Maryland Law Review

Volume 60 | Issue 3 Article 12

Measured Endorsement

Shari Seidman Diamond

Andrew Koppelman

MEASURED ENDORSEMENT

SHARI SEIDMAN DIAMOND* & ANDREW KOPPELMAN**

INTRODUCTION

> It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane.[1]

The interpretation of the Establishment Clause of the First Amendment is in flux. For many years, there was no unified Establishment Clause doctrine, but only a series of disconnected results. The Court finally converged on a single standard in 1971, when it held in *Lemon v. Kurtzman*[2] that in order to withstand an Establishment Clause challenge, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[3] In subsequent years, however, this standard proved amorphous and unpredictable in its application, and produced confusing results. "Critics commonly intone what has become an almost canonized litany of paired but manifestly inconsistent decisions purporting to apply the test."[4] The future of the *Lemon* test is doubtful. "[A] majority of the Justices on the current Court have expressed dissatisfaction with the test and have advocated alternatives . . . ."[5]

---

* Professor of Law and Psychology, Northwestern University, and Senior Research Fellow, American Bar Foundation. B.A., University of Michigan; J.D., University of Chicago; M.A., Ph.D., Northwestern University.

** Associate Professor of Law and Political Science, Northwestern University. A.B., University of Chicago; M.A., J.D., Ph.D., Yale University. Both authors thank Jamin Raskin and the Symposium audience for helpful comments on an earlier draft.

1. Am. Jewish Cong. v. Chicago, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting), *quoted with approval in* County of Allegheny v. ACLU, 492 U.S. 573, 676 (1989) (Kennedy, J., concurring in part and dissenting in part). For a critical assessment of these claims, see *infra* note 186.

2. 403 U.S. 602 (1971).

3. *Id.* at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

4. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269 (1987).

5. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 987 (1997).

Among the various proposals for reform, the one that appears to have the broadest support on the Supreme Court is the "no endorsement" test advocated by Justice O'Connor.[6] That test holds that government violates the Establishment Clause when it acts in a way that endorses religion.[7] A number of majority opinions of the Court have adopted the "no endorsement" test, and in some cases without a majority opinion, a majority of the justices adopted the test.[8]

---

6. *See generally* Agostini v. Felton, 521 U.S. 203, 234-35 (1997); Westside Cmty. Bd. of Educ. v. Mergens, 496 U.S. 226, 250-53 (1990).

7. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))).

8. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305-08 (2000) (applying the "no endorsement" test); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (same); *Mergens*, 496 U.S. at 250-53, 263 (writing for the plurality, Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Blackmun, applied the "no endorsement" test); *County of Allegheny*, 492 U.S. at 600-01 (applying the "no endorsement" test); Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (same); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488-89 (1986) (same); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 389-97 (1985) (same); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (applying the test within the first step of the *Lemon* test and explaining that if endorsement is found to be the purpose of a statute, there is no need to apply the second and third steps of the *Lemon* test).

In *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) (plurality opinion), all nine of the now-sitting Justices wrote or signed opinions indicating that endorsement was at least relevant to Establishment Clause analysis. *See id.* at 763-69 (plurality opinion) (Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, emphasizing that "endorsement" only occurs when the government itself either expresses religious values or discriminates by showing favoritism to private religious activities); *id.* at 774 (Justice O'Connor, concurring, joined by Justices Souter and Breyer) (disagreeing with the plurality's attempt to limit the application of the endorsement test and asserting 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"); *id.* at 799 (Stevens, J., dissenting) ("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."); *id.* at 817-18 (Ginsburg, J., dissenting) (indicating that endorsement is relevant to Establishment Clause analysis).

At the same time, the test has fallen short of full adoption by the Court. Professor Smith's conclusion twelve years ago remains an accurate description of the Court's position:

> The Court seems disposed to accept the *expansive* implications of the test, and thus to employ "endorsement" as an additional ground for finding an impermissible purpose or effect in a challenged law. However, the Court has not yet accepted the *restrictive* implications of the test; it has not confirmed, for instance, that a law which does not endorse religion may be upheld even if "it in fact causes, even as a primary effect, advancement or inhibition of religion."

Smith, *supra* note 4, at 275 (footnote omitted) (quoting *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring)). As we shall make clear below, we think that this restriction of the test's scope is appropriate. We think that the endorsement test is an appropriate ele-

The Court's adoption of the test, however, conceals a mass of continuing uncertainty. Two ambiguities are especially salient. First, it is not clear that the way the test has in fact been applied is consistent with its rationale. Second, the Court has not offered much guidance as to how to address disagreement over whether any particular government action is an endorsement of religion.

In this Article, we shall offer a solution to both of these problems. We will argue that the prohibition of endorsement is an indispensable element of the Establishment Clause. And we will further argue that this prohibition can be operationalized with less confusion and uncertainty than the Court's opinions suggest. The basic problem with the Court's approach is that none of the Justices appears to have noticed that the problem of plural interpretations of symbols is not unique to Establishment Clause litigation. It arises in other areas of the law involving symbolic communication. Of these, the area with the best developed standards for discerning whether a forbidden message has been communicated to the public is trademark law.

When a litigant claims trademark infringement under the Lanham Act,[9] courts frequently use survey evidence to assist in determining whether consumers are likely to be confused about the source of a particular product.[10] Similarly, when a litigant claims that a competi-

---

ment of the Establishment Clause doctrine, but we do not think it should swallow the entire doctrine.

9. 15 U.S.C. § 1051 *et. seq.* (1994). The Lanham Act provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

10. *See, e.g.*, Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc., 921 F.2d 467, 475 (3d Cir. 1990) (explaining that the survey is the most direct form of evidence that can be offered on likelihood of confusion); Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd., 824 F.2d 665, 669 (8th Cir. 1987) (noting the use of survey results by a cosmetics company as partial evidence of trademark law violations); Am. Footwear Corp. v. Gen. Footwear Co., 609 F.2d 655, 665 (2d Cir. 1979) (finding that the litigants failed to show consumer confusion because the only evidence shown to support their claim was a consumer survey that failed to establish the likelihood of actual confusion); Qualitex Co. v. Jacobson Prods. Co., No. CV-90-1183HLH, 1991 Dist. LEXIS 21172, at *14-15 (C.D. Cal.,

tor has engaged in deceptive advertising,[11] litigants often present survey evidence to assist the court in assessing whether consumers are likely to be deceived by the commercial message.[12] Applying an analogous empirical approach to test for violations of the Establishment Clause, we show that courts need not speculate about the reactions of the community or rely solely on their own potentially idiosyncratic perspectives in evaluating whether the government is creating a perception of religious endorsement. Rather, in cases involving allegations that the Establishment Clause has been violated, a systematic assessment of reactions from members of the community to the display or symbol at issue can assist courts in determining whether the particular display conveys a message of religious endorsement. As in Lanham Act cases, the value of the empirical evidence that a survey can supply is determined by an evaluation of whether the survey was conducted on a relevant population; applied appropriate sampling techniques; employed an unbiased testing approach, including the use of suitable stimulus materials, research design, and questions; and analyzed and reported the results thoroughly and objectively.

We begin by describing the confused state of the endorsement test. Then we offer our revision. We then describe the central role occupied by the assessment of likely consumer reaction in cases alleging trademark infringement and in cases alleging violations of the Establishment Clause. We next describe how survey evidence is used in a typical Lanham Act case and show how a similar approach can be applied when the question is whether a particular display or symbol conveys a message of religious endorsement by the government. In addition to offering a new method for assessing whether a violation of the Establishment Clause has occurred, our discussion of the empirical model we propose to apply to Establishment Clause cases provides a further benefit—it makes explicit some questions that evolving legal doctrine on the Establishment Clause has addressed inconsistently, and that have, as a result, produced uncertainty about the legal standard that is applicable in Establishment Clause cases. We suggest several ways of resolving the ambiguity of the perspective of the

---

Sept. 3, 1991), *aff'd in part & rev'd on other grounds*, 13 F.3d 1297, *rev'd*, 514 U.S. 159 (1995) (finding that surveys are relevant evidence on the issue of likelihood of confusion).

11. *See* 15 U.S.C. § 1125(a)(1)(B).

12. *See, e.g.*, Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1140 (9th Cir. 1997) ("Reactions of the public are typically tested through the use of consumer surveys."); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 40 (D.C. Cir. 1985) (accepting the "general desirability of having some empirical evidence of consumer perception" in deceptive advertising cases, and noting that such evidence may include consumer survey data).

"objective observer" that Justice O'Connor suggested as the relevant basis for a workable endorsement test.[13] We also identify and address unresolved issues about the appropriate weight to be given to the perceptions of majority and minority community members in evaluating whether a message of endorsement has been conveyed.

We emphasize the limited nature of our claim. We are not saying that survey evidence must be relied on in all Establishment Clause cases involving religious displays.[14] In many cases, the presence or absence of religious meaning in the display and the nature of that meaning will be clear enough that such evidence will be unnecessary. We are saying that evidence from an appropriately conducted survey is always relevant and should be per se admissible in any such case.

I. THE CONFUSED ENDORSEMENT TEST

A. *The Doctrine as Justice O'Connor Has Formulated It*

Justice O'Connor first proposed the endorsement test in *Lynch v. Donnelly*,[15] a case considering the constitutionality of a city's Christmas nativity display.[16] The display, erected by the city of Pawtucket, Rhode Island, was located in a park, owned by a nonprofit organization, that was located in the middle of the city's shopping district.[17] In addition to the crèche, the display included a Santa Claus house; reindeer pulling Santa's sleigh; candy-striped poles; a Christmas tree; carolers; cut-out figures representing such characters as a clown, an elephant, and a teddy bear; hundreds of colored lights; and a large banner bearing

---

13. *See Wallace*, 472 U.S. at 76 (O'Connor, J., concurring) (finding the relevant endorsement issue to be "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement"); Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community.").

14. Much less are we claiming, as Jamin Raskin asserts, that adjudication of Establishment Clause claims "ultimately turns . . . on the subjective perceptions of either a majority or minority faction within the population," or that we wish to "assign the task of constitutional adjudication to the audience." Jamin Raskin, *Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause—Commentary on* Measured Endorsement, 60 MD. L. REV. 761, 762, 776 (2001). No one, to our knowledge, has ever propounded such a claim, but if anyone were to do so, we would join Raskin in rejecting it. Many of his arguments are predicated on these mischaracterizations of our position. We will not respond to these arguments, because we are not interested in defending views that are not ours.

15. 465 U.S. 668 (1984).

16. *Id.* at 670-71.

17. *Id.* at 671.

the words "SEASONS GREETINGS."[18] The Court, citing the *Lemon* test, approved the use of the display.[19]

Justice O'Connor joined in the majority opinion, but wrote a separate opinion proposing a "clarification" of the *Lemon* test.[20] She proposed that the "secular purpose" requirement of *Lemon* be understood to mean that government may not act with the intent of endorsing or disapproving of religion.[21] The requirement of a primarily secular effect would mean that government practices may not create a perception that government is endorsing or disapproving of religion.

Justice O'Connor justified her new test as following from the purpose, as she understood it, of the Establishment Clause: "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[22] One way that government may run afoul of that prohibition is by endorsement or disapproval of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[23]

The issue in the instant case, Justice O'Connor thought, was "whether Pawtucket has endorsed Christianity by its display of the crèche."[24] The answer depended on "both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed."[25] Justice O'Connor explained:

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audi-

---

18. *Id.*
19. *See id.* at 679-87.
20. *Id.* at 687 (O'Connor, J., concurring).
21. *Id.* at 691.
22. *Id.* at 687.
23. *Id.* at 688. This formulation was recently quoted, in part, with approval by the Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309-10 (2000).
24. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).
25. *Id.*

> ence is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.[26]

With respect to the city's intentions, O'Connor concluded that "Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions."[27] The city's purpose "was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols."[28] As for the objective component, "the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."[29]

A crucial ambiguity of Justice O'Connor's opinion lay in her failure to explain whose perceptions she was relying on in order to declare the message of the display. Different people have different perceptions. Some, but not all, people may perceive endorsement in any particular case. Her test's rationale seemed to focus on the perspective of nonadherents, asking whether they were sent a message that they were outsiders, but her application of that test did not rely on their perspective at all. Her discussion of the "objective" component of the government message indicated that it mattered what "some [unspecified] portion of the audience" understood government to be saying.[30] Her conclusion, though, did not rely on any evidence about how the crèche was actually perceived by anyone but herself.[31] This led some commentators to conclude that she was in fact viewing the problem from the perspective of a "reasonable Christian."[32] Laurence Tribe has nicely summarized the problem: "When

---

26. *Id.*
27. *Id.* at 691.
28. *Id.*
29. *Id.* at 692.
30. *Id.* at 690.
31. *See id.* at 694 ("Giving the challenged practice the careful scrutiny it deserves, *I cannot say* that the particular crèche display at issue in this case was intended to endorse or had the effect of endorsing Christianity." (emphasis added)).
32. Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 860 (internal quotation marks omitted), *quoted with approval in* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1293 (2d ed. 1988).

deciding whether a state practice makes someone feel like an outsider, the result often turns on whether one adopts the perspective of an outsider or that of an insider. Judges must recognize the range of possible responses and cannot avoid selecting among them."[33]

The question of whose perceptions control was squarely addressed in Justice O'Connor's concurrence in *Wallace v. Jaffree*,[34] a case in which the Court struck down a statute that permitted a moment of silence for private prayer in public schools.[35] The majority opinion relied in part on the endorsement test, concluding that the law "was intended to convey a message of state approval of prayer activities in the public schools."[36] O'Connor agreed. This time, however, she evidently discarded the suggestion in her *Lynch* concurrence that the perceptions of real human beings were what mattered for purposes of determining whether the forbidden endorsement had occurred.[37] Instead, she wrote, "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[38]

O'Connor thought that the legislative history strongly suggested that the law was intended to endorse prayer.[39] At the time of its enactment, Alabama law already provided for a moment of silence, but the earlier law did not list voluntary prayer as one of the activities for which the moment was designated.[40] That fact suggested that the sole purpose of the new law was "to return voluntary prayer to our public schools."[41] On this basis, Justice O'Connor concluded that an objective observer would perceive a message of endorsement.[42]

In her opinion in *Wallace*, Justice O'Connor also made it clear that the "objective observer" should be understood to be acquainted with the values of the Free Exercise Clause.[43] This qualification is necessary because the Constitution has long been understood to permit, and sometimes to require, special governmental accommodation of

---

33. TRIBE, *supra* note 32, at 1293 (footnote omitted).
34. 472 U.S. 38 (1985).
35. *Id.* at 60-61.
36. *Id.* at 61.
37. *See supra* text accompanying note 26.
38. *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring). This formulation was quoted with approval by the Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000).
39. *Wallace*, 472 U.S. at 76-78 (O'Connor, J., concurring).
40. *Id.* at 77.
41. *Id.* (internal quotation marks omitted).
42. *Id.* at 78.
43. *Id.* at 83.

religion, such as exemption of Quakers and other religious pacifists from military duty.[44] An untutored observer might think that such accommodations represent government endorsement of religion, but "courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes."[45]

Justice O'Connor offered a further clarification of the identity of the "objective observer" in *Capitol Square Review & Advisory Board v. Pinette*.[46] The question in that case was whether the Establishment Clause forbade Ohio from permitting a private party to display a cross on the grounds of the state capitol.[47] The square where the display appeared traditionally had been open to the public as a forum for a variety of views.[48] Justice Scalia's plurality opinion adopted a per se rule that "[r]eligious 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."[49] Justice O'Connor rejected this per se exception to the endorsement test, arguing that "[a]t some point . . . a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."[50] But she agreed with Justice Scalia that the Establishment Clause was not violated by the display.[51]

Justice Stevens, dissenting, thought the display unconstitutional because reasonable observers could perceive it as an endorsement of the message of the cross.[52] Justice O'Connor, however, rejected the view "that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge."[53] The "fundamental difficulty" of relying on actual people is that "[t]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."[54] Rather, "the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable

44. *See infra* note 188 (discussing the conscientious objector exemption).
45. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring) (citation omitted).
46. 515 U.S. 753 (1995) (plurality opinion).
47. *Id.* at 757.
48. *Id.* at 757-58.
49. *Id.* at 770.
50. *Id.* at 777 (O'Connor, J., concurring).
51. *Id.* at 782.
52. *Id.* at 798 (Stevens, J., dissenting).
53. *Id.* at 779 (O'Connor, J., concurring).
54. *Id.* at 780.

things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[55] Thus, she explained, "'we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.'"[56]

In the instant case, "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears."[57] That context included "the fact that Capitol Square is a public park that has been used over time by private speakers of various types."[58] The "reasonable observer" would not regard the display as an endorsement of religion, because that observer "would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer."[59]

B. The Doctrine's Confusions

Justice O'Connor's approach has been subjected to two potentially fatal objections. The first is that she has not adequately explained why perceptions of endorsement ought to be so important for purposes of deciding whether there has been an Establishment Clause violation. The second is that she has not clarified how the test ought to operate. Different judges are likely to reach different results—indeed, have reached different results—while purporting to apply the same test. Moreover, it is not clear what arguments are available, even in principle, that could resolve these differences. Thus, the endorsement test does not introduce any certainty into the law. The two objections are related. The way in which Justice O'Connor has developed the test over time has attenuated its link to her stated rationale for the test. Attention to the test's purposes, we shall argue below, can clarify ambiguities in its application. Conversely, O'Connor's lack of attention to the test's purposes has exacerbated its vagueness in operation.

---

55. *Id.* at 779-80 (alteration in original) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (W. Page Keeton ed., 5th ed. 1984)).

56. *Id.* at 780 (alteration in original) (quoting Ams. United for Separation of Church and State v. Grand Rapids, 980 F.2d 1538, 1544 (6th Cir. 1992)).

57. *Id.* at 780.

58. *Id.* at 781.

59. *Id.* at 782.

The purpose of the test, as she originally formulated it, was to prevent a certain kind of political alienation. "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[60] Government may not take actions that send a symbolic message that nonadherents to any particular religion are "outsiders, not full members of the political community."[61] This criterion, O'Connor argues, is better able than any rival conception, such as the coercion-based establishment standard proposed by Justice Kennedy,[62] to "adequately protect the religious liberty [and to] respect the religious diversity of the members of our pluralistic political community."[63]

It is not obvious , however, how endorsement either threatens religious liberty or fails to respect diversity. Endorsement as such is purely symbolic. It does not restrict religious liberty in any tangible way.[64] As for respect for diversity, several commentators have wondered how endorsement is inconsistent with it:

> [I]t is not clear why symbolic exclusion should matter so long as "nonadherents" are in fact actually included in the political community. Under those circumstances, nonadherents who believe that they are excluded from the political community are merely expressing the disappointment felt by everyone who has lost a fair fight in the arena of politics.[65]

To ask that no one be alienated from the results of political decision-making is to ask too much. In a pluralistic culture, alienation is inevitable. "[S]ome beliefs must, but not all beliefs can, achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like 'outsiders.'"[66]

Not only has Justice O'Connor failed to defend her alienation-based rationale for the endorsement test, but she has herself been unfaithful to that rationale in her development of the test. The shift away from the perceptions of actual people to those of a fictitious objective observer means that judicial decisions will often turn on facts

---

60. Lynch v. Donnelly, 465 U.S. 668, 687 (O'Connor, J., concurring).

61. *Id.* at 688.

62. *See* County of Allegheny v. ACLU, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in part and dissenting in part).

63. *Id.* at 628 (O'Connor, J., concurring).

64. *See* Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 65-67 (1990).

65. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 (1986) (footnote omitted); *see also* Smith, *supra* note 4, at 307.

66. Smith, *supra* note 4, at 313.

that have nothing to do with the message that is actually received in the community.[67] It will sometimes turn out that the "objective observer" is untroubled by messages that cause intense alienation in the actual members of the community. Because Supreme Court opinions are reported by newspapers and read by the public, Justice O'Connor's approach exacerbates the very alienation it ostensibly seeks to combat. Jews may be offended by a state-sponsored nativity display, but at least the display does not subject them to a lecture, as some of Justice O'Connor's opinions do, expressing why they are unreasonable to feel offended!

But perhaps this offense would be tolerable if Justice O'Connor had some basis for attributing the views she does to the objective observer. In practice, however, the basis for determining the objective observer's views has proven elusive. It is doubtful whether her reference in *Pinette* to the standard of the reasonable person in tort law[68] can provide the needed clarification. The reasonable person in tort law is a judicially constructed standard of conduct, but the conduct that is judged by that standard is different from the conduct that the judge herself is engaged in. In Establishment Clause litigation, the question the objective observer must answer is precisely the question that the judge must answer.[69] Recall Justice O'Connor's statement that "courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes."[70] Michael McConnell observes that "[a]n objective observer holding separationist views of the First Amendment might be quick to perceive government's contact with religion as endorsement," while one with a different view of the religion clauses might have a different reaction.[71]

---

67. Neal Feigenson notes two telling examples from O'Connor's own opinions:

> In *Lynch*, for instance, how many viewers of Pawtucket's creche were familiar with the city council debates and public pronouncements that preceded its installation? Or, more strikingly, in *Wallace*, how many Alabama schoolchildren authorized to meditate or pray silently were conversant with the legislative history which the court found so crucial?

Feigenson, *supra* note 64, at 87. O'Connor's citation to the legislative history in both these cases may also suggest that she was using the endorsement test as a test of intent rather than effect. In this case, too, the content of the test would not correspond to its purpose. *See* Smith, *supra* note 4, at 293-95.

68. *See supra* text accompanying note 55 (noting Justice O'Connor's statement regarding the reasonable person in tort law).

69. Thus it is unsurprising that, as Justice Stevens notes, O'Connor's objective observer "comes off as a well-schooled jurist, a being finer than the tort-law model." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting).

70. Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (citation omitted).

71. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48.

Looking to the objective observer's perspective thus provides no guidance at all. It is as if a legislature were to write a criminal code instructing the police and courts to "punish wrongdoing," with no specification of what wrongdoing consists of. Thus, McConnell concludes that "[i]f Justice O'Connor's 'objective observer' standard were adopted by the courts, we would know nothing more than that judges will decide cases the way they think they should be decided."[72]

Neal Feigenson observes that O'Connor's approach "rests on a flawed philosophy of language."[73] Contemporary theories of meaning reject the notion that words have an objective content that uniquely determines their message. Rather, the audience plays a role in the creation of meaning. "To identify 'what is normally conveyed' to the community by government action is not necessarily to fix a single, 'normative' meaning. What is normally conveyed may well be a variety of messages to different audiences."[74] The judicial imposition of a single meaning on a message is inconsistent with "[t]he very purpose of the religion clauses," which is "to protect minority and even idiosyncratic modes of belief and understanding."[75]

The fundamental problem, Steven Smith argues, is that the cultural meaning of arguably religious messages is likely to be ambiguous and contested.[76] Any particular governmental action—the granting of conscientious objector status, say—will or will not constitute illegitimate endorsement, depending on whether it is appropriate for government to take that substantive action. Different people in society will have different views about the substantive issues, and their opinions about whether endorsement has occurred will follow from those substantive views. "Because perspectives are in fact incurably diverse, a policy against creating perceptions that government has endorsed or disapproved of religion can provide no grounds for identifying one perspective, or one conception of neutrality, as correct."[77] The endorsement test thus is parasitic on some substantive vision of what it is appropriate for government to do. It cannot be a substitute for that substantive vision.[78]

---

72. *Id.*

73. Feigenson, *supra* note 64, at 83.

74. *Id.* at 85.

75. *Id.* at 86.

76. Smith, *supra* note 4, at 323.

77. *Id.*

78. *See id. passim*; *see also* Theodore C. Hirt, *"Symbolic Union" of Church and State and the "Endorsement" of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence*, 24 WAKE FOREST L. REV. 823, 843 (1989); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 148-51, 192 (1992).

The members of the Court who have rejected or sought to limit the endorsement test have focused on its uncertainty in application. Justice Kennedy's criticism spoke of the test's probable baleful effects,[79] but he also worried that the crèche decisions, relying as they did on the details of how holiday displays were set up,

> could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication.[80]

In *Pinette*, Justice Scalia argued that the application of the endorsement test in the context of public fora would require state decisionmakers "to guess whether some undetermined critical mass of the community might nonetheless perceive the [government] to be advocating a religious viewpoint."[81] Even if there were agreement on whose perspective governs, Scalia argued, "it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield."[82]

II. A FRESH START

We think that the endorsement test has a sound basis in the Establishment Clause, and that it can be operationalized in a clear way. We propose a revision of the endorsement test, both at its foundations and in operation. The revision at these two points is necessarily linked. Once the rationale for the endorsement test has been established, it is important not to forget that rationale, as Justice O'Connor has done, when working out its applications. And those applications must have determinate results, as Justice O'Connor's formulations manifestly do not.

---

79. *See* County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.").

80. *Id.* at 675-76.

81. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion).

82. *Id.* at 769 n.3.

A. *Establishment Clause Fundamentals*

Begin with the foundations. We start from a premise that is, we hope, uncontroversial. *The Establishment Clause forbids government from declaring religious truth.*[83]

The Clause is in part a restriction on government speech. It prevents government from offering an official position on what God has commanded, or what beliefs or rituals most closely reflect God's will. The doctrine in this respect is settled:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[84]

If this much is accepted, then the prohibition of endorsement is an obvious corollary. If government cannot declare religious truth, then it cannot engage in conduct that amounts to a declaration of religious truth. Justice Kennedy, who happens to be the Court's most vocal critic of the endorsement test, offered an example of such conduct, namely: "the permanent erection of a large Latin cross on the roof of city hall."[85]

---

83. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944).

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id. (citation omitted).

84. Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

85. *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy explained:

> Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would

What, precisely, would be wrong with erecting that cross? There are several answers, and all of them have to do with the public perception of the cross's meaning. To see why perception ever matters, we must begin with the justifications for having an Establishment Clause in the first place.

One justification for the Clause is respect for individual conscience. There is considerable disagreement about what "respect" amounts to in practice, but Justice O'Connor's account, at least in her earlier decisions, indicates that it means the avoidance of a certain kind of political alienation on the part of religious minorities.[86] If this is right, then the perceptions of those minorities matter. The problem with endorsement is that it "sends a message to nonadherents that they are outsiders, not full members of the political community."[87]

A second justification for the Establishment Clause is that it promotes civil peace. "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[88] In a pluralistic society, we cannot possibly agree on which religious propositions the state should endorse. The argument for government avoiding support for any religious view is that, unlike government endorsement of any particular religious propositions, it is not in principle impossible for everyone to agree to a rule of neutrality.[89] Here, again, perceptions matter: is government in fact being understood as endorsing propositions that some citizens (almost certainly, religious minorities) cannot possibly agree to?

A third classic justification for the Establishment Clause holds that religion is not helped and may even be harmed by government support:

---

place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

Id. (footnote omitted).

Justice Kennedy has sought to make coercion an indispensable element of an Establishment Clause claim. *See id.* at 659-62 (explaining that "government may not coerce anyone to support or participate in any religion or its exercise"); *id.* at 659-62 (discussing and applying this coercion standard). He has not explained, however, what is coercive about proselytization.

86. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

87. *Id.* O'Connor does go on to say that endorsement also conveys "an accompanying message to adherents that they are insiders, favored members of the political community," *id.*, but without the alienation of the minorities, it is not clear why this should be a problem. A community is supposed to make its members feel like they belong, isn't it?

88. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

89. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 322 (1996); McConnell, *supra* note 78, at 162-63.

> [The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.[90]

John Garvey notes that this "futility" argument has roots in the theological idea that "God's revelation is progressive," so that free inquiry will bring us closer to God;[91] but it can also take the form of a sociological argument that state sponsorship tends to diminish respect for religion,[92] or a skeptical argument that the state does not know enough to justify preferring any particular religious view.[93]

The futility rationale means that government ought not to declare religious truth, because this will impede, rather than help, citizens' search for that truth. Douglas Laycock's indictment is typical: "Government-sponsored religion is theologically and liturgically thin. It is politically compliant. It is supportive of incumbent administrations."[94] These generalizations are not universally accurate—try applying them to the regimes of Mohammed or Calvin, or the religious

---

90. Engel v. Vitale, 370 U.S. 421, 431-32 (1962) (footnotes omitted).

91. John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 285 (1996).

92. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287-301, 442-52 (J.P. Mayer ed., Doubleday 1969) (1840).

93. "The one only narrow way which leads to heaven is not better known to the magistrate than to private persons," Locke wrote, "and therefore I cannot safely take him for my guide who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am." JOHN LOCKE, A LETTER CONCERNING TOLERATION 32 (Patrick Romanell ed., Bobbs-Merrill 1950) (1689).

James Madison wrote that the idea "that the Civil Magistrate is a competent Judge of Religious Truth" is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages." James Madison, *To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance*, *in* MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 64, 66 (1996).

94. Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 380 (1992).

establishments of Israel or Iran[95]—but they probably describe any possible establishment in the United States.

> In tolerant communities, efforts to be all-inclusive inevitably lead to desacralization, to the least common denominator, to a secular incarnation with plastic reindeer, to Christmas and Chanukah mushed together as the Winter Holidays. By stripping all the specific elements of different faiths and denominations and attempting to keep only the common elements that all faiths share, tolerant governments produce a mishmash that no faith can accept or believe in.[96]

De Tocqueville's argument against establishment held that alliance with politicians would weaken religion's moral hold on people's allegiances.[97] The mirror image of that claim is that holding political power not only fails to enhance one's competence in religious matters, but actually impairs it. The ends that political leaders must pursue are not religious, and if they are given power over religion they will probably be induced by the imperatives of their tasks to distort religion for political purposes. The nature of government, so the argument goes, is such that it is an unusually poor judge of religious truth. Here, again, it matters whether the government's conduct in question is actually affecting religion—though here the relevant religion, the established religion, is likely to be that of the majority. And in that inquiry, it is highly relevant whether the population understands the state to be instructing them about religion.

Each of these claims is a contingent one, depending on the outcomes that are actually produced by the government action in question. Matthew Adler observes that the claim that a given kind of expression causes a given kind of harm

> will be persuasive just insofar as (1) there is sufficient empirical evidence for the claimed, causal regularity; (2) there is sufficient theoretical warrant for the claimed, causal regularity; and (3) the case at hand (the case of this particular kind of speech, in this particular state of the world) is subsumed under the regularity.[98]

In each of the cases of harm we have just considered, expression is, at a minimum, quite likely to be part of the causal sequence that the Constitution seeks to prevent.

---

95. This objection was raised by our colleague, Ron Allen.

96. Laycock, *supra* note 94, at 380 (footnote omitted).

97. *See* DE TOCQUEVILLE, *supra* note 92, at 297-98.

98. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1496 (2000).

This brings us to the limits of the endorsement test as a means of operationalizing the Establishment Clause. None of the harms just considered requires government expression endorsing religion. Each of them can occur without endorsement. This is part of the reason why the endorsement test cannot be more than a component of the Establishment Clause doctrine. State manipulation of religion, for instance, could be accomplished by means that do not convey a message of endorsement, such as, say, secret payments to one religious group to subsidize proselytization. And many actions could bring about political alienation of minorities other than endorsement of the majority's religion.[99]

Perhaps the best justification for an "objective observer" approach is that it is well suited to the institutional limitations of the judiciary.[100] Adler, while skeptical of theories of law that give expression a central place, concedes that there may be good reasons for courts to give a doctrinal role to the objective meaning of a law. It might be, for example, that a cultural-impact test would be difficult for courts to administer, while a test that focuses on objective meaning would be more administrable.[101]

---

99. This point is emphasized by Adler. *Id.* at 1438-48.

100. For this reason, one of us has endorsed the use of an objective test to determine whether a law has a secular purpose and thus satisfies the first prong of *Lemon*. *See* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. (forthcoming 2002). We agree with Raskin on this point. *See* Raskin, *supra* note 14 (auth. rev. manu. at 8). We do not intend, as he claims we do, "to abolish doctrinal focus on the *purpose* of governmental action," or to "discard the objective purpose analysis altogether," *id.* at __ (auth. rev. manu. at 9, 13). We only take issue with his claim that evidence of perceived meaning is irrelevant to the determination of objective meaning. The term "objective," when applied to social reality, can intelligibly mean only the reality that is a shared belief of the natives, so that it presents itself to any individual *as* objective. *See generally* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966). A crucifix is objectively a religious symbol, but only because the natives of our culture overwhelmingly take it to be so.

The purposes of the Establishment Clause just considered in the text provide two reasons why the perceived meaning of a government action may be relevant to adjudication. If the goal of the Clause is to prevent political alienation, then courts should ask whether this result has occurred. If the goal of the Clause is to prevent government from endorsing an official religious line, then courts should ask whether that result has occurred. We are uncertain why Raskin rejects these reasons.

101. *See* Adler, *supra* note 98, at 1437; Matthew D. Adler, *Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Reply to Anderson and Pildes*, 148 U. PA. L. REV. 1577, 1593-94 (2000). One of us has argued elsewhere that this formulation understates the inherent importance of expression. *See* Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001). However, this criticism of Adler is more germane to Equal Protection than to Establishment, since devaluing beliefs is not as bad as devaluing persons. *See* Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393 (1999).

But those same institutional limitations must be taken into account in evaluating an objective-observer test. Precisely because judges' performance in this area has not covered them with glory, a dose of reality may be helpful. The subjective, perceived meaning of a law may shed light on the law's objective meaning. It is even more likely to be relevant, of course, if it is the very thing that the courts are looking for. Intention, meaning, and understanding bleed into each other, causally and epistemologically.[102] In the normal case of successful communication, they correspond to one another because they form a causal sequence: I think of a dodo, I say the word "dodo," and now you're thinking about a dodo, too. This causal relation means that each step in the sequence is evidence that the others have occurred. The fact that the word has an objective sentence meaning entitles you to infer that I was thinking about a dodo. After I said the word, I was entitled to infer that you understood what I was saying. And the epistemology can travel in the opposite direction in the causal sequence, so that cause can be inferred from effect. If you're a typical speaker of the language, and you understood me to refer to a dodo, your understanding is evidence that the word means a dodo and I intended to refer to a dodo. Even if one accepts an "objective observer" standard, then, evidence of actual perceptions is probative of what an objective observer would observe.[103]

---

102. We plead guilty to the "deep loss of confidence in the ability of courts" that Raskin charges us with, Raskin, *supra* note 14, at 776, but that loss of confidence is not gratuitous; it has been earned. Raskin proposes to amend that test in order to ask " 'what viewers may fairly understand to be the purpose of *the government's placement of religious elements* in the display.' " *Id.* at 763. This proposal makes sense to us, but we note that at one point he seems to turn it from a context-sensitive test into a per se rule: "As long as there is a recognizably religious element in the display, it constitutes an impermissible endorsement." *Id.* at 770. This would render unconstitutional the name of the city of San Francisco. To avoid such difficulties, it still would be helpful to have data about what a display actually means to its audience. In his crèche example, Raskin claims that "*the most plausible purpose*" for adding the Christian nativity scene is to endorse Christianity, *id.*, but one can think of many other plausible purposes. It might be that one thinks that the nativity is just an attractive way to decorate a public place, or that one wants to acknowledge Christianity as one of a number of identities that are celebrated at various times of the year. Judges' tendency to invent such reasons would be curbed if it were permissible to introduce evidence.

103. For this reason, we can make no sense of Raskin's claim—which, unlike some of his other arguments, *see supra* note 14, really does take issue with our thesis—that evidence of perceived religious meaning is not even "*relevant*" to Establishment Clause cases. Raskin, *supra* note 14, at 763.

B. Social Meaning and the Fourteenth Amendment

In other contexts, the Court is able to work quite well with the social meanings that are actually perceived by real people. Compare another constitutional provision that restricts government speech: the Fourteenth Amendment.[104] The social meaning of government action has always been understood to be relevant to the determination of whether a law denies to some "the equal protection of the laws."[105] In *Strauder v. West Virginia*,[106] the first race discrimination case to reach the Supreme Court after the Civil War, the Court struck down a state law excluding blacks from juries.[107] The Court declared that the Fourteenth Amendment protects blacks "from legal discriminations, implying inferiority in civil society."[108] The exclusion of blacks, the Court held, was "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[109]

This focus on social meaning became a problem for the Court when it had to decide the constitutionality of segregation laws in *Plessy v. Ferguson*.[110] There, the plaintiffs argued that the law was unconstitutional because it "stamps the colored race with a badge of inferiority."[111] The Court responded in the same way that the critics of the endorsement test have—by noting the fragmentation of social meaning. "If this be so," the Court concluded, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[112]

Justice Harlan's dissent in *Plessy* is widely celebrated, but he, like the majority, makes claims about social meaning based on pure ipse dixit:

---

104. Justice O'Connor has noted the analogy between her test and the Court's role in this area:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

Lynch v. Donnelly, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring).

105. U.S. CONST. amend. XIV.

106. 100 U.S. 303 (1879).

107. *Id.* at 310.

108. *Id.* at 308.

109. *Id.*

110. 163 U.S. 537 (1896).

111. *Id.* at 551.

112. *Id.*

> *Every one knows* that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. *No one would be so wanting in candor as to assert the contrary.*
>
> . . . .
>
> . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, *as all will admit*, is the real meaning of such legislation as was enacted in Louisiana.[113]

The italicized passages were obviously false. Harlan's claims about what "all will admit" were already belied by the very majority opinion to which he was responding. "All" did not admit that the statute's purpose was what Harlan alleged, and it is not clear that those who did not admit it were "wanting in candor." David Strauss observes that "it is not obvious that the architects of Jim Crow invariably desired to hurt blacks."[114]

Nonetheless, *Plessy* was an easy case. Social meaning may have been somewhat fragmented, but the association of segregation with racism was sufficiently clear that, as Charles Black famously noted, laughter was the appropriate response to the assertion that blacks

---

113. *Id.* at 557, 560 (Harlan, J., dissenting) (emphasis added).

114. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 964 (1989). According to Strauss,

> [s]ome of them may have sincerely desired only to promote social stability and the harmonious development of both races. Some may have sincerely believed that segregation aided blacks. Or they may have recognized its harmful effects but considered them a regrettable byproduct of a system that was the best for society as a whole.

Id.; *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 *passim* (1987) (arguing that because government actors are part of a culture that is saturated with racial prejudice, they cannot act without being influenced by racial considerations, even if they are unaware of them).

were being treated equally.[115] In *Brown v. Board of Education*,[116] Black argued, the question before the Court was

> whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.[117]

The easiness of *Plessy* and *Brown* does, however, leave us with a question as to what to do with harder cases. Black thought it obvious that racial segregation connoted the inferiority of blacks,[118] but admitted that "the subjectively obvious, if queried, must be backed up by more public materials."[119] He relied on indisputable facts of history, custom, and law to assure "that [his] reading of the social meaning of segregation is not a mere idiosyncrasy."[120] When the social meaning of a given practice is more ambiguous or contested than that of overt racial segregation, it is not clear how a court should respond to a Fourteenth Amendment challenge. Thus, for example, it is far from clear whether states violate the Fourteenth Amendment when they fly the Confederate flag over their capitals, because it is unclear whether the flag symbolizes racism (as some think) or, rather, merely commemorates history and promotes tourism (as others think). James Forman argues that the flag should be held unconstitutional because it "has been adopted knowingly and consciously by government officials seeking to assert their commitment to black subordination."[121] Sanford Levinson, who is unpersuaded by innocent explanations of the flag, is nonetheless uneasy about the prospect of a federal court banning the flag on this basis: "If, though, multiple interpretations are genuinely possible, if the flag is truly polysemous, then how precisely can a federal court (or anyone else) justify in effect negating all

115. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960). Raskin's suggestion that survey data would have disconfirmed this strikes us as equally risible. *See* Raskin, *supra* note 14, at 774-75.

116. 347 U.S. 483 (1954).

117. Black, *supra* note 115, at 427.

118. *See id.* at 424.

119. *Id.*

120. *Id.*

121. James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 513-14 (1991).

other interpretive possibilities save the particular one that it chooses to privilege?"[122]

What is needed, in the contexts of both Equal Protection and the Establishment Clause, is an authoritative way to resolve disputes about social meaning. Sometimes, as in *Plessy*, a single social meaning is so predominant that the existence of idiosyncratic views doesn't matter. In other cases, there will be a variety of widely held views. What should be done in the doubtful cases?

III. OPERATIONALIZING ENDORSEMENT

The problem of social meaning is not unique to constitutional law. It is familiar in trademark law. In that field of law, courts have increasingly recognized their own limitations and accepted better (albeit imperfect) gauges of social meaning, including survey evidence and the testimony of expert witnesses on the quality of such evidence. This approach, we argue, is readily available to assist in addressing analogous issues in constitutional law.

A. The Relevance of Trademark Law

In this Section, we describe the relevant rules of trademark law and consider their applicability in the context of the Establishment Clause.

1. Perception in Trademark and Establishment Clause Cases.—The legal question in a typical case of trademark infringement is whether the consumer is likely to be confused about the relationship or affiliation between the plaintiff's products or services and the defendant's products or services.[123] This question flows directly from the purposes of trademark law. One traditional justification for creating an exclusive right in a name or other trademark is that such a restriction protects the public by preventing consumer confusion.[124] Consumers use names (and other distinctive marks) to identify products and services that have previously pleased them, as well as those with which they have had bad experiences.[125] Trademarks thus provide information on the reputation of the source of a product and on the quality of the

122. Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1102 (1995); *see also* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 90-110 (1998).

123. *See supra* notes 9-12 and accompanying text.

124. MICHAEL A. EPSTEIN, EPSTEIN ON INTELLECTUAL PROPERTY § 7.01[B] (4th ed. 1999).

125. *See id.*

producer.[126] If a mark does not accurately signal a single source, the consumer cannot use the mark to make any inference about preference or quality. For example, if a consumer is induced to visit The Sign of the Beefeater restaurant because he or she believes that it has a business connection with a well-known or respected source (*e.g.*, a popular liquor producer), and there is actually no business connection between the two, the consumer not only has been misled, but also may be disappointed if the restaurant does not meet the consumer's expectations. Moreover, the consumer may, based on that disappointing experience, be persuaded to lower his estimate of the quality of the liquor company's products and to search for some other source for an acceptable gin.

A more indirect benefit to consumers is the incentive created by trademark protection for companies to invest in the quality of the products they produce. If a consumer considering whether to purchase a can of soup from the grocery store could not tell whether it was produced by the company that was responsible for the can of soup she had just consumed with gusto, she would have no reliable way to re-stock her shelf with soup from the same source. Similarly, the company making the soup would have no incentive to produce a high or consistent quality soup that would stimulate repeat purchases. An exclusive right to a distinctive mark increases the incentive for a company to accumulate consumer goodwill by investing in quality, reputation, and service.

Consumer confusion as to the source of a product or service is thus the touchstone of trademark infringement. The perceptions of the audience are central, just as we suggest they should be when a court is asked to consider whether the Establishment Clause has been violated by a public display. For example, in a classic trademark infringement case, a federal court was called upon to determine whether a new restaurant, The Sign of the Beefeater, was infringing the trademark rights of the owner of the trademark "Beefeater Gin."[127] To assess whether those rights were being violated, the court had to decide whether a consumer who encountered a sign for the restaurant was likely to infer that the liquor company that produces Beefeater Gin also owned or was sponsoring the restaurant.[128]

---

126. *See id.*

127. James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 273 (7th Cir. 1976).

128. *Id.* at 274. Trademark infringement would have also occurred if consumers were likely to believe that the producers of Beefeater Gin had authorized or licensed the use of the name, The Sign of the Beefeater. *See id.* The same principle applies when companies

The analogous allegation in an Establishment Clause case would be that a display or symbol conveys a message of governmental endorsement of religion. For example, when a community member encounters a public display in front of city hall in the month of December that includes a lone nativity scene, the court, applying the endorsement test, must determine whether community members are likely to assume that the display is expressing support for a particular set of religious views.

In the trademark infringement suit involving Beefeater, the producer of Beefeater Gin was able to convince the court that consumers *were* likely to believe there was a business connection with the new restaurant, and the court found that the distiller was entitled to prevent the restaurant from using the confusing name.[129] Similarly, in our hypothetical Establishment Clause case involving the crèche in front of city hall, if community members were likely to see an expression or authorization of religious support by government in the particular display, a court applying a Lanham Act-like standard would enjoin the presentation of the display in this public setting. If the evidence revealed that community members did not take a message of governmental religious support from the display, the crèche would survive attack under the Establishment Clause. Although this overview reveals that audience perceptions play a role in both trademark and Establishment Clause cases, two issues arguably differ in the two domains: identifying whose perceptions matter, and the role of intentions in determining whether a violation has occurred.

2. Whose Perceptions Matter.—Justice O'Connor has identified perceptions as key to understanding the reach of the Establishment Clause, but has not made it clear whose perceptions constitute the relevant standard. Her standard is the "objective observer," but as we[130] and others[131] have pointed out, it is unclear what she means by

---

not licensed to sell shirts that display a professional team logo are enjoined from doing so based on evidence that consumers are likely to believe that the use of the logo was authorized or licensed by the professional team. *See* Nat'l Football League Props., Inc. v. Wichita Falls Sportswear, Inc., 532 F.Supp. 651, 658-59 (W.D. Wash. 1982).

129. *See Burrough*, 540 F.2d at 279 (finding that a significant percentage of the restaurant-going public would mistakenly believe that the restaurant's sign was promoting Beefeater Gin).

130. *See supra* notes 26-59 and accompanying text.

131. *See, e.g.*, McConnell, *supra* note 71, at 48 (explaining that one's perceptions of government contact with religion may depend on how one views the issue of separation of church and state); Smith, *supra* note 4, at 292 and accompanying text (arguing that the idealized objective observer "will perceive precisely as much, and only as much, as its author wants it to perceive").

"objective." At times, she seems merely to be contrasting the subjective view of the source of the message (the intent of the sender to endorse or not to endorse a particular religious view) with the view of the recipient of the message, who views the display itself but is not privy to the intent of the source of the message.[132] At other times, she seems to have the perspective of a particular audience member in mind.[133] The trier of fact must determine what the perceptions of the "objective observer" are likely to be. The difficulty is that perceptions of governmental endorsement may vary when a symbol is not unambiguously nonsecular (*i.e.*, it consists of a nativity scene rather than an image of, for example, Smokey the Bear), so the first step, deciding *whose* perceptions matter, presents a challenge.

The natural reference point for a judge determining either whether trademark infringement has occurred or whether the government has conveyed a message of religious endorsement is what he or she perceives the meaning of the message or symbol to be. A personal reaction from a judicial perspective, however, has explicitly been rejected in trademark jurisprudence[134] and, for similar reasons, cannot be conclusive in the context of the Establishment Clause.

We are not suggesting that the judge's own views on the message that the symbol is likely to convey are never relevant. In some cases, they may be sufficient. In a trademark case, if the alleged infringer has labeled a product that directly competes with the plaintiff's product with a literal, exact copy of the plaintiff's trademark, then the court may take notice of this fact and grant relief accordingly.[135] An analogous situation arises in Lanham Act cases involving deceptive advertising. When an advertising statement is literally or explicitly, rather than implicitly, false, the court may grant relief without reference to the advertisement's impact on the buying public.[136] In such easy cases, there is no need for a plaintiff to go to the considerable expense of conducting a survey. Similarly, there may be displays that are unambiguously religious. Justice Kennedy, we noted earlier,

---

132. *See supra* text accompanying notes 25-26.

133. *See supra* text accompanying notes 38, 43, 45, 53-56.

134. *See infra* text accompanying notes 144-146.

135. *See* Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 195 (3d Cir. 1990) ("[L]ikelihood of confusion is inevitable, when, as in this case, the identical mark is used concurrently by unrelated entities."); Cullman Ventures, Inc. v. Columbian Art Works, Inc., 717 F. Supp. 96, 127 (S.D.N.Y. 1989) (explaining that where marks are "virtually identical . . . consumer confusion is inevitable").

136. Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 317 (2d Cir. 1982) (citing Am. Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978)); Am. Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1356 (S.D.N.Y. 1976).

would draw the line at "the permanent erection of a large Latin cross on the roof of city hall."[137] But not all cases are this easy. When there is disagreement about the meaning of a display, the judge's own views are not a reliable indicator of what the display means to other members of society.

The judge's personal views may not reflect the perspectives of other observers who do not share the judge's personal, educational, and other background experiences.[138] Of course, Justice O'Connor talks about the perspective of the objective observer rather than a judicial perspective, but judges are not immune from falling prey to *false consensus*,[139] which is the well-documented tendency for people to assume that others share their personal attitudes and beliefs.[140] Indeed, Justice O'Connor has on occasion suggested the image of a very particular observer as her standard—"an objective observer, acquainted

---

137. County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part).

138. This will be true even if, as we join Raskin in hoping, organized political action succeeds in placing on the bench "Supreme Court justices who are able to take into account the full breadth of society in envisioning the meaning of public action for the purposes of constitutional analysis." Raskin, *supra* note 14, at 775 n.52. In a pluralistic society, even the most enlightened judge can benefit from information. Even a judge who has "profound historical and social consciousness, wisdom, judgment, and a sense of the deep values of the Constitution," *id.* at 776, may not be able to discern what a display means for religious minorities. Raskin sometimes appears to have a radically exaggerated view of judicial autonomy, as when he argues that "if *the court itself* must determine the constitutional meaning of the semiotics of a government-erected display . . . then it is hard to see how the actual perceptions of a certain randomly assembled group of citizens are even *relevant* to the endorsement analysis." *Id.* at 763. Is Raskin suggesting that when a court needs to make a determination, no evidence of what is happening in the world outside the judge's mind is even relevant? If so, courts would be able (and perhaps would be required) to dispense with testimony in *all* cases.

139. *See generally* Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977) (discussing the tendency to find one's own behavioral choices and judgments as relatively common).

140. Several recent studies comparing judges with laypersons have revealed that judges are susceptible to some of the same cognitive biases that affect laypersons. *See, e.g.*, John C. Anderson et al., *Evaluations of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 730 (1993) (demonstrating that judges' evaluative judgments can be dependent on their knowledge of "outcome information"); Britte Englich & Thomas Mussweiler, *Legal Judgment Under Uncertainty: Anchoring Effects in the Courtroom*, J. APPLIED SOC. PSYCH. (forthcoming) (demonstrating that judicial sentencing judgments in rape cases were influenced by irrelevant anchors); Stephan Landsman & Richard Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 125 (1994) (finding that "judges and jurors in civil cases react similarly when exposed to material that is subsequently ruled inadmissible—their perceptions of central trial issues are altered"); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 29 (1999) (indicating that judges' biases and personal attitudes, "some of which have been documented for human behavior more generally," affect how they make risk-related decisions).

with the text, legislative history, and implementation of the statute."[141] Such a standard might suggest that a judicial perspective is relevant, or at least that legal training would be required to understand and interpret the message being conveyed by the display in dispute. Familiarity with the statutory text will be beyond the expertise or knowledge of most of the lay community members who are likely to encounter the display. An alternative interpretation of Justice O'Connor's meaning is that she is recognizing the importance of context in influencing how an observer understands the meaning of the controversial display. Thus, if a statute permitted the construction of displays in a public area on a first-come-first-served basis, and that information were widely known, it might dispel the impression that many community members would otherwise have: that the particular display appearing in the public area reflected governmental endorsement of the religious significance of the display.

In trademark litigation, the context of the purchase influences the likelihood of confusion. For example, if the product at issue is costly or if the purchasing audience is likely to exercise considerable attention and inspect the product fairly closely, the likelihood of confusion is smaller than when the goods are bought by purchasers who are likely to engage in little or no inspection.[142] Although the usual standard is the typical buyer exercising ordinary caution, when a buyer class is mixed, so that some consumers are more sophisticated than others, "the standard of care to be exercised by the reasonably prudent purchaser will be equal to that of the least sophisticated consumer in the class."[143]

Before surveys of consumer perception were common in trademark litigation, courts were often left to speculate on the likely reaction of the relevant group of consumers. A number of judges recognized the difficulties inherent in arriving at an accurate assessment of what the perceptions of others, often quite different in background and experience, might be. For example, in reviewing the trial court's decision on whether a manufacturer of girdles labeled "Miss Seventeen" had infringed the trademark of the magazine, *Seventeen*, Judge Frank suggested that in the absence of a test of the reactions of numerous girls and women, the trial court judge's finding as to what was likely to confuse was "nothing but a surmise, a conjecture, a

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

142. *See* RESTATEMENT OF TORTS § 729(d) (1938) (stating that one consideration in determining whether a mark is confusingly similar is "the degree of care likely to be exercised by purchasers").

143. Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 293 (3d Cir. 1991).

guess."[144] He noted that "neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl."[145] More recently, in a Lanham Act case involving an allegation of deceptive advertising, the court observed that "the court's reaction is at best not determinative and at worst irrelevant. The question in such cases is—what does the person to whom the advertisement is addressed find to be the message?"[146] If the endorsement test proposed by Justice O'Connor "focuses on how people perceive the relationship between the state and religion,"[147] then the relevant population of people includes more than judges. As we shall suggest below, and as Justice O'Connor has sometimes indicated, the relevant population includes both members of the majority and minority community members.

3. The Role of Intentions.—Violations of the Lanham Act can occur even in the absence of any allegation or proof that the defendant intended to mislead the consumer.[148] The issue is whether the communication had a deceptive effect.[149] The issues of deceptive effect and intent are not, however, completely independent. In the absence of direct proof on likely consumer reaction, evidence that the defendant intended to mislead can provide the basis for finding a Lanham Act violation on the ground that the defendant is presumed to have achieved its intended effect.[150]

We do not agree with Justice O'Connor's view that a similar rule should be followed in the Establishment Clause context, so that laws would be condemned if they were enacted with the intention of endorsing religion. Aside from the notorious difficulties of discerning

---

144. Triangle Publ'ns, Inc. v. Rohrlich, 167 F.2d 969, 976 (2d Cir. 1948) (Frank, J., dissenting). Judge Frank reported that he personally consulted "some adolescent girls and their mother and sisters" to fill in the gap, acknowledging that his "method of obtaining such data [was] not satisfactory," but characterizing it as "better than anything in this record to illuminate the pivotal fact." *Id.* His data collection, of course, would not pass muster under either modern standards for judicial notice or acceptable survey practice.

145. *Id.*

146. Am. Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976).

147. 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, 35 (1994).

148. *E.g.*, Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha, 754 F.2d 591, 596 (5th Cir. 1985) ("Good faith is not a defense to trademark infringement. The reason for this is clear: if potential purchasers are confused, no amount of good faith can make them less so." (citations omitted)).

149. *See id.*

150. *See, e.g.*, Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 258 (2d Cir. 1987) ("Intentional copying gives rise to a presumption of a likelihood of confusion." (citing Perfect Fit Indus. v. Acme Quilting Co., 618 F.2d 950, 954 (2d Cir. 1980))).

governmental intent,[151] none of the harms that the Establishment Clause seeks to prevent are contingent on a decisionmaker's intent.

Moreover, it is not clear that intent to endorse a religious view is always constitutionally problematic. Some citizens are religious. If those citizens participate in politics, their political actions will inevitably reflect their religious views. They may well regard their legislative actions as endorsing those views. An endorsement test that invalidates laws that have a religious meaning to their enactors would deny to religious people their right to participate in politics.

> Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. . . . [W]e do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths. To do so would deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced Treatment Act, [invalidated in *Aguillard*], but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims.[152]

If the endorsement test is understood to "forbid the legislature from making religiously-informed judgments, or basing legislation on the religiously-informed judgments of their constituents," this not only produces bizarre results, but is also "an invitation to mischief—a not-so-subtle suggestion that those whose understandings of justice are derived from religious sources are second-class citizens, forbidden to work for their principles in the public sphere."[153] For this reason, the endorsement test should hardly ever look at legislative intent.[154] The central issue should be what message is actually communicated.

---

151. This difficulty is described in detail in Justice Scalia's dissent in *Edwards v. Aguillard*. 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (discussing the "hazards" of trying to determine governmental intent, such as making assessments from "contrived and sanitized" legislative histories).

152. *Id.* at 615 (citations omitted).

153. McConnell, *supra* note 78, at 144.

154. Although evidence of intent to advance a particular religious view may, as in Lanham Act cases, suggest that the source has successfully achieved the desired effect, it is the nature of the effect that matters.

On the other hand, there can be clear cases of impermissible intent. The most obvious is a case in which the law harms a religious minority, and this was the legislators' intent. In such a case, it is unnecessary to engage in an Establishment Clause analysis, because it is clear that the Free Exercise Clause has been violated.

B. Designing the Survey

In this Section, we consider how to design a survey that would be useful in resolving the endorsement question.

1. Providing Survey Evidence of Consumer Perceptions.—A properly done survey provides an economical and systematic way to gather information about the reactions of a large number of individuals.[155] The informational value of survey results depends on the quality of the survey. Quality is assessed by evaluating a number of features, including whether the relevant population was identified, how the sample of respondents was selected, how the survey was structured, what questions were asked, and how the results were analyzed.[156] We consider each of these in a typical trademark survey[157] and in our hypothetical survey measuring endorsement.

---

155. Shari Seidman Diamond, *Reference Guide on Survey Research*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 231-32 (2d ed. 2000).

156. *See id.* at 236-72.

157. In modern trademark litigation, surveys are frequently used in determining whether a likelihood of confusion exists, but courts rely on a variety of factors in evaluating likelihood of confusion. For example, Judge Friendly, in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961), listed the following nonexhaustive set of factors to consider:

> the strength of [the] mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.

Id. at 495.

Surveys are used as evidence of actual confusion (the fifth factor on the list). *E.g.*, Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 400 (8th Cir. 1987). No single factor on the list is determinative and not all of the factors have to be proven, but good survey evidence is generally enough to show infringement, and some courts have complained when a plaintiff with sufficient resources fails to produce survey evidence. *E.g.*, Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 695 (2d Cir. 1994); Henri's Food Prods. Co. v. Kraft, Inc., 717 F.2d 352, 357 (7th Cir. 1983); E.S. Originals Inc. v. Stride Rite Corp., 656 F. Supp. 484, 490 (S.D.N.Y. 1987); Info. Clearing House, Inc. v. Find Magazine, 492 F. Supp. 147, 160 (S.D.N.Y. 1980). The circuits vary in the list of factors they use, but the lists are substantially overlapping. For example, the Seventh Circuit's list includes: "the type of trademark in issue, the similarity of design, similarity of products, identity of retail outlets and purchasers, identity of advertising media utilized, . . . intent [of the alleged infringer], and actual confusion." Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 381-82 (7th Cir. 1976) (citing Roto-Rooter Corp. v. O'Neal, 513 F.2d 44, 45-46 (5th Cir. 1975).

2. The Appropriate Population.—To assess consumer perceptions in a trademark infringement case, a survey may be conducted to test consumer reaction to the allegedly offending stimulus, for example, the sign advertising the new restaurant. The first step in designing the survey is to identify the relevant population. The allegedly infringing The Sign of the Beefeater restaurant was in Chicago, so the relevant population consisted of consumers in Chicago who were likely to be exposed to the advertisement for the restaurant.[158] A suitable sample was selected using a probability sampling procedure; the sample consisted of heads of households (half male and half female) within a five mile radius of the restaurant.[159] The justification for selecting survey respondents in the area of the restaurant is that they constituted the group most likely to see the sign, and most likely to have a meal at the restaurant.[160]

The target population for a survey to assess likelihood of consumer confusion varies with the product or service. When EXXON sued a motel named TEXON for trademark infringement, the relevant population consisted of licensed automobile and truck drivers.[161] When the product was a toy marketed to children between the ages of six and twelve, the relevant population consisted primarily of children in that same age group (who were able to influence the purchase of the toy).[162] The failure to include a significant portion of the relevant population weakens the strength of the survey.[163]

How should the relevant community be defined in a survey designed to assess perceptions of endorsement? The answer will depend on why we think endorsement matters. And this will in turn depend

---

158. *See* James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 277 (7th Cir. 1976).

159. *Id.*

160. An improvement on the survey, not mentioned by the court, would have been to screen potential respondents to exclude individuals who had not recently visited any restaurant.

161. *See* Exxon Corp. v. Texas Motor Exch. of Houston, Inc., 628 F.2d 500, 505 (5th Cir. 1980) (noting that both EXXON and TEXON appealed to a large audience of customers, but the common trait among their customers was that they were all "members of the car driving public").

162. *See* Processed Plastic Co. v. Warner Communications, Inc., 675 F.2d 852, 857 (7th Cir. 1982) (finding that the district court's decision as to likelihood of confusion was not clearly erroneous when based on a survey conducted on children aged six to twelve, despite the fact that the survey omitted "the upper teenage group, parents, and grandparents who would presumably also purchase the toy").

163. *See, e.g.*, Wendy's Int'l, Inc. v. Big Bite, Inc., 576 F. Supp. 816, 823 (S.D. Ohio 1983) (noting that the absence of respondents less than eighteen years old in a survey involving fast food restaurants was problematic).

on what we think is the point of having the Establishment Clause in the first place.

Recall our earlier discussion. If the purpose of the Clause is respect for conscience, then surveys ought to focus on members of religious minorities and find out what message is being conveyed to them. If it is the preservation of civil peace, then one would again focus on the perceptions of minorities, perhaps attempting to discern the degree to which they are offended.[164]

If the purpose of the Clause is to prevent religion from being distorted and harmed by government support, then surveys must be targeted at a more inclusive population. This reasoning implies that the question that surveys should attempt to answer is whether (a significant percentage of) the population, *including members of the majority religion*, think that a display conveys a religious message.[165] If the majority thinks so, then it is fair to conclude that an official government line is being conveyed and, perhaps, accepted. The most pertinent population may even be those persons who adhere to the religion that government is endorsing, because they are likely to be far more vulnerable to the deleterious effects of the message being conveyed than are members of minority religions. Baby Jesus surrounded by candy canes and Rudolph is unlikely to have a degrading effect on the religiosity of Jews who view the display, but Christians may be more vulnerable to this sort of manipulation.

These rationales do not compete with one another. On the contrary, they are mutually reinforcing, and the Court routinely cites them in tandem. Government action would thus seem to threaten the purposes of the Establishment Clause if it *either* alienates religious ma-

---

164. But perhaps not. "At this point in the 20th century," Justice Lewis Powell observed, "[t]he risk . . . even of deep political division along religious lines . . . is remote." Wolman v. Walter, 433 U.S. 229, 263 (1977) (concurring in part and dissenting in part). The trouble with this rationale is that peace can come in many flavors, some of them quite consistent with official religion. All that matters is that the losers know that they have no hope of changing the status quo, and therefore no incentive to challenge it. In the litigation over religious displays, both sides have plausibly blamed civil strife on the other. The secularists are right that the displays are the trigger for litigation, and the religious are right that vague rules of constitutional law have encouraged litigation.

165. Raskin misunderstands our claim here in two ways. First, he imagines that our survey would ask people whether they think there is an Establishment Clause violation. *See* Raskin, *supra* note 14, at 771-72. A person can consistently think both (1) that a display conveys a religious message, and (2) the Establishment Clause should be read far more loosely that the Supreme Court has read it, so that it permits even the most overt government endorsement of religious messages. Our survey only asks citizens for their opinions about (1); their opinions about (2) are irrelevant. Second, he distorts our position (which is stated clearly in the text accompanying this footnote) by asserting that we only care about majority perceptions. *Id.* at 771-73.

jorities *or* attempts to give the majority religion an official form. *Both* majority and minority perceptions ought to count in determining whether a display conveys a message of endorsement. If a substantial part of *either* group perceives endorsement, a violation of the Establishment Clause ought to be found.[166]

On the assumption that the Establishment Clause is violated when a message of religious support is conveyed to any group of individuals, a residency requirement is an inappropriate limitation on the relevant population. If the presence of the display discourages visitors from making their home in the community because they feel unwelcome, due to a perception of endorsement, or if it encourages visitors to move in due to the same perception, the display has had an effect that is inconsistent with the Establishment Clause.

3. Sample Selection.—Probability sampling techniques, which give each member of the relevant population a known probability of appearing in the sample, maximize both the representativeness of the survey results and the ability to assess the accuracy of estimates obtained from the survey.[167] Although courts regularly accept results from nonprobability samples in trademark cases,[168] a key question about any sample or any method of sampling is whether some bias occurred that was likely to produce an unrepresentative sample. In a case alleging infringement of the trade dress in a running shoe, one court rejected a survey conducted on spectators and participants at running events on the ground that those who attend such events are likely to be unusually knowledgeable about the trade dress used by

---

166. Professor Smith briefly considers the possibility that the endorsement test might refer to the perceptions of a majority, but he rejects it on the following basis:

> [T]o say that the perception must be that of a majority, or of some designated group of citizens, seems unacceptable. Such a standard, besides creating additional factual questions about what a majority perceives, would offend the central principle of Justice O'Connor's own test by establishing as definitive, and thereby endorsing, the religious viewpoint of a majority or other designated group while discounting the religious perspective of minorities or outsiders.

Smith, *supra* note 4, at 292. But the issue is not whether the majority regards the law as unconstitutional; it is whether the majority understands the law as endorsing a religious proposition. It is possible that the majority understands the governmental action to be religious and supports it for that very reason. In such a case, the majority's perception of the law as religious would weigh against its constitutionality. And, as we have noted, it is quite possible to give weight to the majority's view without discounting that of outsiders.

167. Diamond, *supra* note 155, at 243.

168. *See id.* at 244 (noting that a large portion of consumer surveys conducted for Lanham Act litigation are admitted into evidence because non-probability sampling results are used by major companies to make crucial decisions and are used widely in marketing research).

companies that sell running shoes.[169] A similar problem of a biased sample would arise in an endorsement survey if survey interviewers selected survey participants by randomly approaching community members who passed within twenty feet of the display—and the survey was conducted while a protest against the display was taking place.

4. Survey Structure.—Trademark surveys can be conducted either in person or over the telephone. Face-to-face interviewing is generally used when the respondent must respond to some visual stimulus. Face-to-face interviewing is thus most appropriate for the Establishment Clause cases involving displays or visual symbols. Following this format, respondents would be questioned after they viewed either the actual display or symbol where it has been erected, or after they were shown a realistic image of the display or symbol. In light of the potential influence of context on the message being conveyed, a simple picture, like those generally used in trademark surveys, might not be sufficient. A reasonable alternative would be a videotape of the actual display and its surrounding environment.

5. Choice of Questions.—To objectively assess whether consumers are likely to be confused by a trademark or an advertisement, consumers must be questioned on their perceptions using an unbiased research design and non-leading questions. Courts have properly given little or no weight to surveys in which the wording of a question suggests to the respondent what the appropriate answer should be.[170] A standard way to begin a trademark survey assessing whether an allegedly infringing trademark is conveying an inaccurate message is to show respondents the mark and to ask the open-ended question, "Who do you believe is sponsoring or promoting this product?" To assess whether an advertisement is conveying a deceptive message, a common question is "Aside from convincing you to purchase the product being advertised, what is the main message that this advertisement is trying to convey?" This question is usually followed up with a probe ("Anything else?") that invites the respondent to identify additional messages. If such open-ended questions produce inaccurate answers, the answers suggest that the respondent has been confused by the mark or by the advertisement.

---

169. *See* Brooks Shoe Mfg. Co. v. Suave Shoe Corp., 533 F. Supp. 75, 80 (S.D. Fla. 1981), *aff'd*, 716 F.2d 854 (11th Cir. 1983).

170. *E.g.*, Universal City Studios, Inc. v. Nintendo Co., 746 F.2d 112, 118 (2d Cir. 1984) (rejecting a survey in part because its main inquiry "was an obvious leading question in that it suggested its own answer").

Open-ended questions, such as those asking in a general way about the message being conveyed, can underrepresent the range of reactions that the respondent has, even with follow-up probes. A multi-faceted stimulus can produce many reactions from the same individual and the open-ended question requires the respondent to explicitly articulate each reaction. A respondent may not exhaustively describe her full repertoire of reactions when she must put each of those reactions into her own words. To probe reactions more thoroughly, surveys frequently include follow-up questions that offer respondents an opportunity to choose among possible alternatives (*i.e.*, closed-ended questions). For example, the survey instrument can be used to probe alternative messages that an allegedly deceptive advertisement might be conveying. If the allegation is that the advertisement suggests that the advertiser's product contains particular ingredients while a competitor's product fails to include all of them, the survey might show respondents a list of ingredients and ask the consumer which of them, according to the advertisement, are contained in each product. As long as the closed-ended questions include all possible alternatives as choices and are not worded in a way that suggests right or wrong answers, the closed-ended format is useful in that it allows respondents to easily express the full range of possible alternatives that might represent their views. The difficulty with closed-ended questions that provide a list of choices is that they may suggest answers that respondents would not have considered in the absence of the provided list of possibilities. Thus, in a survey assessing whether a display implies religious endorsement by the state, explicitly presenting governmental intent to advance a particular religious view as a possible alternative on a survey instrument may in itself be leading because it may suggest an idea that otherwise would not occur to the respondent. Therefore, we would rely heavily on open-ended questions to elicit community reactions to an allegedly religious display, followed by a set of direct closed-ended questions that would be evaluated only against a standard of comparison provided by responses to a set of control displays.[171]

The analogous survey for assessing whether a symbol or display conveys a message of religious endorsement by the government would require questions that address two issues: (1) whether the government is seen as sponsoring or promoting the display, and (2) if it is, whether

171. *See infra* Part III.B.7 (explaining that the control display would present an unambiguous message of religious endorsement or nonendorsement). For a discussion of the use of control groups in trademark surveys, see Diamond, *supra* note 155, at 256-60.

that sponsorship or promotion of the display conveys a message that the government is endorsing a particular religious view.

A first question might ask survey respondents, "What is the main idea this display is presenting?" followed by the probe, "Anything else?" The next question could be "Who do you believe is sponsoring or promoting this display?" and, if the respondent answers that it is the government, "What do you think the government's purpose is in sponsoring or promoting this display?" A response that government is sponsoring the display because the holiday decorations brighten up the town square would not suggest a violation of the Establishment Clause. A response that the government wants to show how important Christianity is for the community would suggest unlawful endorsement.[172]

An additional open-ended question would be "How does the display make you feel?" and a follow-up question, "Why?"[173] How the display makes both majority and minority members of the community feel is relevant to an assessment of the effects of the display. If community members who share the religious affiliation allegedly endorsed in the display report that the display makes them feel that the government supports their religion, the meaning of the display would be different than if those community members reported no effect on their feelings. If they report that it makes them feel happy, and in response to the follow-up question "Why?" say it is because it is a beautiful display, their response would provide no indication that they have perceived the display as an indication of state endorsement.

This last question is particularly important, however, for minority members of the community who may feel rejected or excluded by a message that the state is endorsing a religious position that they do not share. The message of endorsement to nonadherents, according

---

172. Raskin hypothesizes a special kind of case, which to our knowledge has never arisen in litigation:

> [suppose] a local government creates an indisputably religious display—say, Jesus Christ on the cross below a banner stating, "He died for your sins"—and places it in an empty park lot that had been privately owned for decades, but is now suddenly owned by the government because of a tax forfeiture (to almost no one's knowledge in the general public).

Raskin, *supra* note 14, at 771-72. Under these circumstances, where (unlike the *Pinette* case) there is no question that government is in fact sponsoring the display, the only question that remains to be litigated is whether the display conveys a religious message, and so one could omit from the survey any questions having to do with who is sponsoring it.

173. The questions we have suggested are tentative. Before a survey is actually carried out, a pilot test must be conducted to determine whether the questions are clear, precise, and unbiased—that is, whether the respondents understand the questions as they were intended to be understood. Diamond, *supra* note 155, at 248-49.

to Justice O'Connor, can be "that they are outsiders, not full members of the political community."[174] And if that is the conclusion they draw after viewing the display, this fact suggests that the display is unconstitutional.

Following these open-ended questions, respondents might be asked a series of closed-ended questions that assess reactions to specific choices. The answers to these closed-ended questions would be evaluated only against the pattern of responses to the same questions about a set of control displays.[175]

After respondents to the survey are asked about their perceptions, the survey should include a question that allows respondents to indicate their own religion. We have suggested that if a substantial portion of either adherents or nonadherents perceive the display as governmental proselytizing, the survey would provide evidence that the Establishment Clause is being violated. Thus, it is important to identify the subgroups within the survey sample.

6. Analysis and Reporting of Results.—In addition to analyzing and presenting what respondents have said, survey reports generally summarize the pattern of responses. It is obvious that an accurate presentation of results is a crucial attribute of a good survey, but what is not so obvious is that potentially ambiguous responses may produce differing summaries. Dispute about the analysis and interpretation of results may arise when open-ended questions are employed, because analysts differ in their categorization of individual responses. For example, in *Coca-Cola Co. v. Tropicana Products, Inc.*,[176] where the plaintiff's and defendant's experts strenuously disagreed on the number of allegedly deceptive responses—the plaintiff arguing that forty-three percent of the responses to the open-ended question indicated deception[177]—the court did its own analysis and identified no more than fifteen percent that indicated deception.[178] If a respondent says on a survey, in response to a nativity scene, that "[T]he government is sponsoring the display because the holiday season is a time to bring everyone together," has the respondent indicated a perception of governmental proselytizing? The potential for ambiguous responses

174. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

175. *See infra* Part III.B.7.

176. 538 F. Supp. 1091 (S.D.N.Y. 1982), *rev'd on other grounds*, 690 F.2d 312 (2d Cir. 1982).

177. *Id.* at 1094.

178. *Id.* at 1096.

highlights the value of closed-ended follow-up questions that can help clarify the meaning of responses to the open-ended questions.

7. *Using Accepted Instances of Endorsement and Nonendorsement as Controls.*—By adding a set of control displays to the survey design, it is possible to ask respondents to choose among response alternatives in a closed-ended format without producing an inflated or deflated estimate of perceived governmental sponsorship or endorsement. If respondents were shown a series of displays, including one or more that courts agree are clear cases of endorsement and one or more that courts agree are clear cases of nonendorsement, in addition to the display at issue, the responses to the various displays could be used to assess the impact of the format of the closed-ended question. If, for example, twenty percent of respondents who were shown a series of possible governmental purposes for a display agreed that one purpose was to provide support for a particular religious view, these responses might be due to the suggestion of such a possibility in the question, or might simply be indicative of guessing, rather than providing information that twenty percent of viewers actually saw the display as an indication of governmental endorsement. If respondents were also asked precisely the same questions about a display that is widely accepted by the courts as indicating no religious endorsement (*e.g.*, a sign saying "Welcome to Los Angeles") and twenty percent reported a perception of state endorsement of particular religious views, that twenty percent would properly be attributed to the effects of guessing or the particular wording of the question, and not to the allegedly infringing display. If, in contrast, the control display stimulated a lower rate of perceived endorsement, the difference between the rates for the display at issue and the control group could be used to determine whether perceptions of endorsement exceeded some acceptable minimum.

8. *The Potential for Strategic Behavior.*—In a carefully executed survey, respondents cannot ascertain what responses are expected or preferred by the sponsor of the research. In a community in which there is controversy over a display that allegedly conveys a message of governmental endorsement of religion, some members of the community may be familiar with the issues involved in the dispute. To assess whether familiarity with the dispute is associated with a distinctive set of responses to the survey, respondents should be asked at the end of the interview whether they are familiar with, and how much

they know about, the controversy.[179] To the extent that respondents who are familiar and unfamiliar with the issues respond differently, greater weight should be given to the responses of those unfamiliar with the controversy, because their responses are less likely to be the product of strategic behavior.

9. How Many People Must Give a Response That Signals Confusion or a Perception of Endorsement?—In trademark law, there is no single response percentage threshold for a finding of likelihood of confusion, although courts have on some occasions found survey percentages to be too low to warrant a finding that confusion was likely. When a survey indicated that only 7.6% of respondents believed that "YOGOWHIP" came from the same company as "MIRACLE WHIP," the court held that consumer confusion was not likely.[180] The court noted that a ten percent level had been deemed sufficient in an earlier case,[181] while a nine percent level had been characterized in another case as a "'questionable amount of confusion.'"[182] In evaluating the level of confusion reflected in the results of a survey, it is important to consider the questions that the respondents have been asked. If ten percent of respondents say that the company responsible for The Sign of the Beefeater restaurant also produces gin, particularly when the restaurant sign they are shown indicates that the restaurant does not serve liquor, that ten percent is more substantial than if respondents were asked whether the company responsible for the restaurant did or did not produce gin. It would be far less likely that a consumer would guess "gin" in the absence of confusion in response to the first question, and highly likely that some of the agreements in response to the second question would represent mere guesses.[183]

Justice O'Connor is quite correct that the idiosyncratic views of a few people cannot be enough to sustain a finding of impermissible endorsement.[184] As critics of the endorsement test have noted, some political alienation is inevitable no matter what the government does.

---

179. This is why Raskin's proposal that we consider "an *actual election*" as a substitute for polling reveals a complete misunderstanding of our argument. Raskin, *supra* note 14, at 774.

180. Henri's Food Prods. Co. v. Kraft, Inc., 717 F.2d 352, 358 (7th Cir. 1983).

181. *Id.* (citing James Burrough Ltd. v. Sign of the Beefeater, Inc., 572 F.2d 574, 578 (7th Cir. 1978)).

182. *Id.* (quoting Wuv's Int'l, Inc. v. Love's Enters., Inc., 208 U.S.P.Q. 736, 756 (D. Colo. 1980)).

183. For a description of the use of control groups to assess the effects of guessing, see Diamond, *supra* note 155, at 256-60.

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

Some de minimis threshold sufficient to exclude such unusual views is indispensable, and here, as in trademark law, there is no principle from which we can deduce what percentage is too low to count. It is enough here to note that courts have drawn such lines in the trademark context and that there is no reason to think that they cannot draw similar lines in Establishment Clause cases.[185] We can suggest an arbitrary threshold—ten percent, for example—but there is no reason why it could not be higher or lower.[186]

---

185. Neal Feigenson, who suggests defamation law as a model, has argued that similar lines have been drawn there:

> Defamation law is most useful in providing the standard for determining the message's meaning. In defamation law, as opposed to the law of obscenity, for instance, "community standards" or the "average observer" do not necessarily rule. In a defamation case, "liability is not a question of majority vote." Rather, "[i]t is enough that the communication would tend to prejudice [its object] in the eyes of a substantial and respectable minority" of the community. While defamation is not "a question of the existence of some individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent," neither does it depend on the views of "right-thinking people." Indeed, "if the plaintiff's reputation is injured in the eyes of a segment of the community whose views cannot be said to be totally irrational or lawless, the courts should give redress against the injury."

Feigenson, *supra* note 64, at 96-97 (footnotes omitted) (alterations in original) (quoting Peck v. Chi. Tribune, 214 U.S. 185, 190 (1909); 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 5.1, at 25 (2d ed. 1986); Note, *Defamation-Imputation of Sympathy with Communism*, 7 ALA. LAW 347, 349 (1946)). Feigenson, however, suggests that one plaintiff's perception of endorsement, along with a cogent supporting explanation, is enough to shift the burden of justification to the State. *Id.* at 101. Joel Jacobs, however, worries that Feigenson's test "relies heavily on the reactions of individuals who may be hyper-sensitive and/or ingenuine." Jacobs, *supra* note 147, at 40. A de minimis exception needs to be more robust than this.

186. Raskin criticizes us for failing to "commit [our]selves to a particular percentage threshold at which the perception of endorsement becomes a binding force on the judicial determination of an Establishment Clause violation." Raskin, *supra* note 14, at 773. If it would be helpful for a court (including, perhaps, the Supreme Court) to set a legal threshold, then the court ought to do that. But our analysis does not entail any particular number, and we are not persuaded that our argument would be strengthened or even clarified if we picked some number and then insisted on it. Because we think minority perceptions matter, and because a religious minority might be smaller than any given percentage threshold, such an insistence would be misleading. To say this is not to say that "no particular percentage of the polled public is required to find religious endorsement in order to strike it down." *Id.*

Our response to Judge Easterbrook's concerns, quoted in the epigraph at the beginning of this Article, should at this point be clear. Judge Easterbrook provides a distorted view both of modern trademark evidence and of the way that evidence assessing the perceptions of the community would emerge in litigation under the Establishment Clause if the modern approach to trademark litigation were to be applied. Judge Easterbrook's hypothetical expert would be offering to testify about whether viewers are likely to perceive one display the way they view another. Courts, at least in the wake of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), require federal judges ruling on the

Some government acts are unlikely to be particularly ambiguous. Religious symbols that have been drained of meaning for the entire population, such as the names of cities like Los Angeles and San Francisco, are likely to prove acceptable.[187] On the other hand, an endorsement test that relies on empirical evidence may well condemn some government conduct that seems natural and familiar to many people. We await the evidence, of course, but we would not be surprised if a crèche erected by a city conveyed a message of endorsement to the overwhelming majority of both Christian and non-Christian citizens.

This may be why Justice O'Connor hesitates. Holiday displays are so familiar that they may seem natural, and Justice O'Connor may simply not want to adopt a test that will have the effect of prohibiting them. If one believes that such displays *must* be permissible as a matter of law, however, then it would be better to say this and to say that perceptions of endorsement are legally irrelevant, rather than to declare that those who perceive endorsement of religion are unreasonable or unfair.[188]

---

admissibility of the expert testimony to evaluate the methods used by prospective experts to arrive at their opinions. A federal court should expect experts offering such testimony to offer some basis—for example, a survey—on which to claim that the two hypothetical displays would be perceived similarly. Offering an opinion grounded in mere "*ipse dixit*" of the expert, *Joiner*, 522 U.S. at 146, should not suffice. The alternative form of evidence suggested by Judge Easterbrook—a few witnesses testifying about their reactions to the display—would also meet with judicial skepticism. Although early trademark cases in pre-survey times did rely on the testimony of consumer witnesses who reported that they were or were not confused; *see* Life Savers Corp. v. Curtiss Candy Co., 87 F. Supp. 16, 17 (N.D. Ill. 1959) (noting that seventy-five or eighty witnesses testified that they had accidentally picked up a package of the defendant's candy); Elgin Nat'l Watch Co. v. Elgin Clock Co., 26 F.2d 376, 377 (D. Del. 1928) (discussing the argument that a plaintiff ought to be prepared with twenty to thirty witnesses (quoting J. CUTLER, ON PASSING OFF 43 (1904)); these consumer witnesses have largely been supplanted by survey evidence in modern trademark litigation. The obvious opportunities to select and present witnesses who are unrepresentative or who testify strategically reduces the credibility of such testimony as a way to assess general reactions in the relevant population.

187. We note, however, that trademark law faces and deals with an analogous situation when meanings change over time. "Thermos" and "aspirin" are two examples of initially valid trademarks that lost their trademark status when usage of a term that originally signaled a single producer came to be understood as a general product category. *See* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577 (2d Cir. 1963) ("thermos" for vacuum bottle); Bayer Co., Inc. v. United Drug Co., 272 F. 505 (S.D.N.Y. 1921) ("aspirin" for acetyl salicylic acid). If a town decided to change its name today to Saint Francis, the community perceptions of the message conveyed by the new name might well indicate a violation of the Establishment Clause. In contrast, we would not expect the name San Francisco, for the city by the Bay, to evoke such a response.

188. There are cases in which perceptions of endorsement must be irrelevant as a matter of law. Some government acts are deemed per se permissible under the Establishment Clause. For example, legislatures are permitted to exempt conscientious objectors from

On the other hand, Justice O'Connor has been operating in ignorance. Neither she nor anyone else knows for certain how much political alienation and how much degradation of the majority's religiosity are the price that is being paid for the crèche. Perhaps it is worth it. But until the cost is accurately measured, there is no way to say so with any confidence.[189]

IV. ANOTHER APPLICATION: OPERATIONALIZING EQUALITY

The reliance on survey data that we have suggested here may be useful in other areas of constitutional law as well. The message conveyed by government action is not only pertinent in the context of religion.

Consider the Fourteenth Amendment's prohibition of racial discrimination. Today's doctrine of Equal Protection is a disaster area. All that is prohibited in practice is legislation that classifies on the basis of race, which means in contemporary America that the Amendment designed to protect the freed slaves and their descendants functions today to attack affirmative action programs and thus to vindicate the rights of white people. Racism is not dead, of course, and there is still state action that does not classify on the basis of race, but is motivated by disdain for blacks. But current doctrine requires that any challenge to such action prove that the action was taken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[190] Not only is conscious malice almost impossible to prove, but malice describes only part of the problem. Paul Brest has ob-

---

generally applicable laws. *See, e.g.*, 50 U.S.C. app. § 456(j) (1994) (providing an exemption from military service for "any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form"). Perhaps the oldest such law is the exemption of Quakers from the military draft. *See id.*; United States v. Seeger, 380 U.S. 163 (1965) (discussing and applying the conscientious objection standard). Someone might regard that law as an endorsement of the Quaker religion, but the exemption would be constitutionally permissible even if a majority of the population so perceived it. Other government acts are deemed per se forbidden. Government may not pay the salaries of priests, or create a tax deduction for Christians, and a person attacking these practices need not, and should not be required to, rely on survey evidence. But most government actions, such as the erecting of symbols on public property, are neither licensed nor forbidden by settled Establishment Clause doctrine. Within that very large field, survey evidence has a useful role to play in litigation.

189. It is also arguable that present Establishment Clause law is simply incoherent—an unprincipled amalgam of secular individualism and religious communitarianism. *See generally* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE (1995). Here we will simply record our view that the endorsement of religion that communitarianism would permit cannot be given a principled justification with the materials currently available to legal discourse.

190. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

served that government's obligation to avoid prejudiced decisionmaking is equally violated by decisions that reflect "racially selective sympathy and indifference," meaning "the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."[191]

Charles Lawrence has suggested that the best response to the problem of unconscious prejudice is one that builds on Charles Black's suggestion that the constitutionality of racial segregation should turn on "what segregation means to the people who impose it and to the people who are subjected to it."[192] Lawrence proposes that cultural meaning should be the basis for determining whether a government action is racially discriminatory and thus subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[193] If an action has a racially charged meaning, he argues, it is reasonable to presume that that meaning is shared by the decisionmaker.[194] Cultural meaning thus provides a window into unconscious motivation.

> This test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.[195]

Thus, for example, the social meaning of the segregation that was at issue in *Brown v. Board of Education*[196] was obvious. "Given this common knowledge, it is difficult, if not impossible, to envision how a governmental decision-maker might issue an order to segregate without intending, consciously or unconsciously, to injure blacks."[197]

---

191. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

192. Black, *supra* note 115, at 426.

193. Lawrence, *supra* note 114, at 355-56.

194. *Id.* at 356.

195. *Id.*

196. 347 U.S. 483 (1954).

197. Lawrence, *supra* note 114, at 363.

Lawrence claims that his test produces a similar result in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[198] one of the cases in which the Supreme Court announced that the Constitution prohibited only intentional discrimination. The case involved a nearly all-white suburban village's refusal to permit the construction of an integrated low-income housing project.[199] The Court concluded that the exclusion of blacks by the village's refusal to rezone for low-income housing was not per se unconstitutional, and that the black plaintiffs had "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."[200] Lawrence argues, on the contrary, that segregated housing itself carries a message of inferiority, and that race was a prominent theme on both sides of the debate over whether to permit the project.[201] Moreover, the maintenance of an all-white suburb itself is interpreted in our culture "as evidence of blacks' continued untouchability."[202]

He offers a similar analysis of *City of Memphis v. Greene*,[203] in which the Court upheld a city's decision to construct a wall cutting off traffic between black and white neighborhoods.[204]

> Individual members of the city council might well have been unaware that their continuing need to maintain their superiority over blacks, or their failure to empathize with how construction of the wall would make blacks feel, influenced their decision. But if one were to ask even the most self-deluded among them what the residents of Memphis would take the existence of the wall to mean, the obvious answer would be difficult to avoid.[205]

It is not clear how Lawrence deals with differences in the perceptions of different parts of the community—or, for that matter, differences between his perceptions and those of the Court. He does not explain how the Court is to decide what a significant portion of the population thinks, or what proportion counts as "significant." The plurality of perceptions matters as much here as it does in the Establishment Clause context.

---

198. 429 U.S. 252 (1977).
199. *Id.* at 254-55.
200. *Id.* at 270.
201. Lawrence, *supra* note 114, at 366-67.
202. *Id.* at 369.
203. 451 U.S. 100 (1981).
204. *Id.* at 128-29.
205. Lawrence, *supra* note 114, at 357-58 (footnotes omitted).

In Equal Protection, just as in Establishment, there are distinct policies that point to different relevant populations. Process-based theories suggest that the perceptions that matter are those of the decisionmakers, who are obligated not to make racially biased policies; result-based theories are, on the contrary, concerned about the political alienation of minorities.[206] For present purposes, we need not choose between these approaches. It is enough to note that they exhaust the set of alternatives on offer in the literature, and that both of them entail the relevance of survey evidence of a kind that the Court has never considered in this context. The weakness of the Court's approach is revealed by the fact that it relies solely on the judges' own perceptions of the meaning of the government action. It is possible that everyone in Arlington Heights, blacks and whites alike, agreed that the exclusion of the housing project had a racist meaning. It is possible that everyone in Memphis, blacks and whites alike, agreed that the traffic barrier had a racist meaning. In both cases, the dim perception of judges in distant Washington, D.C., turned out to be the only perception that mattered.

In *Plessy v. Ferguson*,[207] Justice Harlan tried to respond to the Court's obliviousness by pointing to what "[e]very one knows."[208] His problem was that he had no way to prove what he thought that everyone knew. It is, however, possible to compile such evidence, and such evidence can be helpful, particularly in the face of oblivious judges. It shouldn't matter whether judges are perceptive about social meaning. Their perceptions are not at issue, and the perceptions that are at issue can be measured and presented to the court.

The measurement of social meaning is thus relevant to Fourteenth Amendment adjudication. It is, however, less pertinent than it is in cases involving the Establishment Clause. Fourteenth Amendment cases rarely involve purely symbolic actions such as erecting crèches. Rather, they involve actions—zoning decisions, traffic rules, regulations of railroads—that aim at tangible results in the world. It is possible that an action that has a racial meaning could still be justifiable. The commitment to eradicating racism cannot reasonably be expected to override every other commitment that our society has. Heightened, but not invariably fatal, judicial scrutiny seems to be what is called for in these cases.[209] In the typical Establishment Clause case,

---

206. For a discussion of process-based theories and result-based theories, see generally ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 13-114 (1996).

207. 163 U.S. 537 (1896).

208. *Id.* at 557 (Harlan, J., dissenting).

209. *See* KOPPELMAN, *supra* note 206, at 103-11.

on the other hand, when all that government is doing is disseminating a meaning, a finding of prohibited cultural meaning should usually end the case.

CONCLUSION

Both the Equal Protection Clause and the Establishment Clause are concerned with preventing oppression of minorities. In both cases, the oppression resides centrally in the production of social meaning—of the official meaning of race or religion. Courts have understood that social meaning matters in constitutional law. That proposition seems undeniable. "Social inequality is substantially created and enforced—that is, *done*—through words and images. Social hierarchy cannot and does not exist without being embodied in meanings and expressed in communications."[210] But courts have not known where to go from there. They have not recognized that social meaning is measurable or that an assessment need not be based on mere speculation. The missing method can be found in trademark law—an area that is hardly obscure, but with which constitutional scholars tend to be unfamiliar.[211]

In his famous 1789 pamphlet, *What Is the Third Estate?*,[212] the Abbe Sieyes noted that the Third Estate in France—that vast majority of the population that was neither the nobility nor the clergy—that was legally nothing, was in fact everything, and was demanding, politically, to become something.[213] Our suggestion about the actual perceptions of symbolic government action endorsing religion, measurable by survey evidence, is similar. The cultural meaning of symbolic action, as perceived by the population at large, is everything. Legally, it is nothing. Our suggestion is that it become something.

---

210. CATHARINE A. MACKINNON, ONLY WORDS 13 (1993).

211. Professor Koppelman, for example, was profoundly ignorant of this field until Professor Diamond pointed out its relevance to the Establishment Clause issues that Koppelman was studying. For this reason, the authors are in disagreement about the significance of the order of names at the beginning of this Article. Koppelman thinks that it reflects the fact that the idea for the Article is really Diamond's. Diamond, who until Koppelman's faculty workshop on secular purpose had not focused at all on constitutional issues involving religion, is adamant that the names are merely in alphabetical order.

212. EMMANUEL JOSEPH SIEYES, WHAT IS THE THIRD ESTATE? (M. Blondel trans., S. E. Finer ed., 1963) (1798).

213. *Id.* at 51-52.