers the relevant context to be the overall holiday setting. The only difference between Justice Brennan's argument and the majority's is that Justice Brennan assumed that Christmas was primarily a religious holiday, whereas the majority assumed it was primarily secular. It is unclear, moreover, how the disagreement between the majority and the dissent might be resolved without making an appeal to some other kind of context, such as history or contemporary societal understandings. Yet, as discussed below, these forms of context are not susceptible to formalization, either.

3. *Historical Context*

The problem of how to treat historical context gave the Justices considerable difficulties in *Lynch* and *Allegheny*. Although historical context has often been considered to be particularly relevant to the Establishment Clause inquiry,[187] it also seems to present particular problems for discerning the

183. *Id.* at 709 (Brennan, J., dissenting).

184. *Id.* at 711.

185. *Id.* at 713.

186. *Id.*

187. *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 2 (1995) (noting that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment" (quoting Everson v. Bd. of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting)) (internal quotation marks omitted) (alteration in original)).

meaning of religious symbols.[188] One problem posed by the notion of historical context is that the Justices do not agree about *which* history is relevant. For Establishment Clause purposes, is it the history of "official acknowledgment" of religion,[189] the history of the particular holiday celebrated, the history of the symbol itself, or the history of the particular forum where the display is located that is relevant? The Justices have appealed to each of these histories at various points in evaluating the constitutionality of religious displays.[190] Additionally, if all of these histories are relevant, how is one to decide which one is dominant, in a case where they conflict? This problem is an instance of the boundlessness of context—the ever-present possibility of further specifying context.

The Justices are thus capable of arriving at different conclusions about the permissibility of particular displays by choosing a broader or narrower historical context.[191] For example, by surveying the history of official references to religion, Justice Burger, writing for the majority in *Lynch*, concluded that a somewhat relaxed view of the permissibility of government expressions of religious sentiment is most consonant with the intent of the Framers of the Establishment Clause.[192] In dissent, Justice Brennan focused specifically on the history of the public celebration of the Christmas holiday, concluding for his part that this holiday engendered intense sectarian divisiveness until quite recently and therefore should *not* be considered an uncontroversial secular event.[193]

The role of history in interpreting the social meaning of holiday symbols is complex, of course, because the passage of time has the capacity both to negate and simply to mask the religious significance of those symbols. On the one hand, meaning is historically contingent: for example, although Santa Claus may have once had religious significance as a representation of Saint Nicholas, this figure is now usually considered by the Court to have lost its religious connotations and to have become part of the "secular"

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188. For an excellent summary of the difficulties raised by the use of history, and particularly of original intent, in the interpretation of the religion clauses, see *id.* at 1–6.

189. *Lynch*, 465 U.S. at 674.

190. *See id.* at 674–78 (history of official recognition of religion); *id.* at 718–25 (Brennan, J., dissenting) (history of the celebration of Christmas); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 781–82 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (history of the forum); County of Allegheny v. ACLU, 492 U.S. 573, 580–85 (1989) (plurality opinion) (history of the crèche and the menorah as holiday symbols).

191. *Cf.* GOFFMAN, *supra* note 144, at 8 ("Any event can be described in terms of a focus that includes a wide swath or a narrow one and—as a related but not identical matter—in terms of a focus that is close-up or distant."); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (describing how using a broader or narrower conception of context can change the results in criminal law). An analogous point is made in Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1332–75 (2002) (arguing that constitutional doctrine is plagued by the difficulty of determining how broadly or narrowly the relevant transaction between the individual and the government is framed).

192. *See Lynch*, 465 U.S. at 673–78; *see also* Van Orden v. Perry, 125 S. Ct. 2854, 2861–63 (2005) (plurality opinion) (examining the history of official acknowledgements of religion in finding a Ten Commandments display on government property to be constitutional).

193. *See Lynch*, 465 U.S. at 718–25 (Brennan, J., dissenting).

symbolism of the Christmas holiday.[194] The phenomenon whereby religious symbols or traditions are seen to lose their religious force over time is familiar in Establishment Clause jurisprudence, forming the basis for the Court's decisions to uphold the constitutionality of Sunday closing laws, for example.[195]

At the same time, however, it is possible that the passage of time simply masks an endorsement of religion that was successful enough to become uncontroversial in the end, by repressing or ignoring all dissent. This possibility seems to be implied by Justice Brennan's description of the sustained controversy over the celebration of Christmas among Christian sects in the eighteenth and nineteenth centuries in America.[196] Justice Brennan pointed out that "historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action, since, as the Court has rightly observed, 'no one acquires a vested or protected right in violation of the Constitution by long use.'"[197] Similarly, it is possible that a government act that once would have been inoffensive may now have the capacity to offend certain individuals—due to increased religious diversity, for example, or a change in citizens' sensibilities about the official acknowledgment of religion.[198]

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194. *See, e.g.*, *id.* at 692 (O'Connor, J., concurring). Even Justice Brennan, in his dissent to *Lynch*, takes for granted that Santa Claus is secular. *See id.* at 695 n.1 (Brennan, J., dissenting); *cf. Allegheny*, 492 U.S. at 617 (plurality opinion) (describing the Christmas tree as the "preeminent secular symbol of the Christmas holiday season"). The Christmas tree, treated in *Allegheny* as secular, is arguably a symbol that is charged with religious meaning. Although pagan in origin, the evergreen tree now symbolizes for Christians the everlasting life promised by Jesus and guaranteed by his death and resurrection.

195. *See* McGowan v. Maryland, 366 U.S. 420, 431–53 (1961); *cf.* Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857 (1997); Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

196. *See Lynch*, 465 U.S. at 718–25 (Brennan, J., dissenting).

197. *Id.* at 718 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)). One might take issue with the accuracy of Justice Brennan's statement. The Supreme Court has on occasion declared, for example, that it will not reconsider longstanding precedent on a legal issue simply because evidence arises that that precedent may have been wrong. *See, e.g.*, Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 154 n.6 (1983) ("Respondents argue that application of the Act . . . would present a significant risk of conflict with the Tenth Amendment . . . . It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities."); *cf.* U.S. v. Lopez, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) ("Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean."). Indeed, the Court seemed to accept the notion that longstanding practice justified legislative prayers, which would otherwise violate the Establishment Clause. Marsh v. Chambers, 463 U.S. 783, 786–92 (1983). And in *Van Orden v. Perry*, the plurality suggested that the fact that a Ten Commandments display had been in place without any complaints for forty years weighed in favor of its constitutionality. 125 S. Ct. 2854, 2858, 2864 (2005) (plurality opinion).

198. *See* TRIBE, *supra* note 172, at 1296 (2d ed. 1988); *cf.* JUDITH BUTLER, *supra* note 165, at 13–14 (arguing that historical "context is invoked and restaged at the moment of utterance" of hate speech, but also that offensive speech has a "changeable power" that allows it to gain different, even opposite meanings when it is used in contexts for which it was not intended); FELDMAN, *supra* note 12, at 269–70.

B. *The Courts' Struggles with Social Context and Consensus*

Lower courts have struggled with social context when facing Establishment Clause challenges to symbols or displays that are *not* widely understood as having religious content. Although it would presumably always be possible to find someone, somewhere, who would not understand a menorah as being a symbol connected with Judaism or who would see a crucifix as merely a somewhat morbid sculpture, such symbols do not themselves generally pose interpretive difficulties, because there is a broad societal consensus that they are strongly associated with religion.[199] In cases dealing with more conventional religious symbols, the interpretive battle is usually waged over whether the overall context conveys a message of approval of Judaism or Christianity, rather than whether the symbol itself is religious.[200] In cases where the religious nature of the symbol itself is doubtful, however, courts have generally acknowledged the role that societal consensus plays in creating meaning. Courts are forced to recognize that, although it is indeed possible that some individuals might view the disputed symbols as having religious significance, those views must be excluded because they are simply shared by too few people.

In the Ninth Circuit case *Alvarado v. City of San Jose*,[201] the plaintiffs challenged San Jose's installation and maintenance of a sculpture intended to celebrate the influence of Mexican and Spanish culture in the city.[202] The sculpture was a representation of the "Plumed Serpent," a symbol of the Aztec deity Quetzalcoatl, who was worshipped in Aztec and Mayan cultures from about 100–300 A.D. until the sixteenth century.[203] After rejecting the notion that the Plumed Serpent sculpture could raise Establishment Clause concerns merely because it was once worshipped by a religious sect, the *Alvarado* court focused on the contemporary social context in order to interpret the symbol. By way of demonstrating the symbol's current religious significance, the plaintiffs had pointed to New Age and Mormon texts discussing Quetzalcoatl in spiritual terms, as well as to the statements of a councilwoman who found the sculpture to have spiritual significance for her. The court considered those writings and statements but noted that each one asserted a purely subjective view of Quetzalcoatl as having religious significance or expressed a purely subjective belief that Quetzalcoatl was relevant

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199. *But see* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770–72 (1995) (Thomas, J., concurring) (noting that the unadorned Latin cross erected on public property was more a political symbol than a religious one).

200. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 598 (1989) ("There is no doubt, of course, that the crèche itself is capable of communicating a religious message.").

201. 94 F.3d 1223 (9th Cir. 1996).

202. *See Alvarado*, 94 F.3d at 1225.

203. *See id.* at 1226.

to an established religion.[204] With respect to the New Age writings, the court stated, for example:

> They refer specifically to Quetzalcoatl and the Plumed Serpent, from which they derive spiritual sustenance, but it is clear that the experience they describe is subjective, however much they may wish to share it. They refer to Quetzalcoatl in the past tense and describe him as a deity belonging to an ancient tradition. Even the bits quoted in the plaintiffs' brief are full of language signifying a subjective response: "the prophetic facts of the matter *gave me the conviction* that Quetzalcoatl was not just a local affair. Rather, *I saw* in Quetzalcoatl an invisible and immanent force underlying and transcending the mythic fabric of mechanization. . . . *It occurred to me* that [Quetzalcoatl] . . . was himself an incarnation of Christ."[205]

The court then rejected as "unworkable" the plaintiffs' definition of a religious symbol, for Establishment Clause purposes, as "any symbol . . . to which *an individual* ascribes 'serious or almost-serious' spiritual significance."[206]

The Ninth Circuit's approach echoes that of the Sixth Circuit in *Kunselman v. Western Reserve Local School District*,[207] dealing with an Establishment Clause challenge to use of the "Blue Devil" as a school mascot. The court found the plaintiffs' sense of personal offense at the symbol to be insufficient to show that the school was endorsing Satanism by adopting the symbol, holding that no reasonable observer would share the plaintiffs' perspective.[208] The court noted that the defendant had submitted affidavits from the senior class president and various school officials, stating that the mascot had not been perceived as a religious symbol, but rather as a "menacing type of figure for athletic activities."[209] Quoting the district court, the Sixth Circuit thus held that "the fact that plaintiffs are personally offended by the mascot is insufficient to establish a First Amendment violation in the context of the facts of this case."[210]

In both *Alvarado* and *Kunselman*, then, the court looked beyond the plaintiffs for evidence of a broader societal consensus as to the meaning of the contested symbol. Those cases, in which the courts decided that certain symbols were incapable of supporting an endorsement of religion because

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204. *See id.* at 1229–31. The court also rejected the plaintiffs' contention that New Age was a religion for the purposes of the Establishment Clause.

205. *Id.* at 1230.

206. *Id.* (emphasis added).

207. 70 F.3d 931 (6th Cir. 1995).

208. *See Kunselman*, 70 F.3d at 932–33.

209. *Id.* at 932.

210. *Id.* at 932–33; *see also* Guyer v. Sch. Bd., 634 So. 2d 806, 808 (Fla. Dist. Ct. App. 1994) (stating, in the context of an Establishment Clause challenge to the use of Halloween symbols in the public schools, that "[t]he determinative question is not whether the witch, cauldron, and broom are capable of communicating a religious message to some people. What is determinative is the context in which these symbols are displayed." (citation omitted)).

they simply could not reasonably be understood within the current social context as religious in nature, demonstrate the important role of social context in determining meaning. The courts' methodology, which seems to have yielded eminently reasonable results, nonetheless highlights the difficulties posed by social context and consensus.

In each case, the court looked to evidentiary submissions to determine the societal consensus about the meaning of the challenged symbols. The meaning of the allegedly religious symbols thus appears to be conceptualized by the lower courts as primarily an empirical question. The courts attempt to determine the generally understood meaning of a symbol by looking to the affidavits of individual members of the community and reject the plaintiffs' interpretations largely because they are shared by too few people.[211] This approach could prove problematic in a less straightforward case, however, for a number of reasons.

First, meaning—which is certainly dependent on consensus to some extent—is nonetheless not an empirical concept. Moreover, the obvious difficulties with treating meaning as an empirical matter are likely to be magnified in the judicial setting, where courts will be faced with the problem of how to weigh evidentiary submissions—both expert and nonexpert—regarding the meaning of symbols. A second, equally important problem with searching for societal consensus through evidentiary submissions is that such consensus will often be impossible to find, and to the extent it is "found," it will simply be a reflection of the majority viewpoint.

Unlike the lower courts in *Alvardo* and *Kunselman*, the Supreme Court seems intent on excluding the social context from its analysis in religious display cases. For example, the Court is particularly loath to consider the currently existing relationships of social and political power among religious groups and to treat minority religions differently from majority religions for endorsement test purposes. In *Allegheny*, the only Supreme Court case to consider the constitutionality of a minority religious display (a menorah), the Court's opinion did not discuss the fact that the religion at issue was a minority religion. Justice Blackmun, who wrote the opinion of the Court, did note the relatively small Jewish population of Pittsburgh, in a footnote in a part of his opinion that was joined by no other Justice.[212] In remarking on this minority status, Justice Blackmun stated that it was "distinctly implausible to view the combined display of the tree, the sign, and the menorah as endorsing the Jewish faith alone."[213] Justice Blackmun was

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211. The Supreme Court has never considered an Establishment Clause challenge to a display involving a less manifestly religious symbol, such as those involved in *Alvarado* and *Kunselman*; therefore, it has not directly addressed the role of actual individuals' perceptions in deciding whether a symbol is religious. *Cf.* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion) (criticizing the endorsement test because it would require governmental entities trying to avoid an Establishment Clause violation "to guess whether some undetermined critical mass of the community might . . . perceive the [governmental entity] to be advocating a religious viewpoint").

212. *See* County of Allegheny v. ACLU, 492 U.S. 573, 616 n.64 (1989).

213. *Id.*

quick to qualify this remark, however, adding that he did not mean to imply "that it is implausible, as a general matter, for a city like Pittsburgh to endorse a minority faith. The display of a menorah alone might well have that effect."[214] Thus, even Justice Blackmun remained insistent that minority or majority religious status is irrelevant to endorsement test analysis.

Of course, if the Court were to take the social context into account, it might very well conclude that the minority status of the menorah is, in fact, relevant to whether its display by the county conveys a message of religious endorsement. After all, it does seem less plausible that a city where Jews have relatively modest political and demographic representation would intend to endorse the Jewish religion by displaying a menorah—just as it was unlikely, in the Sixth Circuit case of *Brooks v. City of Oak Ridge*,[215] that the city of Oak Ridge, Tennessee, in which Buddhists are a negligible minority of the population, intended to endorse Buddhism when it erected a "Buddhist bell" in a city park as a symbol of friendship with Japan, fifty years after that city had played a seminal role in the Manhattan Project during World War II.[216] Excluding the broader social context from the interpretive enterprise, including the minority or majority status of the particular religion represented, renders the inquiry into the meaning of the display incomplete. Indeed, it is somewhat like trying to determine the social meaning of racial segregation without considering which racial group is in power.[217]

Several commentators have taken the Court to task for its reluctance to consider the social context, in that the Court has thus far refused to consider the differing perspectives that members of religious majorities and minorities are likely to bring to their observation of a given display. Those commentators have noted that the Court has generally declined to give prominence to the perspective of the religious outsider, in particular, when deciding whether the "reasonable observer" would perceive a government practice or symbol to constitute an endorsement of religion. Yet, "[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to make this assessment."[218] Thus, despite the fact that the degree to which a governmental practice causes offense is likely to be affected by the religious beliefs of the observer of that

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214. *Id.*

215. 222 F.3d 259 (6th Cir. 2000).

216. *Brooks*, 222 F.3d at 262–63. The Sixth Circuit, following the Supreme Court's lead, did not discuss the minority status of the Buddhist religion in Oak Ridge.

217. *Cf.* Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 390–93 (criticizing the Supreme Court's equal protection jurisprudence for its refusal to take social and historical context into account). This is not to say that race and religion pose identical problems for discerning social meaning. For example, social meaning is arguably clearer in the race context, because the goal of racial equality is understood and accepted by most people, even if there are disputes over how this equality principle is to be applied. In the religion context, however, there seems to be a dispute over the substance of principle to be applied, as well as over how to apply it. The indeterminacy is thus more profound.

218. McConnell, *supra* note 8, at 148.

practice,[219] the doctrine applied by the Court seemingly assumes that all citizens—Christians, members of minority religions, and nonreligious citizens—share the same perspective.[220] As discussed above, however, just the opposite is likely to be true. The existence of religious pluralism and a diversity of viewpoints about the proper role of religion in society most likely means that the various observers of a display—not to mention the judges who are supposed to stand in the shoes of those observers and decide what the display means to them—bring different assumptions to the table, and therefore will arrive at different social meanings in interpreting the display.[221]

I do not mean to argue in this Article simply that a Jew and an Evangelical Christian may both view the same crèche display but receive different messages from it—that the display may profoundly offend and alienate the former observer, while barely registering with the latter, for instance. Such an assertion, while intuitively appealing and perhaps even accurate in a great number of cases, falls prey to a kind of essentialism that I hope to avoid in this analysis, an essentialism that I believe other commentators have espoused when discussing the endorsement test.[222] Rather, I mean to argue that it is not simply one's religious beliefs or lack thereof, but also one's assumptions and beliefs about the proper relationship between church and state that aggravate the difficulty of discerning whether a given display conveys a message of endorsement of religion. Of course, an individual's religious identity, as well as other aspects of her experience and background, likely influence these assumptions and beliefs. But a devout Christian who nonetheless believes that religion is an entirely private matter, to be kept completely separate from the realm of government, may find that a Christmastime crèche display connotes an endorsement of religion (one that is entirely inappropriate); or, on the contrary, that it conveys an offensive trivialization of religion. In any case, the individual's religious identity does not necessarily determine the individual's understanding of the message conveyed by the crèche.

Indeed, recent innovative empirical research by Gregory Sisk, Michael Heise, and Andrew Morriss on the influence of a judge's religion on his or

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219. *See, e.g.*, TRIBE, *supra* note 172, §§ 14–15, at 1293 ("[A]ctions that reasonably offend non-adherents may seem so natural and proper to adherents as to blur into the background noise of society."); McConnell, *supra* note 8, at 154 (describing the endorsement test's bias in favor of mainstream religions).

220. Indeed, the Court's practice of granting standing in religious symbol cases to almost any observer of the display, without regard to the religious beliefs of that observer, is perhaps further evidence of this attitude. *See* Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1320 (1999).

221. An even more radical critique has been put forward by some scholars who argue that neutrality is itself an illusory concept in such contested matters, because there is simply no baseline with respect to which neutrality can be determined. *See, e.g.*, SMITH, *supra* note 154; Ravitch, *supra* note 130.

222. *See, e.g.*, Tushnet, *supra* note 8, at 711 n.52 ("Indeed it is difficult to believe that the Lynch majority would have reached the same result had there been a Jew on the Court to speak from the heart about what public displays of crèches really mean to Jews.").

her decisionmaking in First Amendment cases supports the intuition that an individual's religion affects, but does not completely explain, an individual's perspective on church-state problems.[223] For example, Sisk, Heise, and Morriss found, after an extremely careful statistical study, that Jewish judges were more likely than others to approve Establishment Clause claims.[224] Although no correlation with religion (or lack thereof) could be found for judges who tended toward strong church-state separation and weak free exercise rights, "Jewish judges along with judges from non-mainstream Christian backgrounds were significantly more likely to approve of judicial intervention to overturn the decisions or actions of the political branch that either refused to accommodate religious dissenters or provided an official imprimatur upon a religious practice or symbol."[225] Relatedly, the social context in which the judge operated—specifically, the percentage of Jewish adherents compared to the community's entire population, as well as the percentage of individuals in the judge's community who were adherents of any religion, influenced—to a statistically significant degree—the judge's attitude toward Establishment Clause and Free Exercise claims.[226] Perhaps somewhat counterintuitively, a high rate of religious adherence in a judge's community was correlated with strong recognition of both Free Exercise *and* Establishment Clause rights—a finding that the authors convincingly explain by pointing out that:

> [B]ecause a strong overall level of religious adherence in a community emphatically is not the equivalent of uniformity of beliefs, such a community in fact may combine a high level of religious devotion with some appreciation of religious diversity, which might move that community both to be receptive to religious dissenters and to be skeptical of governmental actions that appear to elevate one form of religious tradition above others.[227]

Even more significantly, the authors found that the more religiously homogeneous a judge's community was, the *more likely* that judge was to uphold a claim that a governmental display of religious symbolism violated the Establishment Clause.[228] Their work could thus be read to caution against making entirely reductionist or essentialist assumptions about the exact role played by an individual's religious identity in interpretation.

Nonetheless, several commentators have criticized the Court for declining to adopt the perspective of the "reasonable nonadherent," rather than that of the "reasonable observer."[229] Laurence Tribe was perhaps the first to ob-

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223. Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

224. *Id.* at 502.

225. *Id.*

226. *Id.* at 589–90.

227. *Id.* at 590.

228. *Id.* at 591.

229. *See, e.g.*, TRIBE, *supra* note 172, §§ 14–15, at 1296.

serve that "[w]hen deciding whether a state practice makes someone feel like an outsider, the result often turns on whether one adopts the perspective of an outsider or that of an insider."[230] It is therefore the perspective of the person who is a religious outsider with respect to the particular symbol at issue that should be assumed by the Court, according to Tribe and others.[231]

Even accepting this questionable premise, it seems that adoption of the perspective of the "reasonable nonadherent," however, is still unlikely to resolve the interpretive problems at the heart of the religious symbol cases. Rather, urging courts to assume the perspective of the "reasonable nonadherent" raises a host of additional questions: How are courts to assume this perspective, especially if it is a foreign perspective for the individual judge? Is the judge to attempt to do so by exercising the power of empathy? By giving more weight to the testimony of nonbelievers than to believers?[232] Moreover, it is not entirely clear that it is exclusively, or especially, the sensibilities of the nonadherent that are or should be at the heart of the Court's concern in religious symbolism cases.[233]

Given the multiple ways in which I have demonstrated context to be unstable and unformalizable, the act of interpreting a display of religious symbolism—whether from the perspective of the reasonable nonadherent or from some other perspective—will continue to pose challenges. Although focusing on the perspective of the religious outsider, assuming it is possible for judges to do so, might narrow the range of possible assumptions with which a court is to view religious displays, the outsider perspective does not solve other problems of context. Physical and historical aspects of context, as well as the "overall holiday context" remain elusive.

V. CAN THE PROBLEM OF CONTEXT BE SOLVED?

The foregoing discussion suggests that it is simply impossible to formulate a stable rule for determining whether and under what conditions a symbolic display conveys a message of religious endorsement and is therefore unconstitutional. For the central lesson of modern speech act theory is that, although meaning is unavoidably context dependent, context itself is a boundless concept that cannot be usefully codified or delimited. Rather, a certain measure of indeterminacy is an inherent quality of all symbolic

230. *Id.* at 1293.

231. *See, e.g.*, Anjali Sakaria, Note, *Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations*, 37 HARV. C.R.-C.L. L. REV. 483, 494 (2002).

232. Indeed, such a rule might be unconstitutional under the Free Exercise Clause. *But cf.* Feigenson, *supra* note 90, at 99 (arguing that courts deciding cases under the endorsement test should consider the testimony of witnesses of different backgrounds).

233. *See* Marshall, *supra* note 89, at 374 (arguing that "the harm of establishment is not tied to its effects upon outsiders," and that "[i]t is the government's message that is critical, not the effects of that message .... Non-Christians, therefore, have no greater or lesser claim than do Christians that the state has improperly endorsed Christianity by displaying a cross, crèche or other such symbol"); *cf.* Note, *supra* note 220, at 1320 (discussing the broad standing accorded by the Supreme Court, to adherents and nonadherents alike, to challenge religious displays).

(linguistic or nonlinguistic) communication. Moreover, this indeterminacy is aggravated in the religious symbol context for two reasons: first, the potentially stabilizing force of subjective intent is more or less removed from the picture; and second, religious pluralism in the community interpreting those religious symbols increases the likelihood of divergent viewpoints and understandings of a given display. So long as the courts remain concerned with the constitutionality of certain kinds of governmental messages—in other words, as long as they are concerned with social meaning—the problem of indeterminacy will not go away. Given this state of affairs, what, if anything, can be done to improve the Court's religious symbolism jurisprudence?

A. *Per Se Rules Permitting or Forbidding Religious Symbols on Public Property*

If, as I have argued here, a case-by-case, context-based determination of the "message" conveyed by religious symbols leads ineluctably to jurisprudential inconsistency, one might propose a clear per se rule—either permitting any and all religious symbolism on public property, or forbidding the same—as a straightforward solution to the indeterminacy of social meaning. At least a per se rule would be easy to administer, and it would not call on courts to grapple with the messy task of discerning social meaning under conditions in which they are most likely doomed to failure. This considerable advantage makes per se rules worth considering in more depth but ultimately does not support the adoption of such a rule either favoring or disfavoring religious symbols.

1. *Per Se Rule Permitting Religious Symbols*

A per se rule permitting any and all religious symbols on public property would be equivalent to a determination that the Establishment Clause is simply not implicated by such symbolic speech, or that controversies arising from those symbols are nonjusticiable. And indeed, one might argue that the interpretive difficulties inherent in religious symbol cases counsel against courts' involvement in this area. Because it is so difficult to determine what a religious display "means" and whether it conveys a message of endorsement, and because the interpretation of such displays, being inevitably context dependent, does not lend itself to formulation into legal rules, the argument goes, courts should simply get out of the business of interpreting them.[234] Another defense of per se rules permitting religious symbols would argue, as some have done, that real-world harms and effects, not social meanings and expressive harms, are the traditional concern of our legal system.[235] Relatedly, some have cogently argued that the Establishment Clause

234. Steven Smith has advocated this position, Smith, *supra* note 8, at 331–32, but appears to have moderated his view somewhat recently. SMITH, *supra* note 154, at 122–27.

235. *Cf.* Note, *supra* note 220, at 1313–18 (discussing the apparent tension between the notion of "expressive harm" and the Article III requirement of concrete and particularized injury). This

is traditionally concerned with actual religious coercion, which is absent in the case of mere symbolic encouragement.[236]

Essentially, such arguments amount to an attack on the notion that symbolic or expressive concerns are relevant to the Establishment Clause analysis. This Article assumes the position that such concerns are central at least in the narrow class of cases involving Establishment Clause challenges to religious symbolism, without articulating a full defense of that position. Instead, this Article centers on the problem of how social meaning is to be determined, once it is accepted that social meaning is relevant. Nonetheless, some points may be made in defense of the expressivist approach.

First, one might point out that, even if symbolic harms are not cognizable under other constitutional provisions, the Supreme Court has long recognized that symbolic entanglement of the government with religion is one of the central evils that the Establishment Clause was intended to protect against.[237] The view that symbolic harm is not constitutionally cognizable is thus simply not in line with longstanding precedent. The Court explained in *Engel v. Vitale*,[238] for example, that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[239] The Court continued by acknowledging that even purely symbolic entanglement of government with religion may exert an indirect coercive force on individuals, but also explained that "the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[240] Indeed, the Court in *Engel* noted that the state-composed English Book of Common Prayer, which embodied the symbolic unity of church and state, represented an important reason for the colonists' decision "to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion."[241] Whatever the merits of the view that the Establishment Clause was

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argument also engages a larger debate, beyond the scope of this paper, regarding whether the expressive theories of law have any merit as a general matter. *Compare* Adler, *supra* note 13, *with* Anderson & Pildes, *Expressive Theories*, *supra* note 13.

236. Van Orden v. Perry, 125 S. Ct. 2854, 2865–66 (2005) (Thomas, J., concurring); County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 413–17 (2002); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

237. Stephen Gey has attacked the coercion theory on the ground that it is inconsistent with the "main thrust" of the Establishment Clause. Gey, *supra* note 86, at 465.

238. 370 U.S. 421 (1962).

239. *Engel*, 370 U.S. at 430.

240. *Id.* at 431.

241. *Id.* at 425–27. Of course, the Court's pronouncements on history and original intent in *Engel* and other Establishment Clause cases, most notably *Everson v. Board of Education*, 330 U.S.

originally intended to protect against symbolic harm, it is now well established that the Court takes such harms into account in Establishment Clause cases, and several commentators seem to agree that "government-sponsored religious messages are more problematic than government funding of religion and, more broadly, that expressive harms are the chief harms with which the Establishment Clause should be concerned."[242] Indeed, even Justice Kennedy, who has espoused an approach to the Establishment Clause under which only coercive exercises of government power would be unconstitutional, has nonetheless admitted that the Establishment Clause would bar some symbolic displays, such as "a large Latin cross [erected] on the roof of city hall."[243]

The view that a per se rule rejecting out of hand all claims of Establishment Clause injury from religious symbols would be inconsonant with Supreme Court precedent is further supported by the Supreme Court's standing rules in Establishment Clause cases. Rather than expressing suspicion about the viability of such claims of symbolic injury, the Supreme Court has relaxed its rules in Establishment Clause cases—perhaps out of the recognition that otherwise such claims would be nonjusticiable, which would be a clearly undesirable result in its view.[244] In cases involving religious symbols, in particular, the Supreme Court has never set forth a theory of standing but has seemingly granted standing to any plaintiff in proximity to the offending symbol.[245]

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1 (1947), have been deservedly attacked by a number of scholars. Nonetheless, those statements form the foundation of current Establishment Clause doctrine.

242. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1876 & n.256 (2004). Kathleen Sullivan has defended the notion that the Establishment Clause reaches symbolic encouragement of religion and not just coercive government actions on textualist grounds:

> [T]he right to free exercise of religion implies the right to free exercise of non-religion. No one may be coerced into worship, any more than out of it. . . . Thus the Free Exercise Clause would forbid the state to coerce minority sects or atheists into contrary beliefs, even without the Establishment Clause.
>
> But the Establishment Clause cannot be mere surplusage. If the Free Exercise Clause standing alone guarantees free exercise of non-religion, the Establishment Clause must do more than bar coercion of non-believers. . . . If the Establishment Clause is to have independent meaning, it must bar something other than coercion of private citizens into confessions of official faith.
>
> In the context of government speech and symbols, that "something else" is government stamps of approval upon religion. . . . On this reading, the Establishment Clause does more than bar "coercion"; it bars "endorsement" and "acknowledgement" of religion as well.

Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 205–06 (1992).

243. County of Allegheny v. ACLU, 492 U.S. 573, 660–61 (1989) (Kennedy, J., concurring in part and dissenting in part). Moroever, as Noah Feldman has insightfully acknowledged, the concept of coercion is not itself without some indeterminacy. Feldman, *supra* note 236, at 416–17.

244. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 94–106 (1968).

245. Note, *supra* note 220, at 1319–20; *cf.* City of Edmond v. Robinson, 517 U.S. 1201, 1202 (1996) (Rehnquist, C.J., dissenting from denial of cert.) (arguing that the Supreme Court has been too lax with respect to standing in religious symbol cases).

A final response would point out that symbolism is of central importance to the functioning of religion. One might even go so far as to argue that symbols are the primary mode through which religion exerts its persuasive force.[246] To give the government free rein in displaying religious symbols would thus be to lend considerable support to religion. Moreover, Ira Lupu has argued that symbolic government action has become more prominent in Establishment Clause debates than even official financial support of religion for a number of reasons, one of which is the growing importance of symbols in our contemporary society of fast-paced mass communication.[247] He notes that:

> Eye-catching pictures have always been worth many words, but the accuracy of renderings and the speed of their transmission have improved many times over between the Framers' time and our own.
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> . . .
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> . . . In a fast-moving political culture in which visual images dominate public focus, public controversy over matters of government speech about religion can be expected to take precedence over issues of government money in support of religion.[248]

Ultimately, however, to one who embraces the coercion theory of the Establishment Clause, a per se rule permitting religious symbolism on public property will most likely be an attractive alternative solution.[249] This position would be inconsistent with the expressivist view, which recognizes that symbols on public property can convey messages to the observers and that those messages can be constitutionally problematic. A full defense of the expressivist approach, however, is beyond the scope of this Article.[250]

2. *Per Se Rule Forbidding Religious Symbols*

At the other extreme would be a per se rule that flatly prohibits the display of any religious symbols on government property. Again, this rule would seem to be clear and administrable, avoiding the indeterminacy problems described above. In addition, one might argue that very little is actually lost if the government cannot permit or sponsor the display of religious symbols on public property. It might appear that there is much to be gained and little to be lost by such an absolute prohibition.

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246. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("[T]he church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment . . . ."); THOMAS FAWCETT, THE SYMBOLIC LANGUAGE OF RELIGION: AN INTRODUCTORY STUDY (1970).

247. Lupu, *supra* note 111, at 787–88.

248. *Id.*

249. *But see* County of Allegheny v. ACLU, 492 U.S. 573, 660–61 (1989) (Kennedy, J., concurring in part and dissenting in part).

250. As noted above, other commentators have written such defenses. *See, e.g.*, Cole, *supra* note 84, at 583–86. Perhaps the fullest defense of the "symbolic" understanding of the Establishment Clause is contained in Marshall, *supra* note 87.

Like the per se rule permitting religious displays, the per se rule forbidding all religious symbols may be vulnerable to attack, depending on one's theory of the underlying substantive values that the Establishment Clause is intended to serve. The per se rule against religious symbols would run contrary to the accommodationist view, which would argue that religion, as a vital part of citizens' lives and perhaps even of public life, deserves acknowledgement in the public square.[251] Some commentators have argued that something vital is lost if government is prevented from sponsoring religious symbols even in certain anodyne contexts.[252]

The usual rationale in favor of some symbolic accommodation of religion is that it is necessary in order to avoid excessive hostility to religion. It would be a false statement, proponents of this view argue, for government to send the message that religion plays no legitimate role in public life, since it obviously does play an important role for many citizens; thus, denying any symbolic recognition to religion would be tipping the scale in favor of nonreligion, which is also forbidden by the Establishment and Free Exercise Clauses.[253] Others have urged that symbols such as those celebrating recognized holidays and commemorating events from our shared history promote cultural cohesiveness and thereby impart the "practical benefit to be derived from community spirit and cultural continuity."[254]

Moreover, as *Capitol Square* demonstrates, other First Amendment concerns—particularly free speech concerns—may be raised by the public display of religious symbols. A per se rule prohibiting the display of religious symbols on public property, if it included privately sponsored displays, could in many cases result in an affirmative disadvantage or burden imposed on religious speech by comparison to nonreligious speech. Such a result would most likely run afoul of the entire line of free speech public forum cases, from *Widmar v. Vincent*[255] through *Lamb's Chapel v. Center Moriches Union Free School District*,[256] *Rosenberger v. Rector and*

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251. *See generally* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

252. *See, e.g.*, Kelly C. Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 BYU L. REV. 509, 510–14; *see also* ACLU v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 307 (6th Cir. 2001).

253. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Zorach v. Clauson, 343 U.S. 306, 315 (1952); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1641–42 (1987).

254. Crabb, *supra* note 252 at 510–14; *see also Capitol Square*, 243 F.3d at 291, 307 (upholding the constitutionality of the Ohio state motto, "With God All Things Are Possible," in part because "[l]ike the national motto, and the national anthem, and the pledge of allegiance, the Ohio motto is a symbol of a common identity" and noting that "[s]uch symbols unquestionably serve an important secular purpose—reenforcing the citizen's sense of membership in an identifiable state or nation"). Justice Scalia has also referenced "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors." McCreary County v. ACLU, 125 S. Ct. 2722, 2756 (2005).

255. 454 U.S. 263 (1981).

256. 508 U.S. 384 (1993).

Visitors of University of Virginia,[257] and *Good News Club v. Milford Central School*.[258]

Finally, the proposal that the Court adopt a per se rule prohibiting all religious symbols on public property is susceptible to a more fundamental critique. Even a straightforward per se rule is subject to substantial ambiguity, due to the fact that any attempt to stabilize context—even through the use of a per se rule—is vulnerable to the ever-present possibility of describing a new context to which the per se rule cannot possibly be meant to apply.[259] This problem was described above as one aspect of the boundlessness of context.

To put the point more concretely, the application of a per se rule forbidding all religious symbols on public property, for example, would presumably require an injunction forbidding the government to sponsor an exhibition of medieval art in the lobby of the city hall. Likewise, the display of a Buddhist bell by the City of Oak Ridge, Tennessee, as a symbol of friendship and reconciliation with Japan fifty years after the City of Oak Ridge had played a major role in developing the atom bomb in World War II, would also be unconstitutional.[260] It is difficult to imagine what Establishment Clause values might be served by those results;[261] indeed, much cultural benefit could be lost if such a sweeping prophylactic rule were adopted.

B. *A Presumption against Religious Symbols on Government Property*

A more concrete solution to improve the jurisprudence in this area—again, with the caveat that the fundamental problem of indeterminacy is endemic to any jurisprudence centered on social meaning—is to add a presumption against religious symbols on government property to the current endorsement test. This is the solution proposed by Justice Stevens in his *Allegheny* opinion, but for different reasons from those I present here.[262]

Presumptions in law may serve a number of purposes, at least two of which are relevant here. First, presumptions are our legal system's response to uncertainty, ignorance, or indeterminacy. Since "[t]he defining trait of

257. 515 U.S. 819 (1995).

258. 533 U.S. 98 (2001).

259. *See supra* notes 140–142 and accompanying text.

260. Brooks v. City of Oak Ridge, 222 F.3d 259 (6th Cir. 2000).

261. *But see* Feigenson, *supra* note 90, at 109–10 (suggesting that the National Gallery's display of works of religious art "raises major constitutional issues," which should, nonetheless, be resolved in favor of permitting the display).

262. County of Allegheny v. ACLU, 492 U.S. 573, 650 (1989) (Stevens, J., concurring in part and dissenting in part); *see also* Van Orden v. Perry, 125 S. Ct. 2854, 2874, 2882 (2005) (Stevens, J., dissenting). Drawing on the history of the Establishment Clause, Justice Stevens determined that such displays violate the Clause because of the unacceptable risk they pose for offending adherents and nonadherents alike, as well as for fomenting divisiveness in the political body. *See also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting).

litigation is decision under uncertainty,"[263] the law imposes presumptions and burdens of proof to manage this uncertainty by designating which party bears the risk of that uncertainty (and therefore loses if the presumption is not overcome).[264] Often this uncertainty revolves around matters of historical fact, which are inaccessible to the decisionmakers (judge and jury) and often to the parties and witnesses themselves.[265] In the sort of cases discussed in this Article, by contrast, the uncertainty pertains to the social meaning of a display. This minor distinction gives no reason, however, to think that a presumption would be any less appropriate.

As the doctrine of religious symbolism currently stands, the judge is left to decide essentially in a vacuum what the social meaning of a display is and whether that social meaning is sufficient to trigger Establishment Clause concerns. In conditions of extreme indeterminacy, the judge is left without any guidance with which to make this decision, except perhaps the general rule that the plaintiff bears the burden of proof. Not only does this lack of guidance render decisionmaking more difficult, it also masks the substantive judgments that are really at work when a judge decides, purportedly as a question of law, what the message of a display is. Starting with an initial presumption at least brings the substantive bias (in this case, a legally-mandated bias in favor of plaintiffs) out into the open. It should make manifest and thereby stabilize some of the assumptions brought by the interpreter to the act of interpreting a symbolic display.[266] A presumption would thus add some determinacy to the jurisprudence without some of the problems that a bright-line rule would entail.[267]

Another purpose served by presumptions is counteracting systemic biases or predispositions on the part of the factfinder that are determined, for substantive or policy reasons, to be inimical to the goals of the judicial process.[268] These "cognitive filters, which are easily colored by social, psychological, or dogmatic predispositions," if considered undesirable, may

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263. Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627, 633 (1994).

264. *Id.*; *see also* RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE 20 (1992).

265. Allen, *supra* note 263, at 633.

266. *Cf.* Levinson, *supra* note 191, at 1375–76 (noting that "the substantive judgments that determine, or are reflected in, the results of cases are buried in tacit framing decisions" and advocating "bring[ing] these basic questions of goals and mechanisms to the surface by explicitly asking what, exactly, constitutional norms are supposed to accomplish by way of improving the behavior of government and how they might be designed and applied to realize these purposes").

267. *See generally* J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U. L. REV. 907, 909–11 (1992) (arguing that presumptions are a generally desirable mechanism in law, because they negotiate between the harshness of a strict rule-based approach, with no exceptions, and the unpredictability of an equity-based, case-by-case approach).

268. Of course, legal presumptions may serve a number of other purposes as well, including offsetting systemic inequalities arising from parties' unequal access to information; favoring certain substantive outcomes or classes of litigants; and shaping the underlying substantive law by creating prima facie requirements for a particular class of cases. *See, e.g.*, Allen, *supra* note 263, at 631–38; Tamar Frankel, *Presumptions and Burdens of Proof as Tools for Legal Stability and Change*, 17 HARV. J.L. & PUB. POL'Y 759, 759 (1994).

be counterbalanced by presumptions in favor of the party who would not get the benefit of the decisionmaker's predispositions.[269]

Thus, a presumption against religious symbols on public property can work as counterweight to the background noise, discussed above, that tends to favor established and majoritarian religions.[270] As Linda Hamilton Krieger has argued:

> [O]ne important function performed by presumptions and burdens of proof is precisely their capacity to constrain biases in fact-finder inference stemming from the subtle or blatant operation of the traditional normative regime. Legal adjudication necessarily requires fact finders to evaluate, draw inferences from, and choose between competing factual accounts. Where a member of a subordinated group seeks to enforce a law which diverges from traditional social norms, individuals implicitly or explicitly loyal to those traditional norms will tend to resolve factual ambiguities in ways that favor the defense and disfavor the prosecution.[271]

One might substitute for the phrases "competing factual accounts" and "factual ambiguities" in the above paragraph the phrases "competing interpretations" and "interpretive ambiguities," in order to see more clearly the relevance of Professor Krieger's observation to the religious symbol cases. A presumption against religious symbols on public property could thus act as a counterweight to the majoritarian bias and social background noise that would otherwise dispose most judges, like the reasonable observer, to perceive no endorsement of religion arising from a display.

A presumption against religious symbols on public property would more reliably counteract this majoritarian bias than the device, espoused by many scholars, of urging judges simply to adopt the viewpoint of the reasonable nonadherent.[272] As outlined above, one of the principal interpretive difficulties in the religious symbol cases is the traditional, or majoritarian, bias that is likely to infect the interpretive process. This bias is not likely to be constrained simply by urging judges to adopt the perspective of the reasonable nonadherent, since all of the context-based difficulties identified above will still present themselves. Moreover, it is not clear exactly how a judge is to place himself or herself in the position of the reasonable nonadherent. A legal presumption against government-sponsored displays of religious symbolism, however, would counteract the potential majoritarian bias in a more effective and, hopefully, predictable way than simply asking judges to step outside their personal biases and walk in another's shoes for the course of the judicial opinion.

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269. GASKINS, *supra* note 264, at 23.

270. *See supra* text accompanying notes 170–175.

271. Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 AM. J. COMP. L. 89, 122 (1999); *see also* GASKINS, *supra* note 264, at 7 ("In general terms, burden-shifting indicates a challenge to established presumptions—those elusive default settings that surround any rule-based procedure.").

272. *See supra* notes 229–231 and accompanying text.

Under the doctrinal change I propose, it would be possible to counteract the presumption of unconstitutionality upon a showing by the government that the message conveyed by a given display is unequivocally secular and nonendorsing. To make such a showing, the governmental defendant would have to point to contextual factors, as such defendants currently do, as well as to evidence of societal consensus about the meaning of the display, since these are the factors that, according to my analysis, produce social meaning. If there is any doubt, however, the court would have to decide in favor of the plaintiff challenging the display. Thus, the court would no longer be in the position of having to decide what message the display conveys—often an impossible task—before deciding whether it is constitutional; rather, the presumption would mean that, if the court is uncertain as to the message conveyed, the display must be found unconstitutional.

In the vast majority of cases, displays of religious symbolism would be found to be unconstitutional; the presumption would function like a per se rule against religious symbolism on public property except in the most anodyne contexts. A governmental defendant would likely be able to overcome the presumption against religious displays where, for example, a medieval art exhibition is concerned, should such a case arise. It will be able, in most cases, to show that the museum context negates any potential endorsement effect.[273] The Buddhist bell given to the City of Oak Ridge, Tennessee, by the government of Japan on the fiftieth anniversary of the end of World War II might overcome the presumption as well. In both the museum example and the Buddhist bell example, the defendant could probably point to a number of contextual factors showing that no endorsement was present. In addition, the level of societal consensus about the meaning of the display in those cases is probably sufficiently high that the meaning will be clear.

In cases where the degree of consensus is lower, however, the deck will be stacked against the government. This would produce dramatically different—but more consistent—results in the vast majority of crèche, cross, and menorah cases. Thus, neither the crèche nor the menorah from the *Allegheny* case would be permissible. The Latin cross in the *Capitol Square* case would present a closer question, but also most likely would have to be dismantled under the presumption I propose, unless free speech concerns were held to predominate.[274] Other cases in which the government has permitted religious symbols in public forums might come out the other way, however,

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273. *See* Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."). *But see* Doe v. Small, 726 F. Supp. 713 (N.D. Ill. 1989) (invalidating display of religious paintings in public park sponsored by a private group during the Christmas holiday season), *vacated*, 964 F.2d 611 (7th Cir. 1992) (en banc) (reversing the district court injunction as overbroad but not reversing finding of unconstitutionality).

274. While the Supreme Court has repeatedly suggested that avoiding an Establishment Clause violation is a sufficiently compelling state interest to justify content-based restrictions on speech, *see, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761–62 (1995), it has never actually upheld a content-based speech restriction on this ground. Such a holding would seem to imply that the Establishment Clause takes priority over the Free Speech Clause; as such, it is understandable that the Court would avoid expressly articulating such a position.

if the public nature of the forum and the lack of government sponsorship were more evident. In a public forum having status and recognition analogous to that of Speaker's Corner in Hyde Park, London, which is universally known as a bastion of free speech open to all comers, even an unattended religious symbol (assuming unattended displays were permitted as a rule) would probably be universally understood as an instance of private religious speech, not government-sponsored religious endorsement.

Of course, courts actually applying the presumption might decide these cases differently; indeed, this potential for continued indeterminacy in religious symbol cases is perhaps the strongest critique of the solution I have proposed. Although I do believe that a strong presumption against those symbols on public property would be more easily administered and lead to more consistent results than the current endorsement test, it clearly follows from my analysis that indeterminacy is endemic to the enterprise of discerning the social meaning of religious symbol displays. It is not possible to eradicate this indeterminacy entirely; thus, some hard cases will remain. It is perhaps best, then, to understand the proposed presumption as a pragmatic device,[275] intended to minimize the problem of majoritarian bias and to present a default answer to the endorsement question, rather than as a definitive resolution of the problem. It would be an improvement over the current chaotic jurisprudence but not a resolution of the dilemma of context-based meaning. Whereas under the current endorsement test, courts are required to determine what message a display conveys in a vacuum using only the unreliable concept of context as a guide, under the presumption, courts would have to decide the case in favor of the plaintiff if there is any doubt.

One might further object that this presumption would result in courts' holding unconstitutional an enormous quantity of symbolic speech that is not, in fact, endorsing of religion. This is a legitimate concern, though I am not certain—given my conclusion about the inherent indeterminacy of social meaning in these cases—whether it is truly meaningful to say that the displays that would be found unconstitutional are in fact nonendorsing. Even taking this objection at face value, however, it seems to me that some degree of overbreadth or prophylaxis is necessary in this class of Establishment Clause cases to ensure that majoritarian biases are sufficiently constrained. It is not unusual, after all, for courts to indulge presumptions in favor of plaintiffs where constitutional rights are at stake.[276] Ultimately, however, it is necessary to recognize that any solution to this problem will ultimately invoke substantive judgments about the meaning and scope of the Establishment Clause. Those who disagree with the premises that the Establishment Clause is intended to protect against symbolic government harms, for example, will find a presumption against religious symbols on public

275. *Cf.* SMITH, *supra* note 154, at 122–27. Smith argues that the search for neutral constitutional principles to resolve the dilemma of church-state relations should be abandoned in favor of a more modest and, it seems to me, pragmatic "historical" approach.

276. *See, e.g.*, Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–643 (1994).

property to be particularly hard to swallow. A comprehensive theory of the Establishment Clause and a defense of that theory, however, are well beyond the scope of this Article.

A final criticism of the presumption is that it might simply shift the ambiguity, and the interpretive struggle, to the threshold question whether something is or is not a religious symbol. As illustrated by the *Alvarado* and *Kunselman* cases, however, while this determination is still context dependent, it will be less controversial in the vast majority of cases, since those symbols that spawn the most litigation—such as crèches, crosses, and menorahs[277]—are widely accepted as religious symbols. My proposed incremental improvement, while far from perfect, will therefore bring some regularity to the jurisprudence of religious symbolism in the majority of cases, while demonstrating greater sensitivity to the majoritarian bias otherwise inherent in the interpretation of religious displays.[278]

CONCLUSION

While the symbolic or "expressive" dimension of government conduct has attracted a large amount of attention from constitutional scholars in recent years, the question of how the meaning of government conduct is to be

277. *See, e.g.*, Howard, *supra* note 66.

278. Another potential solution would be to leave it to the courts, and ultimately to the Supreme Court, to try to create a social consensus about the meaning of religious symbols by forging an underlying consensus about the level of governmental involvement with religion that is acceptable in our society. Courts, as institutions that are bound up with the social power structure and recognized as exercising legitimate power in our society—as possessors, in Pierre Bourdieu's terminology, of enormous "symbolic capital"—have substantial power to shape our view of the world or to legitimize a particular view of the world. Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 14 THEORY AND SOC'Y 723, 729–31 (1985). One solution to the problem of social meaning in religious symbol cases might thus be to encourage the Supreme Court to grant certiorari in a greater number of cases, thereby using its considerable social capital to create consensus and to regularize the jurisprudence in this area.

Yet this proposal, too, entails a host of objections. The principal one is perhaps that no good is likely to arise from attempting to impose consensus upon a religiously pluralistic society, first, because the Court is unlikely to succeed in doing so, and second, because any such attempts will likely engender a sense of bitterness and alienation on those whose views are not adopted. In addition, the very notion of consensus on religious matters runs contrary to the U.S. constitutional tradition that recognizes religious diversity as a positive value and aims to respect that diversity. For all of these reasons, attempting to create consensus in the realm of interpretation of religious symbols through Supreme Court fiat is unlikely to produce satisfying results.

One might also suggest the inverse of this proposed solution—a more federalist or decentralized approach to religious symbolism whereby each community may interpret a symbolic display for itself and no attempt is made to come up with any national consensus regarding what sorts of displays are permissible. *See* Schragger, *supra* note 242, at 1875–91. From the perspective of linguistic theory, this approach has much to recommend it, as it plausibly suggests that different communities of interpreters will understand symbolic displays differently. The objections to this approach, however, are that it makes constitutional jurisprudence in this area even less predictable, since what is constitutional in one community may be unconstitutional in another, and that it does not resolve the problem of how to discern what a symbolic display "means" to a given community. Courts might be able to find consensus more easily in a smaller, local community, as opposed to a nationwide consensus, about the meaning of a display, but courts still risk, in the process, suppressing or ignoring the few dissenting voices within that local community. *See id.* at 1880, 1891 (recognizing the danger of "exclusionary harms to individual dissenters" within communities, but arguing that these dangers are outweighed by other advantages of a localized approach).

discerned has been largely ignored. In cases involving Establishment Clause challenges to religious symbolism, interpretive difficulties are particularly pronounced. Treating the display of religious symbols as an instance of linguistic communication and applying the lessons of modern speech act theory helps to explain why the interpretation of religious symbol displays is so difficult and has led to such inconsistent results. In particular, speech act theory shows that the inevitable dependence of meaning on context, along with the impossibility of fixing or formalizing context, renders the highly context-dependent inquiry into the meaning of religious displays extremely unstable. This instability is magnified in the religious symbol cases, because subjective intent plays a relatively minor role and context a more important role. Religious pluralism and the lack of societal consensus about the meaning of religious displays further aggravate the interpretive difficulties. To the extent that any societal consensus regarding the meaning of religious displays can be identified, moreover, it tends to embody the majoritarian perspective.

I have suggested that the problems I have identified cannot truly be solved—they are endemic to the interpretation of religious symbolism and perhaps to the interpretation of social meaning in general. I have argued, however, that one doctrinal innovation—a presumption against the display of religious symbols on public property—might lend a degree of predictability and minimize the majoritarian bias inherent in the interpretation of religious symbols. I believe that this solution is preferable to asking courts to assume the perspective of the reasonable nonadherent, as many commentators have done, since, according to speech act theory, many of the same interpretive difficulties will arise whether courts are using the perspective of the reasonable adherent or the reasonable nonadherent. At the same time, however, the interpretive problems posed by religious symbolism will not entirely go away. They are inherent in any context-dependent inquiry into meaning and, indeed, as complex as language itself.