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Refining the Reasonable Observer

BY: TIMOTHY MALACRIDA

“[O]ur observer continues to be biased, replete with foibles, and prone to mistake . . . selective, vision impaired, and a bit of a hot-rodder our observer may be, but the reasonable observer of Justice O’Connor’s description he is not.”¹

I. INTRODUCTION

Identifying when a law, practice or display runs afoul of the Establishment Clause continues to be a challenge for individuals and courts. This is due, in large part, to the lack of clear standards from the Supreme Court and the varied application of existing standards by judges of the lower federal courts.² The Court has several different tests to help courts determine when religion violates the Constitutional mandate that separates church and state.³ Among the most popular tests articulated by the Court in its attempts at defining the arena of Establishment Clause jurisprudence are the three-pronged *Lemon* test,⁴ several iterations of a coercion analysis,⁵ and variations of the endorsement test.⁶ Because of the complexity of Establishment Clause cases, and the delicate balance that exists between accommodating free exercise while not endorsing religion, courts cannot leave the practice of drawing lines of constitutional permissibility to a single test.⁷ It is important for the federal courts to reevaluate their past

¹ *Am. Atheists v. Duncan*, 637 F.3d 1095, 1108–09 (10th Cir. Dec. 20, 2010) (denial of rehearing en banc) (Gorsuch, J., dissenting), *cert. denied*, 132 S. Ct. 12 (2011).

² *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989) (O’Connor, J., concurring) (“Unfortunately, even the development of articulable standards and guidelines has not always resulted in agreement among the Members of this Court on the results in individual cases.”).

³ *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

⁵ *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *id.* at 640 (Scalia, J., dissenting) (defining the crux of a coercion analysis as coercion through the government’s power).

⁶ *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring) (establishing the endorsement test). Justice Kennedy offered an alternative to the endorsement analysis which sets proselytization as the bar for endorsement. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659–79 (1989) (Kennedy, J., dissenting).

⁷ *Bd. Of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring) (finding that funding a school district created in accordance with where a particular religious group lived, was impermissible).

analyses in order to reduce misapplication by judges and properly refine the tests that intend to protect our constitutional rights.

One test that can benefit from refinement, as evidenced by the tremendous difficulty judges have in uniformly applying it, is Justice O'Connor's endorsement test.⁸ Issues of inconsistency primarily arise from the varied application of the "reasonable" or "objective" observer.⁹ Some judges create observers that are hostile to religion, often the equivalent of a heckler's veto, and style them "reasonable" or "objective" to seemingly fall within the Supreme Court precedent and the precedent of their own circuit.¹⁰ Other jurists create observers that seem overly accommodating or deferential to religion such that displays, laws and practices that involve religious content are rarely struck down as unconstitutional.¹¹ In this way, the First Amendment rights of every American are threatened by a judiciary in need of further guidance. While Justice O'Connor expected and embraced some flexibility and case-specific findings of fact, the practices of these jurists are not the virtuous flexibility built into the endorsement test.¹²

This Comment will propose a solution to this seemingly unworkable metric. It will attempt to define the reasonable observer as much as possible for the courts in an effort to minimize the variables judges are able to put into their observers and ultimately provide Justice

⁸ See, e.g., *Am. Atheists v. Duncan*, 637 F.3d 1095, 1111 (10th Cir. 2010) (holding that the display of a cross to honor fallen patrolmen was a violation of the establishment clause), *cert. denied*, 132 S. Ct. 12 (2011)

⁹ *Id.*

¹⁰ *Am. Atheists v. Duncan*, 637 F.3d 1095, 1104 (Dec. 20, 2010) (denial of rehearing en banc) (Kelly, J., dissenting), *cert. denied* 132 S. Ct. 12 (2011); *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1243–44 (10th Cir. July 30, 2009) (denial of rehearing en banc) (Gorusch, J., dissenting).

District court opinions also may provide insight into the qualities put into the reasonable observer, however this Comment only analyzes appellate decisions because of their value as binding precedent.

¹¹ See, e.g., *Elewski v. City of Syracuse*, 123 F.3d 51 (2nd Cir. 1997) (holding that the display of Christmas décor throughout the city was not an endorsement and granting extraordinary knowledge to the "reasonable observer" in the form of understanding the goings on of private commercial enterprises such as shopping malls).

¹² *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 783 (1995) (O'Connor, J., concurring) ("[F]lexibility is a virtue and not a vice....").

O'Connor's virtuous flexibility while keeping results within a permissible range.¹³ Such a solution returns the endorsement test to Justice O'Connor's original intent of protecting from an actual threat to constitutional liberties, namely the perception that one's "standing in the political community" changes based on religious belief or affiliation.¹⁴

This Comment will analyze the characteristics articulated by members of the Court and examine the federal circuit court decisions that create, or fail to create—in whole or in part—a "reasonable" observer. Finally, this Comment will provide a framework under which courts can apply, with more accuracy and uniformity, the reasonable observer inquiry of Justice O'Connor's endorsement test. The endorsement test, with the proper refinements, is a workable standard and a valuable tool for courts seeking to protect First Amendment rights.

I. BACKGROUND

Justice O'Connor outlined the endorsement test in her 1984 concurring opinion in *Lynch v. Donnelly* where the Court considered a holiday display of a crèche on public ground in the city of Pawtucket, Rhode Island.¹⁵ The test evolved from the *Lemon v. Kurtzman* framework, articulated more than a decade earlier, and sought to clarify the oft criticized test while

¹³ One must always accept that there will be some issues on the margins that will not be decided uniformly, but this is the nature of cases "sensitive to context" and should not be seen as a reason to disregard the test completely. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring). The key is to shrink the margins and provide uniformity wherever possible. A disinterested (neither hostile nor deferential) observer is the appropriate standard for courts in light of Justice O'Connor's instructions and the Supreme Court's precedent. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.") (citing *Zorach v. Clauson*, 343 U.S. 306, 314, 315 (1952)).

Professor Brainerd Currie once wrote "[b]ad law makes hard cases." Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U Chi. L. Rev. 227, 245 (1958). This reversal of the old adage "hard cases make bad law" seems to hold true in endorsement test inquiries in so far as an unclear standard has produced the troubling result of eliminating uniformity and predictability in the federal courts.

¹⁴ *Lynch*, 465 U.S. at 687 (1984) (O'Connor, J., concurring).

¹⁵ *Id.* at 687–94.

preserving its central elements.¹⁶ While clarification of the *Lemon* test was the primary goal of the endorsement test, the *Lynch* concurrence ultimately provided a new metric against which courts analyze challenged laws, practices and displays.¹⁷

Lemon instructed courts to look at three separate considerations, commonly termed prongs, that the Court previously developed to protect against the “three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”¹⁸ The purpose prong requires that the actor has a subjective purpose that is secular,¹⁹ the effect prong states that the “principal or primary effect . . . neither enhances nor inhibits religion”²⁰ and the entanglement prong states that there must not be “an excessive government entanglement with religion.”²¹ Seeing two possible ways the government could violate the Establishment Clause, Justice O’Connor reduced the *Lemon* test to two inquiries for her endorsement test: the first focusing on “excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines”²² and the second concerning whether government endorses or disapproves of religion.²³

¹⁶ *Id.* at 688–89. For general criticisms of the *Lemon* test, in whole or in part, see, *Edwards v. Aguillard*, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108–13 (1985) (Rehnquist, J., dissenting); *Mueller v. Allen*, 463 U.S. 388, 403, n. 11 (1983); *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 768–69 (1976) (White, J., concurring).

¹⁷ *Lynch*, 465 U.S. at 688–89 (O’Connor, J., concurring).

¹⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

¹⁹ *Id.* at 612.

²⁰ *Id.* at 612 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

²¹ *Id.* at 613 (quoting *Walz*, 397 U.S. at 674).

²² *Lynch*, 465 U.S. at 687–88 (O’Connor, J., concurring).

²³ *Id.* at 688.

Justice O'Connor opined in her *Lynch* concurrence that in order to determine whether government disavowed or endorsed religion courts must conduct an "[e]xamination of both the subjective and the objective components of the message communicated by a government action."²⁴ This examination, itself composed of two inquiries, accounts for the concerns of both the purpose and effect prongs of the *Lemon* test while leaving the entanglement prong as a separate consideration.²⁵ The subjective inquiry considers only the intent of the challenged law, display or practice and is a distinct consideration having no place or weight in the objective analysis, and instead focuses solely on whether the actor's purpose is to impermissibly endorse religion.²⁶ The objective inquiry is a distinct consideration from the subjective inquiry and determines whether an endorsement or disavowal of religion occurs without consideration of personal feelings; but rather through the eyes of a hypothetical observer of the challenged, display, practice or law.²⁷ Justice O'Connor further opined that she envisioned the use of an objective observer for the endorsement test as a vehicle to return the Court's focus to the principle that the government's approval or disavowal of religion is only relevant where such a finding objectively demonstrates that religion is "relevant, in reality or public perception, to status in the political community."²⁸

While Justice O'Connor's influential concurring opinion in *Lynch v. Donnelley* stopped short of styling the observer as "reasonable," it extensively developed the concept of an objective interpretation of a display or practice as the proper path for finding an endorsement or disavowal of religion when a secular purpose is present.²⁹ The objective interpretation, as Justice O'Connor

²⁴ *Id.* at 690.

²⁵ *Id.*

²⁶ *Id.* at 690–91.

²⁷ *Lynch*, 465 U.S. at 691–94 (O'Connor, J., concurring).

²⁸ *Id.* at 692.

²⁹ *Id.* at 692–94.

described it, is made in light of the unique context, with knowledge of the “history and ubiquity” of the challenged display or practice.³⁰ Justice O’Connor also opined in *Lynch* that what is “objective” is a factor to be determined “within the community.”³¹

Lower courts did not have much time to apply Justice O’Connor’s endorsement test before she revisited it in the Court’s 1985 term.³² Justice O’Connor clarified her analysis and employed an “objective observer” to whom knowledge of “the text, legislative history, and implementation of the statute” is attributed.³³ In the Court’s 1986 term, Justice O’Connor ultimately determined the objective observer should also be a “reasonable observer.”³⁴

In the years following *Lynch*, Justice O’Connor provided some defining characteristics for the reasonable observer.³⁵ Justice O’Connor deemed the observer akin to the hypothetical “reasonable person in tort law” who should not carry prejudices, be overly sensitive, mistaken or otherwise unreasonable.³⁶ Beyond helping to set the observer’s identity, the analogy to the reasonable person of tort law further shows that the observer standard does not accept input from “the perceptions of particular individuals,” or “the actual perception of individual observers who naturally have differing degrees of knowledge,” or even an amalgamation of individuals.³⁷

³⁰ *Id.* at 692–93.

³¹ *Id.* at 690.

³² *Wallace v. Jaffree*, 470 U.S. 38, 69–70 (1985) (O’Connor, J., concurring).

³³ *Id.* at 76. Justice O’Connor continued to use the term “objective” to describe the endorsement test’s observer. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O’Connor J., concurring).

³⁴ *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O’Connor, J., concurring).

³⁵ *See Symposium, Measured Endorsement*, 60 MD. L. REV. 713 (2001).

³⁶ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O’Connor, J., concurring) (internal quotations omitted). “The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. He is not to be identified with any real person.” RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

³⁷ *Pinette*, 515 U.S. at 779. This also represents a rejection of the heckler’s veto. Justice O’Connor clearly dismisses the application of a nonadherent as the reasonable observer. *Id.* at 780. *See* RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) (“The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual.”). The standard is required to be identical no matter who is challenging, because “the law can have no favorites” in tort, or in religion. *See id.*

Justice O'Connor deemed the hypothetical reasonable observer "more informed than the casual passerby,"³⁸ and not "limited to the information gleaned simply from viewing the challenged display."³⁹ Justice O'Connor, though indicating the observer was an ideal, did not style the observer as extraordinary with regard to the scope of his knowledge, nor "ultra-reasonable."⁴⁰

In the same vein, the hypothetical observer created by Justice O'Connor had a reasonable memory of actions, but not an intricate knowledge of legal minutia.⁴¹ The observer, being reasonable, could "recognize the distinction between speech the government supports and speech that it merely allows" and "read and understand an adequate disclaimer."⁴² Similarly, the observer Justice O'Connor envisioned possessed an understanding of our nation's history and "cultural landscape".⁴³ The observer respected certain religious references in public life as useful tools for solemnizing secular occasions and acknowledging our history and did not see these practices as an endorsement or disavowal but rather considered them "ceremonial deism".⁴⁴ The observer was not hyper-sensitive to religious references, but instead a stable-minded and objective hypothetical set of eyes through which courts could temper their own views and the views of litigants in order to reach constitutionally permissible results.

Despite Justice O'Connor's guidance, the Court remains rather vague with regard to any further instructions about the observer's identity or the correct application of the objective inquiry, and its precedent offers little in the way of lucidity to the muddled waters of

³⁸ *Pinette*, 515 U.S. at 779.

³⁹ *Id.* at 780.

⁴⁰ Compare *id.* at 781 (O'Connor, J., concurring), with *id.* at 807 (Stevens, J., dissenting).

⁴¹ *Pinette*, 515 U.S. at 781 (O'Connor, J. concurring).

⁴² *Id.* at 782. See also *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("[N]o 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."); *Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring) ("[E]ndorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.").

⁴³ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring).

⁴⁴ *Id.* at 36–37.

Establishment Clause jurisprudence created by the courts.⁴⁵ This lack of clarity causes much criticism of the endorsement test for not providing a useful metric,⁴⁶ and for not achieving its objective of enforcing the Establishment Clause consistently.⁴⁷ Criticism also comes from other members of the Court over the variables that comprise the test,⁴⁸ and whether the Court can, or should, draw the lines the endorsement test requires.⁴⁹

⁴⁵ More than two decades after her concurring opinion in *Lynch v. Donnelly*, Justice O'Connor stated that "we do not count heads before enforcing the First Amendment." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring). This instruction could be seen as muddying the prior instructions regarding the endorsement test, because the former guideline instructed courts to inquire into the community ideal. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) ("[T]he 'reasonable observer' must embody a community ideal of social judgment, as well as rational judgment."). Similarly, the identity of the observer has not been consistent in the minds of the Justices, nor has the amount of knowledge attributed to the observer. Compare *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (determining that an objective secondary school student was an appropriate observer), and *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (determining that a secondary school student could discern between public and private speech), with *Salazar v. Buono*, 130 S. Ct. 1803, 1824 (2010) (Alito, J., concurring) ("The endorsement test views a challenged display through the eyes of a hypothetical reasonable observer who is deemed to be aware of the history and all other pertinent facts relating to a challenged display."), *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring) ("This Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display."), and *Elk Grove Unified Sch. Dist.*, 542 U.S. at 34–35 (2004) (O'Connor J., concurring) ("Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity.").

The instruction pertaining to the endorsement test maintains that it is against the idea of a heckler's veto, but applying anything other than the hypothetical observer opens the door for the nonadherent observer. The Court rejected child observers stating, "[w]e decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

⁴⁶ Justice Kennedy opined "the endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., dissenting); accord *McCreary Cnty. v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting) ("[T]hat oddity pales in comparison to the one invited by today's analysis: the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n. 3 (1995) (Scalia, J., opining) ("It supplies no standard whatsoever. The lower federal courts... have reached precisely *differing* results--which is what led the Court to take this case.").

⁴⁷ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 907 (2005) (Scalia, J., dissenting) ("[I]nconsistency may be explicable in theory, but I suspect that the 'objective observer' with whom the Court is so concerned will recognize its absurdity in practice."); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., dissenting) ("Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.").

⁴⁸ *Pinette*, 515 U.S. at 799–800 (Stevens, J., dissenting) (arguing that the standard should only be whether an individual could perceive an endorsement). "[P]assersby, including schoolchildren, traveling salesmen, and tourists

However, early in the development of the endorsement test Justice O'Connor recognized that bright line rules of universal applicability were not the intended end-product of the reasonable observer inquiry, which intentionally incorporates a degree of virtuous flexibility.⁵⁰ Furthermore, the Supreme Court's failure to articulate a consistent metric that the lower courts can apply uniformly is not evidence that the test cannot work, but rather an invitation to better the test—and Establishment Clause jurisprudence—by identifying the missteps of the various circuit courts and eliminating the pitfalls that plague the judiciary. Prior criticism of the test is no reason to think that it cannot be refined into a workable standard for future courts. Failure to better define the reasonable observer inquiry of the endorsement test relegates it to a status as the new “sisyphean task of trying to patch together the ‘blurred, indistinct, and variable barrier’” invoked by the Supreme Court.⁵¹

II. ANALYSIS

Realistically, the concept of a reasonable observer will never be a truly static metric because judges will always have to perform an inquiry particular to every case, which will force them to make decisions about what the observer considers and weighs as persuasive.⁵² Defined parameters—in the absence of a static metric for the variables that most often create an inadequate observer—will present the courts with a better test and an opportunity to analyze with uniformity when seeking to preserve the Constitutional prohibition against an establishment of religion. Without intervention in the form of greater delineation, flawed application of the

as much as those who live next to the statehouse, are members of the body politic, and they are equally entitled to be free from government endorsement of religion.” *Id.* at 808 n. 14.

⁴⁹ “This Court is ill equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so.” *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., dissenting).

⁵⁰ *Id.* at 629 (O'Connor, J., concurring); *accord Pinette*, 515 U.S. at 783 (O'Connor, J., concurring).

⁵¹ *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (originally referring to the *Lemon v. Kurtzman* test).

⁵² *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring).

endorsement test's reasonable observer inquiry, while considering Establishment Clause violations, will persist and present a troublesome lack of uniformity often resulting in unacceptable deference or hostility.⁵³ Furthermore, the reasonable observer inquiry needs clarification in order to return its focus to Justice O'Connor's belief that the crux of an Establishment Clause violation, under this element of the test, is whether a hypothetical, objective and reasonable observer believes that, by virtue of the challenged display, law or practice, religion is relevant to standing in the political community.⁵⁴ A well-defined reasonable observer, in the hands of a refocused judiciary, is potentially a great tool for protecting Americans' constitutional rights.

However, before engaging in an analysis of the qualities of the observer, it is important to note the characteristic that underlies all the observer's qualities: objectivity. As Professor Dane correctly opined on the recent Rhode Island school prayer case, *Ahlquist v. City of Cranston*,⁵⁵ the litigant's analysis is not correct when framed as "a *personal* affront that sent *her* the message 'you don't belong here,'" such a standard "merely reflects the wrongheaded psychological turn in current Establishment Clause thinking and misses the real constitutional point."⁵⁶ Professor Dane succinctly identified a common misstep of litigants and jurists alike; the reasonable observer's analysis is wholly objective at all points in the inquiry and his views are not subject to the whims of litigious individuals on a crusade or those who harbor personal vendettas.⁵⁷ With

⁵³ See, e.g. *Am. Atheists v. Duncan*, 637 F.3d 1095, 1108–09 (10th Cir. Dec. 20, 2010) (denial of rehearing en banc) (Gorsuch, J., dissenting), *cert. denied*, 132 S. Ct. 12 (2011).

⁵⁴ *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

⁵⁵ *Ahlquist v. City of Cranston*, 2012 U.S. Dist. LEXIS 3348 (D.R.I. Jan. 11, 2012).

⁵⁶ Perry Dane, Letter to the Editor, N.Y. TIMES, Feb. 1, 2012 at A26 (emphasis added), *available at* <http://www.nytimes.com/2012/02/01/opinion/the-atheist-who-challenged-cranston-ri.html?ref=letters>.

⁵⁷ *Lynch*, 465 U.S. at 690. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (O'Connor, J., concurring). The use of masculine pronouns throughout this Comment has no bearing on the observer's identity and is primarily a matter of convenience and clarity. The gender, sexual orientation, and any other lifestyle choices of the observer are of little consequence in the endorsement analysis. See, e.g., *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("Empirical data is not needed because we do not concern ourselves with personal perceptions,

the understanding that the views and feelings of the complaining litigant are irrelevant to the observer analysis, and by leaving the subjective intent and entanglement inquiries as distinct considerations, one can begin to disassemble and refine the observer in an attempt to better the whole by perfecting its parts.

A. A Singular Observer

Judges vary with regard to the number of observers they employ in their endorsement analyses.⁵⁸ The precedent from the Court indicates a single observer is the appropriate standard, but some judges—particularly when dealing with large displays encountered by crowds or in school settings—fail to comply with this standard and analyze the views of multiple observers.⁵⁹ The Court never utilized, or condoned the use of, an “alternate” observer when their employed reasonable observer failed to find a violation.⁶⁰ The prohibition against alternate observers is logical; alternate observers cannot exist because they ultimately allow judges to indulge in an impermissible subjective inquiry and invite the hunt for the heckler’s veto that the endorsement analysis definitively condemns.⁶¹

nor the perceptions of a nonadherent, but rather a reasonable standard.”). *But see*, *ACLU of N.J. v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1496 (3rd Cir. 1996) (en banc) (Mansmann, J., dissenting) (using a “reasonable religionist” as the observer).

⁵⁸ See *infra* note 59.

⁵⁹ See, e.g., *Freedom From Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1, 11, n. 19 (1st Cir. 2010) (declining to determine which observer the court would apply, indicating the potential for multiple observers); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 186 (3rd Cir. 2008) (Barry, J., concurring) (indicating that the observer could be any of a number of individuals when the local high school’s football coach was the individual violating the Constitution with pre-game prayer); *Skoros v City of New York*, 437 F.3d 1, 43 (2nd Cir. 2006) (Straub, J., dissenting) (arguing that the observer should be both the parent and the child in cases involving classroom curricula); *Freedom From Religion Foundation Inc. v. City of Marshfield*, 203 F.3d 487, 495–96 (7th Cir. 2000) (using language that implies different observers could permissibly exist and have varying degrees of knowledge regarding the erection of a monument in a public park).

⁶⁰ An “alternate observer” approach would be antithetical to the idea of a hypothetical, ideal observer.

⁶¹ *Skoros*, 437 F.3d at 43. See also *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1037–38 (9th Cir. 2010) (holding “under God” in the pledge of allegiance is not an endorsement); *Briggs v. Mississippi*, 331 F.3d 499, 507 (5th Cir. 2003) (concluding that the hunt for a heckler’s veto is inappropriate and holding that the St. Andrews Cross

Similarly, courts should not concern themselves with the analysis of a particular group. Justice O'Connor explicitly instructed that courts should not look to nonadherents to find the characteristics of a reasonable observer.⁶² The reasonable observer, by virtue of his reasonability, feels no influence from societal pressure to see an endorsement or a disavowal where there is none. Furthermore, just as alternate individual characteristics have no place in the analysis, considerations of particular group dynamics and feelings are inappropriate.⁶³ Precedent illustrates that the observer must be a single individual. Thus, the use of an alternative observer to achieve a different result than the reasonable observer inquiry yields is impermissible.

B. A Mature Observer

In a select group of cases, usually challenges involving school-age children, classroom curriculums or public displays with which children come into contact many judges seek to use a child as the reasonable observer.⁶⁴ While a child's viewpoint may be appropriate for a coercion analysis,⁶⁵ the reasonable observer inquiry of the endorsement test does not tolerate a changing

on the Mississippi state flag was permissible); *ACLU of Ohio Foundation, Inc. v. Ashbrook*, 375 F.3d 484, 505–06 (6th Cir. 2004) (Batchelder, J., dissenting) (considering a courtroom display of the Ten Commandments).

⁶² *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring).

⁶³ *See*, *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996); *But see, e.g., ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1496 (3rd Cir. 1996) (en banc) (Mansmann, J., dissenting) (using a "reasonable religionist" as a standard).

⁶⁴ *Bronx Household of Faith v. Bd. of Educ. of N.Y.C.*, 650 F.3d 30, 45 (2nd Cir.), *cert. denied*, 132 S. Ct. 816 (2011) (questioning whether religious groups could use public schools outside of school hours); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1094 (9th Cir. 2010) (Reinhardt, J., dissenting) ("Five-year-olds are not the 'youngest members of the audience,' they are the *entire* audience; 'the public writ large' does not attend kindergarten classes."); *Skoros*, 437 F.3d at 43, 50 (Straub, J., dissenting) (arguing against the court's holding that classroom holiday displays of the Star of David and Star and Crescent for Jewish and Muslim students respectively was not endorsement even though Christian children had snowmen); *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 301 (4th Cir. 1998) (Motz, J., concurring and dissenting) (considering the audience of distribution of bibles in public schools, a youthful observer standard might be appropriate); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994) (using a child standard while considering "witchcraft" in the school curriculum as a potential endorsement violation); *Fleishfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (same).

⁶⁵ *Lee v. Weisman*, 505 U.S. 577 (1992).

viewpoint based on age.⁶⁶ The reasonable observer, to conform to the proscriptions of the First Amendment and for true objectivity and uniformity, must remain as constant as possible and it only follows that the test therefore does not accommodate changing the age of the observer to affect the context in which he sees the display.⁶⁷

Judges do not dismiss the views of children through their refusal to incorporate those impressionable views into the reasonable observer analysis; they simply preserve the integrity of the observer inquiry within the endorsement test.⁶⁸ Justice O'Connor noted that the endorsement test should not be the only test for Establishment Clause violations, which leaves room for a coercion analysis or another well formulated alternative to consider the views and feelings of younger children.⁶⁹ The observer—as a hypothetical construct—concerns himself only with the objective interpretation of the challenged law, practice or display to determine whether it indeed violates the Establishment Clause and just as his analysis is independent of the views of nonadherents the feelings of small and impressionable children must not shackle his views.⁷⁰

⁶⁶ Justice O'Connor opined that using a child in the endorsement analysis would amount to a heckler's veto. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). A child observer would ultimately be impossible in the endorsement analysis. It is unlikely that such a child observer would have the reasonability required of the observer, or the ability to adequately understand the display without outside explanation and interference. *See, e.g., Skoros*, 437 F.3d at 23. While the observer is clearly a fiction, a "youthful reasonable observer" takes the fiction to the point of absurdity. Litigants sometimes seek further diversion from the reasonable mature observer standard. *See Croft v. Perry*, 624 F.3d 157, 169 (5th Cir. 2010) (deeming the Texas pledge of allegiance, which contains the phrase "one state under God" to be permissible).

⁶⁷ The Court caused some confusion in this field, by applying a "secondary school student" as a reasonable observer. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that an invocation at a high school graduation was an impermissible endorsement).

⁶⁸ *Good News Club*, 533 U.S. at 119.

⁶⁹ *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring). For one variation of the Court's "coercion" analysis see *Lee v. Weisman* 505 U.S. 577 (1992). For an alternative view of coercion, see Justice Scalia's spirited dissenting opinion in *Lee* which maintained that it is coercion by force of law that is prohibited by the Establishment Clause. *Id.* at 642 (Scalia, J., dissenting).

⁷⁰ Allowing the observer to consider the views of children once again pushes him into the territory of head counting that was directly proscribed by Justice O'Connor. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 884 (2005) (O'Connor J., concurring). Furthermore, as difficult as it is to gauge the average views of an adult, surely it is not practical for jurists to try and capture the beliefs of small children when considering what a reasonable observer would see. *But see Skoros*, 437 F.3d at 23 (declining to use a school child as the observer, but allowing the observer to give weight to the opinions of impressionable school children).

While it is definite that an observer should not be a child, it is also important that the observer has no age or particular set of life experiences.⁷¹ Justice O'Connor, opining in *Board of Education v. Mergens*, noted that maturity is a threshold issue for the reasonable observer.⁷² As a legal fiction, the reasonable observer has the knowledge necessary to objectively view the display regardless of his indeterminate age.⁷³ Because age, beyond the proscription against child observers, is irrelevant the only requirement court should take notice of is that the observer is mature and capable of objectively analyzing the display and processing the information that comprises its unique context.⁷⁴

C. The Observation Requirement

Due to disagreement among the Justices and the lack of a clear standard,⁷⁵ the circuit courts sometimes misapply the endorsement test—often while considering publicly erected, funded or protected monuments—by analyzing the perceptions of an observer who never viewed the display completely or appreciated its subtle elements.⁷⁶ Judges sometimes mistakenly alter their decisions regarding the observer inquiry by invoking the perception of motorists who only

⁷¹ Even if the reasonable observer has not personally viewed displays that have existed throughout history, he would be able to appreciate them. *See, Ams. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1549 (6th Cir. 1992) (holding the display of a menorah to be permissible).

⁷² *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., opining).

⁷³ RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) (“The actor is required to do what the ideal individual would do...He is not to be identified with any real person . . .”).

⁷⁴ A “mature” standard accomplishes the goal of reconciling cases like *Santa Fe* with the rest of the endorsement test, while maintaining the prohibition against children. Attempting to set an age for the observer or define the observer’s age when considering a case would be irresponsible. By giving judges discretion over an observer’s age, the test would open up a heckler’s veto. Judges could seek to demonstrate that a particular age group would believe their political standing had been affected. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

⁷⁵ *Compare* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 808 n. 14 (1995) (Stevens, J., dissenting), *with id.* at 779 (O'Connor, J., concurring).

⁷⁶ *Trunk v. City of San Diego*, 629 F.3d 1099, 1123 (9th Cir. 2011) (invalidating the display of a mountaintop memorial cross based on misperceptions, visibility and relative size of displays); *Am. Atheists v. Duncan*, 616 F.3d 1145, 1160 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 12 (2011) (failing to appreciate the subtle elements of the display due to a high rate of speed and the relative sizes of elements); *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 772–73 (7th Cir. 2001) (determining that the secular texts having a smaller font than religious texts on a public display could cause a misperception, and noting that “larger lettering also means that it can be observed more clearly from a distance . . . [the ten commandments] stands alone on one side, totally isolated from the other texts . . . reasonably leading [to the belief] . . . that the monument only displayed the sacred text.”).

saw the largest portions of a mountain-top display because they passed by at highway-speeds or the views of individuals who approached from a particular direction.⁷⁷ Similarly judges erroneously allow their observers to place more value in font size than the totality of the display.⁷⁸

Returning to the guidance of Justice O'Connor, there is no room for misperception by the reasonable observer.⁷⁹ The observer is not a passerby or a casual observer, but rather an individual with the ability to see the entirety of the display or practice without blind spots.⁸⁰ The observer fully appreciates the display, including any disclaimer signs, secular items or alternate religious elements and weighs them in his own mind.⁸¹ As an ideal, the observer must have perfect vision in both a literal and a figurative sense and must observe the entirety of the display while still reasonably considering the unique context and history in which it exists.⁸²

Criticism of the requirement to observe the entire display aims at the protection of passersby, but diminishing this aspect of the reasonable observer inquiry is a dangerous proposition.⁸³ To lower the bar to that of a passerby results in a heckler's veto and fails to represent an objective view.⁸⁴ Justice O'Connor's observer protects from an objective endorsement of religion. The fact that a subjective viewer of the same display might find some

⁷⁷ *Am. Atheists*, 616 F.3d 1145, 1160.

⁷⁸ *O'Bannon*, 259 F.3d at 772–73.

⁷⁹ *Pinette*, 515 U.S. at 779–80 (O'Connor, J., concurring). *See also* *Paulson v. San Diego*, 262 F.3d 885, 895 (9th Cir. 2001) (holding that once the observer viewed the entire display any misperception from afar is erased); *O'Bannon*, 259 F.3d at 776 (Coffey, J., dissenting).

⁸⁰ *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring); *O'Bannon*, 259 F.3d at 776 (Coffey, J., dissenting) (“When any person focuses on only one particular aspect of a monument or display to the exclusion of the other aspects it will distort even the most reasonable observer’s opinion. It seems far more reasonable to assume that a person taking the time to gaze upon the beautiful edifice will look at all three sides.”).

⁸¹ *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring). *See, e.g., O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1228–31 (10th Cir. 2005) (holding that a statue mocking a Roman Catholic Bishop on the grounds of a public college was not an endorsement); *ACLU of N.J. v. Schundler*, 168 F.3d 92 (3rd Cir. 1999) (erecting a holiday display with a crèche, menorah and other secular items was constitutional).

⁸² *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 630–31 (1989) (O'Connor, J., concurring).

⁸³ *Pinette*, 515 U.S. at 808 (Stevens, J., dissenting).

⁸⁴ *Id.* at 779 (O'Connor, J., concurring).

preference for religion is ultimately irrelevant to the analysis and is the purview of another test that might properly incorporate the subjective.⁸⁵ The observer must observe fully and appreciate the subtleties of a display; to misperceive is fatal to the rights preserved by the Constitution.⁸⁶

Requiring the observer to fully observe the display corrects decisions like the Ninth Circuit's *Trunk v. City of San Diego*.⁸⁷ In *Trunk*, the panel determined that the disputed cross, erected as a memorial display on public land and surrounded by smaller secular monuments, "painted a sectarian picture."⁸⁸ Judge McKeown's opinion for the panel cited Justice Blackmun's individual opinion, articulated in *County of Allegheny v. ACLU*,⁸⁹ regarding the size of the monument in relation to other elements of the display to support the proposition that disproportionate size could be dispositive.⁹⁰ A complete observation of the display however, would show that the cross was a war memorial surrounded by "2,100 black stone plaques honoring individual veterans, platoons, and groups of soldiers" along with many bollards honoring secular groups and the American flag.⁹¹ The Ninth Circuit's opinion also treated the fact that the cross was the only element visible from the highway as indicative of an endorsement because passing motorists saw only part of the monument.⁹² If the Ninth Circuit instead used an objective observer who viewed the entirety of the display, rather than a hostile observer who saw small secular monuments next to a large cross and felt the sectarian overshadowed the secular, or a passing motorist with limited vision, there is no logical reason to believe that observer would not appreciate the secular nature of the display in its entirety and note no endorsement of

⁸⁵ *Id.*

⁸⁶ *Freedom From Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010) (holding "under God" in the pledge of allegiance was not an endorsement).

⁸⁷ *Trunk v. City of San Diego*, 629 F.3d 1099, 1099 (9th Cir. 2011).

⁸⁸ *Id.* at 1123.

⁸⁹ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 617 (1989) (Brennan, J., opining).

⁹⁰ *Trunk*, 629 F.3d at 1123.

⁹¹ *Id.* at 1103.

⁹² *Id.* at 1123.

religion, let alone an endorsement that made religion relevant to standing in the political community.

D. Relevant Knowledge

Some judges—often when dealing with the conduct of public officials, public symbols or the presence of monuments on public land—grant the observer an almost omniscient status, while other courts are content with only attributing a common level of knowledge of public events to the observer.⁹³ As Justice O'Connor envisioned, the observer should know the public history and ubiquity of the challenged practice, including public statements and reports.⁹⁴ Justice O'Connor also opined that the observer should know the relevant history of a display,⁹⁵ and possess a similar amount of knowledge in the context of challenged legislation.⁹⁶

However, the courts should not stretch the observer's knowledge to expert-historian, or extend his knowledge to purely private statements and acts not likely known by the community or known acts not directly attributable to the public action in question.⁹⁷ Judges seemingly have great difficulty when they attempt to draw the line between public knowledge and omniscience

⁹³ Compare *Am. Atheists v. Duncan*, 637 F.3d 1095, 1104–5 (10th Cir. 2010) (denial of rehearing en banc) (Kelly, J., dissenting), *cert. denied*, 132 S. Ct. 12 (2011) (suggesting the observer should know that an officer had died at that location, that the state had not endorsed the monument, what the motives of the display's creator were, and the reasons for a particular design element), with *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1240–42 (10th Cir. 2009) (denial of rehearing en banc) (Kelly, J., dissenting) (refusing to attribute private conduct of public officials to their official capacity when considering challenges to official conduct), and *Catholic League for Religious and Civil Rights v. City & Cnty. of S.F.*, 624 F.3d 1043, 1056 (9th Cir. 2010) (en banc) (declining to attribute knowledge of personal beliefs of public figures to the reasonable observer).

⁹⁴ Justice O'Connor noted that simply viewing the challenged display does not present the observer with enough knowledge. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Justice Alito provided some context for the knowledge requirement by opining that the observer is aware of the "history and all other pertinent facts relating to a challenged display." *Salazar v. Buono*, 130 S. Ct. 1803, 1824 (2010) (Alito, J., concurring). Justice Thomas similarly opined that he observer "knows all the facts and circumstances surrounding a challenged display." *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring). Justice Stevens, taking an alternate view, provided a much more tailored knowledge to his observer. *Id.* at 718 (Stevens, J., dissenting) ("The reasonable observer, after all, has no way of knowing that this text was the product of a compromise, or that there is a rationale of any kind for the text's selection.").

⁹⁵ *Pinette*, 515 U.S. 753, 781 (1995) (O'Connor, J., concurring).

⁹⁶ *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

⁹⁷ See, e.g., *Green*, 574 F.3d at 1242.

in challenges concerning the activities of small local governments where citizens may be more familiar with their elected representatives.⁹⁸ Such an extension is beyond the relevant history allowed by the observer inquiry. The knowledge attributed to the observer, particularly with regard to history, should not be encyclopedic or all-encompassing because judges might use such a quantity of information to bias the observer.⁹⁹ Relevance of the history is the best guide for the attribution of knowledge of history.¹⁰⁰ In order to prevent judges from using irrelevant facts to sway the observer's view, the observer should only consider those historical facts that reasonably relate to the display, practice or law in the compass of his knowledge.

Similarly, judges often grant varying levels of knowledge regarding religion and religious symbols to their observers.¹⁰¹ The observer should not be a religious scholar who looks for symbolism in his day-to-day life, nor should he be ignorant of religious symbols.¹⁰² It is clear that there are symbols with religious meaning that appear in public, perhaps even in our flags, seals, public grounds, government ceremonies, murals and monuments, but that does not mean

⁹⁸ *Id.* (opining that the personal views of one commissioner, sitting on a three person panel, are irrelevant and therefore improper to consider in determining the intent of the Commission as a government actor). Judge Kelly's belief that judges must separate the personal beliefs of individuals from their intent as government servants when attributing knowledge to the reasonable observer is supported by the Supreme Court's precedent, further enforcing the idea that relevance of knowledge is an important test. *See, e.g., McCreary Cnty. v. ACLU*, 545 U.S. 844, 863 (2005).

⁹⁹ For example, see *Trunk v. City of San Diego* where a Ninth Circuit panel cited anti-Semitism in the region many years before the lawsuit challenging the display, and attributed that knowledge to the observer who then used that biased history in his analysis of the display. *Trunk v. City of San Diego*, 629 F.3d 1099, 1121 (9th Cir. 2011). *But see, ACLU of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 303 (6th Cir. 2001) (declining to limit what the panel characterized as an encyclopedic knowledge while ruling on the Ohio state motto "With God, All Things Are Possible"). Surely judges would always be able to find some religious animosity if they delved into the history of an area. Such a consideration of history also goes to the reasonability of the observer, and is indeed another point at which such superfluous history must fall from the analysis.

¹⁰⁰ *Salazar v. Buono*, 130 S. Ct. 1803, 1824 (2010) (Alito, J., concurring).

¹⁰¹ *Compare Tenaflly Eruv Ass'n, Inc., v. Borough of Tenaflly*, 309 F.3d 144, 176 (3rd Cir. 2002) (attributing knowledge of lechis—items of religious significance to Orthodox Jews—to the reasonable observer while finding installation on a utility pole permissible), *with Briggs v. Mississippi*, 331 F.3d 499, 507 (5th Cir. 2003) (noting that the St. Andrews cross is not an overtly religious symbol despite its use in certain Christian denominations), *and ACLU of Ohio*, 243, F.3d at 302 (arguing against the observer knowing obscure religious symbols).

¹⁰² *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) (holding a commemorative statue put up in the state park was not an endorsement).

they are endorsements.¹⁰³ The observer should possess a working knowledge of major religious symbols, but need not know arcane or obscure facts and practices.¹⁰⁴ This is not to say that endorsement of a minority religion is acceptable simply because an observer does not know the symbols of the religion. Courts should presume the observer has a reasonable knowledge of relevant facts surrounding the religion allegedly involved and would therefore know the meaning of a symbol.

In a case like *Green v. Haskell County Board of Commissioners*, which involved a small community's display of a monument containing the Ten Commandments and the Mayflower Compact surrounded by other secular monuments, the Tenth Circuit's decision to ban the display would likely change if the observer analysis only considered relevant history.¹⁰⁵ The Tenth Circuit failed to fully separate the individual beliefs and statements of the Commissioners from their statements as officials of the county when analyzing the monument, in part because "Haskell County is a place where '[e]veryone knows each other.'"¹⁰⁶ The court noted that some of the statements possessed what seemed like a government official supporting religion in line with personal beliefs, but that does not mean all the statements should be treated in that way.¹⁰⁷

Personal religious beliefs of public servants are not indicative of their reasons for casting a

¹⁰³ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37 (2004) (O'Connor, J., concurring); see *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1033–34 (10th Cir. 2008) (holding that displays of crosses were not an endorsement in a town whose name literally means "the crosses"); *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1257 (9th Cir. 2007) (holding that removal of a cross from the Los Angeles County seal was not a disavowal of religion); *Briggs v. Mississippi*, 331 F.3d 499, 507 (5th Cir. 2003) (holding that a St. Andrews Cross in the state flag of Mississippi was not an endorsement); *King v. Richmond Cnty.*, 331 F.3d 127, 1283–84 (D.C. Cir. 2003) (determining that a sword, while sometimes a religious symbol, did not serve to endorse religion); *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 176; *Murray v. City of Austin*, 947 F.2d 147, 156 (5th Cir. 1991) (holding the use of a Latin cross in the municipal flag was not an endorsement).

¹⁰⁴ In the same vein as minority religions, symbols of "dead" religions were considered in the modern courts, and have found to be non-religious. *Alvarado*, 94 F.3d 1223 (9th Cir. 1996). This seems workable, as the symbols would represent a dormant piece of history, and not an active religious symbol that could influence an individual's belief in their standing in the community, so long as there was no strong evidence that through use of the symbol the government was seeking to revive the "dead" religion.

¹⁰⁵ *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 789–91 (10th Cir. 2009).

¹⁰⁶ *Id.* at 801 (alteration in original) (citation omitted).

¹⁰⁷ *Id.* at 801–2.

particular vote when the vote in question concerns a display with potentially religious significance. Private motivations should not be attributable to the government unless the government “fostered or encouraged the mistake.”¹⁰⁸ The court also incorrectly incorporated the motivations of the individual who requested the display’s erection into the observer’s knowledge.¹⁰⁹ These considerations may inform the observer when relevant, but when the considerations are at best prejudicial their inclusion is inappropriate. Without the consideration of those prejudicial facts in *Green*, the observer sees a display of the Ten Commandments and the Mayflower Compact, in a public space, approved by a Board of Commissioners and with little more information.¹¹⁰ The observer’s endorsement determination then turns on the objective view of the display without prejudicial information and likely results in the display successfully surviving litigation.

E. Reasonable Memory and Prospective Vision

Memory of the past is relevant for courts evaluating a challenged display or practice.¹¹¹ Judges often invoke the social history of the area in which a display occurs as being relevant just as they discuss the history of enacting laws and displays.¹¹² Unfortunately, some judges use the observer’s memory not just for understanding the meaning of the current display or the context the display exists in, but to create an unreasonable observer.¹¹³ The use of an unreasonable

¹⁰⁸ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (Scalia, J., opining).

¹⁰⁹ *Green*, 568 F.3d at 800.

¹¹⁰ *Id.* at 803.

¹¹¹ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 866 (2005).

¹¹² *See Trunk v. City of San Diego*, 629 F.3d 1099, 1121 (9th Cir. 2011) (discussing the locality’s history of anti-Semitism); *Doe v. Indian River School District*, 653 F.3d 256, 286–87 (3rd Cir. 2011) (noting the contentious history of prayer at public events locally is “illuminating”); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1028–34 (9th Cir. 2010) (addressing the social history under which “under God” was added to the Pledge of Allegiance).

¹¹³ *See, e.g., Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 178–79 (3rd Cir. 2008) (utilizing an observer who was hyper-sensitive to past activities, and who attributed too much tangential prejudiced history to the observer during the inquiry).

memory is a misapplication of Justice O'Connor's instruction and leads to precisely the kind of subjectivity that the reasonable observer inquiry must not tolerate.¹¹⁴

Memory and prospective vision are also relevant in understanding the context of a display or practice.¹¹⁵ Some judges insinuate that the reasonable observer, upon viewing a display or practice in a public forum, understands simultaneously that past uses of the forum for secular displays and displays of other faiths change the display they encounter and accordingly treat time like a visible fourth dimension.¹¹⁶ In that light, the observer also looks forward with prospective vision to displays that will occur because such a consideration allows the observer to weigh displays in new forums in their proper context.¹¹⁷

Failure to implement the prospective vision standard inhibits governments that have newly-created public forums from accommodating displays otherwise allowed in an established forum. Similarly, even in places where a well-established public forum exists, if the only display thus far is religious, that is not an indication, without some other proof, that the forum is hostile to secular displays or that only religious displays exist there permissibly. Prospective vision is a useful and powerful tool, which the observer should use to complement his reasonable memory

¹¹⁴ If courts follow the instruction that the observer is akin to the reasonable man of tort law, then there is clearly no room for hostility in the observer's memory. See generally *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring) (likening the reasonable man to the reasonable observer); RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) (noting that the reasonable man's "conduct is always up to standard.").

¹¹⁵ See, e.g., *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d, 1383, 1392 (11th Cir. 1993); *Ams. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1549 (6th Cir. 1992) (en banc) ("The reasonable observer knows that other speakers have used the Plaza before, and will do so again.").

¹¹⁶ *Chabad-Lubavitch of Ga.*, 5 F.3d, at 1392; *Ams. United for Separation of Church and State*, 980 F.2d at 1549.

¹¹⁷ For example, a town might declare a piece of property to be a new public park, and the first group to use the park for a function might be a religious organization, but that does not mean a secular group will not use the park in the future, nor does it mean that the church will ever use it again. This leaves a reasonable observer in no position to find an endorsement. Similarly, a single use denial would not be sufficient to find a disavowal without more evidence.

and understanding of the past. Such an observer protects from unreasonable tides of public perception and reduces both baseless hostility and undue deference toward religious displays.

F. A Reasonable Mind

As important as the many other characteristics of the observer are, perhaps his most valuable, and unfortunately malleable, trait is his reasonability. Justice O'Connor surely did not choose the words "reasonable observer" on a whim, nor did she keep using them for two decades as a matter of convenience. The reasonable observer should be unassailable and incapable of unreasonable action, just like the reasonable person of tort law.¹¹⁸

The observer must not view a display looking for violations and conspiracies to violate the Establishment Clause; to do so would not be reasonable.¹¹⁹ He carries no prejudices. The observer must not "look upon religion with a jaundiced eye, and religious speech need not yield to those who do."¹²⁰ The Court rejected a nonadherent as the reasonable observer,¹²¹ and analogously courts should freely dismiss zealots as the observer.¹²² A disinterested observer who understands that the United States is, by design, religiously accommodating and comprised of citizens of many faiths is the proper standard.¹²³ The status of the reasonable observer as a

¹¹⁸ *Pinette*, 515 U.S. at 779–780 (O'Connor, J., concurring).

¹¹⁹ See *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003). Judge Kelly cogently analogized the situation when he opined "[t]he fact that there were monuments for the Classes of 1954 and 1955 does not mean that the County preferred those classes over those graduating in 1957 or any other year." *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1243 (10th Cir. 2009) (denial of rehearing en banc) (Kelly, J., dissenting).

¹²⁰ *Ams. United for Separation of Church and State*, 980 F.2d at 1553. The mere presence of religion, or religiously affiliated symbols and tests, is not an establishment clause violation. *Van Orden v. Perry* 545 U.S. 677, 691 (2005).

¹²¹ *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring).

¹²² *Id.*; *Skoros v. City of New York*, 437 F.3d 1, 30 (2nd Cir. 2006) (rejecting the thought of a violation resting in the eyes of a single individual); *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996) (rejecting the need for empirical data when considering a challenge to "In God We Trust" being on currency).

¹²³ This conclusion would seem to follow from Justice O'Connor's allusion to tort law's reasonable observer. See RESTATEMENT (SECOND) OF TORTS § 283 cmt. e (1965) (stating that the reasonable observer is freed from the shackles of interest in the action, and therefore freed from the tendency "to prefer his own interests to those of others."). Furthermore Justice Thomas opined that the observer is of "indeterminate religious affiliation," and courts

fiction allows us to strip from him all inclinations that any real person, or group of people, has toward or against religion and grant him true objectivity as Justice O'Connor envisioned in *Lynch*.

The observer's objectivity exists not only in the present but extends to past and future conduct as well. Furthermore, judges should direct the observer's reasonability towards both individuals and governments.¹²⁴ Just because an endorsement or disavowal existed in the past should not bar an individual or government from similar conduct in the future.¹²⁵ For example, a newly erected display almost exactly the same as one that constituted a violation might exist in a public space but, due to some kind of disclaimer or facet that diminishes the perceived endorsement, the current display is constitutionally permissible.¹²⁶ Governments that do little to change the reasonable perception of the observer, as in *McCreary County v. ACLU of Kentucky*, rightly find themselves limited by their past transgressions.¹²⁷ The observer must remain objective when looking into the past or the future and he should not carry bias against current acts by virtue of a past Establishment Clause violator carrying them out or supporting them openly.

With the imposition of a reasonable mind, having a reasonable memory and prospective vision, one understands the troubles of the decision reached by the Third Circuit in *Borden v.*

could conclude that as such a hypothetical, the observer has no interest in any religious belief. *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring).

¹²⁴ See, e.g., *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998); *Kreisner v. San Diego* 1 F.3d 775, 784 (9th Cir. 1993).

¹²⁵ *Granzeier v. Middleton*, 173 F.3d 568, 576 (6th Cir. 1999) (finding that the acts of an errant individual posting overtly religious closing signs, though a state employee, do not taint the practices of the entire government to closure on that day). But see, *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 187–88 (3rd Cir. 2008) (illustrating the difficult position a public school football coach who had past endorsement violations would be in should another individual choose to pray at a football game).

¹²⁶ *ACLU of N.J. v. Schundler*, 168 F.3d 92, 107 (3rd Cir. 1999); *Ams. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1549 (6th Cir. 1992) (en banc) (holding a truly private display of religious symbols in a public forum is not an endorsement).

¹²⁷ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 850–51 (2005).

School District of East Brunswick.¹²⁸ In *Borden*, the Third Circuit determined that a high school football coach who led prayers for his football team for twenty-three years could not participate in or respectfully observe future prayers the team might choose to initiate of its own accord.¹²⁹ The court justified this decision as complying with the Supreme Court's rationale in *Santa Fe Independent School District v. Doe*, but the cases are clearly distinguishable.¹³⁰

In *Borden*, nothing stopped the team's continued prayer before games; the only person prohibited from participating or being respectful and silent during the prayer was their head coach, Mr. Borden.¹³¹ In *Santa Fe*, the question was whether it was permissible for a speaker to deliver invocations addressed to the crowds at school-sponsored events.¹³² A direct analogy between the two cases would be a player or coach on the team delivering an invocation to the crowd and the team on the field or the public address announcer asking the crowd to be silent while the team prayed, but neither of those situations was present in *Borden*.

By prohibiting Mr. Borden from kneeling during his team's prayer, or even watching in silent support, the Third Circuit puts Mr. Borden in an impossible position; he must involuntarily violate the Constitution because his position is marked with the imprimatur of government authority.¹³³ In the future, Mr. Borden must either turn away so the reasonable observer perceives that the government is turning its back on religious prayer, thus disavowing it, or he must be respectfully silent or reverent, which leads to the conclusion that government endorses religion. He cannot permissibly tell the team its members may not pray, because doing so would

¹²⁸ *Borden*, 523 F.3d at 158–59.

¹²⁹ *Id.* at 179.

¹³⁰ *Id.* at 176–77.

¹³¹ *Id.* at 178.

¹³² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 297–98 (2000).

¹³³ *Borden*, 523 F.3d at 177 n. 20.

violate their religious freedom. For Mr. Borden to continue his employment as a football coach in East Brunswick he must violate the Constitution. Such a result is not reasonable.

Mr. Borden's past prayers were a violation; of this there is no doubt in light of *Santa Fe*.¹³⁴ He organized and sometimes led public prayers at football games with the imprimatur of government authority by virtue of his position.¹³⁵ However, in a proper analysis of the *current* conduct, the reasonable observer undoubtedly notes that Mr. Borden stopped leading the prayers and is simply accommodating his team's religious expression.¹³⁶ The observer would not ignore the past conduct. He surely should look at the past and understand the conduct that occurred before the school asked Mr. Borden to stop leading prayers, and similarly understand that future football teams under Mr. Borden's leadership could decide they will not have a team prayer independent of Mr. Borden's influence. Weighing these past, present and future acts, a reasonable minded observer, having a reasonable memory and prospective vision, should see Mr. Borden's current actions as an accommodation of religion, which is squarely within constitutional bounds.

G. The "Would" Requirement

Too often, courts applying the endorsement test's reasonable observer inquiry do not comply with the language used by Justice O'Connor.¹³⁷ The inquiry, by design, disallows

¹³⁴ *Id.* at 176.

¹³⁵ *Id.*

¹³⁶ *Id.* at 161–62.

¹³⁷ See, e.g., *Am. Atheists v. Duncan*, 637 F.3d 1095, 1121 (10th Cir. 2010) (discussing what a reasonable observer "may" believe), *cert. denied*, 132 S. Ct. 12 (2011); *Young v. Beard*, 284 F. App'x 958, 964 (3rd Cir. 2008) (using a "could" standard in determining a prison terminating a music program did not violate the First Amendment); *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1220 (11th Cir. 2004) (also using a "could" standard); *Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 33 (1st Cir. 2001) (using a "might" standard in evaluating a statute that prohibited, among other unattended displays, the local holiday display); *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 962 (4th Cir. 1990) (Blatt, J., dissenting) (using a "could" standard to evaluate whether a town allowing a private group to erect a crèche on public land was permissible). The lower bar of a "could" standard, advocated by Justice Stevens,

alternatives and possibilities that are not certain.¹³⁸ The use of “could,” “might,” or “may” in the standard opens up a door for a heckler’s veto because it promotes the search for the smallest or most sensitive viewpoint and lowers the bar dramatically for the display, law or practice to violate the Establishment Clause.¹³⁹ Just as there is no room for judges to attempt to attribute potential alternative observers with regard to age or number, there is no room for judges to attempt to analyze what a potential observer “might” see.¹⁴⁰ The appropriate standard is “would.”¹⁴¹ The observer is an ideal hypothetical standard, if his perception of what he observes does not lead him to conclude that there is an impermissible endorsement then the challenged display or practice passes constitutional muster under the observer inquiry of the endorsement test.¹⁴²

H. Rejecting the “Community Ideal”

Justice O’Connor opined that the reasonable observer’s identity is a determination that judges should ground in the “community ideal of social judgment, as well as rational

ultimately creates a hecklers veto and would not adequately protect the First Amendment. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799-800 (1995) (Stevens, J., dissenting).

¹³⁸ See, e.g., *Freedom From Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010) (“[T]he constitutionality of a state statute does not turn on the subjective feelings of plaintiffs as to whether a religious endorsement has occurred.”); *Bauchman v. W. High School*, 132 F.3d 542, 556 (10th Cir. 1997) (determining that while some observers might be more sensitive, and therefore find endorsement in the song selection for the holiday concert, that is not the standard for the reasonable observer); *Ams. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1550 (6th Cir. 1992) (opining that the reasonable observer standard is not what “an unreasonable person could think of the display” but rather “what a reasonable person would think.”).

¹³⁹ If the use of a young observer creates a heckler’s veto by lowering the bar, then surely a standard that accepts alternative views would do the same. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

¹⁴⁰ *ACLU of Ohio Foundation, Inc. v. Ashbrook*, 375 F.3d 484, 503 (6th Cir. 2004) (Batchelder, J., dissenting); *Briggs v. Mississippi*, 331 F.3d 499, 507 (5th Cir. 2003) (holding that a reasonable observer would not see endorsement in Mississippi’s state flag by virtue of a “St. Andrew’s Cross” being displayed, even though the litigants and others might see a religious symbol); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 78–79 (2nd Cir. 2001).

¹⁴¹ See, e.g., *Books v. Elkhart Cnty.*, 401 F.3d 857, 867 (7th Cir. 2005) (“This does not mean, however, that to constitutionally display a religious item on public property the government must ensure that it offends no one. That would be asking the impossible.”); *ACLU of Ohio Foundation, Inc.*, 375 F.3d at 505–06 (Batchelder, J., dissenting).

¹⁴² See *Ams. United for Separation of Church and State*, 980 F.2d at 1550 (determining that the standard is not “what an unreasonable person could think of the display” but instead “what a reasonable person would think.”).

judgment.”¹⁴³ However, after nearly three decades of applying the endorsement test, it is clear that courts must eliminate the community ideal from the inquiry because it is unworkable.¹⁴⁴ Judges use this “community ideal” instruction to permit a community’s values to bear on the reasonable observer, which yields a blatantly impermissible result by creating an observer who harbors the bias or deference of the community.¹⁴⁵ Allowing a community’s subjective values to infiltrate the metric against which we measure endorsement destroys any hope of uniformity in the courts and opens up room for a heckler’s veto.¹⁴⁶ The application of the “community ideal” is far too ambiguous, and any potential definition of that term creates either constitutional or practical issues.

If judges define “community” as a small political area, say a town or county, religious and atheistic enclaves might spring up and the unanimity of opinion in their communities would result in the abolition or acceptance of all religious displays. Judges would promote, under the guise of conforming to Justice O’Connor’s endorsement test, enclave formation by informing adherents that where enough of them gather they may use government to endorse religion. This yields an illogical conclusion as it forces the observer into the prohibited situation of becoming an adherent to a particular majority faith.¹⁴⁷ Furthermore, such a holding erodes the

¹⁴³ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring).

¹⁴⁴ The community ideal’s advantage in tort law is that it looks away from an individual’s standard for negligence. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965). However, the advantage of the reasonable man is the downfall of the reasonable observer if courts let an individual community create its own standard for First Amendment violations. The concept of a “community ideal” in tort law is not intended to calculate any actual course of behavior conducted by actual people. *Id.* Rather the “ideal” is neither found in individuals alone, or in a collective, making any head count determining the “community ideal” an incorrect interpretation. *Id.*

¹⁴⁵ *Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011); *Skoros v City of N.Y.*, 437 F.3d 1, 47 (2nd Cir. 2006) (Straub, J., dissenting); *Bauchman v. W. High School*, 132 F.3d 542, 556 (10th Cir. 1997).

¹⁴⁶ *Newdow*, 542 U.S. at 34–35 (2004) (O’Connor, J., concurring).

¹⁴⁷ See *supra* note 123 and accompanying text.

constitutional standard and ultimately fails to protect anyone from government endorsement of religion.¹⁴⁸

If a small community is unworkable, then it would be logical to seek a broader standard that, potentially, provides a useful metric but this analysis also proves unworkable. Courts should not saddle the observer with the unenviable task of identifying the current standard of a state or nation because the fluctuating metric provides little guidance, and identification of the current standard would prove impractical, if not impossible.¹⁴⁹ This broader approach would reduce constitutional protections to a judge's best guesses or considerations of polling data. The task would be burdensome, lack uniformity and ultimately be dangerous to the preservation of First Amendment rights.

Justice O'Connor instructed that courts should not engage in a head count before protecting constitutional rights, which indicates that the test should not accept subjective input on the "average" or "community" ideal.¹⁵⁰ Just as the reasonable person in tort law is beyond ordinary standards, and not swayed by what a juror or several jurors would do, the reasonable observer does not change based on the surrounding community or its conduct.¹⁵¹ Judges should not allow an increasingly secular or sectarian community to influence their decisions; such a consideration only serves to create an unnecessary variable for courts to attempt to apply, decreasing uniformity and going against the instruction of Justice O'Connor and the

¹⁴⁸ The endorsement test provides protection only so long as the objectivity remains in the observer. A subjective view is too polarizing to fall within the Constitutional standard that requires accommodation but non-endorsement. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citing *Zorach v. Clauson*, 343 U.S. 306, 314–315 (1952)).

¹⁴⁹ Justice O'Connor called the religious heterogeneity of America "dizzying" and admitted its incorporation into the test would render the endorsement analysis an "absurdity." *Newdow*, 542 U.S. 34–35 (O'Connor, J., concurring).

¹⁵⁰ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring).

¹⁵¹ RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

Constitution.¹⁵² For clarity, the test should not incorporate the words “community ideal.” If judges accept the true identity of the reasonable observer as completely hypothetical and objective, there is no need for a “community ideal” inquiry.

I. Affecting Standing in the Political Community

Justice O’Connor opined that the crux of the observer inquiry in the endorsement analysis is an attempt to discover whether the reasonable observer perceives the ideals expressed through the display, law or practice affects standing in the political community.¹⁵³ However, many courts do not even cite this goal when applying the endorsement test, and instead end their analysis by determining whether an endorsement or disavowal of religion exists.¹⁵⁴ This is an incomplete application of the endorsement test as Justice O’Connor envisioned it.

The observer is only a vehicle through which courts determine if there is an effect to political standing. Finding religious meaning in a display, practice or disavowal may be a prerequisite for the endorsement test, but this is not the test’s ultimate inquiry.¹⁵⁵ In Justice O’Connor’s analysis, the endorsement or disavowal of religion must further affect, or have the impermissible perception of an effect on, standing in the political community in order to violate the First Amendment.¹⁵⁶ In order for there to be an effect on political standing, the test requires something more than a nonadherent experiencing discomfort.¹⁵⁷ Without this greater impermissible result an endorsement of religion is only the shadow of a threat.¹⁵⁸

¹⁵² *McCreary Cnty. v. ACLU*, 545 U.S. 844, 884 (2005) (O’Connor, J., concurring).

¹⁵³ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring).

¹⁵⁴ *E.g.*, *Knights of Columbus v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001).

¹⁵⁵ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

Justice O'Connor accepted the proposition that there is an endorsement when "pressure upon religious minorities to conform to the prevailing officially approved religion is plain."¹⁵⁹ Some take this to mean Justice O'Connor's observer should concern himself with the ability to "help shape political decisions."¹⁶⁰ Some judges take a similar view but also erroneously use a subjective approach to determine whether the challenged display or practice has relevance to standing in the political community.¹⁶¹ However, just as there is no reason to expose the endorsement test to a heckler's veto at any earlier point in the analysis, it is illogical to invite judges to do so at the last step of their inquiry.

This step is where courts must "distinguish between real threat and mere shadow."¹⁶² Real threat, a violation of the Establishment Clause, only exists where government's endorsement of religion has, at a minimum, the perception to the reasonable observer that religion is relevant to standing in the political community.¹⁶³ Because discussion regarding the meaning of "standing in the political community" is not plentiful, there is little more than Justice O'Connor's original instruction regarding an individual's feeling that religion is relevant to their "status in the political community."¹⁶⁴

¹⁵⁹ *Wallace v. Jaffree* 472, U.S. 38, 70 (1985) (O'Connor, J., concurring) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)) (internal quotes omitted).

¹⁶⁰ Neil R. Feigenson, *Political Standing and Government Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DePaul L. Rev. 53, 67 (1991).

¹⁶¹ *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 185 (3rd Cir. 2008) (Barry, J., concurring).

¹⁶² *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (quoting *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring)) (holding the presence of the cross on government insignia was not an endorsement).

¹⁶³ At this point courts must diverge from the perception of the reasonable observer with regard to who is affected by the political standing becoming relevant. As the observer is assumed to be of indeterminate religious belief, then his political standing could clearly never be affected by one religion being endorsed. *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring).

¹⁶⁴ *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

The majority opinion in *Lynch*, citing Justice Story, provides a standard that might prove to make the test workable: the idea of a political hierarchy based on religious belief.¹⁶⁵ This standard allows the observer to remain objective and determine whether political standing is relevant without entering the biased fray himself. Furthermore the observer can protect the rights of all members of the political community with this standard. Where he finds a political hierarchy created due to religious differences, in which he cannot hold either an elevated or disadvantaged position because he lacks determinate religious affiliation, then there is a proscribed government endorsement. This is also an adequate way to eradicate from the analysis distinctions drawn in the community that are not relevant to standing in the political community, but rather only the social community, or distinctions drawn on grounds other than religion.¹⁶⁶ Simply put, the observer need only determine if an objective perception of the display, law or practice would recognize the existence of multiple classes of citizens, holding different amounts of political power, due to their religious beliefs.

This element of the test helps to maintain an accommodating, and therefore appropriate, standard. Arguments from critics advance the idea that courts should not provide an accommodating standard for religion because doing so for one group might be at the expense of another.¹⁶⁷ Accommodating the religious beliefs of the nation's populace, however, is definitively within the intention of the Constitution and a standard that appreciates that fact is

¹⁶⁵ *Id.* at 678 (majority opinion) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 728 (1833)); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 709 (2002). See also, *Zorach v. Clauson*, 343 U.S. 306, 319 (1952) (Black, J., dissenting).

¹⁶⁶ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) (recognizing there is a "natural interplay" between competing beliefs but maintaining that government "distortion" of that interplay is impermissible).

¹⁶⁷ See, e.g., *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1488 (3rd Cir. 1996) (en banc); *Murray v. City of Austin*, 947 F.2d 147, 170 (5th Cir. 1991) (Goldberg, J., dissenting) ("A little accommodation is a dangerous thing—the floodwaters may not be far behind.").

appropriate.¹⁶⁸ Justice O'Connor herself opined that the First Amendment's religion clauses, as envisioned by the Framers of the Constitution, have a fundamental goal of "preserving religious liberty to the fullest extent possible in a pluralistic society," and that "[b]y enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat."¹⁶⁹ In light of these instructions, accommodation is the only acceptable standard. Neither hostility nor deference towards religion coming from the judiciary is acceptable where it simply substitutes for that which may not originate in the elected branches of government.

III. CONCLUSION

The endorsement test's reasonable observer inquiry presents a workable standard, given the proper refinements and a return to guiding principles. In the refined analysis, the test departs from its broad "reasonable observer" language and narrows with a better understanding of its oft misapplied constituent parts. The test becomes: A single, mature observer, with reasonable knowledge and a reasonable perception of acts in all times, who observed the entirety of the challenged display or practice, and would reasonably find that the government endorsed or disavowed a religion such that he reasonably perceives that a political hierarchy, based on religion, exists.

Of course, this test still has the shortcoming of a judge sometimes defining the line between reasonable and unreasonable knowledge or assumption and truly relevant history or superfluous information, but that variation is within an accepted range of discretion given to judges. The refined approach results in less uncertainty for both jurists and government officials making discretionary decisions. It further ensures both the constitutionally mandated religious

¹⁶⁸ *Lynch*, 465 U.S. at 673; *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 779 (7th Cir. 2001) (Coffey, J., dissenting); *Elewski v. City of Syracuse*, 123 F.3d 51, 54–55 (2nd Cir. 1997).

¹⁶⁹ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 882 (2004) (O'Connor, J., concurring).

accommodation and separation continue to exist. The flexibility that remains in this refined reasonable observer analysis is the kind of flexibility Justice O'Connor perceived as a virtue.

As the reasonable observer inquiry of the endorsement test exists today, judges inappropriately make subjective decisions, and they do so with widely varied results. Under the current standard, judges can create "absurd" observers who are "replete with foibles." If we remove the easily misapplied variables from the hands of judges it will reduce error, provide less room for excessive judicial deference or hostility towards religion and facilitate a more uniform application of constitutional principles. Judges no longer need to engage in a Sisyphean task to protect religious freedom. By adopting this standard judges gain a useful tool, easily reproduced and applied to the full gamut of cases, which will create a clearer and more consistent metric for evaluating potential Establishment Clause violations and protecting First Amendment rights.