

1-15-2013

The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow

Mark Strasser

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Mark Strasser *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 Pepp. L. Rev. Iss. 5 (2013)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol39/iss5/12>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.speth@pepperdine.edu, linhgavin.do@pepperdine.edu.

The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow

Mark Strasser*

- I. INTRODUCTION
- II. THE BIRTH AND EVOLUTION OF THE ENDORSEMENT TEST
 - A. *Lynch and the Birth of the Endorsement Test*
 - B. *The Court Adopts the Endorsement Test*
 - C. *When Would a Reasonable Observer Infer Endorsement?*
- III. THE POST-O'CONNOR ENDORSEMENT TEST
 - A. *Pleasant Grove City v. Summum*
 - B. *Salazar v. Buono*
 - C. *What Do Summum and Salazar Suggest About the Future of the Endorsement Test?*
- IV. CONCLUSION

I. INTRODUCTION

The endorsement test, first explained by Justice O'Connor in her *Lynch v. Donnelly*¹ concurrence and adopted by the Court in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,² provides one way to determine whether state action violates Establishment Clause guarantees. Now that Justice O'Connor has retired, there is some question whether the endorsement test will survive. Despite commentators' claims to the contrary, however, there is no reason to think that the endorsement test retired along with Justice O'Connor, although a separate issue is whether those on the Court using the test will do more than give occasional lip service to the interests and

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio. This Article is a part of Pepperdine University School of Law's February 2012 conference entitled, *The Competing Claims of Law and Religion: Who Should Influence Whom?*

1. 465 U.S. 668, 687-95 (1984).

2. 492 U.S. 573, 574 (1989).

perspectives of minority religious groups.³ At this point, the most likely scenario is that the Court will sometimes use the test,⁴ but will be unlikely to use it to strike down a particular practice.

Part II of this Article discusses the development of the endorsement test during the period that Justice O'Connor was on the Court, noting some of the ambiguities in the test's formulation and application. Part III of this Article discusses how the test has been used in two cases since Justice O'Connor's retirement, noting that the way that the test has been used after Justice O'Connor's retirement mirrors the way that it was used while she was still on the Court. The Article concludes that the test is likely to remain one of the tests used by the Court to determine whether Establishment Clause guarantees have been violated—the test will retain its potential to assure that individuals will not be treated as second-class citizens because of their religious beliefs but will in reality pay mere lip service to religious minorities' sincere reactions to a variety of practices privileging some religions over others and privileging religion over non-religion.

II. THE BIRTH AND EVOLUTION OF THE ENDORSEMENT TEST

The endorsement test has been evolving since its inception in the 1980s. At first, the test seemed to have great promise, because it was designed to prevent the government from acting in ways that would make religious minorities feel like second-class citizens.⁵ While the test as applied did not always fulfill its potential, it at least seemed much more protective than other possible tests.⁶ Regrettably, the test is sometimes used in ways that not only fail to protect religious minorities, but also implicitly cast aspersions upon some of the very people whom it is designed to protect.⁷

3. See Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 140 (“With the departure of Justice O'Connor—the author and most committed supporter of the endorsement notion—there is a good chance that the test will retire along with her. In fact, because the test is so keyed to judicial perception, a change in personnel almost necessarily changes the rule.”).

4. Even after the text had been adopted and Justice O'Connor was still on the Court, the test was only sometimes used. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down graduation benediction as violation of Establishment Clause guarantees against coercion).

5. Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 668.

6. See *Allegheny*, 492 U.S. at 627–28 (O'Connor, J., concurring in part and concurring in the judgment).

An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, . . . but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.

Id. (internal citation omitted).

7. Strasser, *supra* note 5, at 668.

A. Lynch and the Birth of the Endorsement Test

The endorsement test first appeared in a concurrence written by Justice O'Connor in *Lynch v. Donnelly*.⁸ The *Lynch* Court upheld a holiday display in a public park in Pawtucket, Rhode Island, and Justice O'Connor claimed that her endorsement test was both compatible with the Court's decision and with the prevailing Establishment Clause jurisprudence.⁹

The Christmas display at issue included, among other things, reindeer pulling Santa's sleigh, a Christmas tree, an elephant, a teddy bear, candy-striped poles, and a crèche.¹⁰ The constitutional challenge was to the inclusion of the crèche in particular.¹¹

To assess whether that inclusion involved an impermissible promotion of religion, the *Lynch* Court examined some of the previous practices that had passed constitutional muster.¹² Concluding that the crèche's inclusion did not promote religion any more than did the practices whose constitutionality had already been upheld, the Court held that the practice at issue did not violate constitutional guarantees.¹³

Regrettably, there was something at the very least disingenuous about the *Lynch* Court's analysis. The constitutionally permissible practices that the *Lynch* Court described as promoting religion had been described much differently when the constitutionality of those very practices had been at issue—indeed, the Court had suggested in many of the cases that the failure to uphold the practice at issue would indicate a lack of neutrality towards religion,¹⁴ which might be thought to indicate either “hostility toward

8. 465 U.S. 668, 687–95 (1984).

9. In his *Lynch* dissent, Justice Brennan suggested that the majority decision was incompatible with the existing jurisprudence. *Id.* at 695 (Brennan, J., dissenting) (“Despite the narrow contours of the Court’s opinion, our precedents in my view compel the holding that Pawtucket’s inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional.”).

10. *Id.* at 671 (plurality opinion).

11. *Id.*

12. *Id.* at 675–79.

13. *Id.* at 681–82.

14. See, e.g., *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976) (reasoning that “religious institutions need not be quarantined from public benefits that are neutrally available to all”); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (“The law merely makes available to all children the benefits of a general program to lend school books free of charge.”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (suggesting that the legislation at issue does “no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools”).

religion”¹⁵ or a “callous indifference” towards religion.¹⁶ At the very least, the malleability of the implicit standard used by the *Lynch* Court is a cause for concern. If the *same* standard could yield the conclusion that the failure to permit certain practices would hinder or undermine religion *and* that permitting those very practices would promote religion, then the standard is either useless or, perhaps, simply providing cover for a conclusion reached in light of a different method or standard of analysis.

In her *Lynch* concurrence, Justice O’Connor proposed and explicated the endorsement test as a method for determining whether Establishment Clause guarantees had been violated.¹⁷ She explained that the *Lemon* test, sometimes used at the time to determine whether Establishment Clause guarantees had been violated,¹⁸ should be understood to specify two different ways in which the state might violate the relevant guarantees: (1) “excessive entanglement with religious institutions,”¹⁹ and (2) “government endorsement or disapproval of religion.”²⁰ The latter, she explained, should be understood in terms of the endorsement test.

The endorsement test precludes the government from sending a “message to [religious] 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.”²¹ The government is also prohibited from sending the opposite message, such as its disapproval of religion.²²

The endorsement test focuses on two distinct messages, which may but need not coincide. One involves what the state was trying to communicate by performing the challenged action, and the other involves the message

15. *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970).

16. *Lynch*, 465 U.S. at 673. Sometimes, members of the Court accuse each other of being either hostile or callous toward religion. See *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 610 (1989) (“Justice Kennedy repeatedly accuses the Court of harboring a ‘latent hostility’ or ‘callous indifference’ toward religion . . .”).

17. *Lynch*, 465 U.S. at 687–94 (O’Connor, J., concurring).

18. For example, the *Lemon* test was not used in *Marsh v. Chambers*, in which the Court upheld the practice of legislative prayer. *Marsh v. Chambers*, 463 U.S. 783, 800–01 (1983) (Brennan, J., dissenting) (“I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”). The test was used in *Mueller v. Allen*, 463 U.S. 388 (1983), to uphold Minnesota’s granting a tax deduction for expenses incurred in sending children to elementary and secondary schools, and was used in *Wallace v. Jaffree*, 472 U.S. 38 (1985), to strike down an Alabama law setting aside a period of silence (not to exceed a minute) at the beginning of the first class of the day for meditation or voluntary prayer.

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

20. *Id.* at 688.

21. *Id.*

22. *See id.*

actually communicated.²³ If either the intended or the actual message involves the endorsement or disapproval of religion, then the challenged action fails the test and is unconstitutional.²⁴

Consider how one would go about determining what a state was trying to communicate when performing a particular action. One might examine the express comments of those approving a particular policy.²⁵ However, if that were the relevant test, it would be unsurprising for many legislators to be rather circumspect in what they would say on the record if only so that their legislative action would be more likely to survive a constitutional challenge.²⁶ Indeed, one might expect legislators to expressly deny that they were attempting to endorse certain religious views over others in an attempt to forestall a charge of favoritism,²⁷ although a separate issue would be whether a court would accept the legislators' comments at face value.²⁸

Suppose that some legislators make clear that they support particular legislation because they want to promote particular religious views.²⁹ That hardly establishes that others supporting the measure also want to promote

23. *See id.* at 690.

24. *See id.* (“An affirmative answer to either question should render the challenged practice invalid.”).

25. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court stated:

Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: “[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?” Councilman Cardoso said that Santeria devotees at the Church “are in violation of everything this country stands for.” Councilman Mejides indicated that he was “totally against the sacrificing of animals” and distinguished kosher slaughter because it had a “real purpose.” The “Bible says we are allowed to sacrifice an animal for consumption,” he continued, “but for any other purposes, I don’t believe that the Bible allows that.” The president of the city council, Councilman Echevarria, asked: “What can we do to prevent the Church from opening?”

Id. at 541.

26. *See* Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court’s Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 340 (1994) (“The Court could demand direct evidence of illicit motivation before finding animus. This predicate would be very difficult to establish because individuals or legislators who wished to invidiously discriminate would be unlikely to reveal their actual motivations.” (footnote omitted)).

27. *See* 154 CONG. REC. E2174 (daily ed. Sept. 29, 2008) (Rep. Corrine Brown stated: “It is not my intention by this statement to endorse one religion or religious leader over another.”).

28. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (“But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”).

29. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 41 (2004) (O’Connor, J., concurring in the judgment) (“It is true that some of the legislators who voted to add the phrase ‘under God’ to the Pledge may have done so in an attempt to attach to it an overtly religious message.”).

those same religious views,³⁰ especially when the Constitution precludes legislatures from trying to do so.³¹ Merely because particular individuals wish to promote certain religious views would not itself justify imputing a similar goal to the state. That said, however, there will be some circumstances under which the state will be found to have a forbidden purpose. For example, in *Wallace v. Jaffree*,³² the Court examined an Alabama statute authorizing a minute of silence to begin the school day “for meditation or voluntary prayer.”³³ Because a minute of silence for meditation was already authorized,³⁴ the Court could discern *no* secular purpose in specifying that the minute set aside could be used for voluntary prayer as well.³⁵

If a state will be found to intend to promote religion only in cases in which there is *no* secular purpose for its action, then there will be very few instances in which the state will be found to have an impermissible goal.³⁶ In most cases, there will be some secular purpose that can be asserted.³⁷ Justice O’Connor expressly rejected that the mere existence of a secular purpose would immunize the state from the charge that it was attempting to promote religion.³⁸ For example, she noted that the Court had struck down posting copies of the Ten Commandments in the public schools,³⁹ even when the state had some secular purposes behind doing so, for example, “instilling most of the values of the Ten Commandments and illustrating their connection to our legal system.”⁴⁰ Thus, the relevant question is not whether

30. *See id.* at 25–26 (Rehnquist, C.J., concurring in the judgment) (“The amendment’s sponsor, Representative Rabaut, said its purpose was to contrast this country’s belief in God with the Soviet Union’s embrace of atheism. 100 Cong. Rec. 1700 (1954). We do not know what other Members of Congress thought about the purpose of the amendment.”); *see also* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.”).

31. *See* *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (“[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.”).

32. 472 U.S. 38 (1985).

33. *Id.* at 40.

34. *See id.*

35. *Id.* at 56.

36. *Cf. McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 901–02 (2005) (Scalia, J., dissenting) (suggesting that the relevant test is whether the state has any secular purpose at all).

37. *See id.* at 865 n.13 (discussing “the ease of finding some secular purpose for almost any government action”).

38. *See* *Lynch v. Donnelly*, 465 U.S. 668, 690–91 (1984) (O’Connor, J., concurring) (“That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.”).

39. *See id.* at 691 (citing *Stone v. Graham*, 449 U.S. 39 (1980)).

40. *See id.*

there was any secular purpose at all but, instead, whether the religious purposes “dominated.”⁴¹

After explaining some of the factors to be considered as a general matter when seeking to uncover the state’s purposes, Justice O’Connor set about analyzing what the state intended to convey by including a crèche within the challenged display. The district court had found that the state had intended to promote religion by including the crèche,⁴² but Justice O’Connor disagreed: “When viewed in light of correct legal principles, the District Court’s finding of unlawful purpose was clearly erroneous.”⁴³

What had been the district court’s error? Justice O’Connor criticized the district court for its willingness to “ascertain the city’s purpose in displaying the crèche separate and apart from the general purpose in setting up the display.”⁴⁴ Of course, the district court had focused on the crèche because the challenge had been to its inclusion in particular. Each year, the display had been assembled anew. The plaintiff was not seeking to enjoin the city from having a holiday display at all but, instead, was seeking to prevent the city from including a particular element within that display.

Justice O’Connor did not explain why a specific part of the display could not be challenged, although some justifications come to mind. Perhaps she feared that permitting such a challenge would invite challenges to particular aspects of sculptures or paintings, although those artistic displays might be distinguishable in that the removal of the challenged part might be much more difficult. For example, removing a part of a statute would literally destroy the work.⁴⁵ Of course, there would be other ways to prevent a statue from conveying a particular message; for example, one might try to cover up a part of a display that was deemed offensive.⁴⁶ However, covering up part of the work might itself be thought to convey a message; for example, that there was something about that part of the work in particular that should not be seen. Such a method of altering a message might be contrasted with changing the composition of a display by including

41. *Id.*

42. *See id.*

43. *See id.*

44. *Id.*

45. One might have a monument that included both religious and non-religious elements. *See Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 801 (10th Cir. 2009) (discussing monument which included the Mayflower Compact in addition to the Ten Commandments).

46. *See, e.g.,* Melvin I. Urofsky, *The Bull by the Horns: Nadine Strossen, Pornography, and Free Speech*, 41 TULSA L. REV. 677, 680 (2006) (discussing “Attorney General John Ashcroft hanging drapes over the full-figured, but unfortunately bare-breasted Statue of Justice in, of all places, the Justice Department”).

different elements in a particular year.⁴⁷ There would be nothing contained in the display itself that would suggest that there had been any controversy about the elements included within it.

True, someone might well remember that other elements had been included in previous years, so it should not be thought that the failure to include something in a display would simply go unnoticed. That said, however, the failure to include a crèche might well be taken in a different way than would, for example, covering up a crèche that was part of a display.

One of the issues at trial was whether the city would have a display at all if the crèche were not included. The mayor had testified that the display would be erected without the crèche, if necessary,⁴⁸ although he also testified that people would be upset if the crèche were not included.⁴⁹ Yet, an important element of the analysis involves why those people would be upset. There was testimony that the display would serve its commercial purpose of drawing people downtown even if the crèche were not included,⁵⁰ and that inclusion of the crèche added a religious dimension to the display.⁵¹ Thus, the secular purposes for its inclusion were undermined at trial, and there was strong evidence that its inclusion was motivated by a desire to promote the religious aspects of Christmas. But if the public outrage at the crèche's exclusion was to the state refusal to endorse the majority's religious beliefs, then the negative reaction would be to the state refusal to violate the Constitution.

Justice O'Connor also criticized the district court for finding that the city's "use of an unarguably religious symbol 'raises an inference' of intent to endorse."⁵² Yet, the district court had not simply said that by using the crèche the city should be inferred to have intended to endorse a particular religion. On the contrary, the court referred to a variety of factors that supported its conclusion. For example, the mayor had implied that not

47. The design might change from year to year. *See* *Donnelly v. Lynch*, 525 F. Supp. 1150, 1155 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984) ("Subject to the final approval of the Director of Parks and Recreation, a City maintenance supervisor designs the layout of the display. The Mayor may make changes in the layout."); *see also id.* at 1155 n.6 ("The Mayor testified that he had in fact made changes in the display in the past.")

48. *See id.* at 1158.

49. *Id.*

50. *See id.* at 1159 (discussing testimony that "the nativity scene added 'absolutely nothing' to the impact of the display for commercial purposes").

51. *See id.* at 1171 ("The City effectively concedes that the role of the creche in the Hodgson Park display is to evoke the religious aspect of Christmas."); *see also id.* at 1161 ("The most recurrent comments appearing in over half the letters are that the birth of Christ is the essence of Christmas, and that the presence of the creche, as a symbol of this spiritual core, is necessary to preserve the true meaning of the holiday.")

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

including the crèche in the Christmas display would “take Christ out of Christmas.”⁵³ Apparently, many in the community supported including the crèche in the display because they believed that the city “had a right to sponsor and support the religious views of the majority.”⁵⁴ The court further noted that the city had not taken any steps to minimize or disclaim any perceived endorsement of religion resulting from inclusion of the crèche.⁵⁵ The district court’s understated conclusion that one might reasonably infer an intent to endorse was transformed by Justice O’Connor into an unwarranted assumption allegedly based on the mere fact of the crèche’s inclusion.⁵⁶

The errors mentioned by Justice O’Connor suggest that a court making use of the endorsement test should not examine whether a particular part of a display should have been included, but instead should examine the overall effect of a particular display. If a display includes a crèche, then one might examine factors such as how big the crèche is⁵⁷ and where it is placed⁵⁸ to determine whether the overall effect of the display is to endorse religion. Rather than engage in that kind of analysis to determine whether the display as a whole was intended to endorse religion or, perhaps, would have the effect of endorsing religion, Justice O’Connor suggested that the “evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols.”⁵⁹ Of course, that conclusion was not evident to the trier of fact, and Justice O’Connor did not point to anything in the record that would have made the trial court’s contrary conclusion erroneous as a matter of law.

Justice O’Connor explained: “Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.”⁶⁰ But, even if the celebration of a public

53. See *Donnelly*, 525 F. Supp. at 1159.

54. *Id.* at 1158.

55. See *id.* at 1172.

56. See *Lynch*, 465 U.S. at 687–94 (O’Connor, J., concurring).

57. *Donnelly*, 525 F. Supp. at 1176 (“[V]iewers would not regard the creche as an insignificant part of the display. It is an almost life sized tableau marked off by a white picket fence.”).

58. *Id.* at 1176–77 (“[T]he creche is near two of the most enticing parts of the display for children—Santa’s house and the talking wishing well. Although the Court recognizes that one cannot see the creche from all possible vantage points, it is clear from the City’s own photos that people standing at the two bus shelters and looking down at the display will see the creche centrally and prominently positioned.”).

59. *Lynch*, 465 U.S. at 691 (O’Connor, J., concurring).

60. *Id.*

holiday *can* serve a legitimate purpose, that hardly means that all celebrations of public holidays are immunized from constitutional review. Presumably, the mayor officially participating in the celebration of a Christmas Mass would not pass muster, even though that might be described as celebrating a public holiday.⁶¹

When discussing the endorsement test, Justice O'Connor made clear that it was crucial that "a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."⁶² She emphasized the importance of not making "religion relevant, in reality or public perception, to status in the political community."⁶³ But holding as a matter of law that inclusion of a crèche in a holiday display *could not* make religion relevant in the prohibited way undercut the very test that was being proposed.

Ironically, there had been testimony at trial that the inclusion of the crèche was viewed with fear,⁶⁴ because the city's inclusion of that religious symbol exemplified "an increasing tendency of various religious groups to become more political and thereby to impose their views on the larger society."⁶⁵ Others likely grew fearful after witnessing the "intensity of feelings"⁶⁶ in response to the suit to remove the crèche from the display. Apparently, many of those expressing outrage believed the lawsuit represented "an attack on the presence of religion as part of the community's life, an attempt to deny the majority the ability to express publically its beliefs in a desired and traditionally accepted way."⁶⁷

For the court to assess whether the city had intended to promote religion by including the crèche within the display, it might have needed to examine the city's purposes when that display had first been erected forty years earlier.⁶⁸ Even if the original purpose had been to promote religion, however, a separate issue would be whether that was the reason for continuing the tradition.⁶⁹ Most of the district court's focus was on why the

61. *See id.* at 710 (Brennan, J., dissenting) ("Indeed, in its eagerness to approve the crèche, the Court has advanced a rationale so simplistic that it would appear to allow the Mayor of Pawtucket to participate in the celebration of a Christmas Mass, since this would be just another unobjectionable way for the City to 'celebrate the holiday.'").

62. *Id.* at 692 (O'Connor, J., concurring).

63. *Id.*

64. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1156 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

65. *Id.*

66. *Id.* at 1162.

67. *Id.*

68. *See id.* at 1158 (noting that the display was an "accepted community tradition for 40 years").

69. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 433 (1961) (recognizing the "strongly religious origin" of Sunday closing laws). The Court also noted, however, that there were current

city was continuing to mount the display with the crèche included, and the court held that the city's continuing to include the crèche had the effect of promoting religion in violation of Establishment Clause guarantees.⁷⁰

Justice O'Connor's willingness to uphold the inclusion of the crèche as a matter of law is problematic, because such a position is utterly divorced from actual perceptions. She would have found both that the state could not intend to endorse religion by including a crèche in a holiday display and that such a display could not reasonably be thought an endorsement, despite the findings to the contrary by the trier of fact.⁷¹ Her endorsement test would uphold the inclusion of the crèche in a winter display, even if most of the members of the community understood the inclusion of the crèche as an endorsement of a particular religious view. This was not an auspicious beginning for a test that was claimed to be intrinsically tied to public perceptions.⁷²

B. The Court Adopts the Endorsement Test

In *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,⁷³ the Court employed the endorsement test to strike down the placement of a crèche on the Grand Staircase of the Allegheny County Courthouse.⁷⁴ Justice O'Connor's *Lynch* concurrence was praised as "provid[ing] a sound analytical framework for evaluating governmental use of religious symbols."⁷⁵ The test would determine "whether the government's use of an object with religious meaning has the effect of endorsing religion."⁷⁶ That effect would be judged in light of the "message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'"⁷⁷

secular justifications for such laws. *See id.* at 444 ("[A]s presently written and administered, most of [the Sunday Closing laws], at least, are of a secular rather than of a religious character.").

70. *Donnelly*, 525 F. Supp. at 1181 ("This Court finds that by including a nativity scene in its Christmas display, the City of Pawtucket has violated the Establishment Clause of the Constitution.").

71. *Lynch v. Donnelly*, 465 U.S. 668, 691, 693 (1984) (O'Connor, J., concurring).

72. *Id.* at 692.

73. 492 U.S. 573 (1989).

74. *See id.* at 621 (noting "the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs" and concluding that the "display of the crèche in the county courthouse has this unconstitutional effect").

75. *Id.* at 595.

76. *Id.*

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

Claiming to apply the endorsement test, the Court explained that no one could reasonably think that the crèche “occupies this location without the support and approval of the government.”⁷⁸ However, pains were taken to distinguish the constitutionally impermissible crèche at issue in *Allegheny* from the constitutionally permissible crèche at issue in *Lynch*. The latter did not involve government endorsement.

[B]ecause the crèche is “a traditional symbol” of Christmas, a holiday with strong secular elements, and because the crèche was “displayed along with purely secular symbols,” the crèche’s setting “changes what viewers may fairly understand to be the purpose of the display” and “negates any message of endorsement” of “the Christian beliefs represented by the crèche.”⁷⁹

Yet, it may be instructive to consider some of the other secular symbols included within the *Lynch* display: “a Santa Claus house with a live Santa distributing candy; reindeer pulling Santa’s sleigh; a live 40-foot Christmas tree strung with lights; [and] statues of carolers in old-fashioned dress.”⁸⁰ Apparently, these purely secular symbols helped to negate any message of endorsement that might otherwise have been perceived.

At least one question that should have been addressed is whether a nonadherent would describe all of these symbols as “purely secular.”⁸¹ Consider, for example, the “widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday.”⁸² The implication is that one would be unreasonable to view the Christmas tree as endorsing a religious view, even though “Christmas trees once carried religious connotations.”⁸³ Yet, for some non-Christians, the Christmas tree continues to carry religious connotations.⁸⁴

Certainly, it is fair to suggest that merely because something was once a religious symbol does not guarantee that it will always remain one. But that observation merely begins the inquiry, because it will then be important to determine whether the symbol at issue itself has ceased to have a religious dimension. For example, Justice O’Connor noted that Thanksgiving is now

78. *Id.* at 599–600.

79. *Id.* at 596 (citing *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)).

80. *Id.*

81. *Id.*

82. *Id.* at 617.

83. *Id.* at 616.

84. See Joel S. Jacobs, *Endorsement as “Adoptive Action:” A Suggested Definition of, and an Argument for, Justice O’Connor’s Establishment Clause Test*, 22 HASTINGS CONST. L.Q. 29, 46 (1994) (“While Christmas trees may seem innocuous to those who display them, they retain Christian symbolism. Christmas trees, as the name suggests, have long had a strong association with Christianity.”).

understood as a celebration of patriotic values rather than religious beliefs,⁸⁵ although it is an empirical question whether atheists, for example, view the holiday as completely divorced from religious belief.⁸⁶ She also agreed with Justice Blackmun that Christmas trees are secular rather than religious, although she rejected his assertion⁸⁷ that a menorah has a secular element.⁸⁸ Justice Brennan rejected in his concurring and dissenting opinion that the Christmas tree was necessarily secular, suggesting that it may not be “so seen when combined with other symbols or objects.”⁸⁹ But the lack of consensus within the Court itself with respect to which symbols are secular and which are not suggests that this is a topic about which reasonable observers might disagree.

Suppose that there was a display with a crèche, a Christmas tree, a Santa Claus, and a sleigh pulled by reindeer. Some would say that the secular tree, sleigh and reindeer, and Santa Claus would secularize the crèche.⁹⁰ However, other observers might reasonably view such a display as promoting both the religious and non-religious aspects of Christmas. Certainly, it would be unsurprising for individuals who did not celebrate Christmas to feel like “outsiders [who were] less than full members of the political community”⁹¹ when they saw the city put on such a display.⁹² As Justice Kennedy noted in his concurring and dissenting opinion, an atheist would reasonably feel like an outsider when the state engages in a number of differing practices, for example, when an individual recites the Pledge of

85. See *Allegheny*, 492 U.S. at 631 (O’Connor, J., concurring in part and concurring in the judgment).

86. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (suggesting that atheists might have objections to Thanksgiving because it seems to promote religion).

87. See *Allegheny*, 492 U.S. at 617 (discussing “the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah”).

88. See *id.* at 633 (O’Connor, J., concurring in part and concurring in the judgment) (discussing “the religious nature of the menorah and the holiday of Chanukah”).

89. *Id.* at 639 (Brennan, J., concurring in part and dissenting in part).

90. See *id.* at 596 (plurality opinion) (citing *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)).

91. *Id.* at 627 (O’Connor, J., concurring in part and concurring in the judgment).

92. See *id.* at 642 (Brennan, J., concurring in part and dissenting in part). Justice Brennan stated:

I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. Both are reasonable interpretations of the scene the city presented, and thus both, I think, should satisfy Justice Blackmun’s requirement that the display “be judged according to the standard of a ‘reasonable observer.’”

Id.

Allegiance which, under law, “describes the United States as ‘one Nation under God.’”⁹³

One of the salient differences among members of the Court involves their assessments of how a reasonable observer would react to a particular display. Several views were offered, including that *no* reasonable observer would find a Christmas tree to be religious;⁹⁴ a reasonable observer *might* find a Christmas tree to be religious when paired with a menorah;⁹⁵ a reasonable person *would* find a Christmas tree to be religious when paired with a menorah;⁹⁶ *no* reasonable observer would infer religious endorsement where a religious symbol like a menorah was displayed along with a secular symbol like a Christmas tree;⁹⁷ a reasonable observer *would* find such a display an endorsement;⁹⁸ and *some* reasonable observers would find such a display to be an endorsement but other reasonable observers would not.⁹⁹

With such a range of views about what a reasonable observer would or might say, one might have expected the Court to offer a more complete analysis of how the endorsement test works. For example, the Court might have explained whether (1) a state practice violates constitutional guarantees under the endorsement test as long as a reasonable observer believes that it promotes or undermines religion, or (2) a state practice passes muster under the endorsement test as long as a reasonable observer believes that the practice does not promote or undermine religion. Assuming that the Justices on the Supreme Court qualify as reasonable observers and that reasonable observers might disagree about whether a particular practice promotes or undermines religion, the very practices at issue in *Lynch* and *Allegheny* would fail or pass the test respectively, depending upon which type of reasoning accurately captures the test.

93. *See id.* at 672 (Kennedy, J., concurring in part and dissenting in part).

94. *Id.* at 616 (plurality opinion) (“The Christmas tree, unlike the menorah, is not itself a religious symbol.”).

95. *See id.* at 642 (Brennan, J., concurring in part and dissenting in part).

96. *See id.* at 654 (Stevens, J., concurring in part and dissenting in part).

97. *Id.* at 617–18 (plurality opinion) (“[T]he combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.”).

98. *See id.* at 654 (Stevens, J., concurring in part and dissenting in part) (“[T]he presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree.”).

99. *See id.* at 642 (Brennan, J., concurring in part and dissenting in part) (suggesting that different interpretations would be reasonable).

C. When Would a Reasonable Observer Infer Endorsement?

In *Capitol Square Review & Advisory Board v. Pinette*,¹⁰⁰ Justice O'Connor suggested that one reason that the Justices do not agree about what a reasonable person would say when viewing a particular display is that the Justices impute differing levels of knowledge to the reasonable person.¹⁰¹ At issue in *Pinette* was whether the denial of a permit to the Ku Klux Klan to display a Latin cross in Capitol Square in front of the statehouse offended constitutional guarantees.¹⁰² The state of Ohio had feared that the unattended cross would be inferred to involve official endorsement of Christianity by the state.¹⁰³

The *Pinette* plurality refused to find that the state would be justified in restricting private expression merely "because an observer might mistake private expression for officially endorsed religious expression."¹⁰⁴ Instead, the plurality stated: "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."¹⁰⁵ While making clear that the display at issue passed constitutional muster under the endorsement test, the plurality was not especially clear about why that was so.

One interpretation of the plurality's position is that the endorsement test simply should not be applied if private speech is at issue,¹⁰⁶ assuming that the state has had no hand in encouraging the misunderstanding that the expression is public speech.¹⁰⁷ According to this interpretation, even private religious speech reasonably perceived as involving a government endorsement does not fail the endorsement test as long as the state was not

100. 515 U.S. 753 (1995).

101. See *id.* at 779 (O'Connor, J., concurring in part and concurring in the judgment) ("In my view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by Justice Stevens.").

102. *Id.* at 757 (plurality opinion) ("Capitol Square is a 10-acre, state-owned plaza surrounding the statehouse in Columbus, Ohio.").

103. *Id.* at 761.

104. *Id.* at 763.

105. *Id.* at 770.

106. See *id.* at 763 ("We must note, to begin with, that it is not really an 'endorsement test' of any sort, much less the 'endorsement test' which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us."); see also *id.* at 764 ("The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence, and would better be called a 'transferred endorsement' test.").

107. See *id.* at 766 (reasoning that mistaken attribution to the government will not fail the endorsement test where "government has not fostered or encouraged the mistake").

complicit in promoting the misattribution,¹⁰⁸ because the endorsement test is not designed to cover this kind of case.¹⁰⁹

A different interpretation of the plurality position is that the endorsement test is the correct test to use in this kind of case, but as a matter of law that test cannot be used to invalidate private speech unless the government somehow promotes the misperception that the speech is governmental.¹¹⁰ The first interpretation limits the circumstances under which the endorsement test is applicable, which means that some other test must be used to determine whether the display at issue violates constitutional guarantees. In contrast, the second interpretation suggests that the endorsement test is the appropriate standard by which to determine whether the display violates constitutional guarantees and further suggests as a matter of law that the display is permissible because a reasonable person could not infer endorsement under such circumstances.

Justice O'Connor agreed with the *Pinette* plurality that, in the particular case at hand, a "reasonable, informed observer"¹¹¹ would not impute the message to the state,¹¹² although she rejected that such an observer could never misperceive private speech as state endorsement. For example, Justice O'Connor suggested that in some cases "the presence of a sign disclaiming government sponsorship or endorsement"¹¹³ might be required because the Establishment Clause "imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message."¹¹⁴

Justice O'Connor's suggestion that the state might be required to post a disclaimer casts some light on her requirement that the observer be informed. If the observer were fully informed, she would not need to be told by the state that the speech at issue was private rather than public. Thus, Justice O'Connor suggests that a reasonable person need not be fully informed; else, the (sometimes required) disclaimer would only serve to

108. *See id.* at 784 (Souter, J., concurring in part and concurring in the judgment) ("The plurality's opinion declines to apply the endorsement test to the Board's action, in favor of a *per se* rule: religious expression cannot violate the Establishment Clause where it (1) is private and (2) occurs in a public forum, even if a reasonable observer would see the expression as indicating state endorsement.").

109. *Id.* at 764 (plurality opinion) ("Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, . . . or else government action alleged to *discriminate in favor* of private religious expression or activity . . ." (citations omitted)).

110. *But see id.* at 774 (O'Connor, J., concurring in part and concurring in the judgment) ("I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism.").

111. *See id.* at 773.

112. *See id.* at 772.

113. *Id.* at 776.

114. *Id.* at 777.

inform the observer of something she already knows. That said, however, members of the Court have had some difficulty in specifying just what or how much the reasonable observer should know before making a judgment about whether something promotes or undermines religion.

Consider Justice O'Connor's comment that "[t]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."¹¹⁵ Her point is well-taken that the endorsement test cannot be based on whether there exists one sincere person who, in light of her own level of knowledge, believes that a particular practice promotes or undermines religion. Yet, it is difficult to tell whether the emphasis should be on the possibly deficient level of knowledge or, perhaps, on the fact that only one individual has had the relevant reaction. For example, suppose that there were several people who, with a particular quantum of knowledge, believed that a particular action promoted religion. Would that reaction now be given weight because it was shared by several people, or would it not be given weight because those having it only had a particular quantum of knowledge?

An analogous point might be made with respect to the observation that a state has not "made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable."¹¹⁶ Even assuming that the discomfort is associated with an individual's inference that the state is supporting or undermining religion, one cannot tell whether such discomfort would make religion relevant to standing if shared by several people or, instead, whether something more must be shown to establish that standing in the political community had been affected.

Regrettably, Justice O'Connor's focus is neither on the number of individuals who might have had a particular idiosyncratic reaction to a display nor even on whether such individuals misperceived endorsement because of a lack of awareness of a crucial fact. Justice O'Connor explains that "the endorsement inquiry is not 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."¹¹⁷ Indeed, the endorsement test does not involve the "the actual perception of individual observers,"¹¹⁸ because under such an approach "a religious display is

115. *Id.* at 780.

116. *Id.*

117. *Id.* at 779.

118. *Id.*

necessarily precluded so long as some passersby would perceive a governmental endorsement thereof.”¹¹⁹

Justice O’Connor’s analysis is surprising for a number of reasons. First, it is false to say that taking account of the actual reactions of individuals would necessitate invalidating a practice merely because some passersby found it offensive. Suppose, for example, that one thousand individuals of a particular faith are surveyed and that two found a particular practice an endorsement of religion. All else being equal, it would be quite understandable for Justice O’Connor to suggest that the relevant test does not invalidate the practice. There may well be an explanation for these reactions that does not provide a basis for Establishment Clause concern; for example, that the survey responses were insincere or involved some misunderstanding. But refusing to find that the endorsement test invalidates a practice under those circumstances does not justify refusing to consider actual reactions at all.

Suppose that a different survey was taken and that a majority of the community, adherents and nonadherents alike, viewed a particular practice as endorsing religion. That, one would hope, would suffice to establish the unconstitutionality of a practice. Regrettably, Justice O’Connor suggests that even such survey results would not be dispositive, because the “endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share.”¹²⁰ After all, Justice O’Connor would have held as a matter of law that inclusion of a crèche in a holiday display was not unconstitutional under the endorsement test, regardless of the actual reactions of the community.¹²¹

After a moment’s reflection, one comes to realize that Justice O’Connor’s endorsement test is much different from what it might initially have been supposed to be. Justice O’Connor had once emphasized the importance of not making “religion relevant, in reality or public perception, to status in the political community,”¹²² but now suggests that religion being perceived to be or actually being a factor in one’s status in the political community does not matter as long as the hypothetical reasonable observer with the requisite quantum of knowledge (neither too much nor too little) would not infer endorsement.¹²³

119. *Id.*

120. *Id.* at 780.

121. *See Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring).

122. *Lynch*, 465 U.S. at 692.

123. *See Pinette*, 515 U.S. at 780 (O’Connor, J., concurring in part and concurring in the judgment).

Justice Stevens understood the endorsement test somewhat differently. He argued that it is especially important for the endorsement test to “take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses.”¹²⁴ Of course, not all informed nonadherents react the same way. For example, some nonadherents did not believe the crèche at issue in *Lynch* involved an endorsement of religion,¹²⁵ whereas others did believe it an endorsement.¹²⁶ Justice Stevens would not require unanimity among nonadherents in order to find an Establishment Clause violation, suggesting that if a “reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display.”¹²⁷ Justice Stevens offered an example of when endorsement might be perceived: A reasonable observer of “any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory—has sponsored and facilitated its message.”¹²⁸ Because a reasonable person might well perceive endorsement under such circumstances, the state is precluded from having an unattended religious symbol in front of the state capitol.¹²⁹

Justice O’Connor rejected Justice Stevens’s analysis, suggesting that the reasonable observer about whom he was speaking was less than adequately informed.¹³⁰ But if that is the difficulty, there are ways to rectify the problem. Consider a solution proposed by Justice O’Connor to help inform the reasonable observer, namely, having the state post a disclaimer so that the state would not be associated with the message at issue.¹³¹ Such a

124. *Id.* at 799 (Stevens, J., dissenting).

125. *See* *Donnelly v. Lynch*, 525 F. Supp. 1150, 1159 (D.R.I. 1981) (“The Mayor noted that at least one segment of the Jewish community in Pawtucket has called him to express support and to state that they regard the inclusion of the nativity scene as ‘a thing of joy and not a religious service or observance of any kind.’”), *aff’d*, 691 F.2d 1029 (1st Cir. 1982), *rev’d*, 465 U.S. 668 (1984).

126. *See id.* at 1157 (“Steven Brown, Executive Director of the ACLU, saw the creche twice in December, 1980. . . . Like Mr. Donnelly, he regarded it as a religious symbol which, by its inclusion within the City’s display, represented official sponsorship of a particular religious viewpoint. . . . Mr. Brown was raised and educated in the Jewish faith.” (footnote and citations omitted)).

127. *See Pinette*, 515 U.S. at 799 (Stevens, J., dissenting).

128. *Id.* at 801–02.

129. *See id.* at 802, 806.

130. *See id.* at 779 (O’Connor, J., concurring in part and concurring in the judgment) (“In my view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by JUSTICE STEVENS.”).

131. *See id.* at 776.

disclaimer would allegedly suffice to persuade the reasonable observer that the message at issue should not be attributed to the state.¹³²

Yet, there is reason to believe that Justice O'Connor's remedy of posting a disclaimer would not have persuaded Justice Stevens or even the reasonable observer in some circumstances of the state's non-endorsement of the message at issue. Justice Stevens would likely suggest that even a disclaimer would not suffice to establish non-endorsement, because "the Constitution generally forbids the placement of a symbol of a religious character in, on, or before a seat of government."¹³³ For example, in *Van Orden v. Perry*,¹³⁴ the State of Texas had a monument inscribed with the Ten Commandments on the State Capitol grounds.¹³⁵ Even if that monument had included an inscription containing a secular purpose—for example, to provide guidance to youth and "to combat juvenile delinquency"—Justice Stevens would have struck down the maintenance of such a monument on state grounds as unconstitutional.¹³⁶

Suppose, however, that one does not accept Justice Stevens's presumption against placing religious symbols on state grounds, and one believes that the reasonable observer should decide for oneself whether a religious display accompanied by a disclaimer should be inferred to be an endorsement. While the disclaimer might initially seem sufficient for the state to be able to show that it did not endorse a religious message, a reasonable observer might not be satisfied with that "quantum of knowledge."¹³⁷ Suppose, for example, that the mayor had explained to the faithful that the waiver was there because, otherwise, those small, selfish, objecting nonadherents would deprive the majority of cherished religious symbols.¹³⁸ Presumably, a knowledgeable observer who was aware of that subterfuge might infer endorsement, although Justice O'Connor rejected that a reasonable observer would infer endorsement in Pawtucket, the mayor's comments about his desire to keep Christ in Christmas notwithstanding.¹³⁹

132. *See id.* at 776 (discussing the requirement that the state sometimes include a disclaimer to "make the State's role clear to the community").

133. *Id.* at 806–07 (Stevens, J., dissenting).

134. 545 U.S. 677 (2005).

135. *See id.* at 681.

136. *See id.* at 715 (Stevens, J., dissenting) ("Though the State of Texas may genuinely wish to combat juvenile delinquency, and may rightly want to honor the Eagles for their efforts, it cannot effectuate these admirable purposes through an explicitly religious medium.").

137. *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment).

138. *Cf. Donnelly v. Lynch*, 525 F. Supp. 1150, 1158 (D.R.I. 1981) ("[T]he Mayor explained the public reaction by suggesting that people 'thought it was very small of anybody to question what had been accepted by the community' for so many years 'as a good thing.'"), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

139. *See supra* note 53 and accompanying text.

Part of the appeal of Justice O'Connor's endorsement test involves its recognition that no members of the community should feel like second-class citizens because of their religious beliefs.¹⁴⁰ Yet, Justice O'Connor seems much more concerned about the feelings of the hypothetical observer and much less concerned that some members of the community might reasonably and actually feel like insiders and outsiders respectively because of a particular display.¹⁴¹

In *Mitchell v. Helms*,¹⁴² members of the Court continued the trend in which they claimed that the reasonable person could only have one view, lack of consensus on the Court about what a reasonable person would say notwithstanding. At issue was government funding used to lend educational material and equipment to public and private schools.¹⁴³ The difficulty presented for Establishment Clause purposes was that the equipment in a parochial school might be used to indoctrinate schoolchildren in religious matters.¹⁴⁴

The *Mitchell* plurality announced that a reasonable person would not infer government endorsement, even if the government funded materials were used to teach children matters of faith.¹⁴⁵ "If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."¹⁴⁶ The plurality explained: "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."¹⁴⁷

140. See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.").

141. See Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1545 (2010) ("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.").

142. 530 U.S. 793 (2000).

143. *Id.* at 801–02.

144. See *id.* at 804.

145. *Id.* at 809.

146. *Id.*

147. *Id.*

At least two difficulties are posed by the *Mitchell* plurality's analysis. First, it misrepresents the past jurisprudence. In many of the previous cases, the Court invoked neutrality when upholding the provision of aid to both secular and parochial schools as long as the funds, equipment, or materials were *not* used to promote religion.¹⁴⁸ The neutrality had been with respect to the identity of the provider rather than to the nature of the aid.¹⁴⁹ For example, in *Board of Education v. Allen*,¹⁵⁰ the Court upheld the loan of *secular* textbooks to parochial school students.¹⁵¹ Indeed, part of the supporting rationale was that the Court was confident that those approving of the books could distinguish between secular and sectarian texts and that only the former would be approved.¹⁵² If the *Mitchell* plurality's analysis of neutrality had accurately reflected the Court's jurisprudence, the *Allen* Court would never even have discussed the limitations on the books that would receive approval.

The reason that the Court in *Meek v. Pittenger*¹⁵³ had upheld loaning textbooks to parochial schools was that the books were secular, citing *Allen*.¹⁵⁴ However, the *Meek* Court struck down the provision of other kinds of materials and equipment, reasoning that "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian."¹⁵⁵ Because the other kinds of materials and equipment could have been used to promote religious indoctrination, providing them to sectarian schools would violate constitutional guarantees.¹⁵⁶

The same point might have been made about books, namely, that they too might be used to promote the school's sectarian mission. However, the

148. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947) (approving the dispersion of government funds to parents of children attending parochial schools where the spending was part of a "general program under which [the state paid] the fares of pupils attending public and other schools" because the First Amendment requires "the state to be a neutral in its relations with groups of religious believers and non-believers").

149. See *id.*

150. 392 U.S. 236, 238 (1968).

151. *Id.* at 245 ("[O]nly secular books may receive approval.").

152. *Id.* ("[W]e cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.").

153. 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

154. See *id.* at 361–62 (citing *Allen*, 392 U.S. at 244–45) ("[T]he record in the case before us, like the record in *Allen*, . . . contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes.").

155. *Id.* at 365.

156. *Id.* at 366.

Meek Court was reluctant to overrule *Allen*,¹⁵⁷ and thus upheld the provision of books but struck down the provision of the other materials.

The *Meek* Court believed that loaning equipment to sectarian schools might reasonably be viewed as promoting or endorsing religion.¹⁵⁸ So, too, in *Wolman v. Walter*,¹⁵⁹ the Court upheld various programs and services at parochial schools, precisely because the provision of those programs and services on site was not likely to result in sectarian indoctrination.¹⁶⁰ However, those programs that might lend themselves to sectarian indoctrination had to be performed off site where it was thought less likely that the sectarian indoctrination would occur.¹⁶¹

It is debatable whether the *Wolman* Court was correct in its judgment with respect to who would be more likely to indoctrinate or whether indoctrination would be more likely to take place in some locations than in others.¹⁶² Nonetheless, it should at least be clear what the Court in *Meek* and *Wolman* had been trying to do and that the *Mitchell* plurality's explication of neutrality did not accurately reflect the jurisprudence.¹⁶³ As Justice Souter pointed out in his *Mitchell* dissent, the plurality's usage of "neutrality" did not reflect how that term had been used in much of the previous case law.¹⁶⁴

In her *Mitchell* concurrence in the judgment, Justice O'Connor suggested that if a religious school uses aid directly received from the government to indoctrinate students, then "it is reasonable to say that the government has communicated a message of endorsement. Because the

157. Cf. Mark Strasser, *Repudiating Everson: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 601 (2009) ("In short, the *Meek* Court upheld the practice that had already been upheld in *Allen*, but struck down the remaining provisions, notwithstanding the Court's professed confidence that the materials, equipment, and services at issue were secular and would not be put to sectarian uses.").

158. For the suggestion that promotion of religion and endorsement of religion are describing the same kind of phenomenon, see *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (2002) ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same.").

159. 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

160. See *id.* at 244 ("The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.").

161. See *id.* at 247 ("The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise.").

162. See *Mitchell*, 530 U.S. at 817–18 (rejecting the reasoning of *Meek* and *Wolman*).

163. See *id.* at 839 (O'Connor, J., concurring in the judgment) ("[T]he plurality's rule does not accurately describe our recent Establishment Clause jurisprudence.").

164. See *id.* at 878–84 (Souter, J., dissenting).

religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion.”¹⁶⁵ Thus, in *Mitchell* as well, the different Justices could not agree about the conditions under which the reasonable observer would infer endorsement.

So, too, members of the Court in *Zelman v. Simmons-Harris*¹⁶⁶ could not agree about the conditions under which the reasonable observer would infer state endorsement of religion. *Zelman* involved a voucher program in Cleveland whereby state funds were used to pay tuition at parochial schools without any limitations on how those funds would be used.¹⁶⁷ The majority suggested 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.”¹⁶⁸

Yet, there were numerous factors that the informed reasonable observer might have taken into account when making her assessment, for example, that the amount of the voucher was lower than what various private nonreligious schools charged in tuition but higher than what various parochial schools charged.¹⁶⁹ That fact might lead a reasonable observer to infer state promotion of religion, and one obvious way to combat that appearance of favoritism would be to increase the value of the voucher.¹⁷⁰ On the other hand, the reasonable observer would also be aware that states face a variety of fiscal challenges and that increasing the voucher amount would have its own drawbacks in a period of ever-growing deficits.¹⁷¹

165. *Id.* at 843 (O’Connor, J., concurring in the judgment).

166. 536 U.S. 639 (2002).

167. *See id.* at 687 (Souter, J., dissenting) (“The money will thus pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.”).

168. *Id.* at 655 (citing *Mueller v. Allen*, 463 U.S. 388, 398–99 (1983)).

169. *Id.* at 704–05 (Souter, J., dissenting). Justice Souter explained:

[T]he \$2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: “nonreligious schools with higher tuition (about \$4,000) stated that they could afford to accommodate just a few voucher students.” By comparison, the average tuition at participating Catholic schools in Cleveland in 1999–2000 was \$1,592, almost \$1,000 below the cap.

Id. (citations omitted).

170. *See id.* at 706 (“[T]he obvious fix would be to increase the value of vouchers so that existing nonreligious private and non-Catholic religious schools would be able to enroll more voucher students, and to provide incentives for educators to create new such schools given that few presently exist.”).

171. *See* Randle B. Pollard, *Who’s Going to Pick up the Trash?—Using the Build America Bond Program to Help State and Local Governments’ Cash Deficits*, 8 PITT. TAX. REV. 171, 171 (2011) (“All over the United States, state and local governments are facing increasing revenue deficits due to the recession.”).

The reasonable observer of the Cleveland voucher program might also have taken into account that many parents were sending their children to schools promoting the views of other faiths, and that these parents were not doing so because they wanted to expose their children to the views of other faiths but simply because they did not believe that they had any other realistic choice.¹⁷² Once again, the differing possible reactions of the reasonable observer could not simply be attributed to their varying quanta of knowledge but to additional factors as well, for example, how they weighed the different factors when assessing what message might be inferred.

In *Santa Fe Independent School District v Doe*,¹⁷³ the majority again announced how the reasonable observer would react, despite the protestations to the contrary by members of the dissent.¹⁷⁴ This time, however, the Court suggested that no reasonable observer would fail to infer endorsement.¹⁷⁵ At issue was a school policy that permitted students to decide by majority vote whether there would be a solemnizing message at football games. If so, then there would be a separate vote to decide who would give that message.¹⁷⁶

Members of the Court could not agree about whether a student elected to offer the football game message would be giving a public or a private address. The majority suggested that “the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school

172. See *Zelman*, 536 U.S. at 704 (Souter, J., dissenting).

Evidence shows, however, that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools. The families made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.

Id. (citation omitted).

173. 530 U.S. 290 (2000).

174. See *id.* at 324 (Rehnquist, C.J., dissenting).

Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The “crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,” applies with particular force to the question of endorsement.

Id. (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)).

175. *Id.* at 308 (majority opinion) (“Regardless 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.”).

176. See *id.* at 306.

administration.”¹⁷⁷ In contrast, the dissent suggested that the speech at issue would be “*private* speech.”¹⁷⁸ But the reasonable observer might react quite differently to public as opposed to private speech involving a religious message, at least with respect to whether the state was itself endorsing the articulated view.

One of the best cases to illustrate some of the different ways in which the endorsement test might be used is *Elk Grove Unified School District v. Newdow*¹⁷⁹ in which the constitutionality of mandating the Pledge of Allegiance in primary schools was at issue. The current Pledge is: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all,”¹⁸⁰ and the challenge was to the inclusion of “under God” in particular.¹⁸¹

The Court explained that the original Pledge did not include the challenged words,¹⁸² but “under God” was later added in 1954.¹⁸³ In his concurrence in the judgment, Chief Justice Rehnquist explained that the individual who sponsored adding those words wanted to “contrast this country’s belief in God with the Soviet Union’s embrace of atheism.”¹⁸⁴ However, Rehnquist pointed out:

To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, “under God” might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God’s authority.¹⁸⁵

For purposes here, the relevant issue is what the reasonable observer would say about the decision to include the words “under God” within the Pledge, and the reasonable observer would be aware of the intent to distinguish the theistic United States from the atheistic Soviet Union. Nonetheless, Justice O’Connor explained that the reasonable observer “fully

177. *Id.* at 308.

178. *Id.* at 324 (Rehnquist, C.J., dissenting) (emphasis in original).

179. 542 U.S. 1 (2004).

180. *Id.* at 7 (quoting 4 U.S.C. § 4 (2006)).

181. *Id.* at 5 (“Respondent, Michael A. Newdow, is an atheist whose daughter participates in that daily exercise. Because the Pledge contains the words ‘under God,’ he views the School District’s policy as a religious indoctrination of his child that violates the First Amendment.”).

182. *See id.* at 6.

183. *See id.* at 7.

184. *See id.* at 25 (Rehnquist, C.J., concurring in the judgment).

185. *Id.* at 26.

aware of our national history and the origins of such practices, would not perceive these acknowledgments [including the Pledge] as signifying a government endorsement of any specific religion, or even of religion over nonreligion.”¹⁸⁶ She argued that the Pledge “purports only to identify the United States as a Nation subject to divine authority,”¹⁸⁷ although it seems likely that an atheist would feel like a second-class citizen in such a nation.

Even if the Pledge was merely a state-sanctioned description of the nation as theistic rather than, for example, as a country where the freedom to believe or not believe thrives, non-believers might feel like second-class citizens. Yet, as Justice Thomas pointed out in his *Newdow* concurrence, a pledge of allegiance involves more than a mere description of the Nation—it instead involves a personal affirmation.¹⁸⁸ By mandating recitation of the Pledge, the state might be viewed as promoting or endorsing religion in two different respects: (1) it gets children to affirm or reaffirm a belief in God, and (2) it sends a message to believers that they are insiders and to non-believers that they are outsiders.

Newdow is helpfully compared to *Doe*. If *Doe* involved state endorsement because the state provided an opportunity for a student speaker to solemnify a football game,¹⁸⁹ then it would seem that the state’s mandating recitation of the Pledge—which includes an affirmation of God’s existence and, perhaps, “authority”¹⁹⁰—more than suffices to establish state endorsement. Indeed, one might add to the mix that the recitation of the Pledge is led by the state’s representative, the teacher,¹⁹¹ rather than by a student, as was true in *Doe*.¹⁹² So it might be somewhat surprising that Justice O’Connor was confident that the reasonable observer could not find the Pledge requirement an endorsement.

The endorsement test as promulgated by Justice O’Connor relied on the perceptions of the reasonable observer. However, she recognized “the

186. *Id.* at 36.

187. *Id.* at 40.

188. *See id.* at 47 (Thomas, J., concurring in the judgment) (noting that the Pledge involves “children actually pledging their allegiance”).

189. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

190. *Newdow*, 542 U.S. at 40 (O’Connor, J., concurring in the judgment).

191. *See id.* at 4–5 (majority opinion) (“Each day elementary school teachers in the Elk Grove Unified School District (School District) lead their classes in a group recitation of the Pledge of Allegiance.”).

192. *Doe*, 530 U.S. at 294. The claim here is not that student-led religious exercises during school hours would pass constitutional muster. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (striking down student-led prayers in schools).

dizzying religious heterogeneity of our Nation”¹⁹³ and was unwilling to rely on “a subjective approach [that] would reduce the test to an absurdity.”¹⁹⁴ After all, the test would simply be unable to distinguish among permissible and impermissible actions by the state when “[n]early any government action could be overturned as a violation of the Establishment Clause if a ‘heckler’s veto’ sufficed to show that its message was one of endorsement.”¹⁹⁵

Yet, the heckler discussed by Justice O’Connor is not merely some individual who interferes with someone else’s exercise of First Amendment rights. It might instead refer to a reasonable, knowledgeable individual who sincerely perceives a state practice as promoting or undermining religion. Further, that “heckler” might not simply be offering an idiosyncratic reaction, but might instead be reacting in the same way that a host of adherents and nonadherents react.

Suppose that a whole group of sincere, knowledgeable nonadherents sincerely believes that a particular state practice makes them into second-class citizens. Suppose further that a whole group of sincere, knowledgeable adherents sincerely believes that a particular state practice (rightfully) privileges that group. Justice O’Connor suggests that such a practice might nonetheless not involve endorsement, because a hypothetical observer with the correct quantum of knowledge would allegedly react differently.¹⁹⁶ But this means that the endorsement test might have quite ironic results. Not only would it permit the state to send a “message to [religious] 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,”¹⁹⁷ but it would add insult to injury by telling those religious nonadherents that they were not knowledgeable or reasonable, but were instead the equivalent of religious hecklers.

The reasonable person might have different reactions to a particular state practice, and it “blinks reality”¹⁹⁸ to claim that all knowledgeable, reasonable people will agree about whether a particular state practice promotes or undermines religion. Rather than decide whether Establishment Clause guarantees are violated or instead respected when some reasonable observers would infer endorsement and others would not, members of the Court instead pretend that reasonable observers could not disagree. Such an approach is especially disappointing, given the numerous cases in which

193. *Newdow*, 542 U.S. at 34–35 (O’Connor, J., concurring in the judgment).

194. *Id.* at 35.

195. *Id.*

196. *Id.* at 35.

197. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

198. *Davis v. FEC*, 554 U.S. 724, 757 (2008) (Stevens, J., concurring in part and dissenting in part).

presumably reasonable members of the Court could not themselves agree about whether a particular practice constitutes state endorsement.

III. THE POST-O'CONNOR ENDORSEMENT TEST

Justice O'Connor retired in 2006, and indeed, many members of the Court who contributed to our understanding of the endorsement test's evolution are no longer on the Court. Chief Justice Rehnquist was replaced by Chief Justice Roberts shortly before Justice O'Connor retired, and both Justice Stevens¹⁹⁹ and Justice Souter²⁰⁰ have retired since then. While no recent case establishes how the endorsement test will fare in the future, two cases are suggestive with respect to whether and how it might be used.

A. Pleasant Grove City v. Summum

In *Pleasant Grove City v. Summum*,²⁰¹ the Court examined a city's refusal to install a permanent monument containing the Seven Aphorisms of Summum in a public park. Because a public park is a traditional public forum, the Tenth Circuit held that the city had to accept the monument.²⁰² The United States Supreme Court reversed,²⁰³ explaining that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."²⁰⁴ Because the Free Speech Clause did not impose limitations on the power of a city to refuse a donation, the Court held that the city's action did not offend constitutional guarantees.²⁰⁵

While noting that the Free Speech Clause imposes no constraints on governmental speech,²⁰⁶ the *Summum* Court admitted that "government speech must comport with the Establishment Clause."²⁰⁷ The Court then

199. Justice Stevens was replaced by Justice Kagan.

200. Justice Souter was replaced by Justice Sotomayor.

201. 555 U.S. 460 (2009).

202. *Id.* at 464 ("The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum.").

203. *Id.* at 481.

204. *Id.* at 464.

205. *See id.* at 481 ("[T]he City's decision is not subject to the Free Speech Clause, and the Court of Appeals erred in holding otherwise.").

206. *Id.* at 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005))).

207. *Summum*, 555 U.S. at 468.

addressed how to interpret the message communicated by a permanent monument on public property.²⁰⁸

As an initial matter, it might seem surprising that the Court discussed how to interpret the message communicated by a monument for Establishment Clause purposes. After all, the city had rejected a donation and thus did not have to worry about what message would have been communicated by such a monument.²⁰⁹ Further, the refusal of a donation might be for any number of reasons including, for example, a lack of space²¹⁰ or a judgment that the donation was not aesthetically pleasing or in some other way not promoting city interests.²¹¹ Because what was at issue was the rejection of the donation of a monument rather than the acceptance and installation of a monument, much of the *Summum* opinion seemed unrelated to the issue before the Court.²¹²

Nonetheless, the Court decided to offer a long disquisition on the messages sent by monuments, presumably because of the city's prior acceptance of a Ten Commandments monument in that same park. The Court described the difficulty in determining *the* message communicated by a monument, explaining that "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor."²¹³ Thus, even if a creator or donor has a religious message, that would not suffice to establish that the state's message is also religious.²¹⁴ Further, the state's message may change over time, for example, because of the new monuments that might be erected nearby.²¹⁵ Thus, it may not be

208. *Id.* at 469.

209. *Id.* at 466.

210. *See id.* at 478 ("[P]ublic parks can accommodate only a limited number of permanent monuments.").

211. *See id.* at 484 (Breyer, J., concurring) ("[C]ities use park space to further a variety of recreational, historical, educational, esthetic, and other civic interests.").

212. Commentators have manifested their disapproval of the *Summum* Court's reasoning. *See* Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1302 (2010) ("Sloppy, and ultimately incoherent, opinions such as the Supreme Court's majority effort in *Summum* do little more than confuse First Amendment jurisprudence and encourage official misconduct using the government speech doctrine as a cloak.").

213. *Summum*, 555 U.S. at 476.

214. *See id.* ("By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.").

215. *See id.* at 477 ("The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity.").

possible to ascertain the message that a state monument is intended to convey.

One possible way to clear up any confusion about an intended message is to have a state entity announce the message that the monument is supposed to communicate or, in the alternative, include a disclaimer so that observers do not misperceive the relevant message. While a city could decide to declare its own interpretation of a monument's message, the Court rejected that a city is constitutionally required to make such a declaration.²¹⁶ Of course, the Court did not need to address this issue insofar as it was addressing the constitutionality of the city's refusing to accept the Seven Aphorisms monument, and presumably was instead rejecting the necessity of the city's explaining the message communicated by the monument of the Ten Commandments that had been accepted.

The difficulty posed for the city was not in fashioning some official message that would have shielded a Ten Commandments monument from an Establishment Clause challenge. *Van Orden v. Perry*²¹⁷ establishes that the government can have a permanent monument of the Ten Commandments in a park without offending constitutional guarantees.²¹⁸ The particular difficulty posed in *Summum* involved the city's having accepted a Ten Commandments monument and having rejected a Summum monument of similar size,²¹⁹ which might at least *seem* to send a message of endorsement of one religion over another.²²⁰ The city's communication of that message would violate Establishment Clause guarantees.²²¹

216. *Id.* at 473 (rejecting the proposal that "a government entity accepting a privately donated monument . . . go through a formal process of adopting a resolution publicly embracing 'the message' that the monument conveys").

217. 545 U.S. 677 (2005).

218. *See id.* at 692 ("We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.").

219. *See Summum*, 555 U.S. at 465 ("Summum's president wrote a letter to the City's mayor requesting permission to erect a 'stone monument,' which would contain 'the Seven Aphorisms of SUMMUM' and be similar in size and nature to the Ten Commandments monument.").

220. *But see id.* at 482–83 (Scalia, J., concurring) (suggesting that *Van Orden* is dispositive with respect to the constitutionality of the Ten Commandments display in *Pleasant Grove*). *See also* Bernadette Meyler, *Summum and the Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 95, 97 (2009) ("Justice Scalia concluded that the decision in *Van Orden* would preclude any finding that Pleasant Grove had violated the Establishment Clause.").

221. *See* Patrick M. Garry, *Pleasant Grove City v. Summum: The Supreme Court Finds a Public Display of the Ten Commandments to Be Permissible Government Speech*, 2009 CATO SUP. CT. REV. 271, 282 ("An argument could be made that the Establishment Clause forbids any governmental preference for one religious sect over another, and that such favoritism was evident in Pleasant Grove's refusal to display the Seven Aphorisms while continuing to display the Ten Commandments.").

While the installation and maintenance of permanent monuments by a city does send a message, the *Summum* Court made clear the possible difficulty in capturing the *content* of the message sent.²²² But this suggests that a variety of messages might reasonably be inferred to be sent by a public monument, which elevates the importance of determining whether the endorsement test invalidates a state practice if it might reasonably be inferred to be endorsing religion or, instead, does not invalidate a practice as long as the practice might reasonably be inferred not to be promoting or undermining religion. Regrettably, the most recent decision in which the endorsement test played a role did not make clear which, if either, of these understandings of the endorsement test is accurate.

B. *Salazar v. Buono*

At issue in *Salazar v. Buono*²²³ was the constitutionality of Congress's decision to transfer ownership to a private party of a particular tract of land and the cross that had been built on it.²²⁴ However, an understanding of *Salazar* requires a little background.

A cross was erected on federal land to honor soldiers who died in World War I serving their country.²²⁵ The cross had been a gathering point for Easter services since it was built.²²⁶ Frank Buono challenged the continued maintenance of the cross as a violation of Establishment Clause guarantees.²²⁷ The district court ruled in Buono's favor.²²⁸ That decision was appealed.²²⁹

The Ninth Circuit affirmed the lower court ruling, finding that "a reasonable observer would perceive a cross on federal land as governmental endorsement of religion."²³⁰ However, by the time that the Ninth Circuit had reached that conclusion, Congress had already passed a land-transfer statute that would transfer the land to a private party in exchange for other land.²³¹

222. See *Summum*, 555 U.S. at 473–76 (explaining that some observers might interpret a message one way while other observers might interpret the message differently).

223. 130 S. Ct. 1803 (2010).

224. *Id.* at 1811 ("The Court is asked to consider a challenge, not to the first placement of the cross or its continued presence on federal land, but to a statute that would transfer the cross and the land on which it stands to a private party.").

225. See *id.*

226. See *id.* at 1812.

227. See *id.*

228. See *id.*

229. See *id.*

230. *Id.* at 1813 (citing *Buono v. Norton*, 371 F.3d 543, 549–50 (9th Cir. 2004)).

231. See *id.*

The Ninth Circuit did not address the constitutionality of the land-transfer statute.²³²

After the Ninth Circuit had issued its decision that the cross on federal lands violated constitutional guarantees, the plaintiff returned to district court to prevent the land transfer.²³³ The district court concluded that “the transfer was an attempt by the Government to keep the cross atop Sunrise Rock and so was invalid,”²³⁴ which was affirmed on appeal by the Ninth Circuit.²³⁵ The Ninth Circuit decision was appealed to the United States Supreme Court.²³⁶

The case at hand involved a “delicate problem.”²³⁷ The plurality pointed out that on the one hand the cross could not be maintained on federal land without violating the injunction issued by the district court and, on the other, the Government “could not remove the cross without conveying disrespect for those the cross was seen as honoring.”²³⁸

Of course, many cases involve “delicate” matters, and it would be unsurprising for individuals to care deeply about memorials for former family members or for individuals who died serving their country. But regrettable negative reactions notwithstanding, the Court must not refrain from enforcing Establishment Clause guarantees.

One of the questions at hand was whether Establishment Clause guarantees had been violated. The district court had held that a reasonable person would infer endorsement,²³⁹ and the Ninth Circuit had agreed.²⁴⁰ The plurality noted that the Government had not appealed the decision, making the Ninth Circuit’s decision final,²⁴¹ although the plurality implied that it would have reached a different result. For example, the plurality announced: “Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.”²⁴² Thus, one infers the plurality would have upheld the placement of the cross

232. *See id.*

233. *See id.*

234. *See id.* at 1814 (citing *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005)).

235. *See id.* (citing *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)).

236. *See id.*

237. *See id.* at 1821 (Alito, J., concurring in part and concurring in the judgment).

238. *Id.* at 1817 (plurality opinion).

239. *See id.* at 1812.

240. *See id.* at 1813.

241. *See id.*

242. *Id.* at 1816–17.

on federal land under the first prong of *Lemon*.²⁴³ With respect to the effect prong, the plurality noted that the “goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.”²⁴⁴ Here, the plurality may have been suggesting that the cross neither would have had a prohibited effect nor would have been inferred to involve government endorsement. Or, perhaps, the plurality was implying that the installation and maintenance of the cross passed the *Lemon* test and that the endorsement test should not have been used.

That said, given the posture of the case, the plurality did not need to address whether the maintenance of the cross on federal land violated constitutional guarantees.²⁴⁵ That issue was settled. Instead, the issue before the Court was whether the land-transfer act was constitutional.²⁴⁶ With respect to that issue, the plurality did not imply that the *Lemon* test should have been used. On the contrary, the plurality chided the district court for analyzing the land-transfer in light of “its suspicion of an illicit governmental purpose”²⁴⁷ instead of using the endorsement test.²⁴⁸

These mixed signals about which test to use were themselves unfortunate. A further difficulty involved the plurality’s implicit understanding of the factors that would be taken into account by the objective observer. The plurality seemed unconcerned that all of the factors that might lead a court to infer illicit purpose would also have been considered by the knowledgeable, reasonable observer. For example, the district court noted that the government had “reserved the right to reassert ownership and repossess the subject property any time the Secretary of the Interior makes the discretionary determination that the VFW is not adequately maintaining the Latin cross as a World War I memorial.”²⁴⁹ Further, rather than sell the land to the highest bidder, the government had restricted the possible recipient to the “organization (VFW) that originally installed the cross and desires its continued presence in the Preserve.”²⁵⁰ The district court also noted that “the private land being exchanged for the federal property is owned by a couple (Mr. and Mrs. Sandoz) who has

243. See *supra* notes 18–24 and accompanying text (discussing the *Lemon* test and endorsement).

244. *Salazar*, 130 S. Ct. at 1818.

245. See *supra* note 241 and accompanying text.

246. See *Salazar*, 130 S. Ct. at 1815–16.

247. *Id.* at 1819.

248. See *id.* (“Given the sole reliance on perception as a basis for the 2002 injunction, one would expect that any relief grounded on that decree would have rested on the same basis. But the District Court enjoined the land transfer on an entirely different basis: its suspicion of an illicit governmental purpose.”).

249. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1179 (C.D. Cal. 2005), *aff’d sub nom.* *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *rev’d sub nom.* *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

250. *Id.* at 1180.

actively sought to keep the Latin cross on Sunrise Rock.”²⁵¹ After considering these factors, the court concluded that the “government has engaged in herculean efforts to preserve the Latin Cross on federal land and that the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation by Defendants.”²⁵² But a reasonable observer might well take these factors into account when deciding whether the government was endorsing one religion over others.

Needless to say, the plurality’s understanding of these events differed significantly from the district court’s. For example, the plurality noted that the purpose of the injunction was to “address the impression conveyed by the cross on federal, not private, land.”²⁵³ But, the plurality reasoned, “that purpose would favor—or at least not oppose—ownership of the cross by a private party rather than by the Government.”²⁵⁴ After all, no one would claim state endorsement merely because a private party had erected and maintained a cross, and the plurality expressly noted that the endorsement test tends not to be used with respect to displays on private property.²⁵⁵

Yet, it is one thing for an individual to display a religious symbol on her own land, and quite another for an individual to continue to display a religious object on “private” land acquired from the government when the government retains a reversionary interest in the land such that the government will regain title to the land if the private owner takes down the religious display. A reasonable observer who knew of all of the conditions of the transfer might infer government endorsement of religion, assuming that the observer believed the cross a religious symbol.

251. *Id.*

252. *Id.* at 1182. Some commentators suggest that this restriction on who could own the land posed the greatest Establishment Clause difficulty. See Christopher Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 67 (2010) (“But the bigger problem was that Congress decided to sell the land to the VFW without entertaining other suitors.”). However, it is not clear why the government’s inclusion of the reversion condition does not pose at least as great a difficulty, especially because this condition might be thought to undermine the contention that the government ever lost control of the property. See *Buono*, 364 F. Supp. 2d at 1179 (“Such a reversionary clause defeats Defendants’ contention that the government has given up control over the subject property.”).

253. *Salazar*, 130 S. Ct. at 1819.

254. *Id.*

255. *Id.* (“As a general matter, courts considering Establishment Clause challenges do not inquire into ‘reasonable observer’ perceptions with respect to objects on private land.”).

Some commentators suggest that a cross simply cannot be understood as a secular object.²⁵⁶ However, the plurality explained that “a Latin cross is not merely a reaffirmation of Christian beliefs.”²⁵⁷ In addition, it “is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people,”²⁵⁸ as if the symbol ceases to be religious when honoring the dead.

Justice Alito noted in his concurring opinion that the cross is “the preeminent symbol of Christianity.”²⁵⁹ However, he believed that the “the original reason for the placement of the cross was to commemorate American war dead,”²⁶⁰ which allegedly would not involve endorsement. Justice Alito understood that not all who died fighting for this country were Christian and even suggested that adding other religious symbols might dilute the appearance of endorsement of a particular religion,²⁶¹ implicitly acknowledging how someone might infer endorsement. But, he reasoned, the plaintiff would not have been satisfied even if additional religious symbols had been added, because that would likely have been found to be an endorsement of religion over nonreligion.²⁶² Justice Alito did not address whether there would be ways to memorialize those who gave up their lives fighting for this country in World War I without using a religious symbol.²⁶³

This is simply amazing reasoning. Justice Alito seems to recognize that the cross is a religious symbol and that inclusion of other religious symbols might negate some of the perception that the State was preferring one religion over others.²⁶⁴ However, because inclusion of other religious symbols would do nothing to undermine the perception that the state was preferring religion over nonreligion, that remedy would not have sufficed. Fair enough. Because the Establishment Clause precludes preferring one religion over others and religion over nonreligion as a general matter, the

256. See Lund, *supra* note 252, at 65 (“The cross can have no secular meanings independent of its religious meaning.”).

257. *Salazar*, 130 S. Ct. at 1820.

258. *Id.*

259. *Id.* at 1822 (Alito, J., concurring in part and concurring in the judgment).

260. *Id.*

261. See *id.* at 1823 (“One possible solution would have been to supplement the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave their lives in the First World War.”).

262. See *id.* (“But Congress may well have thought—not without reason—that the addition of yet another religious symbol would have been unlikely to satisfy the plaintiff, his attorneys, or the lower courts that had found the existing monument to be unconstitutional on the ground that it impermissibly endorsed religion.”).

263. See *id.* at 1828 (Stevens, J., dissenting) (“I certainly agree that the Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message.”).

264. *Id.* at 1823 (Alito, J., concurring in part and concurring in the judgment).

State will not escape the Clause's strictures by favoring several religions. But this suggests that maintaining the cross without other symbols of course violates Establishment Clause guarantees rather than that maintaining the cross alone would be permissible.

Not only did Justice Alito suggest that the land transfer did not offend endorsement guarantees, but he suggested in addition that the failure to maintain the cross would be inferred to undermine religion.²⁶⁵ He noted that the "demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage."²⁶⁶ Presumably, Justice Alito is not merely making this point to suggest that some would react negatively, but is further suggesting that this would be a reasonable response and thus that the government's ordering the destruction of this "nonreligious" symbol honoring the dead²⁶⁷ would itself fail the endorsement test. But this use of the endorsement test would seem to indicate that Establishment Clause guarantees would be violated no matter what the government did—retaining the cross would be viewed by some reasonable observers as endorsing Christianity and taking down the symbol would be viewed by some as hostility to Christianity in particular or, perhaps, religion more generally.²⁶⁸

The claim here is not that Justice Alito is adding a new twist to endorsement jurisprudence by discussing how particular state actions might be viewed as hostile to religion. For example, in *Good News Club v. Milford Central School*,²⁶⁹ the Court held that a school could not prevent a Christian club from meeting after school at the same time that other school clubs met. The school had denied the club permission to use school grounds because the school viewed the activities of the club as "the equivalent of religious worship."²⁷⁰ The *Good News Club* Court rejected that children would perceive the school's permitting the club to meet after school as endorsement.²⁷¹ In addition, the Court noted that even if it "were to inquire into the minds of schoolchildren in this case, we cannot say the danger that

265. *Id.*

266. *Id.*

267. *See supra* note 260 and accompanying text.

268. *See Salazar*, 130 S. Ct. at 1822–23 (Alito, J., concurring in part and concurring in the judgment).

269. 533 U.S. 98 (2001).

270. *Id.* at 103.

271. *See id.* at 118.

children would *misperceive* the endorsement of religion is any greater than the danger that they would *perceive* a hostility toward the religious viewpoint if the Club were excluded from the public forum.”²⁷²

Here, the Court is suggesting that an observer would be *incorrect* in perceiving the state’s permitting prayer in clubs after school as endorsement.²⁷³ But the Court is also suggesting that an observer might correctly perceive the failure to permit such a club as hostility to religion.²⁷⁴ Basically, the *Good News Club* Court implied that the *failure* to permit the after-school student club that engaged in religious worship would violate Establishment Clause guarantees, just as Justice Alito implied that taking down the cross would violate Establishment Clause guarantees.²⁷⁵

If taking down the cross would violate Establishment Clause guarantees and permitting the cross to remain on federal lands would violate the district court’s order, then Congress’s compromise might seem ideal and, in fact, Justice Alito praised the decision reached by Congress: “Congress chose an alternative approach that was designed to eliminate any perception of religious sponsorship stemming from the location of the cross on federally owned land, while at the same time avoiding the disturbing symbolism associated with the destruction of the historic monument.”²⁷⁶ Yet, Justice Alito did not address some of the implications of his opinion. Consider the observer who characterizes the Government as hostile to religion because it is “bent on eliminating from all public places and symbols any trace of our country’s religious heritage.”²⁷⁷ Such an observer might also be offended by Congress’s transferring ownership of the land on which the cross was located so that all traces of religious heritage on public lands could be eliminated. But this suggests that the land transfer violates Establishment Clause guarantees by manifesting hostility toward religion.

The crucial question for endorsement purposes involves the reaction of “the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement.”²⁷⁸ Consider the reasonable, informed observer who knows that Congress assured that the individual acquiring ownership of the land was in favor of keeping the cross and that the land would revert to the government

272. *Id.* (emphasis added).

273. *See id.* (noting the possibility that someone would “misperceive the endorsement of religion”).

274. *See id.* (noting the possibility that someone would *perceive* rather than *misperceive* the refusal to permit the club as hostility).

275. *See id.*

276. *Salazar v. Buono*, 130 S. Ct. 1803, 1823 (2010) (Alito, J., concurring in part and concurring in the judgment).

277. *Id.*

278. *Id.* at 1819–20 (plurality opinion).

were the cross taken down. As Justice Stevens points out in his dissent, such an observer might well find that the state is bending over backwards to assure the continued display of a paradigmatic religious symbol.²⁷⁹ One infers from Justice Alito's comments that a different reasonable observer might view Congress's transferring ownership of the land as manifesting hostility to the public acknowledgment of religious heritage. Still another reasonable observer might adopt Justice Alito's view that the "transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns."²⁸⁰

Salazar suggests that some reasonable observers might view the land transfer as endorsement while others would not. Other observers would view dismantling the cross as hostility towards religion, while still other observers might view Congress's compromise whereby ownership was transferred as itself involving hostility to religion. The use of the endorsement test in *Salazar* reflects the way that the endorsement test was used while Justice O'Connor was on the Court—presumably reasonable people reach opposite conclusions about which state actions violate constitutional guarantees.²⁸¹

C. *What Do Sumnum and Salazar Suggest About the Future of the Endorsement Test?*

Sumnum suggests that it may be difficult in particular cases to identify the message conveyed by a particular display. That point, while true, is neither particularly surprising nor significant in itself.²⁸² For purposes here, the question is how this observation will fit into the endorsement test jurisprudence.

Some commentators claim that the endorsement test will only invalidate a practice if a reasonable observer would necessarily infer endorsement.²⁸³

279. See *id.* at 1833 (Stevens, J., dissenting) ("[T]he transfer continues the existing government endorsement of the cross because the purpose of the transfer is to preserve its display. Congress' intent to preserve the display of the cross maintains the Government's endorsement of the cross.").

280. *Id.* at 1824 (Alito, J., concurring in part and concurring in the judgment).

281. See, e.g., *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989) (applying Justice O'Connor's endorsement test and noting that whether an effect is constitutional "must also be judged according to the standard of a 'reasonable observer'").

282. See Gey, *supra* note 212, at 1301 ("This discussion was apparently intended to demonstrate the obvious propositions that monuments may convey different messages to different people, and that these messages may change with time. All of this is true, and entirely beside the point.").

283. See Lisa Shaw Roy, *Pleasant Grove City v. Sumnum: Monuments, Messages, and the Next Establishment Clause*, 104 NW. U. L. REV. COLLOQUY 280, 286 (2010) ("The endorsement test, on

But that cannot be, because it will almost always be possible for a reasonable observer to claim no endorsement.

Many of the cases involving endorsement involved dissenting opinions. Sometimes, some members of the Court rejected the majority view that there was endorsement, whereas at other times some members of the Court rejected the dissenting view that there was endorsement. But if the test only invalidates a practice when no reasonable person would deny endorsement, then these cases should have been unanimous, at least with respect to endorsement. Assuming that members of the Court believe each other sincere, knowledgeable, and reasonable, they should admit that not all reasonable, knowledgeable observers would find the practice an endorsement (because some on the Court did not), and thus that the endorsement test had not been met. If, however, the endorsement test invalidates a practice as long as a reasonable person might have inferred state endorsement of religion, then many of the opinions should have been unanimous, at least with respect to whether the endorsement test required invalidation, because a reasonable person would have inferred endorsement.

Admittedly, unanimity with respect to the implications of the endorsement test would not assure unanimity in result. For example, a Justice might suggest that the endorsement test would require invalidation of a particular state practice but that the practice at issue was nonetheless permissible because the endorsement test was not the applicable test.²⁸⁴

Someone reading the *Sumnum* opinion might have inferred that Justice Alito was laying the groundwork for a modified endorsement test. In *Sumnum*, he suggests that there are many reasonable interpretations of government messages.²⁸⁵ Assuming that the individuals offering these reasonable interpretations are sincere and knowledgeable, then the recognition that there might be multiple reasonable reactions to a display might have important implications. For example, it might mean, following Justice Stevens, that as long as a reasonable nonadherent believes a display

the other hand, requires a judge to discern a single, identifiable message of exclusion conveyed by a monument to the reasonable observer.”); Mary Jean Dolan, *Salazar v. Buono: The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42, 51–52 (2010) (“Any assertion that the endorsement test is not dead yet must confront the claim that it was effectively killed off in *Pleasant Grove City v. Sumnum*. The basis for this claim is a meandering passage in *Sumnum* in which Justice Alito, writing for the Court, seemed to suggest in dicta that any monument could mean anything to anyone.”).

284. For example, Justice Thomas has suggested that certain practices are constitutional, past precedent notwithstanding, because the precedent was incorrect. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (Thomas, J., concurring in the judgment) (“I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that *Lee* was wrongly decided.”).

285. *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 476–77 (2009).

to be endorsing religion, the state cannot maintain that display.²⁸⁶ That said, Justice Alito may have had a different position in mind, since his discussion of the multiple reasonable interpretations of a state display might be a prelude to the position that as long as a reasonable informed individual would not infer endorsement, the endorsement test will not invalidate the display.²⁸⁷

Salazar offers somewhat mixed messages regarding the endorsement test. Justice Kennedy and Chief Justice Roberts implied that the land transfer at issue should not have been inferred to be an endorsement,²⁸⁸ although the case was remanded for reconsideration.²⁸⁹ Justice Alito would not have even remanded the case and would instead have simply upheld the transfer.²⁹⁰

It is simply unclear whether Justice Alito believed that the transfer passed muster because a reasonable observer might have believed this did not involve endorsement (even though a different observer would have inferred endorsement) or because no reasonable observer would have inferred endorsement (even though there were members of the Court with a different view). The former would involve a new, very forgiving endorsement test, which would not invalidate a state action as long as a reasonable observer would not view it as involving an endorsement. The latter would be the same endorsement test that has been used in the past, where some members of the Court implicitly suggest that their colleagues are not reasonable, knowledgeable, or, perhaps, sincere. Neither understanding of endorsement seems likely to prevent nonadherents from feeling like outsiders in their political communities.

286. See *supra* notes 124–28 and accompanying text.

287. In a much different context, Justice Alito suggested that state action would not violate constitutional guarantees as long as a reasonable person might have made a particular inference. See *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (“I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use . . .”).

288. *Salazar v. Buono*, 130 S. Ct. 1803, 1819–20 (2010) (“[I]t is not clear that Buono’s claim is meritorious. That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement.”); see also *id.* at 1819 (“The injunction was issued to address the impression conveyed by the cross on federal, not private, land. Even if its purpose were characterized more generally as avoiding the perception of governmental endorsement, that purpose would favor—or at least not oppose—ownership of the cross by a private party rather than by the Government.”).

289. See *id.* at 1821.

290. See *id.* at 1821 (Alito, J., concurring in part and concurring in the judgment).

IV. CONCLUSION

Commentators have suggested that the endorsement test may have retired along with Justice O'Connor.²⁹¹ That suggestion does not seem plausible if only because members of the Court continue to invoke the test.²⁹²

It is fair to suggest that the test may undergo revision, although that requires an analysis both of what it was and what it has become. While Justice O'Connor initially trumpeted the importance of not making religious minorities feel like outsiders and second-class citizens, both her explication and her application of the test would sometimes permit exactly what she claimed the test was designed to prohibit.²⁹³ Indeed, the test might not only permit individuals to feel like outsiders because they might reasonably perceive state endorsement of religious practices contrary to their faith, but it might aggravate those feelings because the nonadherents were implicitly being branded as lacking knowledge or, perhaps, as being insincere hecklers when they voiced their own sincere perceptions.

Even while Justice O'Connor was on the Court, the reasonable person's view was offered to establish that a particular practice did or did not involve endorsement, even though presumed reasonable, knowledgeable members of the Court would have inferred that the reasonable observer would have reached a contrary result. That same tendency has been reflected more recently even after Justice O'Connor's retirement.

It seems likely that the post-O'Connor Court will continue to use the endorsement test, perhaps explicitly suggesting that the test will invalidate a practice only if no reasonable person could fail to infer endorsement or perhaps suggesting that no reasonable person would infer endorsement, even in the face of claims to the contrary by members of the Court. The test that once seemed to have great promise, because it tried to prevent nonadherents from feeling like second-class citizens, has all too often been used, not only to validate practices that are reasonably viewed as endorsing religion over nonreligion or one religion over others, but also to undermine the validity of the perceptions of those who perceive endorsement. But that is nothing new. The endorsement test, a cause for celebration because of its recognition that this country stands for religious liberty, continues to be a source of sorrow. It claims to be concerned about religious endorsement while refusing to acknowledge the manifold ways in which certain religions are privileged

291. Some have suggested that the endorsement test should not be used when analyzing whether government speech violates Establishment Clause guarantees. See Scott W. Gaylord, *Licensing Facially Religious Government Speech: Summum's Impact on the Free Speech and Establishment Clauses*, 8 FIRST AMEND. L. REV. 315, 392–96 (2010) (“[T]he endorsement test does not apply to government speech . . .”).

292. See, e.g., *Salazar*, 130 S. Ct. 1803; *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

293. See *supra* notes 21–22 and accompanying text.

over others,²⁹⁴ or in which religion is preferred over nonreligion. To pretend that nonadherents cannot reasonably perceive endorsement and feel like outsiders when confronting certain (allegedly constitutional) state practices is only adding insult to injury, a result countenanced under the endorsement test both while Justice O'Connor was on the Court and since her retirement.

294. See Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1575 (2010) (“[U]nless all citizens of a country are Jewish or Christian, a government invocation of God is sectarian.”).
