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## Anatomy of the Reasonable Observer

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# ARTICLES

## Anatomy of the Reasonable Observer

*B. Jessie Hill*<sup>†</sup>

### INTRODUCTION

Pity the reasonable observer. This hypothetical person, referenced primarily in establishment clause cases as the imaginary arbiter of whether a government-sponsored display or practice constitutes an endorsement of religion, has been criticized and maligned—his very existence questioned.<sup>1</sup> While the reasonable observer has, so far, survived these attacks, some commentators suggest that he is not long for this world.<sup>2</sup> And a small cottage industry exists to point out the reasonable observer's shortcomings, as well as to propose alternatives to this heuristic device.<sup>3</sup>

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<sup>1</sup> Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1335 (2011) ("There is no unique reasonable observer."); Paula Abrams, *The Reasonable Believer: Faith, Formalism, and the Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1539 (2010) (describing the reasonable observer as "no more than an empty suit").

<sup>2</sup> Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 665-66 (2006); Jennifer Anglim Kreder, *Lessons for Religious Liberty Litigation from Kentucky*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 275, 302 (2013) (noting that many believe the Supreme Court may soon depart from its current doctrinal framework toward one that is more "pro-religion").

<sup>3</sup> See, e.g., Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1574 (2010) (advocating for a "reasonable religious outsider's perspective" in evaluating the constitutionality of ceremonial deism); Dorf, *supra* note 1, at 1337 (tentatively advocating a "qualified victim

Does all of this spell the demise of the reasonable observer? The status of the endorsement test, with which the reasonable observer is most closely associated, has been in question at least since Justice Sandra Day O'Connor left the Supreme Court, and probably well before that. Recent cases such as *Town of Greece v. Galloway*, in which the Second Circuit struck down a town's legislative prayer practice because "it constituted an endorsement of Christianity from the perspective of 'an ordinary, reasonable observer,'" raise the possibility that the Court will soon reconsider the endorsement test and possibly decide to abandon it entirely.<sup>4</sup>

Much of the resistance to the endorsement test arises from disagreement with its underlying substantive assumption—namely, that mere endorsement of religion by the government is unconstitutional.<sup>5</sup> However, the notion that the social meaning of a government practice—determined from the perspective of a "reasonable observer"—is relevant to its constitutionality has significantly more traction within constitutional doctrine.<sup>6</sup> Indeed, even if the Court were to replace the endorsement test with the test preferred by the Court's conservative wing, a "coercion" or "proselytization" test, it must still determine whether the official religious speech was in fact coercive or proselytizing.<sup>7</sup> Presumably, this determination would have to be made from the perspective of a reasonable or objective observer.

There is therefore reason to believe that the reasonable observer would survive the death of the endorsement test.

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perspective" for identifying social meaning); Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 859-61.

<sup>4</sup> *Galloway v. Town of Greece*, 681 F.3d 20, 29-30 (2d Cir. 2012), *rev'd*, No. 12-696, 2014 WL 1757828 (May 5, 2014). In deciding the case, the Supreme Court's analysis made only passing reference to the reasonable observer test in a portion of the opinion representing only three justices. *Town of Greece v. Galloway*, No. 12-696, 2014 WL 1757828, at \*14 (May 5, 2014). In contrast, a concurrence authored by Justice Thomas and joined by Justice Scalia overtly rejected the use of the reasonable observer. *Id.* at \*26 (Thomas, J., concurring) ("[W]hatever nonestablishment principles existed in 1868, they included no concern for the finer sensibilities of the 'reasonable observer.'").

<sup>5</sup> See, e.g., Thomas C. Berg, *What's Right and Wrong with "No Endorsement"*, 21 WASH. U. J.L. & POL'Y 307, 315-16 (2006); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 302-03 (1987).

<sup>6</sup> See *infra* Part I.B. "Social meaning" may be defined as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context." Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995).

<sup>7</sup> A "coercion" or "proselytization" test would recognize establishment clause violations only where the government has coerced someone to engage in a religious practice or has engaged in proselytizing speech. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in part and dissenting in part).

Scholars have recognized the importance of social meaning in other domains of constitutional law and have begun to apply the concept of social meaning more broadly.<sup>8</sup> Recent articles have applied an analysis of social meaning to domains of constitutional law reaching beyond the establishment clause, including same-sex marriage and affirmative action.<sup>9</sup> They have also suggested the relevance of the reasonable observer heuristic to the much-discussed doctrine of government speech.<sup>10</sup> There is, therefore, a particularly acute need to understand how social meaning is conveyed and from whose perspective it is judged. In other words, so long as the expressive content of government action has legal and constitutional significance, the reasonable observer remains relevant as one possible answer to the question, “Whose meaning counts?”<sup>11</sup> And if the spate of recent scholarship on the issue of government speech<sup>12</sup> and related expressive concerns<sup>13</sup> is any indication, that significance is waxing rather than waning.

Yet, the reasonable observer heuristic is also highly problematic. Critics have taken issue with this interpretive device, arguing that it is an overly idealized construct that fails to capture the way real people actually view a religious display. In particular, two powerful critiques have been advanced time and again. First, critics point out that the level of knowledge imputed to the reasonable observer is greater than that of the

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<sup>8</sup> See *infra* Part I.B.

<sup>9</sup> William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2 (2011); Dorf, *supra* note 1; Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> Cf. William P. Marshall, “We Know It When We See It” *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 534-36 (1986) (asking, with respect to religious symbols, “Whose perspective (and perception) should govern?”).

<sup>12</sup> E.g., Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413 (2011); Carter, *supra* note 9; Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347 (2012); Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571 (2011); B. Jessie Hill, *(Dis)Owning Religious Speech*, 20 GEO. MASON L. REV. 361 (2013); Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587 (2008); Tebbe, *supra* note 9. The *Case Western Reserve Law Review*, the *South Dakota Law Review*, and the *Denver University Law Review* recently published symposia on government speech. Symposium, *Government Speech: The Government’s Ability to Compel and Restrict Speech*, 61 CASE W. RES. L. REV. 1081 (2011); Symposium, *Government Speech*, 87 DENV. U. L. REV. 809 (2010); Symposium, *Government Speech Doctrine*, 57 S.D. L. REV. 389 (2012).

<sup>13</sup> Dorf, *supra* note 1. In 1992, Professor Kenneth Karst suggested that while the salience of disputes over material goods, like resource allocation among religious groups, has dissipated, “[i]ssues concerning governmental deployments of the symbols of religion . . . have a far greater capacity to polarize.” Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 507 (1992).

average viewer and is therefore unrealistic.<sup>14</sup> Second, critics argue that the reasonable observer inquiry is so unguided and standardless that the reasonable observer essentially becomes a stand-in for the judge and her personal predilections—especially when one considers the unusually high degree of knowledge imputed to the reasonable observer.<sup>15</sup> This critique usually also posits that the judge is likely to be biased in favor of upholding majority religious symbols, reflecting the fact that most judges are Christian and are therefore less likely to view Christian symbols as an endorsement.<sup>16</sup>

This article argues that the critiques of the reasonable observer heuristic are misguided and that the various alternatives to the reasonable observer that grow out of this critique are both unnecessary and unworkable. In particular, I argue that commentators have misunderstood both the reasonable observer heuristic and alternatives like the reasonable religious outsider. Those commentators have assumed that the judge must put herself in the shoes of a stranger with certain characteristics and then consider the challenged religious display or practice from that perspective.

This conception is fundamentally incorrect. Understood in the most useful way possible, the reasonable observer is an accurate model for making sense of the process of interpreting social meaning. When an interpreter engages in discerning the meaning of something—whether a text or a symbolic display—she considers as much information as she has available: the context, the background, and the relevant social facts, as well as the words or symbols themselves. She then uses this information to reconstruct the intent, or purpose, behind the symbolic representation. This reconstructed intent, I argue, is essentially synonymous with “social meaning.” The reasonable observer is, then, simply a reader of social meaning, and the reasonable observer’s role in discerning the meaning of religious symbolism should not be controversial or suspect.

Still, one problem with this understanding of the reasonable observer is that it fails to address the heuristic’s majoritarianism critique. It is undeniable that two people can view a symbol and reach different conclusions about its meaning, even if both have the same background knowledge about it. Assuming that one’s religious background and beliefs

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<sup>14</sup> See *infra* Part II.A.

<sup>15</sup> See *infra* Part II.A.

<sup>16</sup> See *infra* Part II.B.

are likely to affect perception, it is difficult to say whose understanding should be the one that matters under the establishment clause.<sup>17</sup> And one might fear that symbols and practices will be understood as less problematic when they reflect the expectations and cultural background of judges, many of whom are white, male, and Christian. Thus, the reasonable observer still risks embodying an overwhelming majoritarian bias when used to interpret social meaning. This line of argument leads to the suggestion that judges should instead adopt the perspective of the religious outsider, so that minority group interests are sufficiently protected.

I contend that this “outsider” solution does not actually advance the ball on opening up social meaning to minority perspectives. There are certainly problems with the reasonable observer: most importantly, there is nothing that requires judges to choose the social meaning that favors the religious outsider over the religious insider (or, for that matter, vice versa).<sup>18</sup> The inquiry into social meaning by judges is almost completely unconstrained by legal rules. Yet, proposals to require judges to adopt the perspective of the reasonable religious outsider do not solve these problems because they merely ask judges to engage in acts of empathy—of identification with another hypothetical person—for which they are likely ill-equipped. Indeed, many people, not just judges, are uncomfortable and incompetent at seeing the world through another’s eyes, and there is no guarantee that judges, in particular, will execute this task very well. Instead, I propose that judges should use legal devices of the sort that judges are more comfortable with—in particular, rebuttable presumptions and burdens of proof—to force the consideration of social meaning from something other than a majoritarian perspective. Judges are competent at using such devices, and parties will frame their arguments accordingly. Though not without its flaws, this proposal will better protect minority viewpoints than the various “alternative observers” that have

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<sup>17</sup> See, e.g., Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 675-76, 707. As noted below, however, this assumption may be somewhat more questionable than it appears. See *infra* Part II.B.2.

<sup>18</sup> Strasser, *supra* note 17, at 676 (“Justice O’Connor understands that individuals with access to the same information will nonetheless reach different conclusions. However, she says nothing about how to determine who has accurately described the message the state intends to convey, even though such a determination is the central concern of the purpose prong.”).

been proposed. In addition, it may give the social meaning inquiry some greatly needed structure.

In Part I, I briefly review the genesis of the reasonable observer in relation to the endorsement test, the predominant test for analyzing challenges to public displays of religious symbols. I also describe various other constitutional contexts in which social meaning is implicated and how the reasonable observer heuristic is therefore relevant. In Part II, I outline the standard critiques of the reasonable observer as well as some proposals for replacing it with a different, more minority-focused observer. Then, in Part III, I set forth my own critique: that the standard criticisms of the reasonable observer are based on a misunderstanding of that heuristic device and that, while well-meaning, the suggested alternatives are also fundamentally wrongheaded. I conclude that both religious minorities and judges would be better served by a jurisprudence that uses more standard legal devices, such as presumptions and burden-shifting, rather than one that demands judges develop a sympathetic imagination.<sup>19</sup> Legal constraints, rather than legal fictions,<sup>20</sup> are sorely needed.

## I. A BRIEF BIOGRAPHY OF THE REASONABLE OBSERVER

A burgeoning body of scholarship recognizes the constitutional relevance of the social meaning conveyed by expressive governmental actions in a variety of contexts, ranging from flying the confederate flag to outlawing same-sex marriage. At the heart of most of this scholarship is an assumption that the perspective of the reasonable observer is the one from which social meaning will be judged. It is therefore important to understand the origin of the reasonable observer and its role as a heuristic device for making sense of the social meaning inquiry. Its origin can be traced to the endorsement test in establishment clause jurisprudence, but the influence of the reasonable observer has extended far beyond that context.

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<sup>19</sup> Although this article focuses primarily on the use of the reasonable observer heuristic in the establishment clause context, where it is most developed doctrinally, its application may stretch to other contexts where social meaning is constitutionally relevant.

<sup>20</sup> *Cf.* *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting) (describing Justice O'Connor's version of the reasonable observer as a "legal fiction"); *Abrams*, *supra* note 1, at 1538 (describing the reasonable observer as a "legal fiction").

### A. *The Rise of the Reasonable Observer*

Although he did not appear on the scene until later, the stage was set for the reasonable observer in *Lynch v. Donnelly*.<sup>21</sup> This 1984 Supreme Court case involved a challenge under the establishment clause of the First Amendment<sup>22</sup> to a nativity scene display at Christmastime in downtown Pawtucket, Rhode Island. Writing for the majority, Chief Justice Burger applied the test derived from *Lemon v. Kurtzman*<sup>23</sup> and held the display to be constitutional. Burger’s opinion described the display as an acceptable acknowledgement of religion, no more problematic than “the Congressional and Executive recognition of the origins of the Holiday itself as ‘Christ’s Mass,’ or the exhibition of literally hundreds of religious paintings in governmentally supported museums.”<sup>24</sup> The opinion was rather thin on analysis, however, and Justice O’Connor’s brief concurrence therefore assumed particular importance.<sup>25</sup> In her opinion, Justice O’Connor stated that the relevant inquiry was “whether Pawtucket has endorsed Christianity by its display of the crèche.” In other words, she explained, the Court must consider whether the challenged display “sen[t] a message to nonadherents that they [were] outsiders, not full members of the political community, and an accompanying message to adherents that they [were] insiders, favored members of the political community.”<sup>26</sup>

Justice O’Connor offered her “endorsement test” as a gloss on the *Lemon* test, an overlay that focused the *Lemon* test on the social meaning of the governmental practice in question. Justice O’Connor did not specifically mention or describe the reasonable observer in that early case. Indeed, Justice O’Connor focused primarily on the overall substantive goal of the endorsement test—namely, to ensure that government would not promote messages that designated some individuals as second-class citizens on the basis of religion.<sup>27</sup> She made only passing, generic references to the “audience” and “viewers” of religious displays.<sup>28</sup> At the same time, she laid the groundwork

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<sup>21</sup> 465 U.S. 668 (1984).

<sup>22</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

<sup>23</sup> 403 U.S. 602 (1971).

<sup>24</sup> *Lynch*, 465 U.S. at 683.

<sup>25</sup> *Cf. Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (noting that “[t]he rationale of the majority opinion in *Lynch* is none too clear” and “offers no discernible measure for distinguishing between permissible and impermissible endorsements”).

<sup>26</sup> *Lynch*, 465 U.S. at 688, 690 (O’Connor, J., concurring).

<sup>27</sup> *Id.* at 691-92.

<sup>28</sup> *Id.* at 690, 692.



for the reasonable observer in a way that reflects a proper understanding of how meaning is conveyed and interpreted. Specifically, Justice O'Connor explained:

The meaning of a statement to its audience depends both on the intention of the speaker and on the “objective” meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker’s intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them 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.<sup>29</sup>

Justice O'Connor’s explanation demonstrates a sensitivity to the way in which interpretation occurs. For example, interpretation draws upon both subjective components—particularly the speaker’s intent—and objective components—specifically, the context of the speech. Indeed, Justice O'Connor treats the holiday display almost as though it were a straightforward linguistic communication by a government actor. Finally, drawing on the context, Justice O'Connor concluded, rather controversially, that “the overall holiday setting changes what viewers may fairly understand to be the purpose of the display . . . [and] negates any message of endorsement of that content.”<sup>30</sup>

In subsequent cases—most notably, *Wallace v. Jaffree*<sup>31</sup> and *County of Allegheny v. ACLU*,<sup>32</sup> the Court largely embraced and further refined the endorsement test.<sup>33</sup> Justice O'Connor, in her concurrences, put forth the reasonable observer perspective as the relevant viewpoint for discerning whether a government practice endorses religion. In *Jaffree*, the Court struck down Alabama’s moment-of-silence law because it was enacted “for the sole purpose of expressing the State’s endorsement of prayer . . .”<sup>34</sup> In her concurrence, Justice O'Connor took the opportunity to expand on the endorsement test. Regarding the challenge to the moment-of-silence law, she

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<sup>29</sup> *Id.* at 690.

<sup>30</sup> *Id.* at 692.

<sup>31</sup> 472 U.S. 38 (1985).

<sup>32</sup> 492 U.S. 573 (1989).

<sup>33</sup> *Jaffree*, 472 U.S. at 56-61; *Allegheny*, 492 U.S. at 601-02.

<sup>34</sup> *Jaffree*, 472 U.S. at 60.

explained that “[t]he relevant issue is whether an *objective observer*, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.”<sup>35</sup> Similarly, in *Allegheny*, a challenge to both a crèche display and a menorah display in and around public buildings, a majority of the justices applied the endorsement test, though not all in one opinion.<sup>36</sup> Appearing to equivocate about whose perspective was relevant, Justice Blackmun, writing only for himself, declared that the Court “must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions,” as well as the perspective of “a ‘reasonable observer.’”<sup>37</sup> Concurring, Justice O’Connor (joined by Justices Brennan and Stevens) clarified that the relevant perspective is that of the “reasonable observer.”<sup>38</sup>

But the most extensive discussion of, and debate over, the reasonable observer occurs in *Capitol Square Review & Advisory Board v. Pinette*,<sup>39</sup> a case dealing with a free speech challenge to a city’s decision to exclude a Ku Klux Klan-sponsored Latin cross from a public forum. The city claimed it was excluding the cross not because it objected to the Klan’s racist political message, but because the city feared it would be committing an establishment clause violation if it allowed the cross to stand.<sup>40</sup> The primary issue before the Supreme Court, therefore, was whether the establishment clause would be violated if the city allowed the display of the freestanding cross in a state-sponsored public forum.<sup>41</sup> Enter the reasonable observer.

No consistent picture of the reasonable observer emerges from the case. Justice Scalia, writing for a four-justice plurality, favored a *per se* rule that no inference of governmental endorsement of religion can arise from allowing private religious speech in a true public forum. Since Capitol Square was a public forum, the plurality’s rule rendered the reasonable observer an

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<sup>35</sup> *Id.* at 76 (O’Connor, J., concurring) (emphasis added); see also *Witters v. Wash. Dep’t Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O’Connor, J., concurring) (referring to the “reasonable observer”). Although the terms “objective” and “reasonable” are not precisely synonymous, the Court seems to use the terms “objective observer” and “reasonable observer” interchangeably. This article therefore does not distinguish them, either.

<sup>36</sup> See B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 497 (2005).

<sup>37</sup> *Allegheny*, 492 U.S. at 620 (opinion of Blackmun, J.).

<sup>38</sup> *Id.* at 631 (O’Connor, J., concurring).

<sup>39</sup> 515 U.S. 753 (1995).

<sup>40</sup> *Id.* at 758-59 (plurality opinion).

<sup>41</sup> *Id.* at 757.

irrelevancy.<sup>42</sup> Several of the remaining justices debated what level of knowledge should be attributed to the reasonable observer.

Justice O'Connor presented an image of the reasonable observer as an omniscient representative of the entire community. Her concurrence argued that the reasonable observer is "aware of the history and context of the community and forum in which the religious display appears."<sup>43</sup> Specifically, Justice O'Connor continued, this awareness includes "knowledge that the cross is a religious symbol, that Capitol Square is owned by the State, and that the large building nearby is the seat of state government."<sup>44</sup> In addition, the test assumes the reasonable observer's familiarity with "the general history of the place in which the cross is displayed" as an open forum for private speech—in other words, the reasonable observer would recognize "how the public space in question has been used in the past."<sup>45</sup> Justice O'Connor also analogized the reasonable observer to the "reasonable person" in tort law—not a real, ordinary individual, but "a community ideal of reasonable behavior" and a representative of "[collective] social judgment."<sup>46</sup>

Justice O'Connor's view in *Pinette* resonates with her later concurrence in *Elk Grove Unified School District v. Newdow*,<sup>47</sup> the Pledge of Allegiance case. In *Elk Grove*, O'Connor elaborated on the reasons for the reasonable observer heuristic.<sup>48</sup> First, the objective nature of the observer's viewpoint ensures that an unreasonable or marginal perspective will not act as a "heckler's veto" over religious speech that the overwhelming majority of people would not consider to be endorsing religion.<sup>49</sup> And second, being a representative of rational, social judgment, "aware of the history of the conduct in question, and . . . its place in our Nation's cultural landscape," the reasonable observer is particularly well-positioned to discern the social meaning of a particular government practice and the impact of that practice on outsiders' political standing.<sup>50</sup>

Justice Stevens's dissent in *Pinette*, by contrast, emphasized that the reasonable observer's perspective should embody an individual whose religious viewpoint is not

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<sup>42</sup> *Id.* at 770.

<sup>43</sup> *Id.* at 780 (O'Connor, J., concurring).

<sup>44</sup> *Id.* at 780-81.

<sup>45</sup> *Id.* at 781.

<sup>46</sup> *Id.* at 779-80 (alteration in original) (internal quotation marks omitted).

<sup>47</sup> 542 U.S. 1 (2004).

<sup>48</sup> *Id.* at 34-35 (O'Connor, J., concurring).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 35.

represented by the challenged symbol.<sup>51</sup> Justice Stevens criticized Justice O'Connor's version of the reasonable observer for ignoring the reality that different people may reasonably infer different messages from the same display and for asking far too much of the "reasonable" viewer of a religious display. According to Justice Stevens, Justice O'Connor's "reasonable observer" is more like a "well-schooled jurist," an "ideal observer" and even "prescient" enough to have a sophisticated sense of the development of legal doctrine.<sup>52</sup> Arguing that Justice O'Connor's reasonable observer has an unreasonably high level of legal and historical knowledge, Justice Stevens stated, "Many (probably most) reasonable people do not know the difference between a 'public forum,' a 'limited public forum,' and a 'non-public forum.' They *do* know the difference between a state capitol and a church."<sup>53</sup>

Though the debate over his predominant qualities remains unresolved, the reasonable observer continues to appear in Supreme Court cases.<sup>54</sup> Several of the justices, for example, called on the reasonable observer in *Salazar v. Buono*,<sup>55</sup> a challenge to a Latin cross war memorial that originally stood on a portion of federal land but was subsequently transferred, along with the land, to private ownership.<sup>56</sup> The Court also referred to the reasonable observer and the endorsement test in its decision upholding the Cleveland, Ohio school voucher system.<sup>57</sup>

Sooner or later, it seems, the Supreme Court is likely to revise its jurisprudence on the reasonable observer. Over vociferous dissents, the Court recently denied certiorari in two cases applying the endorsement test to religious symbols. In *Utah Highway Patrol Association v. American Atheists*, Justice Thomas's dissent from the denial of certiorari criticized the endorsement test for the confusion it has engendered over the nature and qualities of the "reasonable observer."<sup>58</sup> In that

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<sup>51</sup> *Pinette*, 515 U.S. at 799 (Stevens, J., dissenting).

<sup>52</sup> *Id.* at 800 n.5, 802 n.7.

<sup>53</sup> *Id.* at 807.

<sup>54</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring); *Van Orden v. Perry*, 545 U.S. 677, 707, 718 (2005) (Stevens, J., dissenting); *cf. Summum*, 555 U.S. at 474-75 (majority opinion) (discussing how different observers might perceive a monument).

<sup>55</sup> 130 S. Ct. 1803 (2010).

<sup>56</sup> Justice Kennedy's plurality opinion questioned the relevance of the reasonable observer but proceeded to apply the test. *Id.* at 1819-20; *see also id.* at 1824 (Alito, J., concurring); *id.* at 1832-37 (Stevens, J., dissenting).

<sup>57</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 654-55 (2002).

<sup>58</sup> *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 20-21 (2011) (Thomas, J., dissenting from denial of certiorari).

case, the court below had altogether failed to reach consensus on how the reasonable observer would perceive the challenged practice of marking the deaths of highway patrol officers with Latin crosses bearing the seal of the Utah Highway Patrol. Justice Thomas attributed this discord to the reasonable observer heuristic, which, to him, required “erratic, selective analysis of the constitutionality of religious imagery on government property,” essentially driven by “the personal preferences of judges.”<sup>59</sup> *Mount Soledad Memorial Association v. Trunk*, in which the lower court held a war memorial in the form of a Latin cross on federal land to be unconstitutional under the endorsement test, provoked similar reflections from Justice Alito when the Court denied certiorari.<sup>60</sup> Agreeing that certiorari should be denied, Justice Alito nonetheless emphasized that the “Court’s Establishment Clause jurisprudence is undoubtedly in need of clarity.”<sup>61</sup> Moreover, the Second Circuit recently applied the reasonable observer test to a legislative prayer case, *Galloway v. Town of Greece*, which the Supreme Court reversed in 2014.<sup>62</sup> The unresolved difficulties surrounding the endorsement test and the identity of the reasonable observer are therefore particularly pressing and salient.

### *B. The Reasonable Observer outside the Establishment Clause Context*

While some have suggested that the endorsement test’s days are numbered in the establishment clause context,<sup>63</sup> the reasonable observer’s influence nonetheless seems to have spread to other legal contexts. For example, in the closely related doctrine of “government speech” under the free speech clause of the First Amendment, commentators have argued and judges have held that the question of whether particular speech may be attributed to the government should be judged from the

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<sup>59</sup> *Id.* at 21.

<sup>60</sup> 132 S. Ct. 2535 (2012) (Alito, J., respecting denial of certiorari).

<sup>61</sup> *Id.* at 2535.

<sup>62</sup> 681 F.3d 20 (2d Cir. 2012), *rev’d*, No. 12-696, 2014 WL 1757828 (May 5, 2014).

<sup>63</sup> *See, e.g.*, Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 665 (2006) (noting that there are five votes on the Court in favor of adopting a “coercion” test in place of the endorsement test); Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 379-81 (2006). *But see* Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273, 1314 (2013) (“Commentators have suggested that the endorsement test may have retired along with Justice O’Connor. That suggestion does not seem plausible if only because members of the Court continue to invoke the test.” (footnotes omitted)).

perspective of the reasonable observer.<sup>64</sup> If the endorsement test is on the wane, the government speech doctrine—according to which speech is immunized from free speech clause challenges if it is attributable to the government—is clearly growing in influence and importance. Its application has ranged from questions concerning the constitutionality of excluding particular religious displays from public parks,<sup>65</sup> to permissible viewpoint-limitations on specialty license plate programs,<sup>66</sup> to prohibitions on funding for women’s health services providers,<sup>67</sup> to allowable sanctions for speech by government employees and even public school cheerleaders.<sup>68</sup> There is thus reason to think that the reasonable observer will remain relevant to constitutional doctrine, whether or not the endorsement test continues to apply in establishment clause cases.<sup>69</sup>

Moreover, the reasonable observer has begun to make appearances outside the First Amendment context. For example, Professor Michael Dorf persuasively argues that the Constitution bans governmental messages that designate some individuals, groups, or relationships as inferior to others.<sup>70</sup> In so doing, Dorf not only makes the case for recognizing “expressive” harm as a constitutionally cognizable harm, but also grapples with the difficult problem—present in religious symbolism cases—of “discerning, or more properly, . . . constructing, social meaning” in cases where it may be disputed.<sup>71</sup> Rejecting the

<sup>64</sup> See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (holding the relevant question in identifying governmental speech to be “whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party”); Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1465-69 (2011); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 627-28 (2008); Carl G. DeNigris, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach*, 60 AM. U. L. REV. 133, 159-60 (2010).

<sup>65</sup> *Summum*, 555 U.S. 460 (2009).

<sup>66</sup> *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).

<sup>67</sup> *Planned Parenthood Ass’n of Hidalgo Cnty. Texas, Inc. v. Suehs*, 692 F.3d 343, 349-50 (5th Cir. 2012).

<sup>68</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421-23 (2006) (government employee speech); *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App’x. 852 (5th Cir. 2010).

<sup>69</sup> Indeed, in *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787, 2014 WL 1343625 (Apr. 7, 2014), the New Mexico Supreme Court employed the perspective of the “reasonable observer” in considering a photographer’s claim that she would be sending a message of endorsement of same-sex relationships, in contravention of her religious principles and her free speech rights, if she agreed to photograph a same sex commitment ceremony. *Id.* at 69 (“Reasonable observers are unlikely to interpret Elane Photography’s photographs as an endorsement of the photographed events.”).

<sup>70</sup> Dorf, *supra* note 1, at 1275 (asserting that “the Constitution forbids government acts, statements, and symbols that label some persons or relationships as second-class”).

<sup>71</sup> *Id.* at 1278, 1315-46.

reasonable observer approach as too indeterminate, Dorf, like other critics of the reasonable observer discussed below, advocates for a variation on that test—the “reasonable victim” perspective.<sup>72</sup>

Along similar lines, Professor Helen Norton has explored the intersection of government speech and equal protection jurisprudence and argues that, in its current state, the doctrine is insufficiently protective against the unique harms that may arise from discriminatory or hateful governmental messages.<sup>73</sup> Norton, too, explicitly draws upon the reasonable observer framework from the establishment clause cases to suggest how social meaning can be discerned for purposes of making constitutional claims.<sup>74</sup>

Similarly, Professor Nelson Tebbe argues in a recent article that government actions outside the religious speech context should, like religious speech, be constitutionally constrained by a nonendorsement principle.<sup>75</sup> Drawing on examples from the realms of equal protection, electioneering, political gerrymandering, and due process, Tebbe contends that the social meaning of government actions may have constitutional implications in a wider variety of cases than courts and scholars have acknowledged.<sup>76</sup> In so arguing, Tebbe suggests that the perspective of the reasonable or objective observer may be used to discern both *whether* the government is speaking through its actions and *what* the government is saying.<sup>77</sup>

These recent articles echo earlier, more general discussions of the expressive thread of equal protection.<sup>78</sup> As many scholars have observed, concerns about government messages of inferiority have been at the heart of at least one strain of equal protection doctrine, stretching from *Plessy v. Ferguson*, to *Brown v. Board of Education*, to *Shaw v. Reno*.<sup>79</sup> In addition, Professor Richard Primus has considered the expressive dimensions of disparate impact doctrine under Title

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<sup>72</sup> *Id.* at 1334-38 (modifying the reasonable observer approach to take account of the “qualified victim perspective”).

<sup>73</sup> Helen Norton, *The Equal Protection Implications of Government’s Hateful Speech*, 54 WM. & MARY L. REV. 159, 209 (2012).

<sup>74</sup> *Id.* at 199-202.

<sup>75</sup> Tebbe, *supra* note 9.

<sup>76</sup> *Id.* at 657-92.

<sup>77</sup> *Id.* at 694.

<sup>78</sup> Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000); 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 (1993).

<sup>79</sup> Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960); Dorf, *supra* note 1, at 1272-73; Pildes & Niemi, *supra* note 78, at 509-10.

VII, noting both the necessity and the difficulty of using a reasonable observer heuristic to determine social meaning in that domain.<sup>80</sup> Thus, the importance of the reasonable observer construct—and of choosing the perspective from which social meaning is judged—will likely persist as long as social meaning is viewed to be constitutionally relevant.

In sum, though first conceived in the establishment clause context, the reasonable observer has proven relevant in numerous other domains. The lasting and pervasive influence of Justice O'Connor's reasonable observer means that it is important to understand just what this heuristic is intended to accomplish, what its shortcomings are, and whether it can be improved by adopting some commentators' proposed modifications.<sup>81</sup> Those questions are addressed in Parts II and III.

### C. *Understanding the Injury*

Before proceeding to the criticisms of the reasonable observer, it is important to understand just what the harm is in cases where a governmental message constructs a group as inferior on the basis of religion (or race or sexual orientation). Justice O'Connor hints at the nature of the injury involved when she explains that religious endorsement tells “nonadherents that they are outsiders, not full members of the political community” and sends a corresponding message “to adherents that they are insiders, favored members of the political community.”<sup>82</sup> This description suggests that governmental endorsement of religion causes “citizenship harms.”<sup>83</sup>

Speaking of racial stigma rather than religious exclusion, Professor R.A. Lenhardt defines “citizenship harms” in terms that are relevant to the endorsement test.<sup>84</sup> “Focused more on deprivation of intangibles such as ‘empathy, virtue, and feelings

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<sup>80</sup> Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 582-83 (2003).

<sup>81</sup> It is noteworthy that the reasonable observer has been used outside the context of evaluating purely symbolic or semantic government action (such as erecting displays or sponsoring prayer) for determining the social meaning of non-symbolic acts (such as allocating funding for education). Admittedly, the notion that the social meaning of non-symbolic government acts should be constitutionally relevant is somewhat more controversial and difficult to defend. See, e.g., Berg, *supra* note 5, at 319; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 155 (1992); Smith, *supra* note 5, at 286-89 (1987).

<sup>82</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>83</sup> The term “citizenship harms” comes from R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 844 (2004).

<sup>84</sup> Lenhardt, *supra* note 82, at 844.



of community' than on the denial of concrete political benefits like the right to vote or serve on a jury, citizenship harms ultimately go to what it means to be in community with others."<sup>85</sup> Citizenship harms hinder an "individual's ability to belong—to be accepted as a full participant in the relationships, conversations, and processes that are so important to community life."<sup>86</sup>

Numerous constitutional scholars have articulated the concerns at the heart of the endorsement test in similar terms. For example, Professor Neal Feigenson argues that concerns about political standing—concerns that extend beyond the concrete protection of civil rights—should be central to the endorsement test.<sup>87</sup> When the government endorses one set of religious beliefs, it aligns itself with one group's conception of the good, thereby undermining full political participation.<sup>88</sup> Even more broadly, this sort of stigmatizing government conduct undermines the equal status and respect to which each citizen is entitled under the Constitution.<sup>89</sup> Indeed, even those who accept some "endorsing" government speech but draw the line at "proselytizing" government speech fundamentally accept that the government is prohibited from making religious minorities into outsiders.<sup>90</sup> We are keenly aware, as a nation, of the divisiveness that results when the government plays religious favorites.<sup>91</sup>

A thorough explication of the nature and validity of expressive harm is well beyond the scope of this article. My goal is simply to show that both courts and scholars seem to accept that a concern about what might be called "citizenship harm" is at the heart of the endorsement test. Indeed, similar harms may be relevant to other constitutional provisions, such as the equal protection clause. Moreover, although citizenship harms may be accompanied by more concrete harms, like discrimination

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Similarly, Professor Alan Brownstein describes the problem as suggesting that religious outsiders are "guests" rather than core participants in the community. Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61, 78 (2000).

<sup>87</sup> Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 66-67 (1990).

<sup>88</sup> *Id.* at 68-69 ("Once government makes religion relevant to political discourse, some who are not members of the favored religion and who do not share those conceptions will be marginalized: they will no longer feel that they can participate equally in the formulation of policies, or will be perceived by others as less worthy participants.")

<sup>89</sup> See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 122-27 (2007); Norton, *supra* note 73, at 181-83.

<sup>90</sup> See Dorf, *supra* note 1, at 1288-92.

<sup>91</sup> *Id.* at 1291-92.

or other “microaggressions,”<sup>92</sup> there is an increasing recognition that such injuries to political status should be recognized as constitutionally significant injuries in their own right.<sup>93</sup>

To summarize, the reasonable observer is here to stay. Although the continuing vitality of the endorsement test itself is by no means assured, the influence of the reasonable observer has extended well beyond its origins in that test. The reasonable observer has proved useful as a heuristic device for understanding a variety of problems of social meaning. In particular, the reasonable observer is one perspective from which it is possible to judge whether government action can be understood to inflict expressive injury, or “citizenship harms,” upon individuals.

## II. CRITIQUES AND ALTERNATIVES

The reasonable observer has been subject to extensive criticism. One of the principal criticisms of Justice O’Connor’s observer is that he is not a “real” person. This criticism really consists of two separate claims: first, that the knowledge imputed to the reasonable observer is not the sort of knowledge that a real person observing a religious display would possess; and second, that the hypothetical reasonable observer inevitably reflects the biases of the judge and fails to take account of the perspective of reasonable religious nonadherents. Each of these criticisms will be considered in turn. The alternatives proposed by various commentators will be described as well.

### A. *The Omniscience Criticism*

Justice O’Connor’s insistence on describing the reasonable observer as being extremely knowledgeable has subjected her heuristic to attack. According to Justice O’Connor, the reasonable observer is acquainted with “the text, legislative history, and implementation of the [law].”<sup>94</sup> The observer also knows the history and nature of the place where a religious display appears and is familiar with religious symbols and basic First Amendment categories.<sup>95</sup> This characterization led Justice Stevens to argue that this “presumptuous” description of the reasonable observer turns it

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<sup>92</sup> Lenhardt, *supra* note 82, at 836-39.

<sup>93</sup> *Id.*; see also Norton, *supra* note 73, at 175-81 (discussing the concrete “behavioral harms” that may arise from government hate speech).

<sup>94</sup> *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985).

<sup>95</sup> See *supra* Part I.A.

into an “ultrareasonable observer’ who understands the vagaries of this Court’s First Amendment jurisprudence.”<sup>96</sup> Indeed, Justice Stevens’s opinion in *Pinette* points out that “[r]easonable people have differing degrees of knowledge; that does not make them obtuse, . . . nor does it make them unworthy of constitutional protection. It merely makes them human.”<sup>97</sup> The reasonable observer is subject to criticism, then, because he is not limited by the information that the average viewer of the religious display would have.

Numerous commentators have echoed Justice Stevens’s concerns. For example, Professor Steven Smith has pointed out that “*real human beings* perceiving government actions often do not have access to such extrinsic evidence . . . .”<sup>98</sup> Similarly, Professor Paula Abrams has criticized the reasonable observer for “lack[ing] the one characteristic most significant to Establishment Clause concerns—humanity.”<sup>99</sup> She argues that the reasonable observer’s “omniscient knowledge of government purpose and action” causes his perspective to diverge from that of the average passerby, and that this divergence is aggravated if that passerby belongs to a religious minority.<sup>100</sup> Moreover, in his review of lower court applications of the reasonable observer test, Dean Jesse Choper noted that the varying interpretations of the reasonable observer’s mental state have “generated a host of inconsistent rulings.”<sup>101</sup> One important criticism of the reasonable observer heuristic, then, is that this hypothetical person seems to possess an indeterminate level of knowledge, or at least a level of knowledge that far exceeds that of the average community member or passerby. In addition, Professor Abrams’s argument suggests that the hypothetical observer’s omniscience tends to align him more with the

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<sup>96</sup> *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 807 (1995) (Stevens, J., dissenting).

<sup>97</sup> *Id.* (citations and internal quotation marks omitted).

<sup>98</sup> Smith, *supra* note 5, at 293 n.109 (emphasis added).

<sup>99</sup> Abrams, *supra* note 1, at 1538, 1547.

<sup>100</sup> *Id.*; see also Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139, 162-63 (2006) (“[T]he fiction of a reasonable observer requires the hypothetical observer to know much more than an actual observer knows. Most observers will not know the text, legislative history, and implementation of the statute, especially if the display is old.”).

<sup>101</sup> Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 511-13 (2002); see also *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 20-21 (2011) (Thomas, J., dissenting from denial of certiorari); Strasser, *supra* note 17, at 710-11, 716-17.

government than with the typical religious nonadherent, thereby sparking the second criticism: majoritarian bias.<sup>102</sup>

### B. *The Charges of Inconsistency and Majoritarianism*

The second criticism—that the reasonable observer tends to embody the perspective of the majority, or of an adherent of a majority (Christian) faith—is perhaps the more important and powerful criticism.<sup>103</sup> There are actually two related versions of this argument, both of which assume that the reasonable observer should be imbued with the characteristics of a living, breathing human.<sup>104</sup> The first version simply states that the reasonable observer test is incapable of consistent application because it does not indicate whether the reasonable observer adheres to any particular faith. Because religious views, along with other significant aspects of one’s worldview, are likely to affect how individuals perceive religiously charged symbols or government-sponsored conduct, the argument goes, the test inevitably produces incoherence in the doctrine.<sup>105</sup> This version of the criticism does not directly adopt a charge of majoritarian bias in the endorsement inquiry; it is, however, often accompanied by the suggestion that, in the

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<sup>102</sup> Abrams, *supra* note 1, at 1547 (“[T]he objective observer is impregnated with a comprehensive understanding of government action that inevitably shifts her perspective away from that of a passerby, particularly a passerby from a religious minority.”).

<sup>103</sup> See Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL’Y 263, 265 (2006) (identifying the “majority bias critique” as “the most persuasive criticism of the endorsement test”).

<sup>104</sup> See, e.g., Strasser, *supra* note 17, at 714 (attributing some difficulties to the fact that “the Endorsement Test is not grounded in the actual reactions of reasonable observers”).

<sup>105</sup> See, e.g., Choper, *supra* note 101, at 511; Dorf, *supra* note 1, at 1334-35 (“[The reasonable observer] has a serious limitation as a tool for deciding what a contested symbol or text means. We only need such a test for hard cases, but it is precisely in hard cases that different people may reasonably ascribe different meanings to the same symbol or text. There is no unique reasonable observer.”); Kosse, *supra* note 100, at 168 (“[D]efining the community ideal of reasonable behavior by the ‘collective social judgment’ is impossible in a religious arena. An observer’s perception of what is reasonable changes depending on whether that observer is an atheist, Buddhist, or a Christian.”); Marshall, *supra* note 11, at 533-37 (arguing that the endorsement test’s failure to specify “[w]hose perspective . . . should govern” leads to inconsistent and unsatisfactory results); Strasser, *supra* note 17, at 707-09; Benjamin I. Sachs, Note, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523, 1526 (1998) (“[T]he O’Connor formulation fails to resolve whether the observer will have the perspective of one in the religious majority or religious minority, and whether the observer will have the perspective of an adherent or a nonadherent of the religion on display. It is impossible to amalgamate, or average, these perspectives into one ‘hypothetical observer.’”).

absence of specific guidance, judges will tend to fall back on their own predominantly majoritarian perspectives.<sup>106</sup>

A stronger form of this critique suggests that, by avoiding the question of whether the reasonable observer possesses a particular religious viewpoint, the Supreme Court's reasonable observer inevitably parrots the perspective of the majority religion—broadly speaking, Christianity.<sup>107</sup> Professor Caroline Mala Corbin points to the Supreme Court's unsupported assertion that the word “God” is nonsectarian, as well as to lower courts' tendency to depict plaintiffs who object to Christian displays as “troublesome and oversensitive,” to argue that “the hidden norm” in cases challenging certain kinds of religious speech “is a Christian perspective, or perhaps a Judeo-Christian perspective.”<sup>108</sup> At the same time, Professor Corbin points out that courts and commentators generally ignore the viewpoints of nonbelievers and other religious minorities.<sup>109</sup> Similarly, Steven Gey has suggested that focusing on the reasonable observer may further alienate religious minorities:

By employing an “objective observer” to decide questions of endorsement, Justice O'Connor relays the message to religious minorities that their perceptions are wrong; or, even worse, that their perceptions do not matter. I can think of no more effective way to “send[ ] a message to nonadherents that they are outsiders, not full members of the political community.”<sup>110</sup>

I have espoused a similar version of this argument. Drawing on speech act theory,<sup>111</sup> I have contended that

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<sup>106</sup> See, e.g., Kosse, *supra* note 100, at 168 (“Since no collective social judgment about religious matters exists, the tendency to analyze the cases based on the desired outcome or a majority perspective is a real danger.”); Marshall, *supra* note 11, at 537 (arguing that a judge is likely to “assume the objective observer to be him or herself” rather than use a particular objective test).

<sup>107</sup> According to the most recent Pew Foundation survey, from 2007, Christians represent 78.4% of the U.S. population, though no one denomination constitutes a majority. Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey*, REPORTS (2007), <http://religions.pewforum.org/reports>.

<sup>108</sup> Corbin, *supra* note 3, at 1585, 1587.

<sup>109</sup> *Id.* at 1586.

<sup>110</sup> Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 481 (1994) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)); cf. Primus, *supra* note 80, at 580-81 (arguing that “[n]othing in the case law disciplines the inquiry into the reasonable observer's perspective” in race discrimination cases, and therefore “the Court is left to consult its own intuitions about reasonableness[,]” leading to the view that the challenged legislation “is deemed to express . . . the valuations as seen by mainstream whites, and laws touching on issues of racial equality will stand or fall based on how they appear from that perspective”).

<sup>111</sup> Speech act theory is a branch of linguistic theory that focuses on the effects of linguistic utterances rather than on the simple descriptive meaning of words. It is

although the endorsement test correctly focuses on interpreting social meaning to determine whether symbolic government action disparages certain citizens on the basis of religious belief, it almost inevitably falls into the trap of majoritarian bias.<sup>112</sup> This majoritarian bias derives from a broader social context that inevitably shapes meaning and interpretation. For example, the predominance of Christianity in American society makes Christian symbols seem less jarring and more natural than non-majority symbols.<sup>113</sup> Christian symbols are therefore less likely to be perceived as affirmatively endorsing Christianity.

Concern about the inherent majoritarian bias in the reasonable observer's perspective has led numerous commentators to suggest alternatives. Professor Norman Dorsen and Charles Sims observe that, "whatever else it was intended to do, the establishment clause was designed at least to avoid having the government prefer one religion over another, not only financially, but through intangible benefits or burdens."<sup>114</sup> Therefore, particularly in light of the courts' countermajoritarian role, they suggest that the question of whether an endorsement exists should be judged "from the viewpoint of those who reasonably claim to have been harmed."<sup>115</sup> Likewise, Professor Caroline Corbin, drawing on an analogy to the reasonable woman in sexual harassment law, advocates for a "reasonable religious outsider" perspective.<sup>116</sup> Not only does this perspective work to counteract majoritarian bias and "blind perpetuation of Christian privilege," it more accurately reflects the underlying purpose of the establishment clause—to protect religious minorities—and properly vindicates the countermajoritarian role of the courts.<sup>117</sup> In a related context, Professor Dorf, in considering constitutional challenges to other forms of constitutional expression, argues that government actions claimed to create a message of second-class citizenship should be subject to heightened scrutiny "if some identifiable group of people

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characterized by an emphasis on the contextual factors that give rise to a particular utterance's effects. See generally Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 485 (2013) ("The core idea [of speech act theory] is that we can perform a variety of actions when we say things. . . . The action performed by an utterance can be called its illocutionary force.").

<sup>112</sup> Hill, *supra* note 36, at 520-21.

<sup>113</sup> *Id.* at 521-22.

<sup>114</sup> Dorsen & Sims, *supra* note 3, at 859 (emphasis omitted).

<sup>115</sup> *Id.* at 859-61.

<sup>116</sup> Corbin, *supra* note 3, at 1597.

<sup>117</sup> *Id.* at 1596 n.325, 1597.

reasonably takes offense at” that message.<sup>118</sup> Dorf, too, thus suggests that the perspective of the “victim” is the relevant one.<sup>119</sup>

Avoiding the reasonable observer heuristic altogether, some scholars have suggested other means of determining what a particular religious display might mean. For example, Professors Shari Seidman Diamond and Andrew Koppelman suggest replacing the amorphous reasonable observer inquiry with survey evidence on the meaning of a display, similar to the sort of evidence used to determine consumer confusion in Lanham Act cases.<sup>120</sup> And Professor Jay Wexler proposes that an Article I court comprising judges with diverse religious beliefs should make determinations of whether particular symbols or displays constitute religious endorsement to ensure consideration of minority religious perspectives.<sup>121</sup> For the reasons discussed below, I argue that all of these proposals, while each adding something valuable to our understanding of the reasonable observer heuristic, still fundamentally miss the mark.

### III. REHABILITATING THE REASONABLE OBSERVER

The reasonable observer is not all bad—he’s just misunderstood. It would not be wise to seek to replace the reasonable observer with an alternative observer. Alternatives such as the reasonable nonadherent have a number of flaws and are unlikely to remedy the shortcomings of the reasonable observer. Instead, courts should focus on developing legal rules and devices for constraining the apparently free-form inquiry into social meaning.

Thus, it is important to understand the reasonable observer for what he is and what he is not. The reasonable observer is a way of articulating the process of any interpreter attempting to discern social meaning. He is not a stand-in for actual members or segments of the community. In this light, the reasonable observer heuristic, while perhaps still awkwardly conceived, appears far less pernicious. At a minimum, concerns about attributing too much or too little knowledge to the reasonable observer fall away.

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<sup>118</sup> Dorf, *supra* note 1, at 1337.

<sup>119</sup> *Id.* Dorf’s view is similar to my own in that he acknowledges the possibility of multiple reasonable interpretations and gestures toward using presumptions as a way to manage multiple meanings. *Id.* at 1336-38.

<sup>120</sup> See Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713 (2001).

<sup>121</sup> Wexler, *supra* note 103, at 289-91, 304-05.

However, concerns about majoritarian bias are not addressed by this novel understanding of the reasonable observer. I therefore propose a remedy for these concerns as well. The solution to the problem of majoritarian bias is not to create an alter ego for the reasonable observer, but rather to constrain biases through presumptions, burden-shifting, and other procedural techniques.

A. *Understanding the Reasonable Observer in Relation to the Act of Interpretation*

It is a mistake to expect the reasonable observer to resemble a living, breathing human being. As Justice O'Connor's words mostly indicate, this was never the intent of the reasonable observer heuristic. To expect the reasonable observer to represent a real person with a particular range of knowledge, beliefs, and experiences is to undermine the heuristic's fundamental purpose. Yet, critics of the reasonable observer suggest that the main problem is the reasonable observer's failure to align with the actual observations of real people. Instead, the problem with the reasonable observer is that the interpretive inquiry under the endorsement test is unconstrained by substantive and procedural rules, rendering the quest for social meaning inevitably open-ended.

1. Interpretation and Intent

As Justice O'Connor stated in *Lynch*, the goal of the endorsement test is to determine the *social meaning* of the display at issue.<sup>122</sup> This social meaning "is not a question of simple historical fact."<sup>123</sup> Instead, she explained, it is "like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts."<sup>124</sup> Therefore, the endorsement inquiry is not an empirical question about how individual viewers would perceive a particular government-sponsored display or practice; it is much more abstract. For this reason, Justice O'Connor emphasized that the endorsement test does not "focus on the actual perception of individual observers, who naturally have differing degrees of

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<sup>122</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

<sup>123</sup> *Id.* at 693.

<sup>124</sup> *Id.* at 693-94.



knowledge.”<sup>125</sup> Instead, the relevant inquiry is a quest for what might be called the “public meaning” of governmental acts.<sup>126</sup>

I therefore argue that the reasonable observer does not represent particular members of a community, but rather the act of interpretation itself—of determining public meaning. Several things follow from this understanding, all of which help to make some sense of the endorsement test and its current shortcomings. First, when confronted with a textual or other symbolic and communicative act, we do not discern meaning by polling particular individuals for their views. Indeed, it is clear that meaning is not an empirical proposition; a word or phrase means what it means by virtue of participating in a system of language, not because a majority agrees that it has that meaning.<sup>127</sup> As John Searle has memorably explained, when someone states that the term “‘oculist’ means eye doctor,” she is “engaging in a (highly complex) rule-governed form of behavior”; she is “not reporting the behavior of a group but describing aspects of [her] mastery of a rule-governed skill.”<sup>128</sup> Or, as Wittgenstein explains, “To understand a language means to be master of a technique.”<sup>129</sup> Consequently, interpretation is not statistical or empirical in nature; “the truth that in my idiolect ‘oculist’ means eye doctor is not refuted by evidence concerning the behavior of others.”<sup>130</sup> Moreover, although “there is nothing infallible about linguistic characterizations,” and indeed, “speakers’ intuitions are notoriously fallible,” Searle explains that errors in interpretation are “not . . . due to over-hasty generalization from insufficient empirical data concerning the verbal behavior of groups” but from incomplete mastery of

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<sup>125</sup> *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring).

<sup>126</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1512-13 (2000).

<sup>127</sup> Of course, a word can be given a particular meaning within a particular community or subgroup that differs from its standard meaning in the language. For example, drug dealers might use code words whose meaning is not accessible to individuals outside their group in order to make their conversations more difficult to understand. But this simply suggests that the subgroup itself has adopted its own set of language rules, and not that the term itself loses or changes its predominant meaning simply because a certain percentage of individuals use it in a different way.

<sup>128</sup> JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 12 (1969). Or, as Wittgenstein puts it, she is playing the “language-game” (*Sprachspiel*). LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 4, para. 7 (G.E.M. Anscombe trans., 3d ed. 2001) (maddeningly explaining that he is using the term “language-game” to refer to the methods by which children learn their native language, as well as to “the whole, consisting of language and the actions into which it is woven”); see also *id.* at 33, para. 81, 68, para. 199.

<sup>129</sup> WITTGENSTEIN, *supra* note 128, at 68 para. 199.

<sup>130</sup> SEARLE, *supra* note 128, at 13.

the rules of the language.<sup>131</sup> On this account, then, it should not be troubling that the reasonable observer is not an actual member of the community, or that his qualities do not correlate to those of real—but fallible—observers or interpreters.

Second, when discerning the meaning of a particular utterance, we must consider the nature of interpretation itself. The act of interpretation is, in essence, the act of *attempting to discern the intent behind an utterance*. This is achieved primarily by looking to the context of the statement and using all available clues to reach the best possible understanding of what a person would likely intend by using those words or symbols.<sup>132</sup>

But it is important to understand exactly what this posited relationship between intent and interpretation does and does not imply. It does imply that whenever an observer or reader engages in the act of interpretation she assumes that a person constructed the utterance at issue intentionally, with a particular idea in mind.<sup>133</sup> It does not imply, however, that there is always one clear intent that is accessible to both the speaker and the interpreter, nor does it imply that the subjective intent of the speaker somehow controls the “true” meaning of the utterance. Rather, it is possible that the speaker’s intent was not clear or singular or precise enough to answer every interpretive question that the interpreter might have. Thus, a speaker may not have intended to send a message of exclusion to non-Christians in proclaiming, “Christ is King, and those who disagree must repent or suffer eternal damnation.” The speaker may not have even remotely entertained any thought of non-Christians at all.<sup>134</sup> But this does not mean that no message of exclusion can possibly arise. And at the same time, the speaker does not have a monopoly on meaning: I might say, “I have to go to the park today” when I really mean, “I have to go to work today.” If I misspoke, I may have the opportunity to clarify my intention, but my initial

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<sup>131</sup> *Id.* at 14.

<sup>132</sup> *Id.* at 16.

<sup>133</sup> As Searle explains, “When I take a noise or a mark on a piece of paper to be an instance of linguistic communication, as a message, one of the things I must assume is that the noise or mark was produced by a being or beings more or less like myself and produced with certain kinds of intentions.” *Id.* at 16.

<sup>134</sup> See, e.g., Smith, *supra* note 5, at 286-88. Wittgenstein gives the following example: “Someone says to me: ‘Shew the children a game.’ I teach them gaming with dice, and the other says ‘That sort of game isn’t what I meant.’ Must the exclusion of the game with dice have come before his mind when he gave me the order?” WITTGENSTEIN, *supra* note 128, at 28.

sentence still referred to a place of recreation with grass and trees, rather than a law school office.

Therefore, interpretation is always an act of construction of a hypothetical intent that does not actually exist and not a reconstruction of an actual intent that can be unearthed and verified. As Stanley Fish explains, “[A]ll communications are mediated. That is, communications of every kind are characterized by exactly the same conditions—the necessity of interpretive work, the unavoidability of perspective, and the construction by acts of interpretation of that which supposedly grounds interpretation,” including intent.<sup>135</sup> To restate in perhaps overly simplistic terms, interpretation is the listener’s (or reader’s) act of reconstructing the intent of the speaker (or writer). But the intentions of one person are never entirely or directly accessible to another person. Indeed, in many cases the intentions may not even be accessible to the speaker. Even in the context of a face-to-face conversation, where an interlocutor can respond and ask for clarification, the intentions of the speaker are still mediated by language, which is rife with imprecision and potential for mistaken application of rules.<sup>136</sup> Thus, even if the interpreter could somehow directly access the precise thoughts inside the mind of the speaker, the interpreter would still lack information necessary to answer the question of what the speaker’s utterance means.

Of course, in the case of symbolic displays or the “social meaning” arising from government conduct, the distance between the speaker’s actual intentions and the listener’s understanding is further increased because the speaker is absent or not identifiable. But whatever the scenario, it is important to recognize that interpretation is always a post-hoc construction of intent—not the act of actually accessing intent.<sup>137</sup> Moreover, the inaccessibility of intent opens up the possibility of a difference between the speaker’s original intention and the objective meaning.

Thus, if we accept that interpretation is the act of using the rules of language to reconstruct the intent of another, we must acknowledge the possibility of “mistakes” on both ends of the message—the receiver’s end and the sender’s end. Or, as Justice O’Connor suggests in the context of governmental

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<sup>135</sup> STANLEY FISH, *With the Compliments of the Author: Reflections on Austin and Derrida*, in *DOING WHAT COMES NATURALLY* 37, 43-44 (1989).

<sup>136</sup> *Id.* at 43.

<sup>137</sup> *Id.* at 43-44.

expression, “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.”<sup>138</sup> In large part, this occasional failure arises because language also depends on convention (rules), which the speaker and hearer may or may not have fully mastered or internalized.

The failure to receive the message that the speaker intended might result from a mistake on the part of the speaker or the listener. It may also result from the measure of indeterminacy that the inherent flexibility and malleability of the surrounding context bring to the interpretive inquiry.<sup>139</sup> Finally, it may result from the fact that intent is not always complete, present, or meaningful in a particular context, even to the speaker herself.<sup>140</sup> All of this implies that “mistakes” are not always actually mistakes—they are sometimes just the inevitable result of the play in the joints of language. The rules are not precise, and meaning cannot be made completely determinate.<sup>141</sup>

Thus, “[m]eaning is more than a matter of intention, it is also at least sometimes a matter of convention.”<sup>142</sup> Hence, Justice O’Connor’s distinction between the intended meaning and the meaning “actually conveyed”<sup>143</sup> essentially corresponds to the Gricean distinction between “speaker’s meaning” and “sentence meaning.”<sup>144</sup> As Professor Matthew Adler explained, the speaker’s meaning is the meaning that the speaker intended to convey, whereas “the sentence meaning of a linguistic utterance is what the utterance conventionally communicates.”<sup>145</sup> Thus, sentence meaning is fundamentally produced by social and linguistic conventions.<sup>146</sup>

“Convention,” which is often synonymous with “context,” can include a wide variety of requirements that are necessary

<sup>138</sup> Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

<sup>139</sup> Hill, *supra* note 36; *see also* Anderson & Pildes, *supra* note 126, at 1512-13 (describing various ways in which the meaning one intends to express may deviate from the meaning one actually expresses).

<sup>140</sup> *See supra* note 134.

<sup>141</sup> *See generally* FISH, *supra* note 135, at 43-48 (elucidating Jacques Derrida’s thesis that the capacity for linguistic failure is inherent in, and essential to the functioning of, language itself).

<sup>142</sup> SEARLE, *supra* note 128, at 45.

<sup>143</sup> Lynch, 465 U.S. at 690 (O’Connor, J., concurring).

<sup>144</sup> Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1384-96 (2000) (discussing Grice).

<sup>145</sup> Adler, *supra* note 144, at 1394 (emphasis omitted) (footnote omitted).

<sup>146</sup> *Id.*

for an utterance to mean something according to the rules of the language game. For example, in order for a sentence to have meaning in English, words must be used in a particular order. To give another example, the meaning of utterances may be changed by the physical and social setting in which the utterance occurs. If I say, "I'm climbing the walls," the meaning of that phrase will vary depending whether the physical context is a rock climbing gym or a hospital room where I've been recuperating for several weeks. Similarly, if I use the term "queer," its meaning may be determined in part by whether I am homophobic, and therefore attempting to insult someone, or homosexual, and reclaiming the term as my own.<sup>147</sup> A Latin cross erected by the Ku Klux Klan may have a different meaning than a cross erected by a group seeking to honor World War I veterans.<sup>148</sup> Thus, the context includes not only the physical surroundings, but also the identities of the speaker and listener.

Another example demonstrates the interaction between intent and convention, or context. Imagine a beach, on which a series of scratches has been made in the sand. To those who speak only English, the scratches appear to be a mere pattern of lines and dots and have no communicative content. Such viewers might imagine that the scratches were made by some natural phenomenon, or perhaps by a child or adult idly scribbling with a stick in the sand in order to make a pretty design. Perhaps to one who understands Arabic, however, the scratches have meaning. Perhaps they read, "Keep our beaches beautiful." The Arabic reader would thus understand the import of the phrase and would also most likely assume the writer to have intended the reader to glean such a message. Of course, the writer may have had no such intention; she may simply have intended to show off her newfound skills in Arabic.

This example illustrates several facts about symbolic or semiotic communication, particularly when the actual speaker is absent. First, the speaker's intended message will never be received if the reader does not have a working knowledge of the relevant linguistic conventions. A Latin cross, like the cross erected in honor of the war dead in the Mojave Desert, will not be understood as a war memorial if it is viewed by someone who

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<sup>147</sup> See, e.g., Judith Butler, *Critically Queer*, 1 GLQ: A J. LESBIAN & GAY STUD. 17, 18-23 (1993) ("But sometimes the very term that would annihilate us becomes the site of resistance, the possibility of an enabling social and political signification: I think we have seen that quite clearly in the astounding transvaluation undergone by 'queer.'").

<sup>148</sup> *Capital Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995); *Salazar v. Buono*, 559 U.S. 700 (2010).

does not know that the cross is a common memorial for the dead.<sup>149</sup> Second, a reader who has familiarity with those conventions will interpret the utterance by using the available information about those conventions to reconstruct the utterer's purpose or intent.<sup>150</sup> Someone who knows the history of the cross erected in the Mojave Desert is more likely to interpret it as a war memorial rather than as a message from the Ku Klux Klan.

Third, the conventionally correct meaning—the sentence meaning—does not always correspond to the utterer's intent, but this is not to say that the interpreter was incorrect to derive that meaning.<sup>151</sup> Indeed, the sentence “Keep our beaches beautiful” is surely an exhortation to keep our beaches beautiful, whether or not it was intended as such. At the same time, meaning is not particularly dependent on the views of any particular reader; the sentence will have meaning regardless of whether there is an available reader who can understand Arabic.

Yet the interpretation does not stop there. “Keep our beaches beautiful” may also be a political statement, or an ironic one—again, whether so intended or not—depending on the broader social context in which the utterance is made. For example, if sometime after the sentence is written, a group of picnickers comes along and leaves trash all around it, the sentence takes on a shade of irony that it may not have had when it was written. The meaning has escaped the speaker's ability to control it because the context in which it occurs has changed. Of course, the interpreter's biases—his views about environmental protection and whether the current government does enough to protect the beaches, for example—may also color the interpreter's understanding. Thus, the war memorial in *Buono* may still signify an endorsement of Christianity in a particular community such as the present-day United States, because our troops are religiously diverse but the symbol

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<sup>149</sup> Cf. *Buono*, 559 U.S. at 707 (considering an establishment clause challenge to a cross erected as a war memorial on federal land).

<sup>150</sup> On this point, see 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, 763-67 (2001) (citing Adler, *supra* note 144) (arguing that the focus of the establishment clause inquiry is the “purpose” of government action, which roughly corresponds to “sentence meaning,” or “the purposes that underlie and render meaningful the actual language of a public enactment or policy itself”). Importantly, Raskin clarifies that the relevant issue is purpose, understood as sentence meaning, and not the subjective intent of individual legislators or government actors. *Id.*

<sup>151</sup> Moreover, according to postmodern theory, the speaker's intent is always in an important sense inaccessible, so the act of interpretation is always a post-hoc construction of purpose, never an actual discovery of purpose. For purposes of this article, however, that argument need not be further examined.

represents only one religion.<sup>152</sup> This message of endorsement may be the correct one, even if the cross was intended as a universal symbol of remembrance.

In this way, the interpretation of those sandy scribbles connects to our understanding of how we interpret a crèche in a public park or a menorah on the steps of a government building. If the menorah appears in a city that is majority Jewish, it may be more likely to be understood by viewers as an endorsement of Judaism by a government dominated by, or politically captured by, that religious group. Indeed, Justice Blackmun suggested as much in *County of Allegheny v. ACLU*, in which he noted that the city's relatively small Jewish population was one reason for rejecting the claim that it had endorsed Judaism by erecting a menorah next to a Christmas tree.<sup>153</sup> Endorsement of Judaism may be the social meaning of the menorah, whether it was so intended or not.

## 2. Interpretation and Knowledge

Of course, in deciding on a particular meaning for the menorah, the interpreter will consider other factors such as the size of the menorah and whether it is accompanied by other symbols like a Christmas tree.<sup>154</sup> If the viewer happens to be familiar with basic principles of constitutional law, and happens to know whether the menorah was sponsored by the government or a private group, and happens to be aware of the history of the physical forum as either a public or non-public forum, that knowledge will of course further assist the viewer in discerning whether the purpose behind its placement was to endorse Judaism. The more the interpreter knows, the more likely the interpretation will be correct.

This observation leads to one of the key contentions of this article. If we understand the reasonable observer simply as a stand-in for the interpreter of social meaning, then the "omniscient" or hyper-knowledgeable quality of the observer seems much less problematic. The more knowledge one brings to bear on the act of interpretation, the better. If we

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<sup>152</sup> See Brief of the American Muslim Armed Forces and Veterans Affairs Council, and the Muslim American Veterans Association, as Amici Curiae in Support of Respondent, *Salazar v. Buono*, 2009 WL 2418469 at 15.

<sup>153</sup> *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 616 n.64 (1989) (opinion of Blackmun, J.) (arguing that it is "distinctly implausible" to consider the menorah sitting next to a Christmas tree to be an endorsement of Judaism, in part because Pittsburgh had approximately 45,000 Jews out of a population of 387,000).

<sup>154</sup> *Id.* at 614.

understand the goal of the endorsement inquiry to be the interpretation of meaning, then we are not concerned with how a particular display might strike an uninformed passerby. We are concerned with what the display *means* and therefore with the message that the government has conveyed. The goal is to achieve the best possible understanding of the purpose behind the government's acts in the current context.

One would not, after all, assume that the best interpretation of a Victorian novel is likely to be achieved by a reader who has no familiarity with the history of the period or the conventions of the genre; nor would we think a statute is better interpreted by someone with less understanding of its subject matter than by an expert.<sup>155</sup> At the same time, however, the meaning of a Victorian novel to a contemporary reader is not necessarily identical with what the author meant to convey. Thus, for example, the novel *Jane Eyre*, published in 1847, shocked nineteenth-century readers with its portrayal of a strong, individualistic heroine whose romance crossed class lines.<sup>156</sup> To the uninformed modern reader (perhaps like the average twenty-first-century high-school student), the protagonist may seem a somewhat spunky but quaint and overly prudish young woman. Yet, to a more informed reader, who is aware of Victorian conventions but seeking to make sense of the character for contemporary readers, *Jane Eyre* may be a novel about the ways in which social conventions create two possible perceptions of women, as either angels or monsters.<sup>157</sup>

Is the reasonable observer in establishment clause cases merely a stand-in for the judge, then? Yes, and this is as it should be. The judge is clearly the individual charged with the act of interpreting the meaning of a display or practice under establishment clause doctrine. Thus, to arrive at an accurate conclusion, the judge should mobilize all available evidence and knowledge and bring it to bear on the interpretive puzzle at hand. Indeed, judges are familiar with the interpretive exercise, because interpretation—of statutes, of common law

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<sup>155</sup> The assumption of expertise that extends to the interpretive act is part of the rationale that leads courts to defer to agency interpretations of the statutes they are charged with administering. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

<sup>156</sup> CHARLOTTE BRONTE, *JANE EYRE* (Wordsworth Classics 1999) (1847).

<sup>157</sup> For a classic feminist re-interpretation of *Jane Eyre*, see, e.g., SANDRA M. GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION* 336-71 (1979).



cases, and of constitutional provisions—is precisely what they are trained and expected to do.<sup>158</sup>

This insight—that the reasonable observer should be and is the judicial interpreter who benefits from having the broadest possible range of knowledge—raises the question whether anything should be excluded from consideration in determining social meaning. Is true omniscience really ideal position from which to make the judgment about meaning?<sup>159</sup>

Consider another, more relevant, hypothetical. The mayor of a city has a nephew who is a budding artist. This nephew paints an enormous canvas of a crucifixion. The crucifixion, however, is not that of Jesus of Nazareth, but rather of a follower of Spartacus, the slave who led a rebellion against the Roman republic.<sup>160</sup> The mayor hangs his nephew's painting in a prominent place in City Hall. Does the reasonable observer view this painting as religious or historical?

If the reasonable observer has access to information that the average passerby does not, what role should that knowledge play in interpretation? In this scenario, as in the case of *Jane Eyre*, the reasonable observer's knowledge undoubtedly assists that observer in understanding the actual intent of the original author or actor (whether the mayor's nephew or Charlotte Brontë). But, as explained above, that original, subjective intent is not necessarily the same thing as the "meaning" of the cross, painting, or novel. Though the crucifixion painter's intended meaning may be clear, that intent does not control the subsequent message sent by the presence of the painting in City Hall. It may well signify an endorsement of Christianity to the reasonable observer. But if so, it is not because the reasonable observer is somehow ignorant, but rather because the relevant question is what we

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<sup>158</sup> Thus, although it has factual elements, the social meaning of a display is a question for the judge to decide, not a question for the factfinder. This is precisely because, unlike reasonableness in tort law, social meaning is not a question of empirical fact but rather of social fact. Judges commonly find social or legislative facts in constitutional cases. See generally Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966).

<sup>159</sup> The related evidentiary issues are dealt with in greater detail *infra*, Part III.C.

<sup>160</sup> For a real-life work of art depicting this crucifixion, see FEDOR ANDREEVICH BRONNIKOV, *CURSED FIELD—PLACE FOR EXECUTION IN ANCIENT ROME, CRUCIFIED SLAVES* (1878). Thanks to Ron Colombo for suggesting a version of this hypothetical. For a similar (but less stark) real-life example, see *Hewitt v. Joyner*, 940 F.2d 1561, 1564 (9th Cir. 1991) (addressing a constitutional challenge to a park full of religious statuary, some of which was created by a sculptor who "was not a particularly religious man and was adamant that the park not be used for any religious purposes" but who "picked biblical characters to sculpt as he felt they best portrayed the 'peace on earth' sentiment").

would *assume* or *believe* the person erecting such a painting, in the present cultural context, intended by doing so.

Therefore, it is necessary to get past the notion that a text or display “means” what its author or creator “meant.” The search for social meaning is always the (re)construction of a hypothetical intention. It asks the question, “What would a hypothetical person usually mean by using this set of symbols in this way, in this context?” For this reason, it is important to know, like the reader of *Jane Eyre*, the purpose for which we are interpreting: is it to determine the novel’s meaning to nineteenth-century readers or its contemporary relevance? With respect to the crucifixion painting, it is not as important to ask what the painter meant to convey so much as it is to ask what the act of placing such an unattended and unexplained painting is likely to signify in a particular cultural setting. The problem, therefore, is not with the level of knowledge possessed by the interpreter but rather with determining the relevance of various aspects of the symbol’s context to the question the interpreter is seeking to answer.

In sum, the criticism of the reasonable observer as omniscient and therefore insufficiently human distracts us from understanding the true purpose of the heuristic device. It exists not to represent a particular kind of viewer but rather as a way of asking what the social meaning of a display is in a particular context. The problem is therefore not with the reasonable observer’s level of knowledge but with determining what is and is not relevant to the inquiry at hand.

### 3. The Reasonable (Wo)man Analogy

The fact that the reasonable observer is essentially an idealized interpreter and a stand-in for the judge herself distinguishes this heuristic from the reasonable person in other legal contexts like tort law and sexual harassment cases.<sup>161</sup> Justice O’Connor asserted in *Pinette* that the reasonable observer, like the reasonable person in tort law, “is not to be identified with any ordinary individual, who might occasionally do unreasonable things.”<sup>162</sup> Instead, the reasonable observer, like the reasonable

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<sup>161</sup> See generally Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) (discussing and criticizing the reasonable person standard in sexual harassment law).

<sup>162</sup> *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 779 (O’Connor, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWN, PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)) (internal quotation marks omitted).

person, is “a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.”<sup>163</sup>

The analogy is not entirely apposite, however. Though the reasonable observer is similar to the reasonable person in that both are idealized, imaginary entities, the purpose of the reasonable observer, which is focused on interpretation, is different from the purpose of the reasonable person, who is a stand-in for community moral judgment about the appropriateness of particular behaviors. The reasonable observer’s judgments are not statistical, empirical, or otherwise derived from what a majority of people might do, as explained above. In determining how a reasonable person—or a reasonable woman, or a reasonable victim—would behave, however, statistical evidence may be quite relevant.<sup>164</sup> In addition, if the average person’s knowledge of certain legal standards or factual circumstances is limited, this limitation would be relevant to determining reasonableness in tort law. The reasonable person is not expected to be an expert in legal or technical matters, but the reasonable observer does have access to specialized knowledge. Finally, and relatedly, the perspective of the reasonable person is employed by juries, while the interpretive conclusions of the reasonable observer are to be reached by judges, as a matter of law.

In one important respect, however, the reasonable person does resemble the reasonable observer: both are likely to be swayed by particular biases.<sup>165</sup> As noted above, the context and identity of the listener, no less than the speaker, affect the message that is received from a particular utterance. In this sense, then, it may make sense to turn to some alternate mechanism for minimizing the role of bias in interpretation. As discussed below in Part III.B., however, the primary alternative—substituting an alternate observer in the place of the reasonable observer—is not likely to solve the problem.

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<sup>163</sup> *Id.* at 780 (O’Connor, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWN, PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)); see also Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?*, 26 IND. L. REV. 227, 227 (1993) (describing the reasonable person as “a mythical individual who is supposed to represent a composite of society’s highest values. The reasonable person test purports to establish liability objectively by asking the question: ‘What would the reasonable person have perceived in the same situation?’”).

<sup>164</sup> See generally V. Blair Druhan, Note, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355 (2013) (using empirical evidence to demonstrate statistical differences between men’s and women’s perceptions of behavior as sexually harassing); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 371, 377 (2012).

<sup>165</sup> See, e.g., Bernstein, *supra* note 161, at 465-71.

## B. *The Reasonable Nonadherent and Her Kin*

The most prevalent proposed substitute is known as the reasonable nonadherent, according to which the judge should simply assume the perspective of a non-believer and interpret the display from that vantage point. This section outlines two critiques of heuristic devices that have been presented as alternatives to the reasonable observer. First, asking a judge to assume the perspective of a religious outsider requires the judge in most cases to engage in a form of role-playing or sympathetic imagining for which she is most likely ill-prepared. It is not at all clear how a judge is expected to place herself in the shoes of a person of a different religious faith and interpret a particular governmental practice or symbolic display from that vantage point.<sup>166</sup> Second, it is not clear that these alternate observers even address the actual problem of majoritarian bias. The assumption of many critics appears to be that individuals' perceptions of religious displays are affected by their religious beliefs. The available evidence tends to indicate, however, that religious belief may not play such a decisive role in discerning social meaning.

### 1. Judicial Empathy?

Even accepting that judges should adopt the perspective of the "reasonable nonadherent" or some such similar construct, it is not at all clear *how* they should do so. Those urging judges to adopt these alternate perspectives appear to expect judges to step into a role and to imagine seeing a display through the eyes of someone different from themselves, despite lacking all of the life experiences and cultural influences that such a person would have. This seems to be an exercise in

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<sup>166</sup> Of course, this problem may afflict the "reasonable woman" of sexual harassment law as well. As Anita Bernstein argues:

A male juror, judge, or labor arbitrator cannot easily apply the reasonable woman standard. Although the standard implies that men and women are immutably different and perhaps mutually incomprehending . . . this factfinder is charged with the task of somehow transcending these differences. If he uses women he knows well as reference points ("How would my wife feel?"), he veers into subjectivity and distinctions based on race and class. If he avoids this kind of specific thinking, then he must resort to speculation, or some self-framed variation on the reasonable man or reasonable person standard, or perhaps some unauthorized research on the nature of women . . .

*Id.* at 474.

empathy—or perhaps something like empathy, but even more difficult to explain and operationalize.

Indeed, though “empathy” itself is difficult to define, it is often referred to as a sort of “perspective taking.”<sup>167</sup> The term “empathy” thus may refer primarily to a cognitive quality—“the capacity to attribute thoughts, desires, and intentions to others, to predict or explain their actions, and to *posit their intentions*.”<sup>168</sup> This is indeed a quality that judges and others arguably should and do possess; it is not, however, the quality involved in adopting the perspective of another person and then applying that perspective in interpreting the social meaning of a display. Instead, it seems judges are being asked to enter into another person’s mind for purposes of interpreting meaning—to imagine another person’s interior life just as that person would experience it.<sup>169</sup> Beyond understanding how another person with particular characteristics might feel or react in a given situation, adopting the reasonable nonadherent perspective also requires the judge to engage in the act of interpretation from that person’s perspective—more an exercise in imagination than an act of empathy.

Even if judges are capable of occupying other minds in this way, such an exercise is arguably just as amorphous, unguided, and unconstrained as the exercise of interpretation from the perspective of the reasonable observer. There is no reason to think that judges are particularly well-suited to this task, and it is unclear how they are to go about it in the first place. Perhaps these commentators are really asking judges to adopt some kind of presumption against majority-religious symbols; but if that is the case, it is probably best simply to say so.

Indeed, recent research into the role cultural attitudes play in shaping cognition gives further reason to be pessimistic about the possibility of an “empathy fix” to the reasonable

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<sup>167</sup> Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1958 (2012); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 325 (2012).

<sup>168</sup> Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 9 (2011) (emphasis added). Scholars have also pointed out that empathy may have an emotional component, which may or may not be properly mobilized in the act of judging. *Id.* at 11-12; Weinberg & Nielsen, *supra* note 167, at 325 (describing empathy as “vicarious emotion”).

<sup>169</sup> This is similar to the classic philosophical problem of “other minds.” See, e.g., *Other Minds*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. 2009) (“Were I able to observe the mental states of another human being that would not mean that I did not have a problem of other minds. I would still lack what I needed. What I need is the capacity to observe those mental states as mental states belonging to that other human being.”). Thanks to Cole Durham for pointing out this connection.

observer conundrum. Writing with a somewhat different goal, Professor Dan Kahan identifies a phenomenon that he calls “cognitive illiberalism.”<sup>170</sup> Cognitive illiberalism refers to the phenomenon whereby individuals’ political and cultural biases distort their understanding of empirical facts, such as the riskiness of particular behaviors like gun ownership and drug use.<sup>171</sup> As Kahan explains, this cognitive illiberalism comprises various kinds of cognitive failures or defense mechanisms. For example, individuals engage in “identity-protective cognition,” whereby they view more favorably evidence and arguments that align with “positions associated with their group identity” and “impute greater knowledge and trustworthiness and hence more credibility to individuals from within their group than from without.”<sup>172</sup> Moreover, the more deliberative the thought process, the more likely it is that individuals will engage in this type of motivated reasoning.<sup>173</sup> There is thus particular reason to think this problem will afflict judges severely.

According to Kahan, cognitive illiberalism is both pervasive and surprisingly intractable.<sup>174</sup> It is intractable partly because it is particularly hard to recognize in oneself. Thus, he explains, “Social psychologists have documented that persons readily, and correctly, discern that individuals who hold factual beliefs different from their own have formed those views to fit their group commitments.”<sup>175</sup> But individuals generally have enormous difficulty identifying the same behavior when they themselves engage in it.<sup>176</sup> Kahan refers to this effect as “naïve realism,” because people are realists about the effects of others’ identities and values on their beliefs but see their own beliefs as objectively true and obvious.<sup>177</sup>

Kahan’s thesis focuses specifically on how individuals view empirical facts. His core argument is that individuals’ group identities and predispositions unconsciously shape their view of the underlying facts upon which legal rules are based.

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<sup>170</sup> Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007). Professor Kahan’s purpose is to evaluate the cultural influences on cognition of risk in public policymaking and to suggest solutions to the negative effects of such influences on accurate assessment of risk.

<sup>171</sup> *Id.*; see also Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 116-18 (2010).

<sup>172</sup> Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 20-21 (2011) (emphasis omitted).

<sup>173</sup> *Id.* at 21.

<sup>174</sup> Kahan, *supra* note 170, at 130-31.

<sup>175</sup> *Id.* at 130.

<sup>176</sup> *Id.* at 130-31.

<sup>177</sup> Kahan, *supra* note 172, at 22.

Thus, to the extent that debates about criminal or constitutional law turn on empirical and predictive facts about the real-world impact of certain policies, an individual will believe that her view of the ultimate legal issue is correct and based on facts and that her opponent's view is a bad-faith or purely ideological view that ignores or misreads the facts.<sup>178</sup> But the same model may be applied to one's perception of social meaning. Indeed, it could help explain why different courts reach radically different conclusions when viewing the same or similar displays, leading to the criticisms of inconsistency and incoherence described above.<sup>179</sup> To take a recent example, recall Justice Scalia's famous exchange with plaintiff's counsel in *Salazar v. Buono*, in which the ACLU attorney insisted that non-Christians would feel marginalized by a war memorial in the form of a Latin cross, because it would appear to honor only the Christian war dead.<sup>180</sup> Justice Scalia characterized that assertion as an "outrageous" interpretation.<sup>181</sup> Such an exchange is a perfect demonstration of two individuals' inability to see their own interpretations as anything but based on clear and obvious facts, and the other's as simply disingenuous.<sup>182</sup>

<sup>178</sup> *Id.* at 6-8; see also Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

<sup>179</sup> See *supra* Part II.B. For example, in *ACLU v. Mercer Cnty.*, 432 F.3d 624 (6th Cir. 2005), the Sixth Circuit Court of Appeals upheld a Kentucky county courthouse Ten Commandments display that it acknowledged to be "identical in all material respects" to the Kentucky county courthouse display that the Supreme Court struck down in *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005). *Mercer Cnty.*, 432 F.3d at 626. This and other post-*McCreary County* cases are discussed in Kreder, *supra* note 2.

<sup>180</sup> Transcript of Oral Argument at 38-39, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (no. 08-472), 2009 WL 3197881; cf. Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1212 (2011).

<sup>181</sup> Transcript of Oral Argument at 38-39, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (no. 08-472), 2009 WL 3197881.

<sup>182</sup> The entire exchange was as follows:

JUSTICE SCALIA: The cross doesn't honor non-Christians who fought in the war? Is that—is that—

MR. ELIASBERG: I believe that's actually correct.

JUSTICE SCALIA: Where does it say that?

MR. ELIASBERG: It doesn't say that, but a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins, and I believe that's why the Jewish war veterans—

JUSTICE SCALIA: It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the—the cross is the—is the most common symbol of—of—the resting place of the dead, and it doesn't seem to me—what would you have them erect? A cross—some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?

Similarly, the Ninth Circuit, in overturning a grant of summary judgment for the government in a challenge to a Latin cross war memorial, stated that the district court improperly discounted the plaintiff's expert's testimony about the history of war memorials: "[T]he district court erroneously branded [the expert's] declarations as conclusory, ignoring the detailed listings and historical analysis provided in the record."<sup>183</sup> At the same time, the court noted disapprovingly that "the district court accepted without comment the statements of the government's expert . . . who offered a number of wholly conclusory statements without historical reference or supporting facts."<sup>184</sup> The clearly divergent perspectives of the district court and the court of appeals on whose historical evidence is trustworthy (and whose is "conclusory") appear to mirror the phenomenon that Kahan describes.

## 2. Is Religion the Problem?

Even if it were possible to adopt another's worldview, it is not clear that the nonadherent's perspective is necessarily the most relevant for the judge to assume. In a recent empirical study, Professors Gregory Sisk and Michael Heise conclude that political ideology—and not religious belief—plays a significant role in predicting how judges will decide establishment clause cases.<sup>185</sup> Their study of all establishment clause decisions by federal appeals court and district court judges between 1996 and 2005 revealed that federal judges appointed by Democratic presidents were 2.25 times more likely to uphold plaintiffs'

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MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.

(Laughter.)

MR. ELIASBERG: So it is the most common symbol to honor Christians.

JUSTICE SCALIA: I don't think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead. I think that's an outrageous conclusion.

MR. ELIASBERG: Well, my—the point of my—point here is to say that there is a reason the Jewish war veterans came in and said we don't feel honored by this cross. This cross can't honor us because it is a religious symbol of another religion.

*Id.*

<sup>183</sup> *Trunk v. City of San Diego*, 629 F.3d 1099, 1112 n.12 (9th Cir. 2011).

<sup>184</sup> *Id.*

<sup>185</sup> Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1261 (2012).



establishment clause claims than Republican-appointed judges.<sup>186</sup> They found that “no other variable—not the judges’ prior legal positions, *religion*, race, or gender—proved consistently salient in predicting the outcome of claims alleging that governmental conduct crossed the supposed line ‘separating Church and State’ under the Establishment Clause.”<sup>187</sup>

These findings throw into question arguments claiming that judges tend to find nonendorsement when they view a government practice or display from a Christian worldview. Clearly, such an assumption underlies arguments urging the courts to adopt the perspective of the “reasonable *religious* outsider” or the “reasonable *nonadherent*.”<sup>188</sup> A similar intuition underlies Professor Mark Tushnet’s statement that the result in *Lynch* may have been different if there had been “a Jew on the Court to speak from the heart about the real meaning of public displays of crèches to Jews.”<sup>189</sup> Likewise, Professor Kenneth Karst has suggested that “[p]erhaps it is not wholly accidental that the main dissenting opinions” in a case upholding Hawaii’s Good Friday state holiday under the establishment clause were written by non-Christian judges.<sup>190</sup> Indeed, these sorts of observations are quite logical and commonplace.

Nonetheless, to the extent that the judge and the reasonable observer are one, it seems that the reasonable observer’s politics would be more important than his religion. Of course, it is possible that one’s politics correlate with one’s attitudes toward the proper role of religion in society. If so, it may be that this attitude helps determine one’s perspective on the social meaning of religious displays and other forms of religiously charged government conduct.<sup>191</sup> But this is not the same as saying that one’s perspective is determined by one’s religion. It is therefore highly questionable whether urging judges to adopt the perspective of a religious outsider would have the intended effect, even if such a feat were possible.

Kahan’s findings, together with Sisk and Heise’s, indicate that cultural and political preconceptions certainly

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<sup>186</sup> *Id.* at 1204-05. Though the study combined all establishment clause cases and did not separate out cases in which judges applied the endorsement test as opposed to another test (such as *Lemon*), the statistical significance of the correlation between decision and ideology was particularly great for cases involving religious symbols ( $p < .001$ ). *Id.*

<sup>187</sup> *Id.* at 1205 (emphasis added).

<sup>188</sup> See *supra* notes 114-18 and accompanying text.

<sup>189</sup> Mark Tushnet, *The Constitution of Religion*, 50 REV. POL. 628, 651 n.31 (1988).

<sup>190</sup> Karst, *supra* note 13, at 524.

<sup>191</sup> *E.g.*, Sisk & Heise, *supra* note 185, at 1230, 1243.

affect judges' perceptions of the displays they are supposed to be interpreting with objectivity. At the same time, merely making judges aware of this effect or asking them to change their perspective is unlikely to have the intended effect. Individual judges may genuinely believe they are being objective, or even mindful of the outsider's perspective, but chances are great that they are not actually doing so.

### C. *Turning to Law*

The predominant critiques of the reasonable observer have distracted us from the true problem at hand: how to interpret the social meaning of a display in a way that is more principled and consistent than existing approaches. This section proposes some doctrinal modifications that could improve the consistency of outcomes in cases involving interpretation of social meaning. These proposed alterations reflect the revised understanding of the reasonable observer outlined above. They do not radically change the endorsement inquiry; indeed, some courts may, consciously or not, already apply the device in this way. But this understanding of the reasonable observer is not uniform, and the small modifications proposed here will regularize and clarify the doctrine. First, the interpretive inquiry involved in these cases must be defined with more precision. Second, evidentiary standards should be relaxed but applied with a proper understanding of what is and is not relevant to the endorsement question. Finally, courts should make more aggressive use of presumptions and burdens of proof in order to manage, and decide among, the inevitable multiplicity of possible meanings involved in any difficult case.

#### 1. An Interpretive Inquiry

The endorsement inquiry must be understood as an interpretive inquiry just like the many other interpretive inquiries in which judges engage. There is, however, one important difference: in cases of social meaning, judges must recognize, and learn to handle, the inevitable polysemy of such displays. Symbolic displays almost always produce multiple reasonable interpretations. There is not one reasonable observer, but many.

The interpretive question must also be stated more clearly. As described above in Part I, the question at the heart of the establishment clause inquiry is whether the governmental practice or display casts particular community

members as outsiders based on their religious beliefs (or lack thereof).<sup>192</sup> But it is also important to recall exactly what the inquiry into *social* meaning entails. The relevant question is not what a particular government actor intended, but rather what the governmental display or practice means in a particular context. As such, the relevant question is what purpose or intention we would reasonably understand the governmental speaker to have when engaging in this practice or sponsoring this display.<sup>193</sup>

This inquiry is, of course, fraught with difficulties. One primary difficulty is that, although many meanings will always be possible, judges will often tend to see the meaning that is most aligned with their own identities, beliefs, or politics as the self-evidently correct one.<sup>194</sup> It seems that progress could be made toward dealing with this problem, however, if courts were required to recognize that, in most cases, there will be multiple reasonable meanings for a religious display.<sup>195</sup> This recommendation recognizes the reality that meaning will be contested in almost all such cases, given the complexities of the context, including the various perspectives of the message's "readers."<sup>196</sup> However, rather than trying to assume one particular perspective on meaning—that of the religious outsider, for example—the correct result can be achieved by adopting a presumption against majority religious symbols, as discussed below.

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<sup>192</sup> See *supra* Part I.C.

<sup>193</sup> See *supra* Part III.A. Interestingly, the Sixth Circuit has occasionally articulated the test in roughly this way, albeit in connection with the "purpose" prong rather than the "effect" prong of the endorsement test. See *ACLU v. Grayson Cnty.*, 591 F.3d 837, 856 (6th Cir. 2010) (considering "what the objective observer would have understood the purpose behind the display to be" (emphasis omitted)). I take the position here that the purpose and effect inquiries collapse into one when social meaning is at issue.

<sup>194</sup> *Supra* Part III.B.1; see also Laycock, *supra* note 180, at 1212 ("When Justices and government lawyers defend government-sponsored religious displays by claiming that the display is really secular, the argument is often rather conclusory. But the response is often even more conclusory. 'Just look at it. See! It's religious.'").

<sup>195</sup> In *Trunk v. City of San Diego*, for example, the court "beg[an] by considering the potential meanings of the" challenged symbol. 629 F.3d 1099, 1110 (9th Cir. 2011) (emphasis added).

<sup>196</sup> My suggestion is also in line with Professor Kahan's proposals for dealing with motivated cognition—namely, "cultivation of judicial idioms of aporia," by which judges acknowledge openly in their opinions that some cases are complex and do not permit straightforward answers; and "expressive overdetermination," by which judges recognize multiple social meanings, while still being required to choose one as the correct one. Kahan, *supra* note 172, at 59-68; cf. Dan M. Kahan, et al., "They Saw a Protest": *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 898 (2012); Secunda, *supra* note 171, at 144-47.

## 2. Evidentiary Concerns

As this article has already suggested, judges engaged in the interpretation of social meaning have no choice but to occupy the position of the reasonable observer. The fact that the reasonable observer's knowledge need not be limited should mean that courts could be relatively relaxed in terms of the evidence they consider. It is already common practice for courts to hear expert testimony,<sup>197</sup> to look outside the record to understand the nature and significance of a particular symbol within a religious tradition,<sup>198</sup> to consider historical materials,<sup>199</sup> and even to take some sort of judicial notice of the social context in which the display exists.<sup>200</sup> In so doing, it seems that judges need not be, and generally are not, limited by the record compiled by the parties before them. If they are engaging in a judicial act of interpreting social meaning as a matter of law rather than as a factual inquiry into adjudicative facts or actual individuals' perceptions, they need not rely on the closed universe of litigation documents.

In addition to the extrinsic materials just described, judges might take empirical studies or surveys into account.<sup>201</sup> This is different, however, from saying that meaning can be empirically determined or that such evidence should be dispositive. Although no statistical study can or should determine social meaning, it is nonetheless important for judges to be made aware of differing understandings of social meaning, particularly by those who are situated differently from them. The views of nonadherents—even idiosyncratic views—would be relevant, as they would simply provide more

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<sup>197</sup> See, e.g., *Hewitt v. Joyner*, 940 F.2d 1561, 1564 (9th Cir. 1991) (noting expert testimony submitted in a challenge under California Constitution to a public park full of religious statuary); *Trunk v. City of San Diego*, 629 F.3d 1099, 1112-14 (9th Cir. 2011).

<sup>198</sup> See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 616-17 n.65 (1989) (citing Gilbert, *The Season of Good Will and Inter-religious Tension*, 24 RECONSTRUCTIONIST 13 (1958)); *Brooks v. City of Oak Ridge*, 222 F.3d 259, 264 n.3 (6th Cir. 2000) (citing 15 THE ENCYCLOPEDIA OF RELIGION 470 (Mircea Eliade ed., 1987)).

<sup>199</sup> See, e.g., *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1023-25 (10th Cir. 2008); cf. *Trunk*, 629 F.3d at 1121 (noting that the city's history of anti-Semitism affected the way that the large Latin cross symbol would be perceived by the reasonable observer).

<sup>200</sup> See, e.g., *ACLU v. City of Stow*, 29 F. Supp. 2d 845, 852 (N.D. Ohio 1998) ("The sad part of this case is that two years ago, probably less than 10% of the residents of Stow even knew that the city had a seal, and most likely only a fraction of those could describe what was on the seal. Now, almost everyone knows that one quadrant of the seal has a Christian cross. The issue has become very divisive to the community.").

<sup>201</sup> See, e.g., *Diamond & Koppelman*, *supra* note 120; Feigenson, *supra* note 87, at 94-101.

information for the judge to use.<sup>202</sup> Such information could be introduced by means of expert testimony and affidavits, though none of these devices, alone, would determine the outcome.

At the same time, relevance must be enforced. In particular, courts must be careful to question the relevance of evidence that goes to the actual, subjective intent of a particular government actor, rather than the “reconstructed intent” that is relevant to social meaning. Thus, for example, in *ACLU v. Grayson County*, the Sixth Circuit Court of Appeals accepted the government’s assertion that its Ten Commandments display—which was essentially identical to the display struck down by the Supreme Court in *McCreary County v. ACLU*—had the purpose not to establish religion but to acknowledge history.<sup>203</sup> Although the dissent pointed out that the government actors made numerous explicit statements indicating an exclusive focus on finding a way to post the religious document in the courthouse,<sup>204</sup> the majority deferred to the government’s own articulation of its subjective purpose.<sup>205</sup> Indeed, the court even acknowledged that the county’s understanding of history was frankly inaccurate—but then found this fact irrelevant.<sup>206</sup> The court noted, for example, that scholars have demonstrated that the Ten Commandments did not, in fact, influence American law in any meaningful way.<sup>207</sup> In addition, the court noted the display’s claim that the *The Star Spangled Banner* inspired the Americans in the Revolutionary War, although the anthem was not actually written until decades after the revolution.<sup>208</sup> The choice to ignore the inaccuracy of the historical claims made by the county could only suggest that the court was concerned with the government actors’ subjective intent or state of mind, rather than the intent that an observer would impute to the government’s actions. An individual may be mistaken about history, but the reasonable observer would not accept false

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<sup>202</sup> See, e.g., *Kunselman v. Western Reserve Local Sch. Dist.*, 70 F.3d 931, 932 (6th Cir. 1995) (noting the district court’s consideration of affidavits describing how a challenged symbol was understood).

<sup>203</sup> *ACLU v. Grayson Cnty.*, 591 F.3d 837, 849 (6th Cir. 2010). The display in *McCreary County* was struck down because the Court found that it did not have a secular purpose under the *Lemon* test. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 859-69 (2005) (applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). In *Grayson County*, the Sixth Circuit held that the display was not motivated by the same religious purpose, and—reaching an issue not reached by the Supreme Court—held that it did not have the effect of endorsing religion. *Grayson Cnty.*, 591 F.3d at 854-55.

<sup>204</sup> *Grayson Cnty.*, 591 F.3d at 857-63 (Moore, J., dissenting).

<sup>205</sup> *Id.* at 849 (majority opinion).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 849 n.6.

<sup>208</sup> *Id.*

historical assertions. If the social meaning inquiry is to be taken seriously, then this sort of evidence should not be considered by courts to be controlling.

### 3. Presumptions

Finally, rather than purporting to assume an outsider's perspective, judges dealing with cases demanding interpretations of social meaning should use presumptions and burden-shifting rules as a means of constraining the interpretive inquiry. If the central concern of the establishment clause is the religious outsider rather than the insider, judges can impose rebuttable presumptions that government sponsorship of majoritarian religious symbolism constitutes endorsement and place the burden on the government to rebut such a meaning. To do so, the government may use evidence of intent, expert testimony, religious and historical treatises, and other relevant information about the context.<sup>209</sup> A successful rebuttal would shift the burden from the government back to the plaintiff.

Presumptions can be invaluable to judges dealing with difficult cases. They function as tie-breakers when evidence is in equipoise. Presumptions allocate the risk of error to the party that should bear it, according the substantive principles of law that control the case. If the objective is to protect religious minorities, it is only sensible to craft a presumption to guide judges in close cases where meaning is disputable and disputed.

Indeed, judges dealing with religious display cases often invoke evidentiary burdens and scrutinize the record to determine whether a party has overcome those burdens. For example, in the *Grayson County Ten Commandments* case, the

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<sup>209</sup> Indeed, the existing case law could be read to implicitly impose such a presumption when the symbol is freestanding. Courts often strike down displays of majority religious symbols when unaccompanied by other, secular or minority religious symbols. *See, e.g.,* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 599-602 (1989) (striking down standalone crèche display); ACLU v. Mercer Cnty., 432 F.3d 624, 634 (6th Cir. 2005) (noting that *Stone v. Graham*, 449 U.S. 39 (1980), suggests the unconstitutionality of standalone Ten Commandments monuments). I have argued elsewhere for a rebuttable presumption against religious symbols on government property, Hill, *supra* note 36, at 539-44. Similarly, Justice Stevens has advocated for such a rule. *Allegheny*, 492 U.S. at 650 (Stevens, J., concurring in part and dissenting in part); Van Orden v. Perry, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting); Capitol Square Rev. & Adv. Bd. v. Pinette, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting). Finally, Professor Stephen Feldman has recommended the adoption of presumptions in certain establishment clause contexts in order to counteract favoritism toward religious insiders. Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 267-71 (2003). This article, however, refines and further develops the theoretical underpinning for that recommendation.

court emphasized that “those objecting to a display . . . bear the burden of producing evidence sufficient to *prove* that the governmental entity’s secular purpose is a sham, and that an objective observer would understand the display to be motivated predominantly by religion.”<sup>210</sup> Of course, the plaintiff already bears the burden of proof in a constitutional challenge. But the existence of multiple reasonable meanings in most cases suggests that a rebuttable presumption in favor of one of those meanings would better serve the goals of the endorsement test and help judges choose correctly among them. Thus, if the court determined that multiple reasonable meanings were possible, it should credit the view that reads a majoritarian symbol as sending a message of exclusion.<sup>211</sup> This presumption flows from the fact that judges will otherwise tend, in most cases, to evince a majoritarian bias in interpreting the display. The government would still be free, however, to rebut the presumed message—for example, with powerful evidence of the symbol’s nonreligious (historical or cultural) significance.<sup>212</sup>

Such a presumption can also act to counter the motivated cognition described by Kahan. If a judge is inclined to see only one meaning as obvious and true, putting a weight on the scale in favor of the “outsider” meaning may well counteract that inclination to some degree. Of course, there is the possibility that these techniques would not solve the problem entirely. Presumptions are easily manipulated and may, themselves, be difficult to administer or become mired in conceptual difficulty. But they would impose at least some constraints on the interpretive inquiry.<sup>213</sup> Moreover, moving the doctrine toward a more legalistic one might move judges’ operative presumptions from the level of unconscious bias to

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<sup>210</sup> *Grayson Cnty.*, 591 F.3d at 856.

<sup>211</sup> This proposal is similar to Professor Dorf’s: he advocates in favor of a presumption of “multiple reasonable perspectives,” suggesting that “if some identifiable group of people reasonably takes offense at what it regards as a government message of second-class citizenship, then the challenged government act, symbol, or statement is . . . subjected to some form of heightened scrutiny.” Dorf, *supra* note 1, at 1336-37.

<sup>212</sup> See, e.g., *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008); *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991).

<sup>213</sup> *Sisk & Heise*, *supra* note 185, at 1249-53 (urging more rule-like structure for establishment clause cases as a means of ensuring that the inquiry is less free-wheeling and the decision-making less politicized). For example, a per se rule against religious displays on public property, though perhaps excessively inflexible in this context, would surely constrain judges in many cases. Cf. *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 492-93 (S.D.N.Y. 2004) (noting disagreement with the state of the law but nonetheless applying a relatively straightforward rule requiring a health exception in abortion regulations).

the level of open debate. If so, the ideal of reasonableness could only be better served.

## CONCLUSION

The reasonable observer heuristic is in need of re-interpretation—not as a stand-in for a flesh-and-blood member of the community, but rather as a way of understanding the process of discerning social meaning. This article contends that a proper understanding of the objective observer, along with a recognition of the potential pluralism of social meaning and a more robust deployment of legal rules and mechanisms, will assist in stabilizing the inquiry, which has been criticized repeatedly as biased and incoherent.

In particular, this article has argued that the reasonable observer heuristic is fundamentally misunderstood by courts and scholars who urge that the reasonable observer should take on the characteristics of real human being. Properly understood as a representation of how the act of interpretation occurs rather than as a hypothetical standpoint from which to judge a religious display, the reasonable observer becomes a helpful starting point for operationalizing the task of interpreting social meaning. Criticizing the reasonable observer for his failure to replicate the qualities of actual human beings and suggesting that courts should identify a replacement observer have led us down the wrong path.

Several things flow from this proper understanding of the reasonable observer. First, this understanding focuses the endorsement inquiry on the act of interpreting social meaning. It asks whether the display at issue may be understood, in its present physical and social context, to send a message of religious hierarchy, or of social, cultural, or political exclusion based on religion. Importantly, this is a question about reconstructed intent of a hypothetical government speaker—it is emphatically *not* a question about the subjective intent of any particular individual or even composite speaker. Second, this revised understanding suggests that a broad range of information and evidence may be considered, but also that the evidence must be considered in light of the inquiry just described. Thus, for example, evidence indicating the “true” intent of the governmental actors is not likely to be highly relevant, and it certainly is not dispositive. Finally, the possibility of multiple meanings and the potential for majoritarian bias mean that courts should use burdens of proof and presumptions in a way that helps to control the otherwise free-wheeling inquiry into social meaning.