Whose Reasonableness Counts?

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_Elewski v. City of Syracuse_, 123 F.3d 51 (2d Cir. 1997).

In late 1995, the city of Syracuse, New York, erected a nativity scene in a downtown public park. The crèche contained statues of Jesus, Mary, and Joseph, a shepherd, a donkey, a lamb, and an angel. Hanging across the crèche was a banner that read “Gloria in Excelsis Deo,” or “Glory to God in the Highest.” The crèche was placed beneath a fifty-five foot Christmas tree, and surrounded by sawhorse barricades reading “Roy A. Bernardi, Mayor.” In _Elewski v. City of Syracuse_, the Second Circuit held that this display did not violate the Establishment Clause of the First Amendment.

In assessing the Syracuse crèche, the court employed the now-familiar Establishment Clause “endorsement test.” To answer the endorsement question, the court relied on the perceptions of a “reasonable observer” as defined by Justice O’Connor’s concurrence in _Capitol Square Review & Advisory Board v. Pinette_. The court concluded that such a reasonable observer would perceive the display, not as an endorsement of religion, but as “a celebration of the diversity of the holiday season . . . and [as a means] to preserve the economic viability of downtown retailers.”

1. 123 F.3d 51, 55 (2d Cir. 1997).
2. Id. at 54.
3. Id. at 53.
5. _Elewski_, 123 F.3d at 55. The Supreme Court has never upheld a religious display owned and erected by the government on public property. Cf. _Pinette_, 515 U.S. at 770 (upholding the display of a cross by a private party on public property); County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) (upholding the display of a menorah owned by a private religious group at the entrance to a public building); _Lynch v. Donnelly_, 465 U.S. 668, 687 (1984) (upholding the display of a government-owned crèche in a park owned by a nonprofit organization).
Case Note argues that Justice O'Connor's formulation imports to the reasonable observer the perceptions of a member of the religious majority, or of an adherent of the religion on display, thereby rendering the endorsement test insufficiently sensitive to displays of majority religious symbols.

I

The Establishment Clause endorsement test was first enunciated by Justice O'Connor in her concurring opinion in Lynch v. Donnelly. In Lynch, Justice O'Connor wrote that government "[e]ndorsement [of religion] 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." The Court employed endorsement analysis in its next religious display case, County of Allegheny v. ACLU, and indicated that endorsement would be judged according to the perceptions of a "reasonable observer."

In Pinette, Justice O'Connor refined the test by attempting to define the reasonable observer according to whose perceptions government endorsement of religion would be judged. Justice O'Connor developed three themes: First, the reasonable observer is informed about the community's general practice with regard to religious displays and about the history of the forum at issue. Second, the reasonable observer is less likely to perceive


8. Id. at 688.


10. Id. at 620 (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment)). In her concurring opinion in County of Allegheny v. ACLU, Justice O'Connor concluded, as the Elewski court did, that the reasonable observer would view the religious displays as a celebration of cultural diversity rather than as an endorsement of religion. See id. at 635-36 (O'Connor, J., concurring).

11. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 772-73 (1995) (O'Connor, J., concurring) ("B[e]cause it seeks to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community, the endorsement test necessarily focuses upon the perceptions of a reasonable, informed observer." (citations and internal quotation marks omitted)).

12. See id. at 780-81. It is worth noting that much of the debate, both judicial and academie, over the definition of the reasonable observer has focused on how much knowledge (for example, about the nature and history of the community and forum at issue) should be imputed to the observer. Thus, in Pinette, Justice O'Connor wrote that the "fundamental point of departure" between her definition of the reasonable observer and Justice Stevens's definition "concerns the knowledge that is properly attributed to the test's "reasonable observer."

"Id. at 778. In Elewski, the court assumed that the reasonable observer would know that the holiday display was encouraged by downtown merchants in order to attract shoppers, and that the
endorsement of religion in government displays of historically "ubiquitous" religious practices. Third, the reasonable observer does not represent any actual person but is the hypothetical expression of a community ideal.

II

The endorsement test is "perspective-dependent." That is, because endorsement is determined according to the perceptions of a reasonable observer, the formulation of the observer determines when and whether endorsement occurs. Crucially, religious symbols are perceived differently by adherents and nonadherents of the religion associated with the symbol on display. It is, for example, more likely that a Jew, Muslim, or atheist would perceive endorsement in a publicly displayed crèche than that a Christian would perceive endorsement from that same crèche. Thus, Justice O'Connor's definition of the reasonable observer too readily glosses over the
characteristic of the reasonable observer that most directly influences the perception of endorsement. By relying on a "'personification of a community ideal of reasonable behavior,'"19 the O'Connor formulation fails to resolve whether the observer will have the perspective of one in the religious majority or religious minority, and whether the observer will have the perspective of an adherent or a nonadherent of the religion on display. It is impossible to amalgamate, or average, these perspectives into one "hypothetical observer."20 Several components of the O'Connor formulation do, in fact, suggest that this reasonable observer will manifest the perspective of one in the religious majority, or at least the perspective of an adherent of the religion on display. By requiring that the reasonable observer perceive the "history and ubiquity"21 of a religious symbol as negating its religious content,22 the O'Connor formulation determines that government displays of majority, or at least common, religious symbols are less likely to be perceived reasonably as endorsement of religion. In County of Allegheny v. ACLU, Justice O'Connor concluded that the "longstanding existence" of certain religious practices in conjunction with their "nonsectarian nature" imply that such practices may be deemed "secular" and thus do not convey an endorsement of religion.23 As Michael McConnell has pointed out, however, "In our culture, most 'longstanding' symbols are those associated with Protestant Christianity, and those most likely to be considered as 'nonsectarian' are symbols associated with liberal Protestantism [and] symbols common to the Jewish and Christian faiths."24 Further, the religious majority may be more likely than religious minorities to understand their own practices as "serv[ing] a secular purpose rather than a sectarian one."25 Thus, by equating ubiquity with secularity, and by allowing the perception of secularity to negate a symbol’s religious content, the O'Connor formulation of the reasonable observer renders the endorsement test insufficiently sensitive to government displays of symbols associated with majority religions.26

20. Id.; see also ACLU v. Schundler, 104 F.3d 1435, 1448 n.12 (3d Cir.) ("We note the nearly impossible task of giving content to the hypothetical reasonable observer in our multicultural society."); cert. denied, 117 S. Ct. 2424 (1997); Marshall, supra note 15, at 536 ("[T]he test remains incomprehensible. Is the objective observer ... a religious person, an agnostic ... a person sharing the predominate religious sensibility of the community, or one holding a minority view?").
23. Id. at 631.
24. McConnell, supra note 16, at 154; see also Developments in the Law—Religion and the State, supra note 15, at 1658 (arguing that widespread acceptance of religious symbols indicates only the "dominance of certain religions").
25. County of Allegheny v. ACLU, 492 U.S. at 631 (O'Connor, J., concurring); see also Hartenstein, supra note 18, at 982 ("[W]hat the majority of Christian Americans consider secular is not religiously neutral to non-Christians.").
26. Cf. Dorsen & Sims, supra note 18, at 861 (arguing that this "turns the establishment clause on its head"); Tribe, supra note 16, at 611 (arguing that this "allow[s] society's insiders to characterize the
Moreover, by not explicitly positing the religious perspective of the reasonable observer, and by explicitly not relying on the perceptions of actual persons, the O'Connor formulation risks importing to the reasonable observer the perceptions of the judges who apply the endorsement test. Judges are asked to assess endorsement through the perceptions of a reasonable observer who has no defined religious perspective. Therefore, the likelihood that judges will conflate their own perceptions of endorsement with the "reasonable" perception of endorsement is high.

By skewing the perceptions of the reasonable observer toward those of the religious majority or adherent, and thereby rendering the endorsement test insufficiently sensitive to displays of majority religious symbols, the O'Connor formulation subverts the goal of the test—forbidding government from sending messages to nonadherents that they are outsiders to the political community.

III

Given the problems that arise from the O'Connor formulation of the reasonable observer, the Court should consider an alternative formulation. Such an alternative is suggested by Justice Stevens's dissent in Pinette and has been adopted by the Third Circuit in ACLU v. Schundler. Schundler also evaluated a religious display owned and erected by the government on city-owned property, and, as in Elewski, the court assessed the display according to the reasonable observer's perception of endorsement. After noting what it described as the "nearly impossible task of giving content to the hypothetical reasonable observer in our multicultural society," the Schundler court message the outsiders receive").

27. See Pinette, 515 U.S. at 779-80 (O'Connor, J., concurring).
28. Cf. The Supreme Court 1988 Term—Leading Cases, 103 HARV. L. REV 137, 235 (1989) ("[B]ecause the standard does not depend upon the perception of real human beings, and the inquiry is undertaken devoid of any explicitly stated perspective, such as that of the reasonable nonadherent, it seems inevitable that results will depend largely on the personal perceptions of the individual Justices."). This, too, skews the perceptions of the reasonable observer toward those of one in the religious majority. See Kenneth L. Karst, The First Amendment, The Politics of Religion and the Symbols of Government, 27 HARV. C.R.-C.L. L. REV. 503, 517 (1992) ("Judges are themselves acculturated to a set of perspectives that are emphatically not the perspectives of outsiders.").
29. Cf. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (stating the goal of the endorsement test). It is perhaps for this reason that the Elewski court was able to conclude that a reasonable observer would perceive a government-displayed Christian nativity scene and a banner reading "Gloria in Excelsis Deo" as a means to "preserve the economic viability of downtown retailers" rather than as an endorsement of religion. See Elewski, 123 F.3d at 52. 55. But see County of Allegheny v. ACLU, 492 U.S. at 601 (concluding that the "Gloria in Excelsis Deo" banner conveys a "patently Christian message").
30. 515 U.S. at 799-800 (Stevens, J., dissenting).
32. See id. at 1438. The Schundler display consisted of a crèche, a menorah, and a sign that read: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." Id.
33. See id. at 1444, 1447-49.
34. Id. at 1448 n.12.
rejected the O'Connor formulation of the reasonable observer, adopting instead the observer defined by Justice Stevens in his Pinette dissent.  

Although it would be possible explicitly to adopt a “reasonable nonadherent” formulation of the reasonable observer, the Stevens model incorporates the perceptions of the religious minority or nonadherent implicitly. The Stevens formulation “extend[s] protection to the universe of reasonable persons and ask[s] whether some viewers of the religious display would be likely to perceive a government endorsement.” Because in our “multicultural society” this “universe of reasonable persons” necessarily includes religious minorities and nonadherents, courts must consider the perspective of a minority or nonadherent when answering Stevens’s question whether “some viewers” of the display would perceive endorsement.

By allowing the perception of endorsement by any viewer in the universe of reasonable persons to mandate a finding of endorsement, the Stevens formulation might result in the invalidation of almost all government-sponsored religious displays. This, however, is not necessarily the wrong result. Establishment Clause violations are assessed according to perceptions of endorsement in order to protect religious minorities from being made to feel that they are less than full members of the political community. Displays should therefore be invalidated when a member of such a religious minority reasonably perceives endorsement from the display. Had the Elewski court employed the Stevens formulation, its analysis might have been more sensitive to such reasonable perceptions.

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35. See id. at 1448. Although the Schundler court devoted much attention to the degree of knowledge of the community and forum properly attributed to the reasonable observer, see id., it also concluded that “when testing for endorsement, we must take into account the perspective of those citizens within the community who hold minority religious views.” Id. The Schundler court held that such an observer would perceive the display at issue as an endorsement of religion. See id. at 1449.

36. This formulation has been suggested by several scholars. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-15, at 1293 (2d ed. 1988); Dorsen & Sims, supra note 18, at 860-61; Developments in the Law—Religion and the State, supra note 15, at 1647-48; The Supreme Court 1988 Term—Leading Cases, supra note 28, at 234.

37. Justice Stevens wrote explicitly that “[i]t is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief [the display at issue] expresses.” Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

38. Id. at 800 n.5.

39. Schundler, 104 F.3d at 1448 n.12.


42. As Kathleen Sullivan has noted: [A]pplication of the “endorsement” test has been unsatisfying. Not to see the creche as sending a message of exclusion to Jews, Muslims or atheists is to see the world through Christian-tinted glasses. . . . But the solution is simple: Banish public sponsorship of religious symbols from the public square. That the endorsement test has been . . . unpersuasively applied does not mean that it asked the wrong question to begin with. The Supreme Court should not eliminate such a test from its Establishment Clause doctrine, but rather should more rigorously enforce it. Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195, 207-08 (1992) (footnote omitted).