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Anatomy of the Reasonable Observer

Jessie Hill, Case Western Reserve University

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ANATOMY OF THE REASONABLE OBSERVER

B. Jessie Hill†

ABSTRACT

The “reasonable observer”—the fictional person from whose perspective we are to judge whether a governmental display or practice violates the Establishment Clause—has been under fire for decades. Primarily, critics argue that the reasonable observer, as conceived by the Supreme Court, is incapable of representing a community perspective because he does not sufficiently resemble a flesh-and-blood person. This criticism can be further articulated as two specific complaints: first, that too much knowledge is imputed to the reasonable observer, making him more omniscient than the average passerby; and second, that the reasonable observer, like the average judge, is biased toward a majoritarian viewpoint. For this reason, judges and scholars have urged replacements for the reasonable observer, such as the reasonable victim and the reasonable nonadherent. This essay argues, however, that the reasonable observer is not all bad—he’s just misunderstood. The criticisms of the reasonable observer are misplaced, and they distract us from the real task at hand—grappling with the process of interpreting social meaning. This essay urges a return to legal and procedural devices as a means of controlling the social meaning inquiry. This essay’s recommendations assume particular salience, moreover, in light of the growing recognition of the constitutional implications of expressive government conduct in domains reaching beyond the Establishment Clause.

† Professor of Law, Associate Dean for Faculty Development and Research, and Laura B. Chisolm Distinguished Research Scholar, Case Western Reserve University School of Law. Early drafts of this paper were presented at the BYU Law and Religion Colloquium and the Annual Law and Religion Roundtable at Stanford Law School. The author thanks the participants in those workshops for helpful criticisms and suggestions, especially Fred Gedicks, Cole Durham, Ron Colombo, Frank Ravitch, Bill Marshall, and Nelson Tebbe.
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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, maligned—his very existence questioned.\(^1\) While the reasonable observer has, so far, survived these attacks, some commentators suggest that he is not long for this world.\(^2\) And a small cottage industry exists to point out the reasonable observer’s shortcomings and to propose alternatives to this heuristic device.\(^3\)

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. Indeed, in its 2013-2014 Term, the Supreme Court will consider a case in which the Second Circuit struck down a town’s legislative prayer practice as constituting an endorsement of Christianity “from the perspective of an ordinary, reasonable observer”—raising the possibility that the Court is primed to ditch the endorsement test.\(^4\) But 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.\(^5\)

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\(^{5}\) 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,
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, however—at least in the First Amendment realm. 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 would still be necessary to determine, when official religious speech is involved, whether the speech was in fact coercive or proselytizing. Presumably, this determination would have to be made from the perspective of a reasonable or objective observer.

Moreover, some 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. 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. They have also suggested the relevance of the reasonable observer heuristic to the doctrine of government speech, which is fast gaining in prominence. 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—and if the spate of recent scholarship on the issue of government speech and related expressive

*See infra Part I.B.*


*See infra Part I.B.*

concerns\textsuperscript{11} is any indication, that significance is waxing rather than waning—the reasonable observer remains relevant as one possible answer to the question, "Whose meaning counts?"\textsuperscript{12}

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 and fails to capture the way in which 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 average viewer and is therefore unrealistic.\textsuperscript{13} 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 own predilections—especially when one considers the unusually high degree of knowledge imputed to the reasonable observer.\textsuperscript{14} 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 themselves Christian and therefore less likely to view Christian symbols as endorsing or otherwise problematic.\textsuperscript{15}

This essay 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 the reasonable observer heuristic, along with alternatives like the reasonable religious outsider, has been misunderstood by most commentators to require the judge to put himself or herself in the shoes of a stranger with certain characteristics and then to judge the challenged religious display or practice from that perspective.


\textsuperscript{12} Cf. William P. Marshall, \textit{"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?").

\textsuperscript{13} \textit{Infra} Part II.A.

\textsuperscript{14} \textit{Infra} Part II.A.

\textsuperscript{15} \textit{Infra} Part II.B.
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 social meaning interpretation. When a reader 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, and uses this information to reconstruct the intent, or purpose, behind the symbolic representation. This “reconstructed intent” is what we mean by “social meaning.” The reasonable observer is, then, simply a reader of social meaning, and the reasonable observer’s appearance in the religious symbolism context should not be controversial or suspect.

Still, one problem with this understanding of the reasonable observer is that it fails to address the majoritarianism critique. It is an undeniable fact 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 are likely to affect perception, the problem is that it is not easy to say whose understanding should be the one that matters under the Establishment Clause.\(^\text{16}\) And one might fear that symbols and practices will be understood as less problematic when they reflect the expectations and cultural background of the judges themselves, many of whom are still predominantly white, male, and Christian. In other words, doesn’t the reasonable observer, so understood, still risk an overwhelming majoritarian bias in the interpretation of social meaning? This line of argument leads to the suggestion that judges should instead adopt the perspective of the outsider, so that minority group interests are sufficiently protected.

I contend that this solution does not actually advance the ball on opening up social meaning to outsider 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).\(^\text{17}\) Relatedly, the inquiry

\(^{16}\) See, e.g., Mark Strasser, The Protection and Alienation of 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. *Infra* Part II.B.2.

\(^{17}\) Strasser, *supra* note 16, 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
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. My proposal is, instead, to use legal devices of the sort that judges are more comfortable with—in particular, rebuttable presumptions and burdens of proof—in order to force judges to consider social meaning from something other than a majoritarian perspective. Judges are more competent and comfortable using such devices, and they can count on the parties to frame their arguments in terms of them, thereby holding judges accountable to some degree. Though not without its flaws, I would argue that this proposal is more likely to protect minority viewpoints than the various “alternative observers” that have been proposed. In addition, it may render the social meaning inquiry in religious symbolism cases more law-like and less unstructured.

In Part I, I review briefly 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 therefore the reasonable observer heuristic is relevant. In Part II, I outline the standard critiques of the reasonable observer, as well as the proposals for substituting a different, more minority-focused observer in its place. 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 the suggested alternatives, while well-meaning, are also fundamentally wrongheaded. I conclude that both religious minorities and judges would be better served by a jurisprudence that required them to use more standard legal devices, such as presumptions and burden-shifting, rather than to develop a sympathetic imagination. 18 Legal constraints, rather than

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18 Although this essay focuses primarily on the use of the reasonable observer heuristic in the Establishment Clause context, where it is most developed doctrinally,
legal fictions,\(^{19}\) are sorely needed.

I. A BRIEF BIOGRAPHY OF THE REASONABLE OBSERVER

In this Part I briefly review the origins and understanding of the reasonable observer in the context of the endorsement test. I then discuss the relevance of the reasonable observer outside the parameters of the endorsement test, reviewing the recent but burgeoning body of scholarship recognizing the constitutional relevance of the social meaning conveyed by expressive governmental actions, ranging from flying the confederate flag to outlawing same-sex marriage. Finally, because it is important to understanding the argument that follows, I attempt to articulate—again, drawing on the work of other scholars—the kind of injury that flows from governmental messages that construct some individuals as inferior to others based on categories such as race and religion. A proper understanding of the harm that the Constitution is meant to remedy in cases of expressive injury is necessary to understanding the social meaning inquiry and how it may be constrained.

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*,\(^{20}\) a 1984 Supreme Court case involving a challenge under the Establishment Clause of the First Amendment\(^{21}\) to a Nativity scene display at Christmastime in downtown Pawtucket, Rhode Island. Applying the test derived from *Lemon v. Kurtzman*,\(^{22}\) Chief Justice Burger, writing for the majority, held the display to be constitutional as an acceptable acknowledgement of religion, no more problematic than “the Congressional and Executive

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\(^{21}\) U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion…..”).

\(^{22}\) 403 U.S. 602 (1971).
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.” The opinion was rather thin on analysis, however, and Justice O’Connor’s brief concurrence in that case therefore took on particular importance. In that opinion, she stated that the relevant inquiry was “whether Pawtucket has endorsed Christianity by its display of the crèche,” or in other words, whether the challenged display “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”

Justice O’Connor offered her “endorsement test” as a gloss on the Lemon test, one focused primarily on the social meaning of the governmental practice in question. Justice O’Connor did not specifically mention or describe the reasonable observer in the early case; indeed, her focus was 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. She made only passing, generic references to the “audience” and “viewers” of the religious displays. At the same time, she laid the groundwork for an understanding of the soon-to-be conceived reasonable observer that fits with 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

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24 Cf. County 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”).
26 Id. at 691-92.
27 Id. at 690, 692.
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.28

Justice O’Connor’s explanation demonstrates a sensitivity to the way in which language and interpretation function, drawing on both subjective components—particularly the speaker’s intent—and objective components—specifically, the context of the speech. Indeed, her discussion treats the holiday scene as though it were a straightforward linguistic communication by a government actor, rather than a symbolic display. Then, on the basis of this understanding of the interpreter’s task, Justice O’Connor concluded, rather controversially, that “the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.”29

In subsequent cases—most notably, \textit{Wallace v. Jaffree}30 and \textit{County of Allegheny v. ACLU},31 the Court largely embraced and further refined the endorsement test. In \textit{Jaffree}, Justice Stevens wrote an opinion for the Court striking down Alabama’s moment-of-silence law because it was enacted “for the sole purpose of expressing the State’s endorsement of prayer….”32 In her concurrence to that opinion, Justice O’Connor took the opportunity to expand on the endorsement test. Regarding the challenge to the moment-of-silence law, she 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.”33 Similarly, in

28 Id. at 690.
29 Id. at 692.
32 \textit{Jaffree}, 472 U.S. at 60.
33 Id. at 76 (O’Connor, J., concurring) (emphasis added); see also \textit{Witters v. Washington Dept. of Servs. for the Blind}, 474 U.S. 481, 493 (1986) (O’Connor, J.,
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. Appearing to suffer confusion about whose perspective is relevant, Justice Blackmun, writing only for himself, declared, “While an adjudication of the display’s effect 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, … the constitutionality of its effect must also be judged according to the standard of a ‘reasonable observer.’” Concurring, Justice O’Connor (joined by Justices Brennan and Stevens) clarified that the relevant perspective is that of the “reasonable observer.”

But the most extensive discussion of, and debate over, the reasonable observer occurs in Capitol Square Review & Advisory Board v. Pinette, 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. The primary issue before the Supreme Court, therefore, was whether the Establishment Clause would be violated by allowing the freestanding cross display in a state-sponsored public forum. 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, favoring a per se rule that no inference of governmental endorsement of religion can arise from allowing private religious speech in a true public forum, rendering the reasonable observer an irrelevancy. Several of the remaining Justices debated just what sort of observer the “reasonable” observer was, in particular the

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 essay therefore does not distinguish them, either.

35 Allegheny, 492 U.S. at 620 (opinion of Blackmun, J.).
36 Id. at 631 (O’Connor, J., concurring).
38 Id. at 758-59 (plurality op.).
39 Id. at 757.
40 Id. at 770.
level of knowledge to be attributed to it.

Justice O’Connor presented an image of the reasonable observer as an omniscient representative of the community as a whole. Her concurrence argues that the reasonable observer is “aware of the history and context of the community and forum in which the religious display appears.”41 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,” as well as “the general history of the place in which the cross is displayed” as an open forum for private speech—in other words, “how the public space in question has been used in the past.”42 Justice O’Connor also analogized the reasonable observer to the “reasonable person” in tort law—not any one real, ordinary individual but “a community ideal of reasonable behavior” and a representative of “[collective] social judgment.”43

Indeed, her view resonates with her later concurrence in *Elk Grove Unified School District v. Newdow,*44 the Pledge of Allegiance case, in which O’Connor elaborated on the reasons for the reasonable observer heuristic.45 First, the objective nature of the observer’s viewpoint ensures that unreasonable or marginal perspectives will not act as “hecker’s veto[es]” over religious speech that, say, the overwhelming majority people would not find to be endorsing.46 And second, because it is a representative of rational, social judgment, “the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape.”47

Justice Stevens’ dissent in *Pinette,* by contrast, emphasizes that the reasonable observer’s perspective should include that of an individual whose religious viewpoint is not represented by the challenged symbol.48 Noting that different people may reasonably receive different messages from the same display, Justice Stevens criticized Justice O’Connor’s version of the reasonable observer for ignoring this reality and asking far too much of the “reasonable” viewer of a religious display. According to Justice

41 Id. at 780 (O’Connor, J., concurring).
42 Id. at 780-81.
43 Id. at 779-80 (alteration in original).
45 Id. at 34-35 (O’Connor, J., concurring).
46 Id.
47 Id. at 35.
48 *Pinette,* 545 U.S. at 799 (Stevens, J., dissenting).
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. Arguing that Justice O’Connor’s view unreasonably expects a high level of legal and historical knowledge from the reasonable observer, 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.”

Though the debate over its predominant qualities has not been resolved, the reasonable observer continues to linger, appearing in more recent cases as well. Several of the Justices, for example, called on the reasonable observer in Salazar v. Buono, a challenge to a war memorial in the form of a Latin cross that originally stood on federal land but was transferred to private ownership. The Court even referred to the reasonable observer and the endorsement test in the case that upheld the Cleveland, Ohio school voucher system, although the system skewed heavily in favor of religious schools.

Sooner or later, it seems, the Supreme Court is likely to revisit its jurisprudence on the reasonable observer. The Court has recently denied certiorari in two cases applying the endorsement test to religious symbols, over vociferous dissents. In Utah Highway Patrol Ass’n v. American Atheists, Justice Thomas’ dissent from the denial of certiorari criticized at length both the endorsement test and the confusion over the nature and qualities of the “reasonable observer” that it has engendered. Noting that the court below had altogether failed to reach consensus on how the reasonable observer would perceive the challenged practice of marking the deaths of Utah highway patrol officers with Latin crosses bearing the seal of the Utah Highway Patrol, Justice

49 Id. at 800 n.5, 802 n.7.
50 Id. at 807.
52 Id. at 1803 (2010).
53 Justice Kennedy’s plurality opinion questioned the relevance of the reasonable observer but proceeded to apply the test. Id. at 1820; see also id. at 1824 (Alito, J., concurring); id. at 1832-37 (Stevens, J., dissenting).
Thomas argued that focusing on the reasonable observer led to “erratic, selective analysis of the constitutionality of religious imagery on government property,” essentially driven by “the personal preferences of judges.”

Similarly, Justice Alito dissented from the denial in certiorari in *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. And the Second Circuit recently applied the reasonable-observer test to a legislative prayer case, *Galloway v. Town of Greece*, which the Supreme Court will hear this Term.

### B. The Reasonable Observer Outside the Establishment Clause Context

While some have thus suggested that the endorsement test’s days are numbered in the Establishment Clause context, the reasonable observer’s influence nonetheless seems to have spread to other legal contexts. For example, in the closely related area of “government speech” doctrine under the Free Speech Clause of the First Amendment, judges and commentators have argued that the question whether particular speech may be attributed to the government should be judged from the perspective of the reasonable observer. If the endorsement test is on the wane, the

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56 *Id.* at 21.
58 681 F.3d 20 (2d Cir. 2012), cert. granted, 133 S. Ct. 2388 (May 20, 2013).
59 *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.” (footnote omitted)).
influence of 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, as its application has ranged from questions concerning the constitutionality of excluding particular religious displays from public parks,\(^{61}\) to permissible viewpoint-limitations on specialty license plate programs,\(^{62}\) to prohibitions on funding for women’s health services providers,\(^{63}\) to allowable sanctions for speech by government employees and even public school cheerleaders.\(^{64}\) There is thus reason to think that the reasonable observer will remain relevant in cases involving challenges to public displays of religious symbolism and religious speech, regardless whether the endorsement test continues to apply in Establishment Clause cases.

Moreover, the reasonable observer has begun to make appearances outside the First Amendment context. In a recent article, Professor Michael Dorf persuasively articulates the view that the Constitution bans governmental messages that designate some individuals, groups, or relationships as inferior to others.\(^{65}\) In so doing, Dorf not only makes the case for recognizing “expressive” harm as constitutionally cognizable harm, but also grapples with the difficult problem—also present in religious symbolism cases—of “discerning, or more properly, …constructing, social meaning” in cases where it may be disputed.\(^{66}\) Rejecting the 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.\(^{67}\) Along similar lines, Professor Helen Norton has explored the intersection of government speech and equal protection jurisprudence, arguing that, in its current state, the doctrine is insufficiently protective against the unique harms that may arise from discriminatory or hateful governmental

\(^{62}\) *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).
\(^{63}\) *Planned Parenthood Ass’n of Hidalgo County Texas, Inc. v. Suehs*, 692 F.3d 393, 349-50 (5th Cir. 2012).
\(^{65}\) 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”).
\(^{66}\) *Id.* at 1278, 1315-76.
\(^{67}\) Dorf, *supra* note 1, at 1334-38 (modifying the reasonable observer approach to take account of the “qualified victim perspective”).
messages. Norton, too, explicitly draws upon the reasonable observer framework from the Establishment Clause cases to suggest that social meaning can be discerned for purposes of making constitutional claims.

Similarly, Professor Nelson Tebbe argues in a forthcoming article that government actions outside the religious speech context should, like religious speech, be constitutionally constrained by a nonendorsement principle. 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 implication in a wider variety of cases than has been acknowledged by courts and scholars alike. Indeed, 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.

These recent articles echo earlier, more general discussions of the expressive thread of equal protection. As many scholars have observed, concerns about government messages of inferiority has been at the heart of at least one strain of Equal Protection doctrine, stretching from *Plessy v. Ferguson*, *Brown v. Board of Education*, to *Shaw v. Reno*. In addition, Professor Richard Primus has considered the expressive dimensions of disparate impact doctrine under Title VII, noting both the necessity and the difficulty of using a reasonable observer heuristic to determine social meaning in that domain. Thus, the importance of the reasonable observer construct—in other words, the issue of the perspective from which social meaning is judged—will likely persist as long as social meaning is viewed to be constitutionally

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69 Id. at 199-202.
70 Tebbe, *supra* note 8.
71 Id. at (draft at 3-4).
72 Id. at (draft at 36-37).
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 some commentators’ proposed modifications. 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 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—she suggests that governmental endorsement of religion causes “citizenship harms”: it 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.” Speaking of racial stigma rather than religious exclusion, Professor R.A. Lenhardt describes “citizenship harms” in terms that are nonetheless relevant to the endorsement test: “Focused more on deprivation of intangibles such as ‘empathy, virtue, and feelings 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,” negatively affecting an “individual’s ability to belong—to be accepted as a full participant in the relationships, conversations, and processes that are so important to

76 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) to 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., Smith, supra note 5, at 286-89 (1987); Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. CHI. L. REV. 115, 155 (1992); Berg, supra note 5, at 319.

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community life.” 78

Numerous constitutional scholars have articulated the concerns at the heart of the endorsement test in similar terms. For example, Professor Neil Feigenson argues that concerns about political standing—concerns that extend beyond the concrete protection of civil rights—should be at the heart of the endorsement test. 79 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. 80 Even more broadly, this sort of stigmatizing government conduct undermines the principle of equal respect to which each citizen is entitled under the Constitution. 81 Indeed, whether it is true for other constitutional provisions or not, Professor Dorf points out that even those with more accommodationist views of the Establishment Clause—those who might accept some “endorsing” government speech but draw the line at “proselytizing” government speech, for example—fundamentally accept the premise that government is not permitted to make religious minorities feel like outsiders—perhaps because of our keen awareness, as a nation, of the divisive potential of governments’ playing religious favorites. 82

A thorough explication of the nature and validity of expressive harm is well beyond the scope of this essay. 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 identifiable concerns of other constitutional provisions, such as the Equal Protection Clause. Moreover, although such status or citizenship harms may be accompanied by more concrete harms,

78 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).


80 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.”).


82 Dorf, supra note 1, at 1289-91.
such as discrimination or other “microagressions,” there is an increasing recognition that citizenship or status harms should be recognized as constitutionally significant injuries in their own right.

II. CRITIQUES AND ALTERNATIVES

Critiques of the reasonable observer have been manifold and extensive. One of the principal criticisms of Justice O’Connor’s observer, however, essentially states that the reasonable observer is problematic because he is not a “real” person. This criticism then breaks down into two specific problems: 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, as described by Justice O’Connor, is biased in such a way that it fails to take account of the perspective of some reasonable members of the community—usually, religious nonadherents. Each of these criticisms will be considered in turn. Next, 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 this heuristic to attack. According to Justice O’Connor, the reasonable observer is acquainted with “the text, legislative history, and implementation of the [law],” as well as the history and nature of the place where a religious display appears, while possessing familiarity not only with religious symbols but also with basic First Amendment categories. This characterization led Justice Stevens to argue that this “presumptuous” description of the reasonable observer turns it into an “‘ultrareasonable observer’ who understands the vagaries of this Court’s First Amendment jurisprudence.” Indeed, Justice Stevens’ opinion in Pinette points out that “[r]easonable people have differing degrees of knowledge;

83 Lenhardt, supra note 77, at 836-39.
84 Lenhardt, supra note 77, at 836-39; see also Norton, supra note 68, at 175-81 (discussing the concrete “behavioral harms” that may arise from government hate speech).
86 Supra ___.
87 Pinette, 515 U.S. 753, 807 (Stevens, J., dissenting).
that does not make them obtuse, nor does it make them unworthy of constitutional protection. It merely makes them human.\textsuperscript{88} The reasonable observer is subject to criticism, then, because he does not possess the sort of limited information that would characterize the average viewer of the religious display.

Numerous commentators have echoed Justice Stevens’s concerns. For example, Professor Steven Smith points out that “\textit{real human beings} perceiving government actions often do not have access to such extrinsic evidence….”\textsuperscript{89} Similarly, criticizing the reasonable observer for “lack[ing] the one characteristic most significant to Establishment Clause concerns—humanity,” Professor Paula Abrams argues that the reasonable observer’s “omniscient knowledge of government purpose and action” causes his perspective to diverge from that of the average passerby, particularly if that passerby belongs to a religious minority.\textsuperscript{90} Moreover, Dean Jesse Choper, reviewing lower-court applications of the reasonable-observer test, noted that the varying interpretations of what, exactly, the reasonable observer is expected to know have “generated a host of inconsistent rulings.”\textsuperscript{91} 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 government than with the typical religious nonadherent, thereby leading to the second criticism: majoritarian bias.\textsuperscript{92}

\textsuperscript{88} Id. (citations and internal quotation marks omitted) (emphasis added).
\textsuperscript{89} Smith, supra note 5, at 293 n.109.
\textsuperscript{90} Abrams, supra note 1, at 1538, 1547; see also Susan Hanley Kosse, \textit{A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases:} McCrory County v. ACLU of Kentucky and Van Orden v. Perry, \textit{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.”).
\textsuperscript{92} 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.”).
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 one.93 There are actually two related versions of this argument, both of which again assume that the reasonable observer should be imbued with the characteristics of a living, breathing human.94 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, and if so, which one. 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.95 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 absence of specific guidance, judges will tend to fall back on their own, predominantly majoritarian, perspectives.96

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93 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”).
94 See, e.g., Strasser, supra note 16, at 714 (attributing some difficulties to the fact that “the Endorsement Test is not grounded in the actual reactions of reasonable observers”).
95 See, e.g., Choper, supra note 91, at 511; Dorf, supra note 1, at 1334-35 (noting that 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 90, 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 Christian.”); Marshall, supra note 12, 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 16, 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.”).
96 See, e.g., Kosse, supra note 90, at 168 (“Since no collective social judgment about religious matters exists, the tendency to analyze the cases based on the desired
A stronger form of this critique suggests that, by avoiding the question whether the reasonable observer possesses a particular religious viewpoint, the Supreme Court’s reasonable observer inevitably (if not intentionally) parrots the perspective of the majority religion—broadly speaking, Christianity.\footnote{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. \url{http://religions.pewforum.org/reports}} Pointing to examples such as the Supreme Court’s unsupported assertion that the word “God” is nonsectarian and the courts’ depiction of plaintiffs who object to Christian displays as “troublesome and oversensitive,” Professor Caroline Mala Corbin powerfully argues that “the hidden norm” in cases challenging certain kinds of religious speech “is a Christian perspective, or perhaps a Judeo-Christian perspective” and that “courts and commentators regularly fail to take into account the perspective of those who belong to a minority religion or have no religion at all.”\footnote{Corbin, supra note 3, at 1586.}

Similarly, Steven Gey has suggested, “[b]y 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.’”\footnote{Steven G. Gey, Religious Coercion and the Establishment Clause, 1994 U. ILL. L. REV. 463, 481 (1994) (quoting Lynch, 465 U.S. at 688); cf. Primus, supra note 75, at 580-81 (arguing that “[n]othing in the case law disciplines the inquiry into the reasonable observer's perspective,” and therefore that “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.”).}

I have espoused a version of this argument myself. Drawing on speech act theory, I have contended that, 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 or non-belief, it almost inevitably falls into the trap of majoritarian bias.\footnote{Hill, supra note 34, at 520-21.} This
majoritarian bias derives from the fact that the broader social context inevitably shapes meaning and interpretation; the fact that certain Christian symbols appear normal, nonsectarian, or otherwise non-endorsing is an effect of the religious composition of society, which makes majority symbols less jarring than non-majority symbols, for example.101

Concerns about the inherent majoritarian bias in the reasonable observer’s perspective has led numerous commentators to suggest alternatives. Observing 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,” and invoking the courts’ countermajoritarian obligations under the Constitution, Norman Dorsen and Charles Sims argue that “the Court must decide whether there has been a religious endorsement not from the viewpoint of the majority, or of a hypothetical reasonable man, but rather from the viewpoint of those who reasonably claim to have been harmed.”102 Likewise, Professor Caroline Corbin, drawing on an analogy to the reasonable woman in sexual harassment law, advocates for a “reasonable religious outsider” perspective.103 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—protecting religious minorities—and properly vindicates the countermajoritarian role of the courts.104 And in a related context, considering constitutional challenges to other forms of constitutional expression, Professor Michael Dorf 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 reasonably takes offense at” that message.105 Dorf, too, thus suggests that the perspective of the “victim” is the relevant one.106

Less commonly but also importantly, some scholars have suggested other means of determining what a particular religious display might mean. For example, Professors Shari Seidman

101 Id. at 521-22.
102 Dorsen & Sims, supra note 3, at 859-61.
103 Corbin, supra note 3, at 1597.
104 Id. at 1596-97 & n.325.
105 Dorf, supra note 1, at 1337.
106 Id. Dorf’s view is actually somewhat similar to my own, however, 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.
Diamond and Andrew Koppelman suggest replacing the currently 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. And Professor Jay Wexler proposes that determinations of whether particular symbols or displays constitute religious endorsement be made by an Article I court staffed by judges representing a diversity of religious traditions, partly in order to ensure consideration of minority religious perspectives. 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

My contention here is that the reasonable observer is not all bad—he’s just misunderstood. Furthermore, 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, I argue, first, that it is important to understand the reasonable observer for what he is: a way of articulating the process any interpreter engages in when attempting to discern social meaning, 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. Certainly, concerns about attributing too much or too little knowledge to the reasonable observer fall away. Second, I recognize that 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. In particular, I argue that 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 such procedural techniques.

107 Shari Seidman Diamond and Andrew Koppelman, Measured Endorsement, 60 Md. L. Rev. 713 (2001).
108 Wexler, supra note 93, at 289-91, 304-05.
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, and to expect the reasonable observer to represent a real person with a particular range of knowledge, beliefs, and experiences is to undermine its 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 approach to meaning 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 focus of the endorsement test is on determining the *social meaning* of the display at issue. 109 This social meaning “is not a question of simple historical fact”; 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.” 110 The endorsement inquiry is, therefore, not an empirical question about how individual viewers would perceive a particular government-sponsored display or practice; it is at a higher level of abstraction. 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 knowledge.” 111 Instead, the relevant inquiry is a quest for what might be called the “public meaning” of governmental acts. 112

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.

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110 *Id.* at 693-94.
111 *Pinette*, 515 U.S. at 779 (O’Connor, J., concurring).
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, or a particular segment of the population, agrees that it has that meaning. 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.”

Or, as Wittgenstein explains, “[t]o understand a language is to be a master of a technique.” Interpretation is therefore 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. 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 the rules of the language. On this account, then, it should not trouble us that the reasonable observer is not an actual member of the community, nor that his qualities do not correlate to those of live, but fallible, actual observers or interpreters.

Second, we must ask, when discerning the meaning of a particular utterance, what does an interpreter do? The act of interpretation is, in essence, the act of attempting to discern the

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113 Of course, words can be given a particular meaning within a particular community or subgroup that differ from their 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.

114 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. 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. paras. 81, 199.

115 Id. at 13.

116 WITTGENSTEIN, supra note 114, at 68 (para 199).

117 SEARLE, supra note 114, at 14.
intent behind an utterance. This is achieved primarily by looking to the context of the statement and using all available clues in order to reach the best possible understanding of what a person would likely intend by using those words or symbols.\textsuperscript{118}

But it is important to understand exactly what this posited relation 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.\textsuperscript{119} 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 himself 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.\textsuperscript{120} But this does not mean that no message of exclusion can possibly arise or be valid. 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 have misspoken, I may have the opportunity to clarify my intention, but my initial sentence still referred to a place of recreation with grass and trees, rather than a law school office.

What is important to recognize here is that interpretation is always an act of construction of a hypothetical intent that does not actually exist, rather than a reconstruction of an actual intent that can be unearthed and verified. As Stanley Fish explains, “in a fundamental sense, all communications are mediated. That is, communications of every kind are characterized by exactly the

\textsuperscript{118} Id. at 16.

\textsuperscript{119} As Searle explains, “When I take a noise or mark on a piece of paper to be an instance of linguistic communication, 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.

\textsuperscript{120} See, e.g., Smith, supra note 5, at 286-287. 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 114, at 28.
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.121 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,
and in many cases not even to the speaker. Even in the context of a
face-to-face conversation, in which the 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.122

Of course, in the case of symbolic displays or “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 represented
by one identifiable speaker. But whatever the scenario, it is
important to recognize, first, that interpretations is always a post-
hoc construction of intent—not the act of actually accessing intent.
And second, that the inaccessibility of intent means opens up the
possibility of a difference between the speaker’s original intention
and the objective meaning received.

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 expression,
“[i]f 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.”123 In large part, this occasional failure is due to
the fact that 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 was intended
by the speaker may 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

121 STANLEY FISH, With the Compliments of the Author: Reflections on Austin
and Derrida, in DOING WHAT COMES NATURALLY 37, 43-44 (1989).
122 Id. at 43.
123 Lynch, 465 U.S. at 690 (O’Connor, J., concurring).
context bring to the interpretive inquiry. 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. All of this implies that “mistakes” are not always actually mistakes—they are sometimes just the inevitable result of the fact that there is play in the joints of language. The rules are not precise, and meaning cannot be made completely determinate. This is either a bug or a feature of language, depending on your perspective.

Thus, “[m]eaning is more than a matter of intention, it is also at least sometimes a matter of convention.” Hence, Justice O’Connor’s distinction between the intended meaning and the meaning “actually conveyed,” which essentially corresponds to the Gricean distinction between “speaker’s meaning” and “sentence meaning.” As Professor Matthew Adler has 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. Language is understood as a series of conventions for performing speech-acts (that is, actions with speaker’s meanings); in turn, the sentence meaning of an action is simply the meaning assigned to it by those conventions.”

“Convention” includes the objective requirements for an utterance to mean something according to the rules of the language game, ranging from the use of particular words in a particular order to 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

\[124\] Hill, supra note 34; see also Anderson & Pildes, supra note 112, at 1512-13 (describing various ways in which the meaning one intends to express may deviate from the meaning one actually expresses).

\[125\] Supra note 120.

\[126\] See generally Fish, supra note 121, 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).

\[127\] Searle, supra note 114, at 45.

\[128\] See supra .


\[130\] Adler, supra note 129, at 1394 (footnote omitted).
reclaiming the term as my own. 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, with no communicative content. That viewer might imagine the scratches to have been 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 to mean that we should keep our beaches beautiful, 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. Second, a reader who does have familiarity with those conventions will interpret the utterance by using the available information about those conventions to reconstruct what the reader believes to have been the utterer’s purpose or intent. 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

131 See, e.g., Judith Butler, Critically Queer, 1 GLQ: A JOURNAL OF LESBIAN AND GAY STUDIES 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.’”).

132 On this point, see also 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, 763-767 (2001) (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”) (citing Adler, supra note 129). 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.
meaning. Indeed, the sentence “Keep our beaches beautiful” is surely an injunction 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. The more knowledge the reader has—both linguistic knowledge and knowledge about the origins of the sentence—the more likely the interpretation will be correct, however.

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. In this way, the interpretation of those sandy scribbles connects up 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. This may be the case—this endorsement 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, such as a Christmas tree. If the viewer happens to be familiar with basic principles of constitutional law, and happens to

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133 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 essay, however, that argument need not be further examined.

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, this familiarity will of course further assist the viewer in discerning whether the purpose behind its placement was to endorse Judaism, or not. The more the interpreter knows, the more likely the interpretation will be correct.

This observation leads to one of the key contentions of this essay. 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 has to bring to bear on the act of interpretation, the better. If we understand the goal of the endorsement inquiry to be the interpretation of meaning, and if we understand the reasonable observer as the interpreter, 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—that is, with achieving the best possible understanding of the purpose behind the government’s acts. 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.135

Is the reasonable observer 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, since interpretation—of statutes, of common law cases, and of constitutional provisions—is precisely what they are trained and expected to do.

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

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135 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 v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).
anything should be excluded from consideration in determining social meaning—that is, whether true omniscience is really ideal position from which to make the judgment about meaning. The related evidentiary issues are dealt with in greater detail in Part III, but I shall try to sketch a brief framework for thinking about the problem here. Consider the following examples that raise this problem of knowledge in different, uniquely thorny ways:

1) The Ku Klux Klan erects a Latin cross in a public forum in front of the state capitol, where the state grants permission to private groups to engage in various temporary forms of speech. The cross is intended as a message of racial hatred, but because it stands unattended, nothing indicates that particular meaning. Would the “reasonable observer” be aware of the KKK’s sponsorship?

2) The mayor of a city has a nephew who is a budding artist. This nephew paints an enormous canvas of a crucifixion—not that of Jesus of Nazareth, but rather of a follower of Spartacus, the slave who led a rebellion against the Roman republic in the first century B.C., resulting in the death of Spartacus and the crucifixion of six hundred of his followers. 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?

3) In 1847, the novel Jane Eyre was published. At the time the book was published, it shocked readers with its portrayal of a strong,

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137 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”).
individualistic heroine whose romance crossed class lines. Does the reasonable observer reading the book in 2013 understand Jane as scandalously inappropriate or as a typically spunky, if quaint, young woman?

These examples, real and hypothetical, illustrate the problem of the knowledgeable reasonable observer. If the reasonable observer has access to information that the average passerby (or high school English student) does not, what role should that knowledge play in interpretation? In all three scenarios, the reasonable observer’s knowledge undoubtedly assists that observer in understanding the actual intent of the original author or actor (the KKK, the mayor, or Charlotte Brontë). But, as explained above, that original, subjective intent is not the same thing as the “meaning,” in every relevant sense, of the cross, painting, or novel. Though the KKK’s intended meaning is clear, that intent does not control the subsequent message sent by the presence of an unattended cross on state capitol grounds. Similarly, if I am asked to interpret Jane Eyre, I may well take into account the novel’s nineteenth-century reception, but this does not prevent me from coming up with a different interpretation of its meaning and relevance in the twenty-first century. What does the image of a crucified slave “mean” in the lobby of City Hall? It may well signify an endorsement of Christianity to the reasonable observer. But if so, this is not because the reasonable observer is somehow ignorant, but because the relevant question is what we would assume or believe the person erecting such a statute intended by doing so.

We must get past the notion that it “means” what its author “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? Is the ownership of the Latin cross relevant, and if so, why? As these examples illustrate, the problem is not with the level of knowledge possessed by the interpreter but rather with determining the

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relevance of various aspects of the symbols’ context to the question the interpreter is seeking to answer. In the case of the endorsement test, the question is whether the display sends a message of exclusion to a group of people based on their religious identity (or lack thereof). That is not a question about the actor’s actual intent; it is a question about social meaning. In the case of the Ku Klux Klan cross, the answer probably depends on the nature of the forum in which it appears. In a true public forum for private speech, as in *Pinette*, the answer is most likely “no.” In the case of the crucifix painting, the answer is more difficult; it probably depends on whether the crucifixion subject’s identity is apparent from the physical context of the painting. It does not, however, depend on what any given observer does or does not know about the painting’s history and origin.

In sum, the criticism of the reasonable observer as omniscient and therefore insufficiently human distracts us from understanding the true purpose of that 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 tort law or other, similar contexts (such as sexual harassment). Although Justice O’Connor asserted in *Pinette* that the reasonable observer “is similar to the ‘reasonable person’ in tort law, who ‘is not to be identified with any ordinary individual, who might occasionally do unreasonable things,’ but is ‘rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment,’” the analogy is not entirely apposite. Though the reasonable observer is similar to the

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reasonable person in its idealized nature, 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.\textsuperscript{141} In addition, if the average person’s knowledge—for example, about legal standards or factual circumstances—would likely be 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. 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 swayed by particular biases.\textsuperscript{142} 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.

B. The Reasonable Nonadherent and Her Kin

This section outlines two critiques of heuristic devices that have been presented as alternatives to the reasonable observer,
such as the reasonable nonadherent. First, asking a judge to assume the perspective of a religious outsider requires, in most cases, that the judge 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 judge a particular governmental practice or symbolic display from that vantage point.\textsuperscript{143} Second, it is not clear that these alternate observers even address the actual problem involved here. 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 that religious belief may not play such a deciding role in discerning social meaning, however.

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 have such a person would have. This seems to be an exercise in empathy—or perhaps something like empathy, but even more difficult to explain and operationalize. Indeed, though “empathy” itself is difficult to

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\textsuperscript{143} 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 uncomprehending ... 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--all of which compel him to disobey jury instructions or otherwise fail to apply the law.

\textit{Id. at 474.}
define, it is often referred to as a sort of “perspective taking.” 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.” 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. Beyond understanding how another person with particular characteristics might feel or react in a given situation, it asks the judge also to engage in the act of interpretation from that person’s perspective.

Even if judges are capable of occupying other minds in this way, moreover, 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 to say so.

Indeed, recent research into the role of cultural attitudes in shaping cognition gives further reason to be pessimistic about the possibility of an “empathy fix” to the reasonable observer conundrum. Writing with a somewhat different goal—to evaluate the cultural influences on cognition of risk in public policymaking and to suggest solutions to the negative effects of such influences


145 Susan A. Bandes, Moral Imagination in Judging, 51 WASHBURN L.J. 1, 9 (2011). 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 at 325 (describing empathy as “vicarious emotion”).

146 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.
on accurate assessment of risk—Professor Dan Kahan identifies a phenomenon that he calls “cognitive illiberalism.” Cognitive illiberalism refers to the process by which individuals’ political and cultural biases distort their understanding of empirical facts, such as the riskiness of particular behaviors like gun ownership and drug use. As Kahan explains, this cognitive illiberalism is comprised of 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 aligns 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.” Moreover, the more deliberative the thought process, the more likely it is that individuals will engage in this type of motivated reasoning. There is thus particular reason to think this problem will afflict judges severely.

According to Kahan, cognitive illiberalism is both pervasive and surprisingly intractable. It is intractable partly because it is particularly hard to recognize in oneself: thus, he explains, “[s]ocial 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”; however, “[t]he same research … finds that people usually don’t discern the distorting effect of such commitments on their own beliefs.” Kahan refers to this effect as “naïve realism,” because people are realists about the effects of others’ identities and values on their beliefs but “understand their own factual beliefs to reflect nothing more than ‘objective fact,’ plain for anyone to see.”

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. Thus, to the

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150 Id.
151 Kahan, supra note 147 at 130-31.
152 Id.
153 Kahan, supra note 149, at 22.
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, whereas her opponent’s view is a bad-faith or purely ideological view that ignores or misreads the facts.\textsuperscript{154} But there is reason to think this same model may be applied to one’s perception of social meaning as well. 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.\textsuperscript{155} Or, to take a recent, particularly salient example, recall Justice Scalia’s famous exchange with plaintiffs’ counsel in \textit{Salazar v. Buono}, in which—despite the ACLU attorney’s insistence that non-Christians would feel marginalized by a war memorial in the form of a cross, because it appears to honor only the Christian war dead, Justice Scalia characterized it as an “outrageous” interpretation to say that the cross honored only the Christian war dead.\textsuperscript{156} That 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.\textsuperscript{157}

\textsuperscript{154} \textit{Id.} at 6-8; see also Dan M. Kahan, \textit{The Secret Ambition of Deterrence}, 113 \textit{Harv. L. Rev.} 413 (1999).

\textsuperscript{155} \textit{Supra} Part II.B. For example, in \textit{ACLU v. Mercer County}, 432 F.3d 624 (6th Cir. 2005), the Sixth Circuit court of appeals upheld a Kentucky county courthouse Ten Commandments display display that it acknowledged to be “identical in all material respects” to the Kentucky county courthouse display that the Supreme Court struck down in \textit{McCreary County v. ACLU}, 545 U.S. 844 (2005). \textit{Mercer County}, 432 F.3d at 626. This and other post-\textit{McCreary County} cases are discussed in Kreder, \textit{supra} note 2.


\textsuperscript{157} The entire exchange was as follows:

\begin{quote}

\textbf{JUSTICE SCALIA:} The cross doesn't honor non-Christians who fought in the war? Is that -- is that --
\textbf{MR. ELIASBERG:} I believe that's actually correct.
\textbf{JUSTICE SCALIA:} Where does it say that?
\textbf{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 --
\textbf{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 --
\end{quote}
Similarly, the Ninth Circuit, in overturning a grant of summary judgment for the government in a challenge to a war memorial in the form of a large Latin cross, stated that the district court improperly discounted the plaintiff’s expert’s testimony about the history of war memorials.158 “[T]he district court erroneously branded [the expert’s] declarations as conclusory, ignoring the detailed listings and historical analysis provided in the record,” the court of appeal lamented.159 “At the same time, it noted disapprovingly, “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.”160 Of course, without viewing the record, we cannot know whose perspective on the expert evidence is the right one; but the clearly divergent perspectives of the district court and the court of appeals on whose historical evidence is more trustworthy (and whose is “conclusory”) appear to mirror the phenomenon that Kahan describes.

2. Is Religion the Problem?

the cross is the -- is the most common symbol of -- 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?

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. 158 Trunk v. City of San Diego, 629 F.3d 1099, 1112 n.12 (9th Cir. 2011).

Id. 159
Id. 160
Even if it were possible to adopt another’s worldview, it is not clear that the non-adherent’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—but not religious belief—plays a significant role in predicting how judges will decide Establishment Clause cases.161 Their study of all Establishment Clause decisions by federal appeals court and district court judges between 1995 and 2006 revealed that federal judges appointed by Democratic presidents were 2.25 times more likely to uphold plaintiffs’ Establishment Clause claims than Republican-appointed judges.162 “No other variable,” they found, “—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.”163

These findings throw into question arguments to the effect that judges tend to find non-endorsement 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 non-adherent.”164 Similar intuitions underlie Professor Mark Tushnet’s statement that “It seems … difficult to believe that the majority could have reached the result it did [in Lynch] had there been a Jew on the Court to speak from the heart about the real meaning of public displays of crèches to Jews.”165 In a similar vein, Professor Kenneth Karst suggested, “Perhaps it is not wholly accidental that the main dissenting opinions” in a case finding Hawaii’s recognition of Good Friday as a state holiday not to be an endorsement of religion “were written by one judge who

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162 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 < .01)
163 Id. at 1205 (emphasis added).
164 Supra.
is a member of the Baha’i faith and another who is Jewish.”\textsuperscript{166} 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 fair to say that it is this attitude that helps determine one’s perspective on the social meaning of religious displays and other forms of religiously charged government conduct.\textsuperscript{167} But this is not the same as saying that one’s perspective is determined by one’s religion itself. It is therefore highly questionable whether urging judges to adopt the perspective of a religious outsider will have the intended effect. Moreover, it is questionable whether such an act is even possible.

Kahan’s findings, together with Sisk and Heise’s, indicate that cultural and political preconceptions most assuredly do 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.

\textit{C. Turning to Law}

This essay 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 corresponding suggestions that courts should identify a

\textsuperscript{166} Karst, \textit{supra} note 11, at 524.

\textsuperscript{167} \textit{E.g.}, Sisk & Heise, \textit{supra} note 161, at 1230, 1243. Note Sisk & Heise’s discussion of number of Catholics in the community as a “confounding variable,” because Catholics in particular regions tend to be more conservative, but liberal Northeastern communities also tend to have a large number of Catholics \textit{Id.} at 1228-29.
sort of replacement observer have led us down the wrong path. They have distracted us from the true problem at hand, which is to figure out how to interpret the social meaning of a display in a way that is more principled and consistent than the interpretations that courts have generally reached so far.

Several things flow from this proper understanding of the reasonable observer, as discussed at greater length below. 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. Moreover, 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 composite speaker. Second, our revised understanding suggests that a broad range of information and evidence may be considered in pursuing this inquiry, but that the evidence must be relevant to the inquiry just described. Thus, for example, evidence indicating the “true” intent of the governmental actors is not likely to be relevant, and 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 social meaning query.

These slight modifications to our understanding of the reasonable observer heuristic 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 may in fact go a long way toward regularizing and clarifying the doctrine.

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, such as statutory and constitutional interpretation, but with one important difference—judges must recognize, and learn to handle, the inevitable polysemy of such displays. They almost always produce multiple reasonable interpretations. In other words, 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 constructs particular individuals as outsiders to the community based on their religious beliefs (or lack thereof). 168 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.169

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.170 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.171 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.” It 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.172 However, as discussed below, rather than

168 See supra Part I.C.

169 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 argue here that the purpose and effect inquiries collapse into one when social meaning is at issue.

170 Supra Part III.B.1; see also Laycock, supra note 156, 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.’”).

171 In Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011), for example, the court “beg[an] by considering the potential meanings of the” challenged symbol. Id. at 1110 (emphasis added).

trying to assume one particular perspective on meaning—that of the religious outsider for example—the correct result can be more easily achieved by adopting a presumption against majority religious symbols, as discussed below.

2. Evidentiary concerns. As this essay 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 can be relatively relaxed in terms of the evidence they consider. It is already common practice of courts to hear expert testimony,\(^\text{173}\) to look outside the record to understand the nature and significance of a particular symbol within a religious tradition;\(^\text{174}\) to consider historical materials;\(^\text{175}\) and even to take some sort of judicial notice of the social context in which the display exists.\(^\text{176}\) 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 interpretation of social meaning, as a matter of law, rather than 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 sorts of materials just described, judges might take empirical studies or surveys into account.\(^\text{177}\) 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

\(^{173}\) See, e.g., Hewitt v. Joyner, 940 F.2d 1561, 1564 (9th Cir. 1991) (noting expert testimony submitted in 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).


\(^{175}\) 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).

\(^{176}\) 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.”).

\(^{177}\) See, e.g., Diamond & Koppelman, supra note 107; Feigenson, supra note 79, at 95-101.
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 information for the judge to use.\footnote{178} 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 \textit{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 \textit{McCreary County v. ACLU}—had the purpose not to establish religion but to acknowledge history.\footnote{179} Although the dissent pointed out the fact that the government actors made numerous explicit statements indicating an exclusive focus on finding a way to post the religious document in the courthouse,\footnote{180} the majority deferred to the government’s own articulation of its subjective purpose.\footnote{181} Indeed, the court even acknowledged that the county’s understanding of history was frankly inaccurate—but found this fact irrelevant.\footnote{182} The court noted, for example, that scholars have demonstrated that the Ten Commandments did not, in fact, influence American law in any meaningful way.\footnote{183} In addition, they noted that the display claimed that the document explaining the display claimed \textit{The Star Spangled Banner} inspired the Americans in the Revolutionary War, although the anthem was not actually written until decades after the revolution.\footnote{184} 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. Yet this sort of evidence is precisely what should be considered irrelevant if the social meaning inquiry is to be taken seriously.

3. Presumptions. Finally, judges dealing with cases involving social meaning should make use of presumptions and burden-shifting, rather than purporting to assume an outsider perspective, as a means of constraining the interpretive inquiry. For example, if indeed 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, placing the burden on the government to rebut this presumed meaning using evidence of intent, expert testimony, religious and historical treatises, and other relevant information about the context. They might then shift the burden from the government back to the plaintiff upon rebuttal of the presumption that the symbol is endorsing.

Presumptions can be invaluable to judges dealing with difficult cases; they function as tie-breakers when evidence is in equipoise, and they 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. Indeed, judges dealing with religious display cases often invoke evidentiary

185 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., Allegheny, 492 U.S. at 599-602 (striking down standalone crèche display); Mercer Cnty., 432 F.3d at 634 (noting that Stone v. Graham, 449 U.S. 39 (1980), suggests the unconstitutionality of standalone Ten Commandments monuments).

burdens and the presence or absence of material in the record sufficient to overcome those burdens. For example, in the Grayson County Ten Commandments case, the court emphasized that “those objecting to a display…bear the burden of producing evidence sufficient to prove that the governmental entity’s purpose is a sham, and that an objective observer would understand the display to be motivated predominantly by religion.” Though the plaintiff of course must bear the burden of proof in a constitutional challenge, like any other, 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 would have to credit the view that reads a majoritarian symbol as sending a message of exclusion. The government would still be free to rebut the presumed message, however—for example, with powerful evidence of the symbol’s nonreligious (historical or cultural) significance.

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. There is reason to fear, of course, that even introducing such techniques would not solve the problem entirely. Presumptions are manipulable and may, themselves, be difficult to administer or mired in conceptual difficulty. But there is reason to believe that they would impose at least some constraints on the inquiry—perhaps to a greater degree than simply urging judges to engage in certain rhetorical strategies such as aporia and expressive overdetermination. Moreover, moving the

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186 Grayson Cnty., 591 F.3d at 856.
187 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.
188 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).
189 Sisk & Heise, supra note 161, at 1249-50 (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.
doctrine toward a more legalistic one might move judges’ operative presumptions from the level of unconscious bias to the level of open debate. If so, the ideal of reasonableness could only be better served thereby.

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 essay 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, may go some way toward stabilizing the inquiry, which has been criticized repeatedly as biased and incoherent. Of course, these proposals call for further specification and refinement; the goal of this essay, however, has not been to lay out a detailed outline of what the relevant rules and presumptions would be and how they would work, but rather to encourage judges to consider adopting them as a means of constraining the endorsement inquiry.