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THE REASONABLE BELIEVER: FAITH, FORMALISM, AND ENDORSEMENT OF RELIGION

by
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The reasonable observer standard, used in Establishment Clause cases to determine whether government action endorses religion, marks a retreat by the Court from vigorous scrutiny of government purpose and effect. The standard, which examines whether a reasonable observer, familiar with First Amendment values and with the history and context of government action, perceives endorsement, embodies a shift toward formalism in Establishment Clause doctrine.

This Essay argues that the reasonable observer standard, which bypasses the role of faith in perception, undermines the protection of a core Establishment Clause value—inclusion. The reasonable observer standard, representing the abstracted perspectives of a "community" of indeterminate faith, decreases the significance of the effect of government action, particularly on the nonadherent. Application of the standard thus tends to validate the perspective of the majority. The value of inclusion is best served by an inquiry into purpose and effect that considers the perceptions of both adherents and nonadherents.

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I. INTRODUCTION

On a cold December day, a reasonable observer hurries by the county courthouse on her way home. She notices a decorated Christmas tree and a lighted menorah on the courthouse lawn. Does this display constitute state endorsement of religion? Under current doctrine, this "objective" observer will determine whether the display is a secular celebration of the holiday season or an impermissible endorsement of religion. What makes her task difficult, however, is that this objective observer lacks human qualities. She is emptied of human perceptions, particularly perceptions drawn from her faith and beliefs. She is a phantom created by the Court, charged with deciding whether a government action communicates a message of endorsement, but stripped of the belief system that would illuminate whether an actual person would attribute a religious message to the government.

The reasonable observer was born from the Court's efforts to distance Establishment Clause doctrine from precedent that the Court views as hostile to religion.[1] The emergence of the reasonable observer standard in Establishment Clause analysis marks a retreat by the Court from vigorous scrutiny of the purpose and effect of government action. The reasonable observer, as with most reasonable person standards, is a legal fiction representing a hypothetical response to a set of circumstances. But the reasonable observer lacks the one characteristic most significant to Establishment Clause concerns—humanity. The diverse reactions of adherents and nonadherents matter if the Court is to take seriously a value central to the Establishment Clause: inclusion.[2] This value finds expression in the repeated statements by the Court that the government may not favor one religious group, leaving nonadherents to feel like outsiders in the political community and creating religious strife.[3]

[1] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). *See also infra* note 6 and accompanying text.

[2] *See, e.g.*, Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), *in* 6 THE PAPERS OF GEORGE WASHINGTON, Jul.–Nov. 1790, at 284, 285 (Dorothy Twohig et al. eds., 1996) ("It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance . . . .").

[3] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J.,

The reasonable or objective observer standard embodies a shift toward formalism in Establishment Clause doctrine. Divested of beliefs, the identity of the reasonable observer derives primarily from her comprehensive knowledge of legislative history. Missing are indicia of real human reactions. Viewed through the eyes of the reasonable observer, the Establishment Clause inquiry is divorced from meaningful analysis of whether government action sends an impermissible message of endorsement of religion.

This Essay argues that the reasonable observer standard undermines the value of inclusion by diminishing the significance of the effect of government action, particularly on the nonadherent. The hypothetical responses of the reasonable observer bypass the role of faith in perception, distorting the evaluation of "reasonableness." The reasonable observer is no more than an empty suit. Predictably, her one-dimensional viewpoint tends to validate the perspective of the majority. Establishment Clause values are best served, instead, by a substantive inquiry into purpose and effect that examines the perspectives of both adherents and nonadherents.

II. *LEMON* AND THE ORIGINS OF THE ENDORSEMENT TEST

The foundational test employed by the Court in Establishment Clause cases dates from the 1971 decision in *Lemon v. Kurtzman*.[4] *Lemon* requires that the government action: (1) have a secular purpose, (2) its primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster an excessive entanglement with religion.[5] *Lemon*, which calls for intensive scrutiny of effect and entanglement, most fully advances a separationist interpretation of the Establishment Clause. Over time, the *Lemon* test has fallen into disfavor as a majority of the Court has rejected a separationist approach.[6] Justice Scalia has colorfully described the *Lemon* test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence . . . ."[7] The Court, on occasion, has refused to apply *Lemon*.[8]

concurring); *see, e.g.*, Erwin Chemerinsky, *Why the Rehnquist Court is Wrong About the Establishment Clause*, 33 LOY. U. CHI. L.J. 221, 228 (2001).

[4] 403 U.S. 602 (1971).

[5] *Id.* at 612.

[6] *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) ("For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

[7] *Id.* at 398.

[8] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (applying coercion test).

The disenchantment with *Lemon* led Justice O'Connor to propose the endorsement test as an alternative.[9] The endorsement test asks whether the government action has the purpose or effect of endorsing religion. Justice O'Connor first articulated the endorsement test in her concurrence in *Lynch v. Donnelly*, a case addressing whether the Establishment Clause prohibited the city of Pawtucket, Rhode Island, from including a crèche in its annual Christmas display.[10] Justice O'Connor argued that the Establishment Clause prohibits government "endorsement or disapproval of religion."[11] She emphasized the significance of inclusion to the Establishment Clause: "Endorsement 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."[12]

Inclusion is served by an endorsement test that is sensitive to a diversity of perceptions. This sensitivity is most likely to be achieved through a test that examines the purpose and effect of government action through the eyes of the adherent and nonadherent. While the purpose prong is largely an analysis of government intent, the effect prong requires a court to determine "what message the city's display actually conveyed."[13] In *Lynch*, Justice O'Connor appears to recognize the importance of examining actual effect. She claims that the resolution of the effect prong involves "[e]xamination of both the subjective and the objective components of the message communicated by a government action" to see whether the action "carries a forbidden meaning."[14] The subjective component to this inquiry is one that would consider how real people would respond: "The effect prong asks whether, irrespective of government's actual purpose, the practice under review *in fact* conveys a message of endorsement or disapproval."[15] Justice O'Connor elaborates on the importance of perception to that determination, explaining, "[i]t is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."[16] She stresses that the "crucial" concern is that a government practice "not have the effect of communicating a message of government endorsement."[17] Perception,

[9] Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).
[10] *Id.* at 668, 671 (majority opinion).
[11] *Id.* at 688 (O'Connor, J., concurring).
[12] *Id.*
[13] *Id.* at 690.
[14] *Id.*
[15] *Id.* (emphasis added).
[16] *Id.* at 692.
[17] *Id.*

however, is not wholly subjective; it is tempered by "what viewers may fairly understand to be the purpose."[18]

The fair or reasonable perception of viewers is not simply a factual question. In *Lynch*, Justice O'Connor rejects the significance placed by the district court on the finding that the government's display of the crèche was "understood" to connote approval.[19] Instead, she concludes that "whether a government activity communicates endorsement of religion is not a question of simple historical fact."[20] Evidentiary submissions may be relevant, but "like the question whether racial or sex-based classifications communicate an invidious message," the ultimate question is "in large part a legal question to be answered on the basis of judicial interpretation of social facts."[21]

III. THE EVOLUTION OF THE REASONABLE OBSERVER

Over time, the endorsement test applied through the eyes of the reasonable observer has garnered the support of a majority of the Court, even though the Court may, in some decisions, use other tests, including *Lemon*.[22] While the Court may be willing to employ the reasonable observer test, the standard presents two significant interpretive issues on which the members of the Court do not agree. First, whose perspective matters in the question of endorsement? An adherent to the faith accommodated by the government action? Or a nonadherent, who may be either a nonbeliever or an adherent to another faith? Second, if perception is a matter of "what viewers may fairly understand to be the purpose," what knowledge and information should be attributed to the reasonable observer? The evolution of the reasonable observer standard from *Lynch* to the most recent decisions illuminates the substantial dispute within the Court over formalism in Establishment Clause analysis.

A. The Reasonable Observer as Adherent

Applying the reasonable observer test in *Lynch*, Justice O'Connor implicitly adopts the perspective of the adherent. The challenged display placed the crèche among other traditional Christmas symbols, including a Santa Claus house, Santa's reindeer and sleigh, a Christmas tree, a candy-cane pole, and carolers. Justice O'Connor found that "Pawtucket's display of its crèche . . . does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche."[23] Admitting that the crèche conveys a religious and indeed

[18] *Id.*

[19] *Id.* at 693.

[20] *Id.*

[21] *Id.* at 694.

[22] *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005) (applying *Lemon*); Lee v. Weisman, 505 U.S. 577 (1992) (applying coercion test).

[23] *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

sectarian message, Justice O'Connor concludes that the addition of less overtly religious symbols such as Santa's sleigh "changes what viewers may fairly understand to be the purpose of the display."[24] Completely ignoring that the display includes only Christian symbols, Justice O'Connor insists that both the symbols and the Christmas holiday have "very strong secular components."[25]

Justice O'Connor's assessment embodies the perspective of the reasonable Christian: "The display celebrates a public holiday, ... [which] generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood."[26] Although she does not explicitly identify the religion of the viewer, Justice O'Connor's assumption that government displays of Christian symbols are not considered endorsements of religion strongly suggests the viewpoint of the adherent. Likening the display of the crèche to the printing of "In God We Trust" on coins, Justice O'Connor equates the government's recognition of Christmas with the far more abstract and non-sectarian principle that the government may acknowledge religion for the legitimate secular purpose of "solemnizing public occasions."[27] She argues that the "ubiquity" of Christmas symbols demonstrates that their display by the government is not understood as conveying government approval of specific religious beliefs.[28] In a statement that may offend both adherents and nonadherents, Justice O'Connor concludes that the display of the Christian crèche "serves a secular purpose—celebration of a public holiday with traditional symbols."[29]

This implicit incorporation of the viewpoint of the adherent negates the purported objectivity of the reasonable observer standard. As *Lynch* demonstrates, the endorsement analysis abdicates scrutiny of government action if the reasonable observer merely legitimizes the choices of the majority.

B. The Reasonable Observer as Nonadherent

Justice Stevens argues that the reasonable observer should stand in the shoes of the nonadherent. To Justice Stevens, the standard's failure to consider the perspective of the nonadherent is at odds with the "paramount" purpose of the Establishment Clause—to protect the nonadherent from being made to feel like an outsider or a stranger.[30]

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 693.

[28] *Id.*

[29] *Id.*

[30] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

Justice Stevens claims that the proper endorsement question is whether "*some* reasonable observers would attribute a religious message to the State."[31]

Justice Kennedy, in criticizing the endorsement test, has argued that the reasonable observer represents the view of the nonadherent.[32] He rejects the endorsement test in large part because evaluating government action from the perspective of the reasonable nonadherent would effectively prohibit the government from accommodating religion.

Justice Kennedy's criticism reveals why it is unlikely that the current Court will seriously evaluate endorsement from the perspective of the nonadherent: "Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula."[33] Insisting that Presidential Thanksgiving Proclamations, the Pledge of Allegiance, and our national motto would all be invalidated under this approach, Justice Kennedy concludes that either "scores" of traditional practices would succumb to the endorsement test, or "it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past."[34]

If inclusion is a "paramount" Establishment Clause value, the critical perspective must certainly be that of the nonadherent. The adherent is far more likely to see the government's display of symbols as an expression of shared community values and the status quo, not a religious statement. This is particularly true when the display reflects the majority religion.

C. The Reasonable Observer as Separate from Adherent and Nonadherent

The dispute over the faith of the objective observer erupted in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*.[35] In *County of Allegheny*, a badly splintered Court debated the faith of the objective observer. Justice Blackmun, writing for himself and Justice Stevens, argued the views of both the adherent and the nonadherent must be considered. Specifically, the Court must ascertain whether the challenged government action "is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[36]

But, in evaluating whether two displays of Christmas and Chanukah symbols constituted endorsement of religion, Justice Blackmun makes no

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[31] *Id.* at 807.

[32] Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 655, 668 (1989) (Kennedy, J., concurring in part, dissenting in part).

[33] *Id.* at 670.

[34] *Id.* at 671–74.

[35] *See generally id.* (majority opinion).

[36] *Id.* at 597.

effort to distinguish between the perspectives of the adherent and the nonadherent. To the contrary, although Justice Blackmun describes the symbols and the setting for the displays in great detail, he fails to evaluate how adherent and nonadherent would perceive the displays.

Justice Blackmun returns to the faith of the observer at the end of his opinion but in doing so he constructs a tension between faith and reason. The objective observer does not embody either the adherent or the nonadherent; her perspective is one of reason, not belief. Thus, the perceptions of the adherent and the nonadherent are distinct from the perception of reason. As Justice Blackmun describes:

> 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."[37]

Justice Blackmun's description of the test suggests that the views of adherent and nonadherent are likely to conflict with the perceptions of the reasonable observer. If the perspective of the reasonable observer differs from that of adherent and nonadherent, what is the basis for her perceptions? Does the reasonable observer represent a compromise between the views of adherent and nonadherent or an alternate reality? The Court offers no answers to these questions. But by distinguishing the perspective of reason from that of faith, the Court discounts the perceptions of both adherent and nonadherent.

D. The Reasonable Observer as the Community

In *Capitol Square Review and Advisory Bd. v. Pinette*,[38] Justice O'Connor remolds the reasonable observer into a shapeless manifestation of the community. In *Capitol Square Review*, the Court upheld the Christmas display of a Latin cross erected by the Ku-Klux-Klan in a public square next to the state capitol.[39] The plurality opinion by Justice Scalia found the endorsement test inapplicable because the display was private religious speech.[40]

Justice O'Connor applies the endorsement test in her concurring opinion and rejects a reasonable observer standard based on the perspective of either the adherent or the nonadherent.[41] Retreating from her position in *Lynch*, Justice O'Connor distances the reasonable observer from her humanity by insisting that she does not embody the

[37] *Id.* at 620 (opinion of Blackmun, J.) (citing Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985); *see also* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring)).

[38] 515 U.S. 753 (1995).

[39] *Id.* at 758, 770 (opinion of Scalia, J.), 792 (opinion of Souter, J.).

[40] *Id.* at 769 (opinion of Scalia, J.).

[41] *Id.* at 779 (O'Connor, J., concurring in part and concurring in judgment).

actual perceptions of individual observers.[42] Instead, the reasonable observer is intended to reflect the "collective," objective response of the political community "writ large."[43] The reasonable observer standard, argues Justice O'Connor, cannot be about the perceptions of "particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe."[44] The flaw in a reasonable observer standard based on actual perceptions is that displays would "necessarily" be precluded as long as some passerby perceives endorsement.[45]

The reasonable observer, Justice O'Connor claims, is analogous to the reasonable person in tort law, who "is not to be identified with any ordinary individual" but should be viewed as "a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."[46] Thus, Justice O'Connor concludes, the question is not whether any, or even some, reasonable person "might" perceive state endorsement of religion for "[t]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."[47]

Justice O'Connor insists that the reasonable observer standard does not disregard the values animating the Establishment Clause. Rather, her standard "simply recognizes the fundamental difficulty inherent in focusing on actual people."[48] But the perceptions of adherent and nonadherent provide the only meaningful assessment of endorsement. The Court's disinclination to allow one passerby to render an Establishment Clause veto is understandable. That concern can best be addressed by determining the critical mass of objections that would suffice for an Establishment Clause violation, not by substituting a faceless community response for the reactions of adherent and nonadherent.

Justice O'Connor may be accurate in concluding that a standard based on the perceptions of adherents and nonadherents increases the likelihood that government displays of religious symbols would be found to be impermissible endorsements of religion. If so, the Court should be wary of such displays, not employ an objective observer standard that purports to value inclusion but ignores dissenting viewpoints.

The consequences of a standard that identifies the reasonable observer as "a personification of a community ideal of reasonable

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 779–80 (alteration in original) (quoting PROSSER AND KEETON ON THE LAW OF TORTS 175 (W. Page Keeton et al. eds., 5th ed. 1984)).

[47] *Id.* at 780.

[48] *Id.*

behavior, determined by the [collective] social judgment"[49] are fairly predictable. The "collective social judgment" of reasonable behavior will necessarily reflect the views of the majority.

E. The Reasonable Observer of Indeterminate Faith

In *Santa Fe Independent School District v. Doe*, Justice Stevens applied the objective observer standard for the majority to invalidate a school policy permitting a majority student vote on prayer before football games,[50] but he appears to back away from insisting that the reasonable observer be identified as a nonadherent. Although Justice Stevens criticizes the policy for failing to protect the minority of nonadherents, he ultimately accepts Justice O'Connor's formulation by concluding that "[r]egardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[51] Justice Stevens may be making the point that anyone, whether adherent or nonadherent, would see government endorsement, but he offers no insight into how the Court is to determine the perspective of "anyone."

The Court's recent forays into displays of religious symbols, evident in *Van Orden v. Perry* and *McCreary County v. ACLU*, also leave unresolved the identity of the reasonable observer.[52] In *McCreary County*, the Court struck down a display of the Ten Commandments in a county courthouse.[53] The majority opinion, written by Justice Souter, adds another personality trait to the objective observer: reasonable memory. Justice Souter describes the objective observer as someone who is not "absentminded" but is presumed familiar with the text and legislative history of the display.[54] In *Van Orden*, Justice Rehnquist's plurality opinion upholding a different display of the Ten Commandments does not rely on the endorsement test.[55] Justice Stevens, dissenting, takes the view of the nonadherent when he observes that the "unmistakably Judeo-Christian message of piety would have the tendency to make nonmonotheists and nonbelievers 'feel like [outsiders] in matters of faith, and [strangers] in the political community.'"[56]

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[49] *Id.* at 780 (alteration in original) (quoting PROSSER AND KEETON ON THE LAW OF TORTS 175 (W. Page Keeton et al. eds., 5th ed. 1984)).

[50] 530 U.S. 290, 305–10(2000).

[51] *Id.* at 308.

[52] Van Orden v. Perry, 545 U.S. 677 (2005); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005).

[53] *McCreary*, 545 U.S. at 856–58, 881.

[54] *Id.* at 866.

[55] *Van Orden*, 545 U.S. at 691–92.

[56] *Id.* at 720 (Stevens, J., dissenting) (alteration in original) (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting)).

Justice Thomas, who is not a fan of the endorsement test, offers an insightful critique of the reasonable observer standard in his *Van Orden* concurrence. Justice Thomas discusses the vacuity of a reasonable observer standard disconnected from belief. He argues that the Court's efforts to discern the reactions of an observer of "indeterminate religious affiliation" fail to give sufficient weight to the concerns of both adherents and nonadherents.[57] At the same time, if the Court does consider the perspectives of adherents and nonadherents, it will inevitably be forced to choose between different views. The Court, Justice Thomas contends, should not be in the business of deciding religious significance. He insists the "Court's effort to assess religious meaning is fraught with futility."[58]

IV. THE KNOWLEDGEABLE OBSERVER OR THE "ULTRA-REASONABLE" OBSERVER?

In *Wallace* v. *Jaffree*,[59] Justice O'Connor added flesh to the bones of the reasonable observer, weighting her with an omniscient knowledge of government purpose and action. In *Jaffree*, the Court held that Alabama's statute mandating a daily moment of silence in schools violated the Establishment Clause.[60] Justice O'Connor, in her concurrence, once again emphasized that one of the animating principles of the Establishment Clause, and the endorsement test, is the concern that "'[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'"[61]

How this core principle is incorporated into the endorsement test is far from "plain." The standard urged by Justice O'Connor is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement."[62] This standard, however, omits any substantive consideration of how government support may indirectly coerce religious minorities. Instead, the 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.

Not only is the objective observer charged with understanding the factual context and political history of the government action, she also must understand the delicate balance between Free Exercise values and

[57] *Id.* at 696 (Thomas, J., concurring).

[58] *Id.* at 697.

[59] Wallace v. Jaffree, 472 U.S. 38 (1985).

[60] *Id.* at 41, 61.

[61] *Id.* at 70 (O'Connor, J., concurring in judgment) (alteration in original) (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).

[62] *Id.* at 76.

the commands of the Establishment Clause. The Establishment Clause allows the government some leeway to accommodate religion to further the free exercise of religion. To Justice O'Connor, the objective observer must understand this "play in the joints"[63] between the Free Exercise Clause and the Establishment Clause and be able to appreciate that the government may, in fact, be accommodating religion. As Justice O'Connor explains, "courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes."[64]

The debate about the knowledge attributed to the reasonable observer emerged explicitly in *Capitol Square Review*.[65] The opinions of Justices O'Connor and Stevens confront the identity crisis suffered by the reasonable observer under the endorsement test. Their open disagreement on the knowledge to be attributed to the reasonable observer reveals the underlying debate between formalism and realism that has become the prevailing tension in Establishment Clause cases.

Justice O'Connor argues that the objective observer should be "more informed" than the casual passerby of the display.[66] She must be aware of the "history and context of the community and forum in which the religious display appears."[67] This includes information beyond simple observation of the display. For example, in regard to the display at issue in *Capitol Square Review*, it is not enough that the reasonable observer knows that the cross is a religious symbol and that the cross is located in a public square adjacent to the seat of government. She also is charged with understanding that private speakers traditionally have used this public square as a public forum open to First Amendment activities. In fact, according to Justice O'Connor, the reasonable observer probably has been to law school because she "would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer."[68] Our reasonable observer is beginning to sound a great deal like a Supreme Court justice.

Justice Stevens, in contrast, rejects a standard that requires the reasonable observer to be highly informed and familiar with First Amendment jurisprudence. Stevens argues that Justice O'Connor's "enhanced tort-law standard is singularly out of place" in Establishment Clause analysis because few observers would actually possess the

[63] Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970)) (internal quotation marks omitted).

[64] *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment) (citation omitted).

[65] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

[66] *Id.* at 779 (O'Connor, J., concurring in part and concurring in the judgment).

[67] *Id.* at 780.

[68] *Id.* at 782.

threshold of knowledge required by the Court.[69] It is "presumptuous," Stevens insists, for the Court to demand the knowledge of the "ultrareasonable observer" as a precondition of Establishment Clause protection.[70] Stevens recognizes the reality that different degrees of knowledge will impact perception. The objective observer who carries a comprehensive knowledge of all aspects of the display and its history is likely to see through the eyes of the government rather than the passerby.

The most recent decision addressing the objective observer, *Salazar v. Buono,* shows the dispute concerning the knowledge of the observer remains unresolved, although the highly knowledgeable observer appears to be the most visible.[71] Justices Kennedy and Alito attribute comparable knowledge to the reasonable observer. Justice Kennedy's plurality opinion, in which Justice Alito concurs on this point, expects the reasonable observer to know "all of the pertinent facts and circumstances surrounding the symbol and its placement."[72] Justice Stevens, dissenting, describes the observer simply as "well-informed."[73] He juxtaposes this standard, in a footnote, however, against the "less informed reasonable observer" that he supported in *Capital Square Review.*[74]

V. THE REASONABLE OBSERVER AND THE ROLE OF BELIEF

The reasonable observer, schooled in government policy and divested of religious identity, offers little insight into whether government conduct actually alienates nonadherents and favors adherents.[75] The Court's willingness to reduce perceptions of religious endorsement to a discernable collection of facts shows little regard for the role of belief in the reactions of the observer. This disregard demonstrates a curious unresponsiveness to the real-life concerns about religious strife that animate Establishment Clause history and prior precedent.

Philosopher D. Z. Phillips argues that religious belief alters an individual's conception of the world.[76] Thus, two people with different religious belief systems, faced with the same facts, will "still reach different moral conclusions."[77] In other words, when "moral perspectives are different, different reactions will occur and different conclusions will

[69] *Id.* at 800 n.5 (Stevens, J., dissenting).

[70] *Id.* at 807.

[71] Salazar v. Buono, 130 S. Ct. 1803, 1811–12 (2010) (plurality opinion) (alleging that a Latin cross in the Mojave National Preserve violates the Establishment Clause).

[72] *Id.* at 1819–20.

[73] *Id.* at 1833 (Stevens, J., dissenting).

[74] *Id.* at 1834 n.4.

[75] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[76] D.Z. PHILLIPS, FAITH AFTER FOUNDATIONALISM 117 (1988).

[77] D.Z. PHILLIPS, INTRODUCING PHILOSOPHY: THE CHALLENGE OF SKEPTICISM 95 (1996).

be drawn."[78] Michael McConnell describes a similar dynamic regarding political belief: "Whether an observer would 'perceive' an . . . [endorsement] depends entirely on the observer's view of the proper relation between church and state."[79] In fact, religious and political beliefs together may influence perceptions; one adherent's strong belief in separation of church and state would produce a different answer on the endorsement question than that of an adherent who favors closer identification between religion and state. The reasonable observer standard thus relies on the quite unreasonable assumption that application of the standard will necessarily yield only one objective answer.

Removing the views of adherents and nonadherents from the perceptions of the reasonable observer does not resolve the problem of subjectivity. If the reactions of actual people are irrelevant, the key elements in determining endorsement are the knowledge of the observer and the context for the government activity. But that analysis, too, is "fraught with futility."[80] While the inquiry into the history and purpose surrounding the government activity may be capable of reasonably objective determination, the Court's examination of context once again begs the question of the perspective of the reasonable observer. The Court's assumption that it will be able to discern one reasonable assessment of context is flawed for precisely the same reason as the Court's refusal to consider actual perceptions; the evaluation of context is likely to yield a variety of reasonable results depending on the religious and political beliefs of the observer.

VI. THE REASONABLE OBSERVER DRESSED FOR SUCCESS

The application of the reasonable observer standard thus becomes normative, not objective at all. If varying belief systems may yield different perceptions then there may, in fact, be more than one reasonable observer. How does the Court choose? It is not surprising that most of the cases in which the courts uphold displays of religious symbols involve symbols of Christianity.[81] The Court's repeated insistence that the Christmas tree is a secular, not religious, symbol demonstrates how the reasonable observer embodies the perspective of the majority.[82] The Court's determination of the religious meaning of the Christmas tree

[78] *Id.* at 104.

[79] Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48 (1985).

[80] Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring).

[81] *See, e.g.*, Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 616 (1989); Lynch v. Donnelly, 465 U.S. 668, 687 (1984). *See also* ACLU of N.J. v. Schundler, 168 F.3d 92, 94–95 (3d Cir. 1999); Elewski v. City of Syracuse, 123 F.3d 51, 52 (2d Cir. 1997).

[82] *See, e.g.*, *Cnty. of Allegheny,* 492 U.S. at 616 (majority opinion), 633 (O'Connor, J., concurring).

means that the contradictory reactions of nonadherents are wrong as a matter of constitutional law, a result at odds with promoting the value of inclusion.

The Court's severing of the reasonable observer from her beliefs could be argued to serve two important normative functions. The first is the principle that the Court should avoid determinations of the religious significance of symbols or doctrine. The second is that the Court's disregard of the relationship between perception and belief advances government neutrality toward religion. The reasonable observer standard fails, however, to promote either objectivity or neutrality.

There are sound reasons for the Court to avoid engagement in the determination of religious meaning, not the least of which is the Court's lack of expertise. The Court, rightly, has been careful to avoid evaluations of religious beliefs and doctrines. However, this concern does not justify the Court's use of a standard that ignores both the role of faith in perception and the likelihood that faith, or lack thereof, will produce conflicting perspectives. To the contrary, this underlying rationale attests to the flaws in the standard. There is little merit to a standard that serves one Establishment Clause value at the expense of another, particularly since the reasonable observer standard actually fails to remove the Court from the business of evaluating perceptions.

The Court's conclusions about the perspectives of the reasonable observer are, in reality, infused with judgments about religious meaning. The reasonable person's embodiment of a predominantly Christian point of view belies the purported objectivity of the standard. Substantive analysis of the effect of government action upon adherents and nonadherents would, by contrast, both further the value of inclusion and remove the Court from questionable judgments about religious significance processed through the reasonable observer fiction. If the Court retains the reasonable observer, it should give her a dual identity: that of reasonable adherent and reasonable nonadherent.

Also problematic is the argument that the reasonable observer standard furthers a key Establishment Clause principle: government neutrality toward religion.[83] Neutrality as an interpretive principle provides only the most general guidance for government action under the Establishment Clause. Neutrality has been the justification for Establishment Clause tests that emphasize separation of religion and government tests that favor accommodation.[84] The formalism of the reasonable observer standard offers only the most superficial

[83] *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 864 (2005). A minority of the Court recently has argued that the Establishment Clause does not mandate government neutrality toward religion; only government coercion is prohibited by the Establishment Clause violation. *Id.* at 892, 909–10 (Scalia, J., dissenting).

[84] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 618 (1971); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

interpretation of neutrality; the test fails to address the complex issues of pluralism at the heart of the debate about neutrality.

VII. FORMALISM, NEUTRALITY, AND THE REASONABLE OBSERVER

Formalism is, in fact, leading to a reformulation of the neutrality principle. The Court is increasingly receptive to the argument that Establishment Clause challenges should be evaluated primarily on the basis of government purpose, with a facially neutral purpose insulating the government action from Establishment Clause challenge, much as the Court has insulated the government from Free Exercise claims with a similar definition of neutrality.[85]

Recent Establishment Clause cases that focus on facial neutrality use the reasonable observer fiction to bypass substantive analysis of endorsement. In a series of decisions dealing with aid to parochial schools or student religious groups, the Court has found that the Establishment Clause is satisfied when the government distributes benefits equally to secular and religious entities under generally applicable laws.[86] This finding represents a significant shift in analysis. Whereas the Court previously had considered whether the government activity represented an evenhanded treatment of aid recipients, it had not found that facial neutrality alone was sufficient.[87] In *Zelman v. Simmons-Harris,* the Court upheld a state-financed tuition voucher program that included sectarian schools.[88] The Court found the program did not violate the Establishment Clause because the money flowed to religious schools through the private choices of families.[89] Justice Rehnquist's majority opinion makes clear that the facial neutrality of the program went a long way toward satisfying Establishment Clause criteria: "[A] program . . . that neutrally provides state assistance to a broad

[85] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 654–55 (2002) ("But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."); Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982))).

[86] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 809–10 (2000); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842–43 (1995); Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[87] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971)

[88] *Zelman,* 536 U.S. at 643–44.

[89] *Id.* at 654–55.

spectrum of citizens is not readily subject to challenge under the Establishment Clause."[90]

This focus on facial neutrality diminishes the weight given to the effect of government support. In *Zelman*, the Court summarily rejects the argument that state aid to religious schools created a public perception of endorsement: "no reasonable observer would think a neutral program of private choice . . . carries with it the *imprimatur* of government endorsement."[91] To the contrary, "[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."[92] Not surprisingly, the Court's unwillingness to consider actual purpose leads to a similar disinclination in evaluating effect.

The reasonable observer test collapses what had previously been separate inquiries into government purpose and government effect into one continuum of "reasonableness." This comingling of two distinct criteria is at odds with a long line of cases that makes clear that a neutral government purpose alone does not defeat an Establishment Clause claim.[93] Under the Court's reasonable observer standard, the important question of whether the government action, quite apart from its purpose, has the effect of endorsing religion becomes subsumed to the analysis of formal neutrality that governs the question of government purpose. The increasing emphasis on neutral government purpose further distances Establishment Clause analysis from substantive consideration of how the government action plays in the real world.

Disengaged from actual purpose or effect and disconnected from the hard decisions central to Establishment Clause values, the viewpoint of the reasonable observer becomes quite narrow. Familiar with legislative history, the nuances of context, and the subtleties of constitutional law, the reasonable observer is unlikely to conclude that the government ever acts to endorse religion, absent clear evidence of impermissible intent.

VIII. WHY THE REASONABLE OBSERVER?

Why has the reasonable observer standard emerged as a key focus of Establishment Clause doctrine? Two explanations seem most likely. It can be argued that the legal fiction of the reasonable observer helps insulate the Court from criticism that it is imposing subjective value choices to resolve the contentious issues presented in many Establishment Clause

[90] *Id.* at 661 (alteration in original) (quoting Mueller v. Allen, 463 U.S. 388, 398–99 (1983)).

[91] *Id.* at 655.

[92] *Id.*

[93] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984); Widmar v. Vincent, 454 U.S. 263, 271 (1981); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

cases. The analysis in *Lynch,* however, exposes the transparency of the Court's efforts to hide these choices behind the face of the reasonable observer. By imbuing the reasonable observer with the perceptions of the majority religion, the Court invites rather than diffuses criticism.

A more persuasive explanation for the emergence of the reasonable observer lies in examining the shift in Establishment Clause doctrine that parallels the adoption of the reasonable observer standard. A majority of the Court has rejected strict separation of religion from government. The prevailing theory is one that emphasizes government accommodation of religion.[94] The reasonable observer embodies this metamorphosis. The Court's repudiation of separationist values is reflected in the identity of the objective observer. By ignoring the perspective of the nonadherent, the reasonable observer disregards the protection of minority rights, an important concern for separationists. Instead, the reasonable observer who manifests the "collective social judgment" of the community will be inclined to approve government accommodation of the majority. The reasonable observer standard facilitates the Court's reformulation of Establishment Clause doctrine to reflect accommodationist values. In this light, the importance assigned to neutral government purpose takes on heightened significance. Under an accommodationist approach, successful Establishment Clause challenges are more likely to require evidence of religious discrimination or coercion; endorsement is relevant only to the extent it demonstrates impermissible purpose.

This shift is likely to lead to increased visibility of majority religions in the public arena. Since the reasonable observer is a person of indeterminate religious beliefs, she is apt to be more familiar with the displays and activities of majority religions. Familiarity, as the Court reminds us, engenders acceptance, which in turn generates additional government action, leading to the "ubiquity" that transforms religious symbols into secular displays.[95] Thus, every December, our reasonable observer sees adorned Christmas trees and lighted menorahs on private property throughout her community. Blind to the perceptions of minority religions, she is expected to understand that when the government displays a Christmas tree and menorah on the courthouse lawn, it merely acknowledges the secular fact of the holidays and does not endorse religion. That the reasonable observer should view government religious displays through the eyes of the dominant religion will not trouble the accommodationist majority on the Court.

Government neutrality is an important interpretive principle for the Establishment Clause only to the extent it is a substantive standard. The significance of neutrality is to ensure the government will avoid fomenting the divisiveness that accompanies perceived government favoritism or hostility toward religion. The formalism of the objective

[94] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 598–99 (1992); *Lynch*, 465 U.S. at 673.

[95] *See Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). *See also supra* note 29 and accompanying text.

observer standard fails to address this concern in any substantive manner. Instead, the reasonable observer formulation erroneously presumes that the critical issues of inclusion and divisiveness will go away simply if the Court ignores them.

Formalism may serve constitutional adjudication in other areas of constitutional law, but religion is different. The Constitution recognizes the uniqueness of religion and the hazards of religious strife through the Establishment and Free Exercise Clauses. The reality and virtues of religious pluralism impose on the Court a Herculean task in drawing the line between permissible accommodation and impermissible endorsement. The difficulty in drawing that line does not justify abandoning the effort.

What is missing from the Court's analysis of endorsement is consideration of two key Establishment Clause concerns: (1) recognition that the question of whether government action sends a religious message will be answered differently depending on the religious and political beliefs of the observers, and (2) a standard that addresses that reality. That standard includes, as Justice Stevens argues in *Van Orden*, a presumption against government display of religious symbols and a vigorous and substantive inquiry into the purposes and effect of government action that accommodates religion.[96] This inquiry should include, at the very least, consideration for the viewpoints of both adherents and nonadherents.

The life expectancy of the reasonable observer is uncertain however. The Court may be poised to recast Establishment Clause doctrine. The coercion test finds an Establishment Clause violation only when the government has coerced religious participation. If a majority of the Court adopts the coercion test, which collapses Establishment Clause and Free Exercise analysis into one question of coercion, judicial review of government accommodation of religion would be significantly reduced.

At bottom, the debate between separationists and accommodationists is not just about the permissible role of government in accommodating and supporting religion. It also is about the role of the Court. The Court, with legitimate reason, does not want to be in the position of evaluating religious perspectives or values. Both separationist and accommodationist theories insulate the Court from judgments about religion. But they achieve that end in significantly different ways.

The separationist approach reduces the discretion of the Court through a presumption against religious displays and government support of religion. These presumptions clearly allow for less accommodation of religion by government; in turn, they effectively protect the rights of minorities and prevent divisiveness.

An accommodationist approach that merely rubber-stamps the choices of the majority also insulates the Court from difficult choices

[96] Van Orden v. Perry, 545 U.S. 677, 708, 721–22 (2005) (Stevens, J., dissenting).

about religion. But it does nothing to further inclusion or prevent religious divisiveness. Ultimately, the accommodationist approach undermines Establishment Clause values rather than serves them.

IX. CONCLUSION

So where does this leave our reasonable observer as she contemplates the display of the Christmas tree and the menorah on the courthouse lawn? Well-schooled, her perceptions are shaped by her knowledge that the government claims it intends only to convey secular recognition of the holidays of December. She can take into account the size and placement of the tree and menorah and any disclaimers or explanatory materials. What she cannot do is react to the display as governed by her beliefs. The response she is not allowed is, in truth, the reaction that the Court must address to achieve an appropriate balance between accommodation of the majority and protection of minority religions. The reasonable observer test walks the Court away from the real world into a fictitious world inhabited by characters disconnected from their beliefs and their humanity. That these ciphers see the world through the eyes of Supreme Court justices offers scant reassurance for the protection of religious pluralism.