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## A Tale of Two Clauses: Search and Seizure, Establishment of Religion, and Constitutional Reason

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**A TALE OF TWO CLAUSES: SEARCH AND SEIZURE,  
ESTABLISHMENT OF RELIGION, AND  
CONSTITUTIONAL REASON**

Perry Dane\*

ABSTRACT

This Article dissects two developments in widely separate areas of American constitutional law—the “reasonable expectation of privacy” test for the Fourth Amendment’s Search and Seizure Clause and the “endorsement” test for the First Amendment’s Establishment Clause. These two stories might seem worlds apart, and they have not previously been systematically examined together. Nevertheless, the Article argues that they have in common at least three important symptoms of our legal culture’s deep malaise. These three phenomena occur in other contexts, too, but they appear with special clarity and a stark cumulative force in the two stories on which this Article focuses.

The most evident of these three common threads is a shallow and distracting focus on psychological reactions and affects. Another is the doomed effort, apparent in both contexts, to ground legal values in empirical facts—an effort found in other current legal strategies such as “original public meaning originalism.” The third is the failure to see that legal techniques that can make sense to solve hard cases at the edges of doctrinal categories must sometimes be distinct from the deeper principles that motivate and shape the categories themselves.

This Article examines the doctrinal development of both the “reasonable expectation of privacy” and “endorsement” tests. It also contemplates their possible fates as each comes under increasing practical and conceptual pressures. At the end of the day, the Article is, in some respects, a plea for at least a certain sort of legal formalism—not the illusory axiomatic, determinate, legal formalism that was the straw man of legal realists, but a more modest, yet self-confident, formalism that understands law’s distinctive role, in concert with other normative languages, in both framing and shaping the world in which we live.

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#### INTRODUCTION

This Article tells the story of two developments in widely separate areas of American constitutional law—the “reasonable expectation of privacy” test for the Fourth Amendment Search and Seizure Clause<sup>1</sup> and the “endorsement” test for the

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<sup>1</sup> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

First Amendment Establishment Clause.<sup>2</sup> Each story has been told, and critiqued, many times.<sup>3</sup> My contribution is to bring the two stories together<sup>4</sup> and to try to draw some larger conclusions from them about trends—and pathologies—in contemporary legal culture. Specifically, I argue that the “reasonable expectation of privacy” and “endorsement” tests have in common three important symptoms of our contemporary legal malaise: a shallow and distracting focus on the psychological, a despairing and doomed effort to ground legal values in empirical facts, and what I call the “colonizing of the core” of legal doctrine by its edge.<sup>5</sup> These three phenomena occur in many other contexts, too. Otherwise, they would not be interesting markers of larger trends. But they appear with special clarity, and a stark cumulative force, in the two stories that will be the focus of this Article.

The aim of this Article is partly to spell out the claim that the trends in legal doctrine at issue here are indeed shallow, distracting, despairing, and wrongheaded. But

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<sup>2</sup> “Congress shall make no law respecting an establishment of religion . . . .” U.S. CONST. amend. I. Both clauses are also enforced against the States by way of “incorporation” under the Fourteenth Amendment. See generally Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

<sup>3</sup> For some leading accounts of developments in Fourth Amendment doctrine, see, for example, Gerald G. Ashdown, *The Fourth Amendment and the “Legitimate Expectation of Privacy,”* 34 VAND. L. REV. 1289 (1981); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821 (2016); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011) [hereinafter Kerr, *Equilibrium-Adjustment Theory*]; Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) [hereinafter Kerr, *Four Models*]; James J. Tomkovicz, *Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645 (1985); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988); Richard G. Wilkins, *Defining the “Reasonable Expectation of Privacy”: An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077 (1987).

For work on the Establishment Clause and endorsement test, see, for example, Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O’Connor’s Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837 (2001); Perry Dane, *Prayer Is Serious Business: Reflections on Town of Greece*, 15 RUTGERS J.L. & RELIGION 611 (2014); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005); Kyle Langvardt, *The Lawless Rule of the Norm in the Government Religious Speech Cases*, 20 WASH. & LEE J. C.R. & SOC. JUST. 405 (2014); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987); Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667; Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986).

<sup>4</sup> To my knowledge, the only other piece of legal scholarship that compares the two doctrines, though with purposes very different from mine, is Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 525–29 (2002) (discussing the Fourth Amendment’s “reasonable expectation of privacy” approach as a point of comparison for analyzing the strengths and weaknesses of the First Amendment’s endorsement test).

<sup>5</sup> See *infra* notes 232–41 and accompanying text.

I also argue that these efforts do not work, even on their own terms. It is no surprise that both doctrinal tests I discuss have been routinely criticized and sometimes ignored, or at least elided. But I also want to suggest that these temptations nevertheless persist because they so powerfully reflect both pervasive, historically significant forces in the modern cultural imagination and more specific anxieties and failures of confidence in contemporary American legal culture.

Part I of this Article outlines the parallel histories of the reasonable expectation of privacy test in Fourth Amendment law and the endorsement test in Establishment Clause jurisprudence. The next three Parts then examine some possible deeper roots of both doctrines in the impulses and neuroses of current legal thought and contemporary life more broadly. Part II discusses our age's emphasis on the psychology and feelings. Part III examines the legal culture's impulse to avoid complicated and potentially unmoored normative debate by trying to reduce normative questions to an essentially empirical inquiry. Part IV looks to legal discourse's effort to escape the sometimes-necessary casuistry of "the artificial reason of the law."<sup>6</sup> Part V concludes by connecting these themes. It suggests, as I suppose every self-respecting law review article should, alternative approaches that the Court should have pursued. It also assesses the current situation, and points, if with only faint hope, to a way out of the morass.

## I. TWO STORIES

Here, to begin with, are the two stories in outline. These accounts are intentionally schematic, to emphasize the parallels between them.

### A. Privacy

1. In *Katz v. United States*,<sup>7</sup> the Supreme Court held that electronic eavesdropping on a phone booth required a search warrant, even though the eavesdropping bug was attached to the outside of the phone booth and did not physically penetrate it.<sup>8</sup>

2. The majority opinion in the case was ad hoc and even conclusory. Building on a long course of development in Fourth Amendment law away from an earlier emphasis on property rights, the Court held that "the Fourth Amendment protects people, not places."<sup>9</sup> Extrapolating from prior cases, it held that "[n]o less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in

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<sup>6</sup> This phrase is based on Lord Coke's invocation of "the artificial reason and judgment of law" in his famous confrontation with King James I. See *Prohibitions del Roy* (1607) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 63, 65. See generally Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

<sup>7</sup> 389 U.S. 347 (1967).

<sup>8</sup> See *id.* at 358–59.

<sup>9</sup> *Id.* at 351.

a telephone booth may rely upon the protection of the Fourth Amendment.”<sup>10</sup> It also looked to a prior case in which the Court had found that a “spike mike” attached to a suspect’s heating system from the outside required a warrant—regardless of whether the mike’s placement was a “technical trespass” as a matter of property law,<sup>11</sup> and held that not even physical penetration was necessary to render the eavesdropping an illegal invasion of the suspect’s private communication.<sup>12</sup>

3. The more well-known opinion in *Katz*, however, is Justice Harlan’s concurrence.<sup>13</sup> Harlan agreed that the Fourth Amendment protects people, not places, but sensibly added that the scope of that protection still “require[d] reference to a ‘place.’”<sup>14</sup> He then argued that those protected places should be identified, not by the rules of property law, but by an inquiry into expectations of privacy.<sup>15</sup> Specifically, he wrote: “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>16</sup>

4. Justice Harlan’s view, often called the “reasonable expectation of privacy” test, eventually came to dominate Fourth Amendment search and seizure law,<sup>17</sup> resulting

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<sup>10</sup> *Id.* at 352 (footnotes omitted).

<sup>11</sup> *Silverman v. United States*, 365 U.S. 505, 506, 511–12 (1961).

<sup>12</sup> *Katz*, 389 U.S. at 353.

<sup>13</sup> See generally Martin McKown, *Fifty Years of Katz: A Look Back—and Forward—at the Influence of Justice Harlan’s Concurring Opinion on the Reasonable Expectation of Privacy*, 85 GEO. WASH. L. REV. ARGUENDO 140 (2017).

<sup>14</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>15</sup> *Id.* The ideas of property and expectations of privacy are, to be sure, potentially related. Thus, for example, a federal district court analyzing a police entry by force into the common area of an apartment building could write, the year before *Katz*, that “[t]he Government’s claim that the tenant has no expectation of privacy and no right to regulate the use of the hallways and stairways of the apartment building must succumb to a commonsense appraisal of the property rights of apartment lessees.” *United States v. Blank*, 251 F. Supp. 166, 173 (N.D. Ohio 1966); cf. Baude & Stern, *supra* note 3, at 1824–29 (arguing for an approach to Fourth Amendment rights grounded in positive legal rights, including property rights).

<sup>16</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>17</sup> About eight months after *Katz* was decided, the Court treated its majority opinion and Justice Harlan’s concurrence as on a par, noting, “We have recently held that ‘the Fourth Amendment protects people, not places,’ and wherever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.” See *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (internal citations omitted). A week later, the Court wrote that its “recent decision in *Katz* . . . makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.” *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (internal citation omitted). In short order, lower courts could write, for example, that “*Katz* teaches that Fourth Amendment protection extends only to situations in which the complaining person had a reasonable and legitimate expectation of privacy.” *United States v. Missler*, 414 F.2d 1293, 1301 (4th Cir. 1969). Similarly, in *Carpenter v. Sigler*, 419 F.2d 169, 171 (8th Cir. 1969),

in a long line of cases in which courts have held that criminal defendants or others did or did not have a “reasonable expectation of privacy” in one or another type of space, structure, or situation.<sup>18</sup>

5. Nevertheless, this test has also been repeatedly criticized. Critics have pointed out that the test is (a) unclear about how to determine whether a person has an “actual (subjective) expectation [of privacy];”<sup>19</sup> (b) normatively imprecise about when or how such expectations become “reasonable;”<sup>20</sup> and (c) especially unhelpful in teasing out the relationship between, and the relative weight of, the subjective and objective components of the test.<sup>21</sup> Over the years, scholars have suggested various alternatives, modifications, revisions, and conceptual reworkings of the test.<sup>22</sup> Some have suggested that the test is not what it purports to be in the first place.<sup>23</sup>

6. The Supreme Court itself has adjusted the test, and in recent cases, has very tentatively begun to step back from it, at least as an exclusive means to answer search and seizure questions.<sup>24</sup>

### *B. Establishment of Religion*

1. In *Lynch v. Donnelly*,<sup>25</sup> the Supreme Court held that the public display of a Nativity scene as one part of a larger Christmas display erected by the City of

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the Eighth Circuit wrote, “The Supreme Court has recognized that the protection of the Fourth Amendment applies at all times whenever an individual has a reasonable expectation of privacy,” using Justice Harlan’s formulation even as it cited, oddly enough, not to his concurring opinion, but to the page in the *Katz* majority opinion that emphasized that “the Fourth Amendment protects people, not places.” *See Katz*, 389 U.S. at 351.

<sup>18</sup> *See, e.g.*, *United States v. Miller*, 425 U.S. 435 (1976) (no reasonable expectation of privacy in bank records obtained, through subpoena, from the banks); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc) (no reasonable expectation of privacy in cell-site location information obtained from cell phone companies), *petition for cert. filed*, No. 16-6308 (U.S. Sept. 26, 2016); *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016) (no reasonable expectation of privacy in cell-site location information obtained from cell phone companies), *cert. granted*, 137 S. Ct. 2211 (June 5, 2017) (No. 16-402).

<sup>19</sup> *See Tomkovicz, supra* note 3, at 653.

<sup>20</sup> *See Wilkins, supra* note 3, at 1088–91.

<sup>21</sup> *See Matthew Tokson, Knowledge and Fourth Amendment Privacy*, 111 NW. U. L. REV. 139, 146–47 (2016).

<sup>22</sup> *See, e.g.*, Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015); Tokson, *supra* note 21, at 187–203.

<sup>23</sup> *See generally* Kerr, *supra* note 22 (describing the test as effectively only a one-step test).

<sup>24</sup> *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 409 (2012) (supplementing the “reasonable-expectation-of-privacy test” with the “common-law trespassory test”); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (announcing the firm rule that when “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant”).

<sup>25</sup> 465 U.S. 668 (1984).

Pawtucket, Rhode Island<sup>26</sup> did not violate the First Amendment's bar to establishment of religion.<sup>27</sup>

2. The majority opinion was ad hoc and even conclusory. Years earlier, the Court had struck down official prayer in public schools.<sup>28</sup> But *Lynch* was its first major case about an arguably devotional *object*. The Court noted the myriad ways in which government permissibly “acknowledg[es]” “the role of religion in American life,” pointing both to practices such as the inclusion of “under God” in the Pledge of Allegiance and to the display of religious art “predominantly inspired by one religious faith” in public museums.<sup>29</sup> It held that the constitutional “inquiry calls for line-drawing; no fixed, *per se* rule can be framed.”<sup>30</sup> Finally, the Court emphasized that Christmas was a “National Holiday” as well as a religious holy day.<sup>31</sup> Drawing on a traditional doctrinal test that looked to the “purpose” and “effect” of challenged practices,<sup>32</sup> the Court held that the crèche was merely a permissible acknowledgment of the “historical origins” of the largely secular national Christmas celebration.<sup>33</sup>

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<sup>26</sup> The display also included “among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that read[ ] ‘SEASONS GREETINGS.’” *Id.* at 671. About two years after *Lynch* was decided, I visited Pawtucket and took some photos that help situate the Nativity scene in the context of the city’s larger Christmas display. My photos are available in a single PowerPoint file at Perry Dane, *The Pawtucket Christmas Display Circa 1986*, <https://goo.gl/LvaEnS> [<https://perma.cc/6BC5-A4KM>] (last visited Apr. 12, 2018).

<sup>27</sup> *Lynch*, 465 U.S. at 687.

<sup>28</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421, 424 (1962); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (striking down official devotional Bible readings in public schools).

<sup>29</sup> *Lynch*, 465 U.S. at 674–78.

<sup>30</sup> *Id.* at 678.

<sup>31</sup> *Id.* at 676.

<sup>32</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (“Three . . . tests may be gleaned from our cases. First, 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.’” (internal citations omitted)).

<sup>33</sup> *Lynch*, 465 U.S. at 680. I have elsewhere criticized the Court’s underlying posit that there are effectively two divisible Christmases, one religious and one secular, and that the “national” Christmas holiday is an essentially “secular” celebration, albeit one with religious roots and religious meaning for believers. See Perry Dane, Christmas 3 (Jan. 15, 2015) (unpublished manuscript), <http://ssrn.com/abstract=947613>. To the contrary, I suggest, “Santa and the like play a complex, rich, and tension-filled role in the ‘religious economy’ of Christmas, and . . . we cannot begin to tackle the constitutional problem of Christmas until we unravel that complexity.” *Id.* Nevertheless, all the opinions in *Lynch*, including the dissenters, accepted the premise of a “secular” Christmas, though I would suggest that the incongruity of that conclusion lurked in the background in a way that none of the Justices was fully willing to acknowledge. I discuss this point further, *infra* note 232.

3. The more well-known opinion in *Lynch*, however, was Justice O'Connor's concurrence. In brief, Justice O'Connor argued that the point of the Establishment Clause was to

prohibit[] government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . The [most] direct infringement [on that principle] is government 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.<sup>34</sup>

She suggested that the “purpose” and “effect” prongs of the traditional doctrinal test announced in *Lemon v. Kurtzman*,<sup>35</sup> should be interpreted to focus on whether the challenged government practice had either the “purpose” or “effect” of “endorsing” religion,<sup>36</sup> and that these were “legal question[s] to be answered on the basis of judicial interpretation of social facts.”<sup>37</sup> Justice O'Connor expanded on her views in a subsequent case involving a crèche on a courthouse grand stairway.<sup>38</sup> She explained that her “endorsement test” would require the Court to ask “whether a reasonable observer,” aware of all the relevant facts and their history and context, “would view [the challenged] practice[] as a disapproval of his or her particular religious choices.”<sup>39</sup>

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<sup>34</sup> *Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring). Justice O'Connor was far from the first to speak in terms of an Establishment Clause concern with “endorsement” of religion. The majority opinion in *Lynch* itself employed the term. *See id.* at 681–83 (majority opinion). Her innovation was to emphasize the psychological and political effect of “endorsement” on nonadherents. This move had been anticipated in a few lower court opinions arising in similar contexts. *See, e.g.*, *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 526 F. Supp. 1310, 1312–13 (D. Colo. 1981) (challenge to a nativity scene that was part of an annual Christmas lighting display); *Donnelly v. Lynch*, 525 F. Supp. 1150, 1173–74 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984). But Justice O'Connor was the first to embrace the idea at the Supreme Court level.

<sup>35</sup> 403 U.S. 602 (1971); *see supra* note 32 and accompanying text.

<sup>36</sup> *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). Justice O'Connor also emphasized the clause's concern with “excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines.” *Id.* at 687–88. That part of her analysis has largely dropped out, however. *See generally* Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong*, 7 FIRST AMEND. L. REV. 253 (2009).

<sup>37</sup> *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

<sup>38</sup> *See County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 623–37 (1989) (O'Connor, J., concurring), *abrogated by Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

<sup>39</sup> *Id.* at 631.

4. Justice O'Connor's view eventually came to dominate Establishment Clause jurisprudence,<sup>40</sup> resulting in a long line of cases in which courts have held various practices, displays, and the like to "endorse" religion or not from the perspective of a hypothetical "reasonable observer."

5. Nevertheless, this test has also been repeatedly criticized. Although the "endorsement test" is not explicitly divided into "subjective" and "objective" prongs, it does rely on both the posited reactions of a set of observers (insiders and outsiders)

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<sup>40</sup> As early as one year after *Lynch*, in *Wallace v. Jaffree*, the Court perfunctorily held, citing to Justice O'Connor's concurrence in *Lynch*, "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" 472 U.S. 38, 56 (1985) (footnote omitted). Justice O'Connor, concurring, more vigorously defended her formulation and its putative analytic power. She argued that

[t]he endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. . . . The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.

*Id.* at 69–70 (O'Connor, J., concurring in judgment). She continued to press her approach in subsequent concurring opinions. *See, e.g., County of Allegheny*, 492 U.S. at 630–31 (O'Connor, J., concurring); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346–49 (1987) (O'Connor, J., concurring in judgment); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711–12 (1985) (O'Connor, J., concurring). Within a few years, lower courts began to look to Justice O'Connor's concurrence in *Lynch* for guidance. *See, e.g., Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir. 1988) (citing O'Connor's concurrence in *Amos*), *cert. denied*, 488 U.S. 1029 (1989); *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 125–26 (7th Cir. 1987); *ACLU v. City of St. Charles*, 794 F.2d 265, 272 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986); *Marks v. City Council of Chesapeake*, 723 F. Supp. 1155, 1163 (E.D. Va. 1988), *aff'd sub. nom. Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989).

In *County of Allegheny*, Justice Blackmun largely adopted Justice O'Connor's endorsement test. *See* 492 U.S. at 594–97 (plurality opinion); *see also id.* at 589–94 (majority opinion). Justice O'Connor herself also further refined her view of how the test should operate. *See id.* at 630–31 (O'Connor, J., concurring); *see also Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (writing for the majority, Justice O'Connor looked to "endorsement" along with other considerations to uphold a program through which public school students were sent into parochial schools to teach remedial courses); *Agostini*, 521 U.S. at 243–44 (Souter, J., dissenting) (also looking to the risk of endorsement implicit in the program). By *Santa Fe Independent School District v. Doe*, the Court's majority took the basic outlines of the endorsement test as given. *See* 530 U.S. 290, 305 (2000). In subsequent years, the Court's use of the endorsement test has been inconsistent, even erratic, but it has nevertheless become the main tool of analysis for lower courts trying to puzzle their way through establishment clause litigation. *See, e.g., Karthik Ravishankar, The Establishment Clause's Hydra: The Lemon Test in the Circuit Courts*, 41 U. DAYTON L. REV. 261 (2016).

and the requirement that those reactions be “reasonable.”<sup>41</sup> Thus, critics have pointed out, among other things, that the test is (a) unclear about how to determine how and whether observers come to feel that they are insiders or outsiders;<sup>42</sup> (b) normatively imprecise about when or how such feelings become “reasonable”;<sup>43</sup> and (c) especially unhelpful in teasing out the relationship between, and the relative weight of, the subjective and objective dimensions of the test.<sup>44</sup> Over the years, scholars have suggested various alternatives, modifications, revisions, and conceptual reworkings of the test.<sup>45</sup>

6. The Supreme Court itself has adjusted the test, and in some cases has begun to step back from it, at least as an exclusive means to answer establishment of religion questions. One need only look, for example, at the 2014 decision in *Town of Greece v. Galloway*,<sup>46</sup> upholding allegedly “sectarian” prayers in a local government setting: the majority briefly nodded to the test, but mostly relied on other considerations.<sup>47</sup>

### C. Now Together

*Katz* and *Lynch* arose in very different constitutional contexts. But the conceptual challenges in the two adjudications were strikingly similar. In each case, the Court was asked to define the limits of state involvement or intrusion with respect to a very specific material object—in one instance a telephone booth, and in the other a crèche. In each case, changing times made a clear understanding of those material objects especially difficult: telephone booths and external listening devices were both unknown in earlier centuries, and a secularizing culture has blurred the devotional and commercial meanings of objects such as Christmas crèches. In both cases, the majority opinions tried to rely on a litany of comparisons, holding, respectively that the phone booth was analogous to “a business office, . . . a friend’s apartment, or . . . a taxicab”<sup>48</sup> and that the crèche was analogous to “religious paintings in governmentally supported museums.”<sup>49</sup> The concurrences tried to do better.

But both the “reasonable expectations of privacy” and the “reasonable observer of endorsement” doctrines are seriously flawed. They are unclear, possibly vacuous, and inherently unstable. Why, then, would the Court be so attracted to them? As I suggested at the outset, I argue that examining these two otherwise unconnected

<sup>41</sup> See *County of Allegheny*, 492 U.S. at 630–31 (O’Connor, J., concurring).

<sup>42</sup> See, e.g., Strasser, *supra* note 3, at 677–78.

<sup>43</sup> See Choper, *supra* note 4, at 510–11.

<sup>44</sup> See Strasser, *supra* note 3, at 672–75.

<sup>45</sup> See, e.g., Hill, *supra* note 3, at 533–44.

<sup>46</sup> 134 S. Ct. 1811 (2014).

<sup>47</sup> See *id.* at 1818–24.

<sup>48</sup> *Katz v. United States*, 389 U.S. 347, 352 (1967) (footnotes omitted).

<sup>49</sup> *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). For a stinging critique of *Lynch*, on this point and others, see Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640 (2012).

areas of law in tandem reveals some deeper patterns in contemporary constitutional thinking, or even contemporary legal thinking more broadly. The rest of this Article tries to examine some of those common patterns. Although I engage in a fair amount of critique along the way, my main interest is in uncovering the patterns themselves, and their implications for the overall health of our legal culture.

To be sure, two areas of doctrine are not by themselves definitive evidence for any more sweeping diagnosis. As I suggested earlier, though, my larger claim is that echoes of the patterns identified here do have larger implications—that the two case studies discussed here are emblematic, in an especially dramatic way, of a larger story or set of stories.

## II. THE LURE OF THE AFFECTIVE

The “reasonable expectations of privacy” and “endorsement” tests both reflect contemporary law’s infatuation with the psychological and the affective, and its suspicion that they are somehow more “real” and germane to human problems than the law’s own more traditional categories and arguments. At the same time, these tests, by superimposing a “reasonableness” requirement on a psychological and subjective substrate, reflect some concern that the pure facts of life not entirely dominate or displace the law and legal argument. That tension between an infatuation with psychology and a suspicion of the merely subjective produces the opaqueness and instability inherent in both tests.

### A. *The Psychological Turn*

The law has long taken mental states into account. Consider the importance of concepts such as *mens rea* in the criminal law, intentionality in tort law, or inquiries into motive in constitutional law.<sup>50</sup> But I have in mind something different—not the law looking to degrees of volition to determine normative culpability, but rather the law finding normative significance in subjective affective reactions to one or another state of affairs.<sup>51</sup> I have in mind, in some sense, the law taking seriously the late

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<sup>50</sup> For an “attempt[ed] . . . clarification of the ambiguity of *mens rea* within present law,” see generally Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635.

For the perspective that “the current confusion and controversy over battery law doctrine . . . extends beyond the element of intent and includes uncertainty concerning the role of the plaintiff’s lack of actual or apparent consent,” see generally Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585 (2012).

For then-Professor Elena Kagan’s argument that “First Amendment law, as developed by the Supreme Court . . . has as its primary, though unstated, object the discovery of improper governmental motives,” see generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

<sup>51</sup> It is also important to distinguish what I am calling the law’s “infatuation with the psychological and the affective” from the employment of emotional intelligence as an element of legal decision-making. See generally THE PASSIONS OF LAW (Susan A. Bandes ed., 1999).

Maya Angelou's much-quoted aphorism "I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel."<sup>52</sup> That maxim is very moving, to be sure, but it also comes dangerously close to resembling (if from the other side of the mirror) a peculiarly modern form of narcissism in which, as Richard Sennett put it, "'What am I really feeling?' becomes a question which . . . gradually detaches itself from and overrides the question 'What am I doing?'"<sup>53</sup>

I do not want to overstate the case. Contemporary law's "infatuation with the psychological and the affective" obviously has older roots. And it is by no means entirely wrong or bad. The Talmud, after all, insists that "All gates [to God] are locked, excepting the gates of wounded feelings."<sup>54</sup> Nor has this "infatuation" overwhelmed the entirety of legal discourse. I am suggesting trends, nuances, and shadings—not absolute binaries.

That said, it bears note that many areas of the law have begun to focus, as they did not in the past, on the realm of psychology and feelings.<sup>55</sup> A clear example is the widening, if still contested, acceptance of causes of action and damages for "emotional distress" in tort law.<sup>56</sup> Even the specific trope I have identified in the Fourth

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<sup>52</sup> I have not been able to find the original source of this aphorism, though it is invariably ascribed to Angelou, and she embraced it in interviews. *See, e.g.,* La Trisha McIntosh & La Tasha Taylor, *A Conversation with Dr. Maya Angelou*, BEAUTIFULLY SAID MAG. (July 4, 2012), <http://beautifullysmagazine.com/201207feature-of-the-month-3/> [<https://perma.cc/KY5B-U3TW>].

<sup>53</sup> RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 325 (1st ed. 1976).

<sup>54</sup> BABYLONIAN TALMUD: BABA MEZI'A 59b.

<sup>55</sup> *See* Daniel F. Piar, *A Welfare State of Civil Rights: The Triumph of the Therapeutic in American Constitutional Law*, 16 WM. & MARY BILL RTS. J. 649, 659 (2008).

<sup>56</sup> Tort doctrine has for some time allowed causes of action or damages for emotional distress in certain contexts, especially when the emotional harm was incident to actual or threatened physical injury. *See generally* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789 (2007). Nevertheless, the boundaries have clearly shifted. Thus, for example, "[t]he tort of negligent infliction of emotional distress has only emerged as a cognizable, independent cause of action within approximately the last half century." *Id.* at 807–08. Similarly, "the emotional distress tort has seen explosive growth in the employment arena." David Crump, *Evaluating Independent Torts Based upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 452 (1992).

To be sure, both courts and scholars continue to recognize the practical and conceptual difficulties posed by the idea of emotional distress. Geoffrey C. Rapp points out a conundrum that goes to the heart of the matter: if the law truly believes that "[s]ometimes words are harder than blows," then should a person be permitted to "use physical force in self-defense when threatened with severe emotional distress resulting from another's intentional extreme or outrageous conduct?" Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 110 (2010) (footnote omitted).

For my purposes, the question of emotional distress in tort law is both analogous and disanalogous to the constitutional doctrines in this Article. On the one hand, the specific

Amendment and Establishment Clause contexts—in which a legal outcome is pegged to “reasonable” psychological perceptions—has begun to spring up elsewhere in constitutional law. Personal jurisdiction doctrine under the Due Process Clause, for example, has moved (if unsteadily and subject to all the same expected criticisms) towards assessing whether a given defendant had a reasonable expectation of being sued in a specific forum.<sup>57</sup>

Contemporary policy analysis also has increasingly focused on psychological and affective reactions to one or another state of affairs. A prime example is the boom in “happiness” research, and attendant prescriptive claims that public policy should aim to increase happiness.<sup>58</sup>

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issues at bar sometimes overlap. For example, invasion of privacy claims in private law are routinely paired with causes of action for emotional distress and often rely on a legal standard of “reasonable expectation of privacy.” *E.g.*, *Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1169 (Ill. App. Ct. 2014). And the “endorsement” test in Establishment Clause jurisprudence finds at least some echo in proposals to employ tort law to help safeguard the sensitivities of persons living in increasingly pluralistic societies. *See* John McLaren, *The Intentional Torts to the Person Revived? Protecting Autonomy, Dignity and Emotional Welfare in a Pluralistic Society*, 17 SUP. CT. L. REV. 2D 67, 85 (2002) (Can.) (suggesting that “the modern law of the intentional torts” could be a “hospitable home for actions to redress the . . . mental, emotional and even spiritual harms cause [sic] by a range of . . . threats, confinements, pranks, harassments and slurs”).

On the other hand, the idea of emotional distress in tort law differs in one crucial respect from developments in either the Fourth Amendment or Establishment Clause doctrine—it has not come anywhere near occupying the doctrinal and conceptual center of the field, and it certainly has not displaced other bases for assessing responsibility and wrongfulness.

<sup>57</sup> *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (“[T]he foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” (omission in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980))).

For criticisms of the circularity of this formulation, see, for example, Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a “Generally” Too Broad, but “Specifically” Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135 (2005); *see also* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 701 (1987). The intricacies of how that concept has played out in personal jurisdiction doctrine, however, are well beyond the scope of this Article.

<sup>58</sup> *See, e.g.*, DEREK BOK, *THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING* (2010); RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* (2005); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009); Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363 (2004).

For a more skeptical discussion of happiness research and its implications, see Rick Swedloff, *The Trouble with Happiness*, 86 TEMP. L. REV. 763 (2014); *cf.* Peter H. Huang, *Authentic Happiness, Self-Knowledge and Legal Policy*, 9 MINN. J.L. SCI. & TECH. 755 (2008).

These developments in legal culture and public policy are, of course, connected to deeper and broader trends in the development of the modern cultural and political imagination. It would be trite by now to point out that we live in an intensely psychologically centered age,<sup>59</sup> marked by what Philip Rieff famously labeled the “triumph of the therapeutic.”<sup>60</sup> Perhaps more starkly, Andrew Delbanco has divided the story of American “hope” into three rough eras<sup>61</sup>: an age of “God” that defined the colonial experience leading into the early Republic;<sup>62</sup> an age of “Nation,” whose inklings began even before the Revolution, in which the national “sacred union” took over much of the place of religion;<sup>63</sup> and finally an age of “Self,” beginning around the 1960s, in which “instant gratification” became “the hallmark of the good life.”<sup>64</sup> “What was lost in the unholy alliance between an insouciant New Left and an insufferably smug New Right,” Delbanco argues, too dramatically perhaps, “was any conception of a common destiny worth tears, sacrifice, and maybe even death.”<sup>65</sup> These developments of recent decades are in an important sense, however, simply manifestations of yet broader trends in the very nature of modernity.<sup>66</sup>

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One might argue that contemporary happiness policy is simply an extension of traditional utilitarianism, but modern philosophical utilitarianism has actually been engaged in a vigorous debate between more objective and subjective conceptions of utility. *See generally* DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 211–90 (1989); John Broome, *Utilitarianism and Expected Utility*, 84 *J. PHIL.* 405 (1987). Further debates involve the very possibility of interpersonal comparisons of utility. *See generally* INTERPERSONAL COMPARISONS OF WELL-BEING (Jon Elster & John E. Roemer eds., 1991); Chris Heathwood, *Subjective Theories of Well-Being*, in *THE CAMBRIDGE COMPANION TO UTILITARIANISM* 199 (Ben Eggleston & Dale E. Miller eds., 2014).

<sup>59</sup> *See generally* FRANK FUREDI, *WHERE HAVE ALL THE INTELLECTUALS GONE?* (2d ed. 2006); *INVENTING THE PSYCHOLOGICAL: TOWARD A CULTURAL HISTORY OF EMOTIONAL LIFE IN AMERICA* (Joel Pfister & Nancy Schnog eds., 1997); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979); MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* (1st ed. 2017); JAMES L. NOLAN, JR., *THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY’S END* (1998); KATIE WRIGHT, *THE RISE OF THE THERAPEUTIC SOCIETY: PSYCHOLOGICAL KNOWLEDGE & THE CONTRADICTIONS OF CULTURAL CHANGE* (2011); *see generally also* ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (updated ed. 1996); THOMAS NAGEL, *THE LAST WORD* (1997).

<sup>60</sup> PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* (1966). For an earlier, interesting—if exaggerated—critique in this *Journal* of the influence of “therapeutic culture” in modern American constitutional law more generally, see generally Piar, *supra* note 55.

<sup>61</sup> *See generally* ANDREW DELBANCO, *THE REAL AMERICAN DREAM: A MEDITATION ON HOPE* (1999).

<sup>62</sup> *See id.* at ch. 1.

<sup>63</sup> *See id.* at ch. 2.

<sup>64</sup> *Id.* at 96.

<sup>65</sup> *Id.* at 97.

<sup>66</sup> *See generally* ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991); BRAD S. GREGORY, *THE UNINTENDED REFORMATION:*

Descending from the stratosphere, however, the two specific constitutional doctrines at issue here relate to the broader cultural focus on psychology and affective subjectivity in somewhat different ways.

The endorsement test seems most of a piece with our pervasive culture of ag-grievement and victimhood that treats psychological “offense” as a harm at least or more serious than physical injury or deprivation of material or dignitary entitlements.<sup>67</sup> In today’s world, we both exaggerate trivial missteps and underplay genuine injuries by running so quickly to the language of offense, as in “I feel offended.”<sup>68</sup> It also fits squarely into contemporary identity politics.<sup>69</sup> Maybe most interestingly, the endorsement test resonates with trends in contemporary religion itself,<sup>70</sup> as American religious life becomes increasingly enmeshed in the contemporary culture of the therapeutic<sup>71</sup>

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HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY (2012); CHARLES TAYLOR, *A SECULAR AGE* (2007).

<sup>67</sup> Cf. Bradley Campbell & Jason Manning, *Microaggression and Moral Cultures*, 13 COMP. SOC. 692, 695 (2014) (discussing the rise of a “culture of victimhood” different from the more traditional “cultures of honor” and “cultures of dignity” previously described by sociologists).

<sup>68</sup> See Conor Friedersdorf, *The Rise of Victimhood Culture*, ATLANTIC (Sept. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-rise-of-victimhood-culture/404794> [<https://perma.cc/9CPM-2Y36>].

<sup>69</sup> See *infra* notes 108–18 and accompanying text.

<sup>70</sup> The sociologist Christian Smith has bitinglly summed up those developments by describing the rise, among the young especially, of what he and his collaborators have called a new “de facto religious faith” of “Moralistic Therapeutic Deism.” Christian Smith, *On ‘Moralistic Therapeutic Deism’ as U.S. Teenagers’ Actual, Tacit, De Facto Religious Faith*, CATH. EDUC. RESOURCE CENT. (2005), <https://www.catholiceducation.org/en/controversy/common-misconceptions/on-moralistic-therapeutic-deism-as-u-s-teenagers-actual-tacit-de-facto-religious-faith.html> [<https://perma.cc/8Q7F-NPGE>]; see CHRISTIAN SMITH & MELINDA LUNDQUIST DENTON, *SOUL SEARCHING: THE RELIGIOUS AND SPIRITUAL LIVES OF AMERICAN TEENAGERS* (2005); CHRISTIAN SMITH & PATRICIA SNELL, *SOULS IN TRANSITION: THE RELIGIOUS AND SPIRITUAL LIVES OF EMERGING ADULTS* (2009).

<sup>71</sup> The sociologist and political scientist Alan Wolfe, for example, describes how psychological and therapeutic conceptions of religion and the religious life have influenced American religion. See ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH* 183 (2003) (“This blending of psychology and religion has its positive side, for there is no necessary reason to conclude that those who focus on their own needs will automatically neglect the needs of others. Still, the psychologizing of American religion makes it difficult for the faithful to emphasize classic religious themes such as duty and responsibility.”). Wolfe notes “the widespread popularity of self-help movements in so many quarters of conservative Christianity in the United States,” but also observes that “evangelicals are just the tip of the iceberg when it comes to blending themes of personal recovery and spiritual regeneration.” *Id.* at 182. “Many Americans [who] consider themselves spiritual more than they do religious . . . often turn for inspiration to writers . . . who, while not identified with any particular religious tradition, incorporate into their explorations of selfhood spiritual themes from many different faiths . . . .” *Id.* In sum, “[p]opular psychology is bound to influence churches more than the other way around, if for no other reason that, in their attempts to reach the ‘unchurched,’ religious leaders have to pay attention to what Americans are buying and reading in such copious amounts.” *Id.* at 183.

and, for that matter, caught up in the rise of identity politics and the culture of grievement.<sup>72</sup>

The Fourth Amendment story is more complicated, bound up as it is in long-standing complexities and ambiguities in the meaning of privacy itself.<sup>73</sup> For now, it might suffice to say this: the idea of privacy can refer to a certain sort of autonomy,<sup>74</sup> as in *Griswold v. Connecticut*,<sup>75</sup> the landmark contraception case decided only two years before *Katz*. It can also refer to protection against intrusion into certain sorts of places or disclosure of certain types of information,<sup>76</sup> and it can be a protection against certain specific sorts of abuses.<sup>77</sup> Whether these various expressions of the notion of privacy reflect distinct values or one overarching principle remains controversial.<sup>78</sup> In addition, concern for “privacy” can also reflect a more general, even free-floating, angst about surveillance—an angst that becomes more complicated and ironic in an age of increasing self-disclosure, both active and passive.<sup>79</sup> Though we

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John Wilson, tracking changes in American religious life, found that American believers in all major faith traditions have increasingly emphasized ideas “that maximize self-realization and personal growth and reward primary relationships” such that “[d]ivine commandments are transformed into instrumental strategies for achieving personal satisfaction.” John Wilson, *The Sociological Study of American Religion*, in 1 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE: STUDIES OF TRADITIONS AND MOVEMENTS 17, 28 (Charles H. Lippy & Peter W. Williams eds., 1988); see also, e.g., George Marsden, *Secular Humanism Within the Church*, CHRISTIANITY TODAY, Jan. 17, 1986, at 14-I. And Erling Jorstad concludes that even most evangelicals “have moved to embrace an outlook harmonious with much of the research from the expanding fields of psychology, accepting the fact that as human beings they have certain needs that can be met largely by cultivating such traits as joy, wholeness, health, and, for some, wealth.” ERLING JORSTAD, POPULAR RELIGION IN AMERICA: THE EVANGELICAL VOICE 70 (1993); see also STEPHANIE MURAVCHIK, AMERICAN PROTESTANTISM IN THE AGE OF PSYCHOLOGY (2011).

To be sure, these developments have not gone without criticism. “Could the goals of therapy such as self-fulfillment, self-actualization, or self-improvement harmonize with the scriptural admonition that Christians should concern themselves with whatever is true, honorable, just, pure, lovely, and gracious? . . . Might not they be more interested in building a pleasant personality than in developing a virtuous character?” JORSTAD, *supra*, at 70–71. More profoundly, leading theologians such as Stanley Hauerwas, who I discuss very briefly *infra* in the text accompanying note 106, would urge a radically different conception of the religious life and religious community.

<sup>72</sup> See generally ROBERT P. JONES, *THE END OF WHITE CHRISTIAN AMERICA* (2016).

<sup>73</sup> See, e.g., Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 882 (2013); see also John Hollander, *The Language of Privacy*, 68 SOC. RES. 5, 5–10 (2001).

<sup>74</sup> See David J. Garrow, *Privacy and the American Constitution*, 68 SOC. RES. 55, 74 (2001).  
<sup>75</sup> 381 U.S. 479 (1965).

<sup>76</sup> See Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 165, 172 (2015).

<sup>77</sup> *Id.* at 160–63.

<sup>78</sup> Compare Andrei Marmor, *What Is the Right to Privacy?*, 43 PHIL. & PUB. AFF. 3 (2015), with Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

<sup>79</sup> See, e.g., Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 245–51 (2008).

might think this free-floating angst is a very recent phenomenon associated with the age of the Internet, perhaps it is not surprising that it actually began to be articulated and translated into policy terms with the increasing sophistication of electronic surveillance and computer databases at just about the time that *Katz* was decided.<sup>80</sup> That is not to say that typical Fourth Amendment litigation, most of which involves the efforts of genuine criminals to exclude from trial evidence of criminality, literally arises out of the general culture's free-floating angst about surveillance.<sup>81</sup> But I do suspect that such angst might have something to do with the attraction of a legal test focusing on the "reasonable expectation of privacy."

### *B. Good Reasons to Be Suspicious*

As should be evident from some of the snarky language in the exposition so far—"infatuation," "trivial missteps," "free-floating angst," and so on—one good reason to be suspicious of the psychological turn in both Establishment Clause and Search and Seizure doctrine is broadly civilizational. If our society is indeed immersed in what Christopher Lasch called a "culture of narcissism,"<sup>82</sup> the law and legal discourse need not be complicit in the collective neuroses. Indeed, much of legal discourse remains a powerful bulwark against it.

But I want to move beyond such abstract critiques. In the specific contexts at issue here, the focus on the psychological is problematic for three related reasons:

#### 1. The Constitution's Anti-Psychological Values

In both the privacy and establishment of religion context, a focus on subjective, psychological, perceptions—however constrained by the "reasonableness" requirement (more on this below)—ignores and risks effacing the often profoundly anti-subjective and counter-psychological values at the heart of these constitutional protections.

a. Consider, for example, the classic peroration by William Pitt (Lord Chatham) in a 1763 parliamentary debate that American courts used to often quote as embodying the basic principle protected by the Fourth Amendment:

The poorest man may in his cottage bid defiance to all the forces  
of the Crown. It may be frail; its roof may shake; the wind may

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<sup>80</sup> See, e.g., Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's: Part I—The Current Impact of Surveillance on Privacy*, 66 COLUM. L. REV. 1003 (1966).

<sup>81</sup> This is one respect in which the Fourth Amendment and Establishment Clause cases are quite different. The typical Fourth Amendment claimant is, deep down, concerned with avoiding jail, not taming the government's ability to peek into all of our lives. The typical Establishment Clause claimant, on the other hand, really does care about the separation of church and state and very likely (in recent decades) about not being treated as an outsider in her own country.

<sup>82</sup> LASCH, *supra* note 59.

blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!<sup>83</sup>

The point of Pitt's imagery was to emphasize that even a dwelling that was not physically secure, such as a "cottage" or a "tenement," should be—by the sheer operation of the law—secure against government intrusion.<sup>84</sup> Indeed, it helps to remember, as Pitt surely did, that eighteenth-century "cottages" and "tenements" were not in any sense what we would understand "private" spaces. "If privacy means the opportunity to withdraw into voluntary isolation, few eighteenth-century British individuals enjoyed much privacy in their entire lives."<sup>85</sup> In the typical "cottage" of Pitt's proverbial "poorest man," families and their many children "often occupied the same cottage sleeping room, which was not separated from the day room."<sup>86</sup> The same was true of urban "tenements."<sup>87</sup> Pitt's aim was not to vindicate pre-existing "expectations of privacy," but to protect legally enshrined zones from government intrusion.

The ideological—even civilizational—dimension of the protection of privacy is if anything more urgent today.<sup>88</sup> Consider, for example, Wolfgang Sofsky's manifesto on privacy.<sup>89</sup> Sofsky argues that the modern state has progressively eroded the scope of individual privacy and, with it, the possibility of meaningful individual autonomy:

Protecting the private sphere involves protecting one's own way of life, property, and room for maneuver. Privacy gives everyone

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<sup>83</sup> *Miller v. United States*, 357 U.S. 301, 307 (1958); see 15 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803., at 1307 (London, T.C. Hansard 1813) (summarizing Pitt's remarks).

<sup>84</sup> See *Miller*, 357 U.S. at 307.

<sup>85</sup> SIMON VAREY, SPACE AND THE EIGHTEENTH-CENTURY ENGLISH NOVEL 33 (1990).

<sup>86</sup> See JOHN WOODFORDE, THE TRUTH ABOUT COTTAGES 1 (1969).

<sup>87</sup> Even in homes that were less "poor," privacy did not exist in our sense of the word.

Although interior space within the house was beginning to be specialized, individual members of a family still shared their spaces in two senses. Bedrooms and beds were often still shared and, at least in the more expensive new houses, apparently individual spaces (like bedrooms and 'closets') were connected by a corridor. This internal 'communicating' space fulfilled a function analogous to the space of a street: as house doors give on to the street, so room doors give on to the corridor.

VAREY, *supra* note 85, at 33.

<sup>88</sup> See David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1113 (2014) ("[Fourth Amendment privacy] should be informed by the intuitions connecting privacy with enclothement, with sanctuary, and with a zone of personal sovereignty. It should help make sense of the relational nature of privacy, the connection between privacy and civility, and the effects of privacy violations on the violators."). See generally Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

<sup>89</sup> See WOLFGANG SOFSKY, PRIVACY: A MANIFESTO (Steven Rendall trans., Princeton Univ. Press 2008) (2007).

the right to remain incognito in public, and not to declare adherence to political creeds. Privacy means that everyone can seek his own happiness, and do it in his own way. Privacy worthy of the name includes freedom of belief and thought, freedom from unwanted disturbance and harassment, from being pressured by the community, the society, or the state.<sup>90</sup>

Significantly, though, Sofsky argues that our contemporary erosion of privacy is not the product of a despotic government imposing itself on an unwilling public.<sup>91</sup> If anything, in fact, the erosion of the private sphere is—in his view—supported and even abetted by public attitudes—not only by the fear of crime and wrongdoing that makes citizens willing to tolerate mass surveillance, but just as perniciously by our affirmative collective impulse to break down the private realms and insert ourselves, via social media and otherwise, into the public realm.<sup>92</sup> Moreover, Sofsky contends, “The vulgar quest for short-lived prominence is accelerating the destruction of privacy. The economy of attention makes people blind to the political danger.”<sup>93</sup>

My point here is not necessarily to endorse Sofsky’s possibly overwrought jeremiad. Other equally earnest authors have argued that our individualistic society is too concerned with personal privacy at the expense of the larger community’s health and safety.<sup>94</sup> Rather, my point is that the sort of political, ideological, and indeed existential questions that social analysts on all sides raise need to be understood as entirely germane—whether explicitly or through the language of our doctrinal architecture—to the legal analysis of the Fourth Amendment. These important questions render the singular focus on “reasonable expectations of privacy” more than a little shallow and distracting.<sup>95</sup> Or to put it another way, if Fourth Amendment law really is about “privacy,” its concepts and doctrines have to connect at some point to the broader and more self-consciously normative concerns evident in other legal conversations about “privacy.” This includes the articulation of familial privacy in cases such as *Griswold v. Connecticut*<sup>96</sup> and of some degree of sexual privacy as a corollary of the guarantee of equal dignity in cases such as *Lawrence v. Texas*.<sup>97</sup>

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<sup>90</sup> *Id.* at 22.

<sup>91</sup> *See id.* at 7–9.

<sup>92</sup> *See id.* at 9–10.

<sup>93</sup> *Id.* at 9.

<sup>94</sup> *See, e.g.,* AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (1999); *see also* AMITAI ETZIONI, *THE NEW NORMAL: FINDING A BALANCE BETWEEN INDIVIDUAL RIGHTS AND THE COMMON GOOD* 105–51 (2015) (discussing privacy and “Privacy Merchants” in the “Cyber Age”).

<sup>95</sup> *Cf.* Tokson, *supra* note 21, at 194–203 (proposing a more directly normative basis for developing Fourth Amendment doctrine).

<sup>96</sup> *See* 381 U.S. 479, 485–86 (1965).

<sup>97</sup> *See* 539 U.S. 558, 567 (2003). I should add that, in my view, the “privacy” or sexual autonomy strain in *Lawrence* is often overstated and that cases such as *Perez v. City of Roseville* do not follow from *Lawrence*’s affirmation of equal dignity for gay Americans.

b. A similar point can be made in the Establishment Clause context. For example, the school prayer cases in the early 1960s were not principally concerned with dissenting students' feelings of exclusion. As Justice Black famously put it, echoing Roger Williams, James Madison, and the other authors of the American church-state dispensation, the "most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion."<sup>98</sup>

Indeed, the parallel goes further. Just as the dulling of subjective expectations of privacy potentially "makes people blind to the political danger"<sup>99</sup> of an over-intrusive state, habituation to the state's deployment of religious symbols and practices can itself "degrade religion"<sup>100</sup> and lead to what James Madison called the "unhallowed perversion of the means of salvation."<sup>101</sup> Or as one student witness put it in the *Schempp* litigation over official devotional Bible readings in public schools, involvement in state-sponsored expressions of religion can become like "peeing," devoid of meaning.<sup>102</sup> Therefore, upholding such state-sponsored expressions *because* a "reasonable" observer might not discern an "endorsement of religion" merely compounds the original problem, producing what Justice Brennan once aptly called "a pyrrhic victory."<sup>103</sup>

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No. 15-16430, 2018 WL 797453, at \*9–10 (9th Cir. Feb. 9, 2018) (relying in part on *Lawrence* to find that extramarital sexual conduct can be protected by the constitutional rights of privacy and intimate association). But that is a debate for a different day, and a different article.

<sup>98</sup> *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Specifically, the Court's opinion held:

Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment . . . . The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. . . . But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

*Id.* at 430–31.

<sup>99</sup> SOFSKY, *supra* note 89, at 9.

<sup>100</sup> *See Engel*, 370 U.S. at 431.

<sup>101</sup> JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS 29, 32 (Jack N. Rakove ed., 1999).

<sup>102</sup> BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER: HOW *ENGEL V. VITALE* CHANGED AMERICA 164 (2007); *see* Dane, *supra* note 3, at 632–34.

<sup>103</sup> *Marsh v. Chambers*, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting); *see* Perry Dane, *Establishment and Encounter*, in RESEARCH HANDBOOK ON LAW & RELIGION (Rex Ahdar ed., forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3090736](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090736);

## 2. Suppressing the Deeper Conversations

The second problem proceeds from the first. Not only does the focus on the psychological and the affective leave behind the more traditional normative grounding of prior cases, it also suppresses the possibility of *any* objective normative conversation about those values. For example, when Justice Black argued that officially sanctioned prayer degrades religion, he was relying on some specific theological principles that lie at the foundation of the distinct American form of separationism.<sup>104</sup> As Black understood the matter, even adherents to the “established” religion—O’Connor’s “insiders”—should have excellent reasons to oppose government’s embrace.<sup>105</sup> Those assumptions cannot be articulated, and either defended or rethought, as long as the Court continues to focus on damage to feelings rather than damage to religion itself. In fact, it is hard to know what Justice O’Connor would do with a theologian such as Stanley Hauerwas, who insists that Christians should properly be outsiders—“resident aliens”—in whatever polity they find themselves.<sup>106</sup> Indeed, while I do not at all suggest that government should intentionally seek to discomfort religious folk, it should be at least an interesting thought experiment to imagine an Establishment Clause that recognized the theological and practical complexities that might be wrapped up in religious alienation from the broader public life.

Earlier in this Article, I pointed out how the psychological focus in Establishment Clause doctrine resonates with a more general focus in contemporary culture on grievement and identity.<sup>107</sup> In a recent, much-discussed, polemic, the political scientist, historian, and public intellectual Mark Lilla criticized the rise of modern identity politics, in which “identity” is “an inner thing, a homunculus that needs tending to.”<sup>108</sup>

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*see also* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1842 (2009) (arguing that a “suitably revised” version of the corruption of religion argument “provides a powerful reason for government, as a general matter, to keep its hands off religious doctrine”). I need to add, in the interest of full disclosure, that I clerked for Justice Brennan during the year that the Supreme Court decided *Marsh v. Chambers*, and I worked on his dissent.

<sup>104</sup> See *Engel*, 370 U.S. at 431. See generally Perry Dane, *Separation Anxiety*, 22 J.L. & RELIGION 545 (2007) (reviewing NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005)). It bears emphasis here that my focus in this Article is on the *American* separationist vision. Other legal systems have very different religion-state dispensations, grounded in different assumptions and even different undergirding metaphors, that might be normatively attractive in their own different way. See generally Dane, *supra* note 103.

<sup>105</sup> See *Engel*, 370 U.S. at 430–31.

<sup>106</sup> See STANLEY HAUERWAS & WILLIAM H. WILLIMON, *RESIDENT ALIENS: A PROVOCATIVE CHRISTIAN ASSESSMENT OF CULTURE AND MINISTRY FOR PEOPLE WHO KNOW THAT SOMETHING IS WRONG* 12–13 (1989).

<sup>107</sup> See *supra* notes 67–72 and accompanying text.

<sup>108</sup> LILLA, *supra* note 59, at 62.

He laments, as a matter of principle, how grievances grounded in identity have displaced older liberal concerns for justice, equality, and solidarity: “Every advance of liberal *identity* consciousness has marked a retreat of liberal *political* consciousness. Without which no vision of Americans’ future can be imagined.”<sup>109</sup>

I do not want to get entangled in the larger controversy over Lilla’s arguments.<sup>110</sup> But a paraphrase of his thesis seems apt to my own more specific critique here: every advance of an Establishment Clause doctrine grounded in a singular focus on the discomfort of religious outsiders has marked a retreat from genuine disestablishmentarian consciousness.<sup>111</sup> Without which no vision—political, theological, or constitutional—of America’s core religion-state dispensation is possible.

That is not to say that religious equality is unimportant. It is very important.<sup>112</sup> But it is not only important for the sake of “nonadherents.” To the contrary, if the American separationist vision is to be believed, it is vital to our common citizenship and to the texture of the American encounter with religion writ large.<sup>113</sup>

Lilla also makes a related practical point. He argues that, unless liberals can recapture “the word *we*”<sup>114</sup> and “a sense of *we*,”<sup>115</sup> and recapture values such as a collective polity that “as Americans we all share but which ha[ve] nothing to do with our identities,”<sup>116</sup> they cannot hope to build the sort of broad-based consensus and sense of solidarity on which movements for justice and equality ultimately depend. Similarly, an approach to the Establishment Clause that focuses only on protecting the sensitivities of “nonadherents” (though that is important) will have a hard time convincing “adherents” “that a union of government and religion tends to destroy government and to degrade religion.”<sup>117</sup> To be sure, that traditional separationist

<sup>109</sup> *Id.* at 10. For a similar, significantly older, critique, see RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* 76–77 (1998).

<sup>110</sup> For representative criticisms, see, for example, James Meek, *Against Passion*, LONDON REV. OF BOOKS (Nov. 30, 2017), <https://www.lrb.co.uk/v39/n23/james-meek/against-passion> [<https://perma.cc/9KTL-SXHL>]; Michael S. Roth, *Inequality and ‘The Once and Future Liberal,’* INSIDE HIGHER ED (Aug. 31, 2017), <https://www.insidehighered.com/views/2017/08/31/reflection-mark-lillas-essay-and-book-about-identity-politics-essay> [<https://perma.cc/FZ6C-VSHN>]. For an especially scathing response to Lilla’s original op-ed column that led to the book, see Katherine Franke, *Making White Supremacy Respectable. Again.*, BLARB (Nov. 21, 2016), <http://blog.lareviewofbooks.org/essays/making-white-supremacy-respectable/> [<https://perma.cc/UG89-XEHW>].

<sup>111</sup> See LILLA, *supra* note 59, at 12.

<sup>112</sup> See generally Cécile Laborde, *Equal Liberty, Nonestablishment, and Religious Freedom*, 20 LEGAL THEORY 52 (2014).

<sup>113</sup> Again, I need to emphasize that my focus in this Article is on the immanent logic of the *American* religion-state dispensation. See *supra* note 104.

<sup>114</sup> LILLA, *supra* note 59, at 119–20.

<sup>115</sup> *Id.* at 14.

<sup>116</sup> *Id.* at 120.

<sup>117</sup> *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

argument might have seen its day in any event.<sup>118</sup> But the current drift of doctrine keeps it out of both the Court's frame of vision and the larger national imagination.

### 3. The Embeddedness of Psychology

Finally, even if the focus on psychology were in principle appropriate, the Court, in both the privacy and the religion contexts, ignores the deep cultural context in which psychology is usually embedded.<sup>119</sup> Specifically, both individual "expectations of privacy" and our collective sense of whether religiously tinged government practices relegate some Americans to the status of political "outsiders" are not (to use the social scientists' jargon) exogenous variables; rather, they are significantly shaped by the law itself.<sup>120</sup>

Indeed, the embeddedness of individual sentiments in broader cultural influences is especially acute in exactly these two contexts. Thus, much of the action in the search and seizure cases centers on quickly developing and changing technologies—GPS tracking,<sup>121</sup> DNA testing,<sup>122</sup> thermal imaging,<sup>123</sup> and so on. To a large extent, Americans look to the courts to map out the privacy implications of this brave new world, rather than the other way around.

For that matter, if Wolfgang Sofsky and like-minded commentators are right, it might well be the proper role of courts not only to fill in vague spots or gaps in our society's cultural construction of privacy, but to actively resist, in the name of deeper values, the sort of short-sighted and even eager acquiescence by which our cultural norms help eat away at our protected private space.

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<sup>118</sup> See Perry Dane, *Judaism, Pluralism, and Constitutional Glare*, 16 RUTGERS J.L. & RELIGION 282, 292 (2015); Dane, *supra* note 3, at 632–34. See generally Dane, *supra* note 103.

<sup>119</sup> Cf. Tokson, *supra* note 21, at 141 (noting how societal knowledge about new and evolving technologies influences expectations of privacy).

<sup>120</sup> The plurality opinion in *Town of Greece* at least alluded to the importance of cultural context in its one nod to the endorsement test:

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.

*Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (plurality opinion) (internal citation omitted).

<sup>121</sup> See *United States v. Jones*, 565 U.S. 400, 402 (2012).

<sup>122</sup> See *Maryland v. King*, 569 U.S. 435, 439–41 (2013).

<sup>123</sup> See *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001).

The issue with respect to the Establishment Clause is different, but the conclusion is the same. As I have emphasized, our church-state dispensation is distinctly American, grounded in a specific historical experience and ideological patrimony.<sup>124</sup> That tradition shapes the grievances of religious minorities—their/our sense of being “outsiders”—as much as it is shaped by them.<sup>125</sup> Other countries, with different traditions, produce different psychologies. It should surprise nobody, for example, that among the leading defenders of the continued privileged status of the Anglican Church in England—the “Church by law established”—have been the former Chief Rabbi Lord Sacks<sup>126</sup> and some leading British Islamic thinkers.<sup>127</sup> Their conception of the advantages and disadvantages of even full-fledged establishment, and its implications for their own status in the polity, are simply different from ours.<sup>128</sup>

Indeed, fascinatingly, Rabbi Sacks’s argument for “antidisestablishmentarianism” employs the same insider/outsider trope as Justice O’Connor does, but to very different effect:

Americans, used since the days of Thomas Jefferson to the separation of Church and State, find it hard to believe that England can be a tolerant place. Surely, they say, the special status of the Church of England means that anyone who has a different faith feels like an outsider. Yet England, for all its shortcomings, is one of the most tolerant societies on Earth. One of the reasons is that the Church helps to sustain that environment.

It is like entering a crowded room, knowing no one, and then discovering to your relief that there is a host who greets you,

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<sup>124</sup> See *supra* note 104 and accompanying text.

<sup>125</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

<sup>126</sup> See JONATHAN SACKS, *THE PERSISTENCE OF FAITH: RELIGION, MORALITY AND SOCIETY IN A SECULAR AGE* 68 (Continuum 2005) (1991); Jonathan Sacks, *Antidisestablishmentarianism—A Great Word and a Good Ideal*, *TIMES* (U.K.), July 20, 2002, at 44 [hereinafter Sacks, *Antidisestablishmentarianism*]; Chief Rabbi, Lord Sacks, *Draft House of Lords Reform Bill Joint Committee—Written Evidence* (Apr. 23, 2012), <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdraftref/284/284iii85.htm> [https://perma.cc/8XWG-RKJM] [hereinafter Sacks, *Written Evidence*].

<sup>127</sup> See, e.g., Tariq Modood, *Establishment, Multiculturalism and British Citizenship*, 65 *POL. Q.* 53 (1994); see also Tariq Modood, *Anti-Essentialism, Multiculturalism and the ‘Recognition’ of Religious Groups*, 6 *J. POL. PHIL.* 378, 379 (1998) (defending “moderate” forms of European religious establishments and moderate secularism as best mediating the inherent tension between multiculturalism and secularism).

<sup>128</sup> The roots of the distinctively English conviction that an established religion can be “not antithetical to, but an integral part of,” a “system of political liberty” go back at least to Edmund Burke’s theoretical and practical advocacy in favor of religious tolerance. See Michael W. McConnell, *Establishment and Toleration in Edmund Burke’s “Constitution of Freedom,”* 1995 *SUP. CT. REV.* 393, 396.

introduces you to others, and makes you feel at home. In a multi-faith England, the Church of England is that host. In America, where there is no host, religious groups compete in an open market. . . . An established Church, secure in its position, can be more hospitable in welcoming and accepting other faiths.<sup>129</sup>

Rabbi Sacks admits that his argument would not work in the United States.<sup>130</sup> But the endorsement test cannot explain why.

#### 4. (Preliminary) Concluding Thoughts

Again, I do not want to take this critique too far. Psychological perceptions of religious alienation or of personal violation are real and normatively significant.<sup>131</sup>

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<sup>129</sup> Sacks, *Antidisestablishmentarianism*, *supra* note 126. For a more theoretical argument along similar lines, see, for example, Peter L. Berger, *The Archbishop Smiled*, THE AMERICAN INTEREST (July 23, 2014), <https://www.the-american-interest.com/2014/07/23/the-archbishop-smiled/> [https://perma.cc/RK7E-9HUV]. Berger puts it this way:

Grace Davie, the distinguished British sociologist of religion, has proposed an interesting idea: A *strong* establishment of a church is bad for both religion and the state—for the former because the association with state policies undermines the credibility of religion, and for the latter because the support of one religion over all others creates resentment and potential instability. But a *weak* establishment is good for both institutions, because a politically powerless yet still symbolically privileged church can be an influential voice in the public arena, often in defense of moral principles. Davie’s idea nicely fits the history of the Church of England. In earlier centuries it persecuted Roman Catholics and discriminated against Nonconformist Protestants and Jews. More recently it has used its “bully pulpit” for a number of good causes, not least being the rights of non-Christians.

*Id.* Grace Davie, the sociologist that Berger cites, articulates her own thoughts on the subject in, for example, Grace Davie, *Establishment*, in THE OXFORD HANDBOOK OF ANGLICAN STUDIES 287, 287–300 (Mark D. Chapman, Sathianathan Clarke & Martyn Percy eds., 2016).

For my own effort to chart the distinct spatial metaphors underlying the American and English religion-state dispensations, and to understand these and other dispensations in the light of more fundamental normative principles, see generally Dane, *supra* note 103.

<sup>130</sup> For example, in a more recent statement on English religious establishment, Rabbi Sacks explicitly emphasized the importance of understanding the English and American situations in their respective historic and political contexts:

Each nation charts its own route to freedom, and that becomes part of its history. The United States found it in the Jeffersonian separation of Church and State. Britain found it in successive acts of emancipation and liberalisation, alongside an established church charged with the burden of generosity toward others.

Sacks, *Written Evidence*, *supra* note 126.

<sup>131</sup> It is surely significant, for example, that in the English language, words such as “violation” or, for that matter, “trespass” can refer to either the breaking of a legal norm, which

Our Constitution might well be concerned with protecting against such psychic pain. Fully rounded-out theories and doctrines of Fourth Amendment privacy and First Amendment disestablishment might well need to pay some attention to the psychological and affective dimension. And, as I discuss in Part IV of this Article, such perceptions could legitimately play a significant role in making sense of otherwise-intractable borderline cases. But none of that justifies the central or exclusive focus on the psychological or the affective in much of our current constitutional conversation, both in these areas and in other corners of our legal imagination.

### *C. Two Responses*

There are two tempting responses to my argument so far. The more straightforward is that I haven't paid enough attention to the reasonableness elements of the "reasonable expectation of privacy" and "endorsement" tests. The other is that, in any event, I take the surface meaning of the tests too seriously—that such language is only a proxy or rhetorical cover for other, less psychological and affective, inquiries. Let me take up these two issues in turn.

#### 1. The Reasonableness Constraint

The literature on "reasonableness" in the law is huge. Suffice it to say that in the two contexts I have in mind here, adding a "reasonableness" fillip to the doctrinal tests that are my subject here does represent a certain rhetorical counterweight to the sheer subjectivity that might be suggested by merely focusing on psychological perception. But it is an ambiguous and not necessarily very consequential pushback. More specifically, the reference to reasonableness in these contexts might serve one of three functions.

First, it might simply emphasize that the Court is interested in typical or non-idiosyncratic perceptions. That was certainly one of the elements of the "endorsement" test from the start.<sup>132</sup> And as Orin Kerr has recently pointed out, though Justice Harlan's original "expectation of privacy" test seemed to have two steps, the first step—which looks to whether someone claiming an illegal search possessed "an actual (subjective) expectation of privacy"—has rarely done any work; the real question has almost always been whether "society" would deem an expectation of privacy reasonable.<sup>133</sup>

This meaning of the notion of "reasonableness," however, would do nothing to alter my argument in this Part of the Article. A typical, average, modal, or unexceptional psychological or affective reaction is still a psychological or affective reaction.

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might be purely technical or even unfelt, *or* the subjective pain that attends the sense of invasion into one's autonomous dignitary core.

<sup>132</sup> See Dane, *supra* note 3, at 620.

<sup>133</sup> See Kerr, *supra* note 22, at 123, 126–27 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

The second possible function of the “reasonableness” qualifier would be to impose a sort of external normative constraint, drawn from some other set of relevant principles, on typical psychological or affective responses. Thus, for example, in upholding the regime of religion-based exemptions created by the Religious Land Use and Institutionalized Persons Act in *Cutter v. Wilkinson*,<sup>134</sup> the Supreme Court approvingly cited Justice O’Connor’s earlier observation in a different case that “removal of government-imposed burdens on religious exercise is more likely to be perceived ‘as an accommodation of the exercise of religion rather than as a Government endorsement of religion.’”<sup>135</sup> But the Court first, and more importantly, simply stated a normative proposition that should have trumped even the most “objective” reasonable observer, to wit that the challenged provision is “compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise.”<sup>136</sup>

This function of the reasonableness notion, though, which can coexist easily with the first, also does not touch my argument here. It deals with exceptional boundary questions and leaves the core of the psychological analysis intact.

The third possible function of the reasonableness idea is that it explicitly signals that the Court is not engaged in an inquiry into psychology and affective states at all, but is instead using the language of psychology and affect to channel its own normative conclusions. That strikes me as an implausible reading of the meaning of the “reasonableness” ideas as articulated by the Court. It would also leave entirely mysterious why the Court needed the psychological piece of the doctrine at all.

## 2. Psychology as Proxy

That still leaves the possibility that the entirety of both tests at issue here—not just the language about reasonableness, but the tests in toto—are merely proxies or vehicles for other normative inquiries. In one sense, even if this were true, it would leave much of my critique intact. That the Court’s infatuation with the psychological or affective might turn out to be shallow and fickle would not make it less of an infatuation. Infatuations are often shallow and fickle. If anything, the impulse to engage in some other inquiry *sub rosa* would only confirm my criticism and that of others of the defects at the heart of these tests.

But I do not want to leave it at that. Even if both the “reasonable expectation of privacy” and “endorsement” tests are merely encoding some other inquiry, their language of psychology and affect remains, and the constraints and distortions that language imposes need to be traced. Here, again, the two contexts—the Fourth Amendment and the Establishment Clause—work out somewhat differently.

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<sup>134</sup> 544 U.S. 709 (2005).

<sup>135</sup> *Id.* at 720 (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 349 (1987) (O’Connor, J., concurring in judgment)).

<sup>136</sup> *Id.*

a. Orin Kerr is probably the best known Fourth Amendment scholar who has argued that the “expectation of privacy” test is really a vehicle for other analytic inquiries. In one landmark article, for example, he has argued that the expectation of privacy test is the broad rubric under which the Court articulates specific rules to guide police regarding the lawfulness of specific types of searches, where the rules themselves are informed by four models of Fourth Amendment protection.<sup>137</sup> These are: (1) the “probabilistic model,” which looks to whether a type of search is unusual, (2) the “private facts model,” which asks whether the specific information being sought is worthy of constitutional protection, (3) the “positive law model,” which looks into whether there is some law other than the Fourth Amendment itself that might restrict the government’s actions, and (4) a more directly consequentialist “policy model.”<sup>138</sup> In more recent work, Kerr has argued that the Court’s Fourth Amendment jurisprudence is often concerned with maintaining “equilibrium” between individual rights and police authority in the wake of changing technologies and social practices.<sup>139</sup>

Let’s assume, for the sake of argument, that Kerr has gotten it all right. The question remains why the Court couldn’t articulate and reason through something like these five concerns more directly and transparently as it fashions its various context-specific rules and exceptions to rules. That would require some subtlety in navigating among the various models and their interactions with each other. But it would not, dare I say it, require rocket science.

Moreover, the issue is not merely aesthetic. After all, the language and tenor of the “expectation of privacy” frame still matters. Courts often try to inquire more directly into whether a given search violates a “reasonable expectation of privacy,”<sup>140</sup> and Kerr and others seem to spend a good deal of their time, in both academic writing and as bloggers and advocates, trying to correct courts that reach conclusions that seem consistent with some intuition about an “expectation of privacy” but are at odds either with the fairly abstract models that Kerr identifies or, more likely, with a technical detail of the infrastructure of Fourth Amendment jurisprudence that has accumulated over the years on the loose scaffolding of the “expectation of privacy” idea.<sup>141</sup>

b. The Establishment Clause story is different. It is harder to say that there is “something else going on” beneath the cover of the “endorsement test,” at least in those cases in which the Court has purported to apply the test.

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<sup>137</sup> See Kerr, *Four Models*, *supra* note 3, at 508.

<sup>138</sup> *Id.* at 506.

<sup>139</sup> See Kerr, *Equilibrium-Adjustment Theory*, *supra* note 3, at 485–87, 494, 500–01, 525–26.

<sup>140</sup> See *id.* at 490 & n.40.

<sup>141</sup> See, e.g., *id.* at 490–91, 529–30, 543.

But it is possible that the endorsement test embodies—much closer to its own surface—some other set of principles or aspirations meatier than the simple idea of endorsement all alone. The problem is that the Court’s interest in psychology still gets in the way.

1. The most obvious non-psychological principle behind the endorsement test—indeed, threaded through it—is equality. That is to say, the endorsement test might simply be a way of enforcing a norm of religious equality.

As I have already suggested, equality is an important Establishment Clause value.<sup>142</sup> But the endorsement test simply does not have the heft and depth to integrate the value of equality into the theory or doctrine of the Establishment Clause. More specifically, both the psychological focus of the endorsement test and its elision of the politico-theological principles crucial to understanding the Establishment Clause<sup>143</sup> render its vision of equality vulnerable or incomplete in two distinct ways.

First, supporters of the endorsement test have a hard time explaining why religious equality should be treated so differently from other equality norms, which do not generally demand that government avoid not only unequal treatment but also alienating expression.<sup>144</sup> Indeed, there is something to be said, over and above sheer entertainment value, for Justice Scalia’s mockery in, for example, his dissent from the denial of certiorari in a case banning a public-school graduation in the sanctuary of a church:

Some there are—many, perhaps—who are offended by public displays of religion. Religion, they believe, is a personal matter; if it must be given external manifestation, that should not occur in public places where others may be offended. I can understand that attitude: It parallels my own toward the playing in public of rock music or Stravinsky. And I too am especially annoyed when the intrusion upon my inner peace occurs while I am part of a captive audience, as on a municipal bus or in the waiting room of a public agency.

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<sup>142</sup> See *supra* note 112 and accompanying text.

<sup>143</sup> See discussion *supra* Sections II.A–B.

<sup>144</sup> This challenge has become even more acute as both scholars and the general culture are increasingly coming to doubt whether religion is “special.” See, e.g., Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352–55 (2012). For some efforts to answer Professor Schwartzman’s important question, see, for example, Andrew M. Koppelman, *How Could Religious Liberty Be a Human Right?*, INT. J. CONST. L. (forthcoming), <https://ssrn.com/abstract=2995605>; Laborde, *supra* note 112, at 62–75; Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017). For my own existential take on the question, see, for example, Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 SAN DIEGO L. REV. 53, 56–59 (2016); Perry Dane, *Scopes of Religious Exemptions: A Normative Map*, in RELIGIOUS EXEMPTIONS 138 (Kevin Vallier & Michael Weber eds., 2018); Dane, *supra* note 103.

My own aversion cannot be imposed by law because of the First Amendment. Certain of this Court's cases, however, have allowed the aversion to religious displays to be enforced directly *through* the First Amendment, at least in public facilities and with respect to public ceremonies—this despite the fact that the First Amendment explicitly favors religion and is, so to speak, agnostic about music.<sup>145</sup>

I should be clear here. I am generally a strict separationist.<sup>146</sup> I share the practical concern that if the Supreme Court definitively abandons the endorsement test, the replacement doctrine will be much less to my liking. The problem is that the endorsement test's own rhetorical emphasis on psychological alienation as the marker of religious inequality ignores the distinct principles underlying church-state separation in the American dispensation, and it leaves the arena wide open to Justice Scalia's effective deconstruction.

The profound hollowness at the heart of the current endorsement test, if it is merely understood as a weapon for equality, can be illustrated—brutally illustrated—by considering two analogous constitutional challenges that are being or have recently been litigated. In one case, the Freedom from Religion Foundation sued to declare the image of a large Latin cross on the official seal of Lehigh County, Pennsylvania to constitute an endorsement of religion and a violation of the Establishment Clause.<sup>147</sup> In the other case, a citizen of the State of Mississippi challenged the constitutionality

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<sup>145</sup> *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2283 (2014) (Scalia, J., dissenting from the denial of certiorari) (internal citations omitted).

<sup>146</sup> *But see, e.g., Perry Dane, A Holy Secular Institution*, 58 EMORY L.J. 1123 (2009) (discussing interpenetration of the secular and religious meanings of marriage in American civil law).

<sup>147</sup> *Freedom from Religion Found., Inc. v. County of Lehigh*, No. 16-4504, 2017 WL 4310247, at \*1 (E.D. Pa. Sept. 28, 2017), *appeal filed*, No. 17-3581 (3d. Cir. Nov. 29, 2017).

A picture of the seal is on the County of Lehigh's website. LEHIGHCOUNTY.ORG, [https://www.lehighcounty.org/Portals/0/generalImages/Parks/County\\_Seal.jpg?ver=2014-05-16-083116-817](https://www.lehighcounty.org/Portals/0/generalImages/Parks/County_Seal.jpg?ver=2014-05-16-083116-817) [<https://perma.cc/7X7Q-EMHR>] (last visited Apr. 12, 2018).



of the state's flag,<sup>148</sup> which still includes as its canton the image of the so-called Confederate battle flag.<sup>149</sup>

The Freedom from Religion Foundation's lawsuit was a success in the federal district court.<sup>150</sup> Similar crosses on other local governmental seals and flags have been declared unconstitutional.<sup>151</sup> The Mississippi case, by contrast, has already been dismissed for lack of a cognizable legal injury.<sup>152</sup> Yet if these two symbols were judged merely on their respective histories, their real expressive impact today, and the extent to which they constitute continuing assaults on American equality, the Mississippi flag would surely come off much worse. In fact, the federal district judge in Mississippi, in the very opinion in which he dismissed the suit, described the challenged symbol in words more stark, blunt, and angrier than I suspect would be found in any modern Establishment Clause decision:

To millions of people, particularly African-Americans, the Confederate battle emblem is a symbol of the Old Mississippi—the Mississippi of slavery, lynchings, pain, and white supremacy. As Justice Fred Banks noted, the Confederate battle emblem “takes no back seat to the Nazi Swastika” in its ability to provoke a visceral reaction.

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<sup>148</sup> Moore v. Bryant, 205 F. Supp. 3d 834, 837 (S.D. Miss. 2016), *affirmed*, 853 F.3d 245 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017).

<sup>149</sup> A picture of the Mississippi State Flag is on the State of Mississippi's website. *State Flags*, MS.GOV, [https://www.ms.gov/Visitors/About\\_Mississippi/State\\_Flags](https://www.ms.gov/Visitors/About_Mississippi/State_Flags) [<https://perma.cc/745Y-ZVSR>] (last visited Apr. 12, 2018).



<sup>150</sup> After decrying the Third Circuit's hybrid *Lemon*-endorsement test as antithetical to the drafters' intent, the plain text of the Establishment Clause, and common sense, *see Freedom from Religion Found.*, 2017 WL 4310247, at \*6–8, Judge Smith granted the plaintiffs' motion for summary judgment, *id.* at \*11. An appeal has been filed. *See Freedom from Religion Found., Inc. v. County of Lehigh*, No. 17-3581 (3d Cir. Nov. 29, 2017).

<sup>151</sup> *See, e.g., Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992); *Friedman v. Bd. of Cty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *ACLU of Ohio, Inc. v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998). *But cf. Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (upholding cross on city seal in part because the design of the seal, including the cross, was based on the coat of arms of Stephen F. Austin, the city's founder), *cert. denied*, 505 U.S. 1219 (1992).

<sup>152</sup> *See Moore*, 853 F.3d at 248 (finding all three of plaintiff's injury in fact theories unavailing).

The emblem offends more than just African-Americans. Mississippians of all creeds and colors regard it as “one of the most repulsive symbols of the past.” It is difficult to imagine how a symbol borne of the South’s intention to maintain slavery can unite Mississippians in the 21st century.

Since the Civil War, this nation has evolved and breathed new life into “We the People” and “all men are created equal.” Mississippi is known for its resistance to that evolution. Part of that resistance stems from electing demagogues and those with empty rhetoric and false courage. The result is a State increasingly isolated from the rest of the nation.

At times there is something noble in standing alone. This is not one of those times. The Confederate battle emblem has no place in shaping a New Mississippi, and is better left retired to history.<sup>153</sup>

These powerful words reflected the stark social reality that the dispute over the Mississippi flag is only one tiny piece of a much larger struggle over the continuing presence of monuments to white supremacy and bigotry in the gallery of our public life, including statues of Robert E. Lee and other Confederate generals. This struggle most recently played out in the violent tragedy in Charlottesville, Virginia,<sup>154</sup> and in Donald Trump’s much-condemned paean to the ostensible “history and culture of our great country” embodied in those supposedly “beautiful statues and monuments.”<sup>155</sup> But that struggle—even with all its powerful echoes of central constitutional values<sup>156</sup>—is largely playing out in the political realm, by way of legislative debates, blog posts, and street demonstrations—not by invoking a provision of the federal Constitution.<sup>157</sup> As the Fifth Circuit opinion in the Mississippi flag case emphasized, even simply

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<sup>153</sup> *Moore*, 205 F. Supp. 3d at 857–58 (footnotes omitted).

<sup>154</sup> See Maggie Astor, Christina Caron & Daniel Victor, *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://nyti.ms/2vvL7MW>.

<sup>155</sup> See Michael D. Shear & Maggie Haberman, *Defiant Trump Laments Assault on Culture and Revives a Bogus Pershing Story*, N.Y. TIMES (Aug. 17, 2017), <https://nyti.ms/2vGvylL>.

<sup>156</sup> See Richard C. Schragger, Micah Schwartzman & Nelson Tebbe, *Mitch Landrieu and the Anti-Denigration Constitution*, TAKE CARE (May 25, 2017), <https://takecareblog.com/blog/mitch-landrieu-and-the-anti-denigration-constitution> [<https://perma.cc/N67K-U3B2>] (arguing that New Orleans Mayor Mitch Landrieu’s speech explaining the city’s removal of Confederate statues “articulat[ed] . . . a constitutional norm of nonendorsement . . . consistent with a larger constitutional ideal”).

<sup>157</sup> See *id.* (“As for Confederate monuments, judges are unlikely to order their removal on the grounds that they violate equal protection.”). *But cf.* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013) (arguing for a broader principle of government nonendorsement).

establishing standing under the Equal Protection Clause to challenge a flag (and by extension, a statute or monument) is difficult because, while the Establishment Clause “directly regulates Government speech,” “the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging.”<sup>158</sup>

One sidebar here, of interest mostly to vexillologists, is that the Confederate Battle Flag does itself feature a cross: the saltire inspired by the Saint Andrew’s Cross that is the flag of Scotland.<sup>159</sup> Indeed, a prior federal court decision rejected an Establishment Clause challenge to the flag on the reasonable grounds that this cross had become so thoroughly secularized, and its ultimate origins were so attenuated and little known, that it passed constitutional muster.<sup>160</sup> But if the flag (or any other monument to the Confederacy) were somehow to be held unconstitutional on the basis of its completely obscure and transformed religious meaning rather than its clear and unredeemed racial code, that would only emphasize, rather than dull, the irony inherent in comparing the Lehigh County and Mississippi cases.

To be sure, there are good reasons, which I have discussed already, for the special constitutional treatment of religious symbols. But the endorsement test, even taken as a device to guarantee equality or equal citizenship, cannot begin to explain those reasons, or to distinguish those symbols from all the other potentially pernicious forms of government expression.

A second related problem with the endorsement test’s affective account of inequality is that it does not explain why we should not be equally solicitous of some religious folk who might themselves feel alienated by the *lack* of specific and thick religious commitments in our national public life.<sup>161</sup> Consider, for example, Justice Kagan’s dissent in *Town of Greece v. Galloway*, the case that upheld an allegedly overly “sectarian” pattern of prayer in a local town council.<sup>162</sup> Justice Kagan did not challenge the practice of legislative prayer itself, first explicitly upheld in *Marsh v. Chambers*<sup>163</sup> more than thirty years earlier; nor, for that matter, did she invoke the endorsement test in so many words. She did, however, argue that the excessively “sectarian” character of prayer in the Town of Greece, combined with the differences between the role of the public in state legislative and town council proceedings, rendered this practice of prayer unconstitutional.<sup>164</sup> One remedy might be to

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<sup>158</sup> *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017).

<sup>159</sup> *See Briggs v. Mississippi*, 331 F.3d 499, 502 (5th Cir. 2003), *cert. denied*, 540 U.S. 1108 (2004).

<sup>160</sup> *See generally id.*

<sup>161</sup> *Cf. Dane*, *supra* note 33, at 2–3, 6–7.

<sup>162</sup> 134 S. Ct. 1811, 1841–54 (2014) (Kagan, J., dissenting). Some of my discussion here is taken from my previous scholarship. *See generally* Dane, *supra* note 3.

<sup>163</sup> 463 U.S. 783 (1983).

<sup>164</sup> *See Town of Greece*, 134 S. Ct. at 1841–54 (2014) (Kagan, J., dissenting). One of Justice Kagan’s central arguments is the hybrid nature of Greece’s Town Hall. *Id.* at 1845. She comments that it is legislative in part, thus, opening prayers are allowed, but its meetings

invite more clergy of different faiths, though how to do that in a more than token fashion in a small, largely Christian town is not clear.<sup>165</sup> More interestingly, though, Justice Kagan suggested, “If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint.”<sup>166</sup> But this ignores the observation in Justice Brennan’s own dissent decades earlier in *Marsh*, in which he argued that *all* official, scheduled, legislative invocations were unconstitutional:

[L]egislative prayer . . . can easily turn narrowly and obviously sectarian. I agree with the Court that the federal judiciary should not sit as a board of censors on individual prayers, but to my mind the better way of avoiding that task is by striking down all official legislative invocations.

More fundamentally, however, *any* practice of legislative prayer, even if it might look “nonsectarian” to nine Justices of the Supreme Court, will inevitably and continuously involve the State in one or another religious debate. Prayer is serious business—serious theological business—and it is not a mere “acknowledgment of beliefs widely held among the people of this country” for the State to immerse itself in that business. Some religious individuals or groups find it theologically problematic to engage in joint religious exercises predominantly influenced by faiths not their own. Some might object even to the attempt to fashion a “nonsectarian” prayer. Some would find it impossible to participate in any “prayer opportunity” marked by Trinitarian references. Some would find a prayer *not* invoking the name of Christ to represent a flawed view of the relationship between human beings and God. Some might find any petitionary prayer to be improper. Some might find any prayer that lacked a petitionary element to be deficient. Some might be troubled by what they consider shallow public prayer, or nonspontaneous prayer, or prayer without adequate spiritual preparation or concentration. Some might, of course, have *theological* objections to any prayer sponsored by an organ of government. Some might object on theological grounds to the level of political neutrality generally expected of

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are also a place where the ordinary citizen can come and petition his or her government. *Id.* As such, the prayers should not be sectarian, rather, they should be more inclusive. *Id.*

<sup>165</sup> See *id.* at 1851 (“[T]he Board . . . might have invited clergy of many faiths to serve as chaplains, as . . . Congress does.”).

<sup>166</sup> *Id.*

government-sponsored invocational prayer. And some might object on theological grounds to the Court's requirement that prayer, even though religious, not be proselytizing. If these problems arose in the context of a religious objection to some otherwise decidedly secular activity, then whatever remedy there is would have to be found in the Free Exercise Clause. But, in this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the State to take upon itself the role of ecclesiastical arbiter.<sup>167</sup>

Justice Brennan wrote his dissent in *Marsh* before the birth of the endorsement test.<sup>168</sup> And it is not surprising that it emphasizes two themes largely missing from Justice Kagan's dissent. First, it emphasizes that "[p]rayer is serious business," which requires a serious, theologically sensitive response and not merely a narrative of affect.<sup>169</sup> Second, a non-psychological principle of separation, along with and informing the principle of equality, is crucial to making sense of the Establishment Clause.<sup>170</sup>

Indeed, Justice Kagan's dissent, in passing over that older separationist impulse, unintentionally abets the conservative side of the Court's effort to revamp the Establishment Clause in terms of mere formal neutrality. In a sense, then, the impoverished debate in *Town of Greece* is simply between two versions of the equality principle—Justice Kagan's equality of substantive inclusion (very much in the spirit of the endorsement test) and the majority's more formal equality of non-coercion.

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<sup>167</sup> *Marsh*, 463 U.S. at 818–21 (Brennan, J., dissenting) (footnotes and citations omitted). I made a similar argument along these lines in an earlier article, see Dane, *supra* note 3, at 612–23, and in blog posts before and after the *Town of Greece* decision was handed down. See Perry Dane, "Prayer Is Serious Business," LAW & RELIGION F. (Dec. 2, 2013), <https://lawandreligionforum.org/2013/12/02/prayer-is-serious-business/> [<https://perma.cc/SR27-67X2>]; Perry Dane, *Town of Greece*, RELIGIOUS LEFT L. (May 18, 2014, 10:19 AM), <http://www.religiousleftlaw.com/2014/05/town-of-greece.html> [<https://perma.cc/MX4P-L7MR>] [hereinafter Dane, *Town of Greece*].

<sup>168</sup> See Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273, 1273–83 (2013).

<sup>169</sup> See *Marsh*, 463 U.S. at 819 (Brennan, J., dissenting).

<sup>170</sup> See *id.* at 803–06; Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222–27 (1963); Perry Dane, *Constitutional Law and Religion*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 119, 122–27 (Dennis Patterson ed., 2d ed. 2010); Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1072–73 (2002); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 46–47 (1997).

Justice Alito's concurrence in *Town of Greece* picked up on some of the difficulties with Justice Kagan's simple-minded appeal for less sectarian prayers, though it drew the wrong conclusions. See *Town of Greece*, 134 S. Ct. at 1829–31 (Alito, J., concurring).

This reading is further confirmed by the Court's more recent opinion in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.<sup>171</sup> The Court in *Trinity Lutheran* considered the constitutionality of a provision in the Missouri Constitution providing, in part: “[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion,”<sup>172</sup> as applied to the State's refusal to consider funding for a new rubber surface for the playground of a church-affiliated preschool.<sup>173</sup> The church argued that the State discriminated against it on the basis of religion.<sup>174</sup> The State responded that its constitutional prohibition simply tracked the requirements of the Establishment Clause, or at least sat within the “play in the joints” between free exercise and establishment.<sup>175</sup> The Court, by a vote of seven to two, held that the State's refusal to consider funding for the church violated the Free Exercise Clause's guarantee of religious equality, though the implications of that holding might well depend on how much weight is put on a footnote, joined by only four Justices, that arguably limited the case to “express discrimination based on religious identity with respect to playground resurfacing.”<sup>176</sup>

*Trinity Lutheran* raised some difficult questions. Even a strict separationist must concede that religious institutions are entitled to equal access to certain generally available government benefits. But only Justice Sotomayor's lonely dissent for herself and Justice Ginsburg dealt in any depth with the rich set of Madisonian separationist principles that had once been at the heart of the Court's thinking about the Establishment Clause.<sup>177</sup> The majority was much more interested in formal equality.<sup>178</sup> And

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<sup>171</sup> 137 S. Ct. 2012 (2017).

<sup>172</sup> *Id.* at 2017 (citation omitted). The entire section reads:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

MO. CONST. art I, § 7. This provision was one of the so-called “Blaine Amendments” that were added to about thirty-seven state constitutions, mostly in the late Nineteenth and early Twentieth Centuries. *See generally* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551 (2003); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2003); Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295.

<sup>173</sup> *See Trinity Lutheran*, 137 S. Ct. at 2017–18.

<sup>174</sup> *See id.* at 2018.

<sup>175</sup> *See id.* at 2019, 2022–23.

<sup>176</sup> *See id.* at 2024 n.3, 2025. Chief Justice Roberts delivered the opinion for the Court on behalf of five other Justices, except for this one footnote, which Justices Thomas and Gorsuch refused to join. *See id.* at 2017; *id.* at 2025 (Thomas, J., concurring in part); *id.* at 2026 (Gorsuch, J., concurring in part). Justice Breyer wrote an opinion concurring in the judgment. *See id.* at 2026–27 (Breyer, J., concurring in the judgment).

<sup>177</sup> *See id.* at 2027–41 (Sotomayor, J., dissenting).

<sup>178</sup> *See id.* at 2017–25 (majority opinion) (mainly discussing the Free Exercise Clause, rather than the Establishment Clause).

though none of the opinions had much to say with respect to “endorsement” (understandably so, given that the endorsement test, even in its heyday, made particularly little sense in the context of disputes over generalized financial aid programs), I have to think that the many years spent obsessing over it sucked much of the energy out of the old Madisonian paradigm. So it should really come as no surprise that Justice Kagan, whose dissent in *Town of Greece* was so focused on equality that she argued that “no one would have valid grounds for complaint” if the town council’s prayers had merely been less sectarian,<sup>179</sup> ended up joining the majority opinion without complaint.

2. Another idea that might arguably be lurking just below the surface of the endorsement test is not a substantive value, as equality is, but rather a principled aspiration. Recall my earlier reference to the “specific theological principles that lie at the foundation of the distinct American form of separationism”<sup>180</sup> and the “politico-theological principles crucial to understanding the Establishment Clause.”<sup>181</sup> Maybe one comparative advantage of the endorsement test is that it tries, however crudely and imperfectly, to translate those principles into terms more consistent with a secularized public reason.<sup>182</sup> Psychology, as the *lingua franca* of the current age, might simply be the best candidate for bringing the Establishment Clause into the modern secular age.

This is not the place to recapitulate the debate about public reason and the place of religious arguments in public debate. I for one find it important and legitimate, though also ironic, that the Establishment Clause would reflect, at least in part, a theological argument for a secular state.

For present purposes, though, it might suffice just to point out that the use of purely public reason to negotiate the precise place of religion in public life is exactly one of the threats against which the Establishment Clause might be an important bulwark. It is perfectly possible to justify even the most blatant state exploitation of religion (or religious intrusion into the state) on entirely secular grounds.<sup>183</sup> But it is precisely such exploitation (or intrusion) that James Madison warned against when he insisted:

[T]he establishment in question is not necessary for the support of Civil Government. . . . If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government? . . . Rulers who wished to subvert the public liberty, may have found an established Clergy

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<sup>179</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1851 (2014) (Kagan, J., dissenting).

<sup>180</sup> See *supra* note 104 and accompanying text.

<sup>181</sup> See text accompanying *supra* note 143; discussion *supra* Sections II.A–B.

<sup>182</sup> Cf. Dane, *supra* note 103, at 8–9 (discussing critiques of the “public reason” constraint on political discourse).

<sup>183</sup> See generally *id.*

convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not.<sup>184</sup>

And in that same spirit, Justice Brennan, again writing long before the birth of the endorsement test, stated as one of the bedrock elements of the Establishment Clause that government may not use “religious means to serve governmental ends where secular means would suffice.”<sup>185</sup>

To see my point, consider *Town of Greece* again.<sup>186</sup> According to the Court, the justifiable purposes of official legislative prayer include “lend[ing] gravity to public business,”<sup>187</sup> encouraging “lawmakers to transcend petty differences,”<sup>188</sup> and “express[ing] a common aspiration to a just and peaceful society.”<sup>189</sup> Elsewhere, Justice Kennedy mentions “acknowledg[ing] the place religion holds in the lives of many private citizens.”<sup>190</sup> Conspicuously missing in this list is the most obvious purpose of genuine prayer—to pray. In one respect, the Court’s reticence to admit that one purpose of legislative prayer is to pray makes a certain odd sense. “The Court, at some level, recognizes that a city hall is not a church or synagogue or mosque. We can all pray for our government, but it is not the government’s job to pray for itself.”<sup>191</sup> But that implicit admission, if understood correctly, should also pose a dilemma for the Court. “[I]f the purpose of [legislative] prayer is not . . . to pray, then all the lesser purposes the Court allows, including lending ‘gravity to public business,’ are merely play-acting—using and abusing religion for secular ends.”<sup>192</sup> The problem is that the endorsement test doesn’t have the depth, or the appropriate language, to call out this dilemma or its constitutional consequences.<sup>193</sup>

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<sup>184</sup> MADISON, *supra* note 101, at 33.

<sup>185</sup> *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

<sup>186</sup> Some of the material in the next few sentences comes from Dane, *supra* note 3, at 628–29, and from my blog post, Dane, *Town of Greece*, *supra* note 167.

<sup>187</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014); *see also id.* at 1823 (“[Legislative prayer] is meant to lend gravity to the occasion . . .”).

<sup>188</sup> *Id.* at 1818.

<sup>189</sup> *Id.*; *see also id.* at 1823 (“[Legislative prayer] is meant to . . . reflect values long part of the Nation’s heritage.”).

<sup>190</sup> *Id.* at 1825 (plurality opinion).

<sup>191</sup> Dane, *Town of Greece*, *supra* note 167.

<sup>192</sup> *Id.*

<sup>193</sup> Indeed, when Justice Blackmun tried at one point to integrate Justice Brennan’s principle, drawn ultimately from Madison, into a psychologically grounded endorsement analysis, the result was silly and forced at best. In trying to explain why the Court was upholding a civic display combining a Christmas tree with a Hanukkah menorah, the Justice wrote:

The Christmas tree, unlike the menorah, is not itself a religious symbol. . . . The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by

*D. A Last Puzzle*

My point in juxtaposing the psychological infatuation present in both the endorsement test and the expectation of privacy test has not been merely to criticize both doctrines, but to suggest that they reveal a similar impoverishment in at least some parts of contemporary constitutional thought. I might therefore end this part of the discussion with one last puzzle.

Consider that in assessing perceptions of privacy and perceptions of endorsement, respectively, the Fourth Amendment and Establishment Clause doctrines I have been discussing here look to two dramatically different comparators. In the Fourth Amendment context, the relevant question is whether persons have a reasonable expectation of privacy in a given context as against *both the government and the world in general*.<sup>194</sup> In the Establishment Clause context, by contrast, the question is only whether a specific action *by the government* would produce an undesirable sense of religious alienation.<sup>195</sup>

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other elements of an accompanying holiday display, including the Chanukah menorah.

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Although the city has used a symbol with religious meaning as its representation of Chanukah, this is not a case in which the city has reasonable alternatives that are less religious in nature. It is difficult to imagine a predominantly secular symbol of Chanukah that the city could place next to its Christmas tree. An 18-foot dreidel would look out of place and might be interpreted by some as mocking the celebration of Chanukah. The absence of a more secular alternative symbol is itself part of the context in which the city's actions must be judged in determining the likely effect of its use of the menorah. Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith. See *Abington School District v. Schempp*, 374 U.S. at 295 (Brennan, J., concurring) (Establishment Clause forbids use of religious means to serve secular ends when secular means suffice) . . . . But where, as here, no such choice has been made, this inference of endorsement is not present.

*County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 616–18 (1989) (opinion of Blackmun, J.) (internal citation omitted), *abrogated by Town of Greece*, 134 S. Ct. 1811.

<sup>194</sup> See, e.g., *United States v. Miller*, 425 U.S. 435 (1976); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (on rehearing en banc), *petition for cert. docketed*, No. 16-6308 (U.S. Sept. 26, 2016); *United States v. York*, 895 F.2d 1026 (5th Cir. 1990). To be sure, the precise legal protections accorded to privacy claims in the private and public contexts are not necessarily the same. See generally Victoria Schwartz, *Overcoming the Public-Private Divide in Privacy Analogies*, 67 HASTINGS L.J. 143 (2015).

<sup>195</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)

These two very different assumptions are each rooted in the specific constitutional histories. Fourth Amendment doctrine, despite the nostrum that it protects “people” and not “places,” is still tied to its history in property law.<sup>196</sup> And the Establishment Clause is rooted in centuries of contemplation about the specific relationship between government and religion in a pluralistic and religiously vibrant society.<sup>197</sup>

Both assumptions, however, have been challenged. Some commentators, for example, have argued that the Fourth Amendment cannot adequately control the abuses of the surveillance state if courts assume that any information willingly made available to third parties—such as phone companies or search engines—is automatically fair game for the government.<sup>198</sup> As Professor Neal Katyal has put it, “[T]he Constitution, for the most part, does not apply to protecting the sensitive records because they are held by a third party, [which] really leaves us in an [sic] very unprotected situation. I think that is a concern.”<sup>199</sup> That very issue is now before the Supreme Court in an important case, *Carpenter v. United States*,<sup>200</sup> that I will discuss at more length in Part V of this Article.<sup>201</sup>

Conversely, some critics have found the endorsement test’s exclusive focus on government action (not in the sense of imposing a state action requirement, but in the sense of ignoring the larger social context in which state action is embedded) to be inadequate and artificial. As Richard H. McAdams puts it:

One way to read Justice O’Connor’s justification [for the endorsement test] is that she thinks the problem with endorsement is that it creates, or tends to create, disutility for members of religious minorities. That is, outsiders feel bad about their second-class status. Perhaps this is a sufficient basis for the endorsement test, but it raises some troubling questions. Are religious minorities

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(“The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”).

<sup>196</sup> See *supra* notes 7–24 and accompanying text.

<sup>197</sup> See generally Dane, *supra* note 104.

<sup>198</sup> See, e.g., DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 201–08 (2004); Patricia L. Bellia, *The Memory Gap in Surveillance Law*, 75 U. CHI. L. REV. 137, 140–41 (2008); Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139, 167–69 (2005); Andrew J. DeFilippis, Note, *Securing Informal Relationships: Recognizing a Right to Privacy in Fourth Amendment Jurisprudence*, 115 YALE L.J. 1086, 1089 (2006); cf. Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 121–23 (2002).

<sup>199</sup> *Symposium on Security, Technology and Individual Rights—2003*, 2 GEO. J.L. & PUB. POL’Y 17, 79 (2004) (comments of Neal Katyal at a panel on Legislative Branch oversight of Executive Branch surveillance).

<sup>200</sup> *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (June 5, 2017) (No. 16-402).

<sup>201</sup> See *infra* notes 256–67 and accompanying text.

not already well acquainted with the fact that they are in the political minority? Where the answer is yes, as it usually is, what is the incremental harm of having government add one more symbol of the dominant religion? When a single religion pervades and dominates a community, members of minority religions will likely feel politically subordinate and culturally excluded no matter what the government expresses. In many American towns, for example, a high proportion of residents decorate their homes and workplaces, including public accommodations like restaurants and shopping malls, with symbols of Christianity, particularly during Christmas and Easter. In these communities, it seems naive to think that barring government expressions of Christianity will prevent Christians from feeling like “insiders” and non-Christians from feeling like political and cultural “outsiders.” Though there may be good responses to this criticism, it does show the value of exploring an alternative rationale for the endorsement test, one that looks beyond the *immediate* reaction to the government endorsement.<sup>202</sup>

These important observations can also be taken a step or two further. Although the Establishment Clause only applies to government action, there is a legitimate question as to whether its strictures should be understood—by rough analogy to the Fourth Amendment—as in some sense informed by expectations that arise in at least some private contexts, such as the workplace and the commercial market.<sup>203</sup> Those

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<sup>202</sup> Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 384–85 (2000) (footnotes omitted). McAdams goes on to suggest a more nuanced explanation:

Religious symbolism is a means of influencing religious behavior. A Christian symbol on government property signals that Christians exercise political control over the relevant governmental body. Legislation creating a Christian religious holiday or moment of silence in majority-Christian schools signals that popular attitudes favor Christian religious observances. Most people already know that Christianity is the dominant religion in the United States, but the signal will still affect beliefs and can still affect behavior.

*Id.* at 386. One problem with this account is that the persons most likely to object explicitly to religious symbols, and feel like “outsiders” because of them, are probably the ones least likely to alter their own religious beliefs or practices as a result of them. Therefore, in this picture, the function of Establishment Clause litigation is to allow the persons who are actually least harmed by government action (in McAdams’s sense) to represent the interests of the persons who are most harmed, but who are unlikely to realize that they are being so harmed.

<sup>203</sup> See, e.g., Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015); Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL’Y 81 (2000).

expectations might take legal form.<sup>204</sup> Or they might only arise out of social etiquette and the accumulation of a myriad of individual prudential judgments.<sup>205</sup> But, in either event, they might suggest a continuum of sorts between the Establishment Clause and our larger normative construction of the place of religion in public life.

My goal here is not to dive into these questions. For what it is worth, I would be inclined *not* to assume too tight a link between either the Search and Seizure Clause or the Establishment Clause and our expectations, legally recognized or not, in the private sphere. My aim here is only to point out that neither the “reasonable expectation of privacy” test nor the “endorsement” test is equipped, on its own, in the absence of a much broader and richer normative and doctrinal conversation, to have much of interest to say about these deeper normative conundrums.

### III. FINDING REFUGE IN THE EMPIRICAL

#### A. *Just the Facts. Not.*

I have argued that the “expectations of privacy” and “endorsement” tests both reflect an infatuation with the psychological and the affective. More broadly, though, they reflect an effort to avoid an often-difficult normative inquiry by trying to escape to the realm of the purely empirical. This temptation is deeply ingrained in contemporary law, influenced as it has been by legal realism’s attacks on formalism, “word magic,” and doctrinal essentialism. Much more than academic realism, however, this effort to find empirical answers to non-empirical questions appears all across the ideological spectrum. Thus, for example, the leading “conservative” constitutional theories’ focus on a search for the “original intent” or (more recently) the “original public meaning” of various constitutional passages.<sup>206</sup> This inquiry is specifically described as essentially empirical,<sup>207</sup> a search for a fact of the matter about the past

<sup>204</sup> See Helfand & Richman, *supra* note 203, at 771–79; Kaminer, *supra* note 203, at 82–86. Consider also the vigorous debate, only somewhat further afield from the question at hand, over whether for-profit corporations are legally capable of having specific religious values or religious missions. Compare Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014), with Ron Fein, *Why Every Single Supreme Court Justice Got Hobby Lobby Wrong*, JURIST (Sept. 18, 2014, 12:00 PM), <http://www.jurist.org/hotline/2014/09/ron-fein-hobby-lobby.php> [<https://perma.cc/J4EM-BQ2E>].

<sup>205</sup> For one example among thousands, see Olivia Rudgard, *Lidl Airbrushes Crosses from Church on Greek Food Packaging to Be ‘Religiously Neutral,’* TELEGRAPH (U.K.) (Sept. 4, 2017, 11:53 AM), <http://www.telegraph.co.uk/news/2017/09/04/lidl-airbrushes-crosses-church-greek-food-packaging-religiously/> [<https://perma.cc/D779-WVYL>]. See generally Geoffrey Brahm Levey, *Symbolic Recognition, Multicultural Citizens, and Acknowledgement: Negotiating the Christmas Wars*, 41 AUSTL. J. POL. SCI. 355 (2006).

<sup>206</sup> See, e.g., Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412–13 (2013).

<sup>207</sup> See *id.* at 412–17.

world that, its proponents argue, determines (or depending on the precise theory, at least channels) the present-day normative meaning of constitutional texts.

Again, the “reasonableness” elements of both the expectation of privacy and endorsement tests constrain, but do not ultimately negate, the focus on the empirical. At the end of the day, the focus on “reasonable” expectations and the “reasonable” observer only emphasizes that the essentially empirical inquiry should be careful and moderate, and not be allowed to run wild into fringe subjectivities. But it does not leave space for the Supreme Court to challenge, or shape, mainstream subjectivities. And it is precisely such space that constitutional law needs to do its job. As George Bernard Shaw famously quipped, “The reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man.”<sup>208</sup>

### *B. Just the Reasonable Facts*

The Shaw quotation I just invoked might invite some comparison between the “reasonableness” tests I have been criticizing here and the “reasonable person” that features so prominently in tort law and some other legal contexts.<sup>209</sup> The resemblance, however, is entirely superficial.

First, while the “reasonable expectation of privacy” and “endorsement” tests try to gauge *attitudes*, the most common “reasonable person” standard evaluates *actions*.<sup>210</sup> The problem, in other words, is not so much with the idea of reasonableness, to which the law will often resort in a variety of contexts, but with the distracting search for reasonable affects. Second, and related, the stated aspiration of the reasonable person standard is not to highlight subjectivities but to mitigate or eliminate them by assessing fault “in a way that ensures interpersonal equality.”<sup>211</sup> Third, to the extent that “reasonable person” tests are necessarily empirical, they look for relevant facts through the lens of some set of legal values rather than as unmoored values in their own right.<sup>212</sup> In fact, the reasonable person test necessarily invites, rather than deflects, deeper debates about what those values are, such as, for example, whether tort law should be conceived as a search for economic efficiency<sup>213</sup> or for corrective justice.<sup>214</sup>

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<sup>208</sup> BERNARD SHAW, *MAN AND SUPERMAN: A COMEDY AND A PHILOSOPHY* 238 (Brentano’s 1926) (1903).

<sup>209</sup> See Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1234–35 (2010).

<sup>210</sup> *Id.* at 1250.

<sup>211</sup> See *id.* at 1239. I elide here the many complications and even contradictions that lurk in trying to achieve that aim.

<sup>212</sup> See Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 370 (2012).

<sup>213</sup> See generally Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

<sup>214</sup> See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* ch. 3 (1995).

To see the point more clearly, consider if the standard in Fourth Amendment law were not the “reasonable expectation of privacy” of the subject of the search, but instead whether the police officer acted “reasonably,” or if the test in the Establishment Clause context were simply whether a given government’s religiously inflected actions were “reasonable.” Putting the tests that way would not help decide any cases, but it would at least open some room within which the real debate could proceed.

There are admittedly some legal doctrines that employ “reasonable person” tests that more closely resemble the ones I have been criticizing here. For example, in some cases, libel law asks how a “reasonable reader” would understand an allegedly defamatory text.<sup>215</sup> But even this sort of test does not try to measure affect or emotions.<sup>216</sup> Nor—more importantly—is the role of the hypothetical reasonable reader to decide whether the text is defamatory, or to supply the values by which defamation should be judged, but only to supply the contextual *meaning* of what might otherwise be an ambiguous utterance.<sup>217</sup>

### C. *Beyond Facts*

The effort to escape or deflect difficult normative questions by trying to rely on the mere “facts of the matter” is wrongheaded. It is also often a chimera, even on its own terms.<sup>218</sup> I have already discussed, with respect to the two sets of constitutional questions at issue here, the degree to which psychological perceptions can be culturally constructed—indeed, constructed by the law itself.<sup>219</sup> But even putting that problem to one side, armchair empiricism remains a dubious enterprise.

Consider the original rationale for the “endorsement of religion” test: “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.”<sup>220</sup> The unspoken assumption here is that there is a direct line between, say, the disaffirmation of a religious *group* and the sense of political alienation of an individual *member* of that group. That seems intuitively obvious. But it turns out that the relationship between group affirmation and individual affirmation or self-esteem is considerably more complicated.<sup>221</sup> My

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<sup>215</sup> See David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 99 (1991).

<sup>216</sup> See *id.* at 99–100.

<sup>217</sup> See *id.* at 100 (arguing that the reasonable reader standard is similar to the common law’s traditional search for the “plain and natural meaning” of a text).

<sup>218</sup> See Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 15 (2016).

<sup>219</sup> See *supra* notes 119–30 and accompanying text.

<sup>220</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

<sup>221</sup> See generally Jennifer Crocker, Brenda Major & Claude Steele, *Social Stigma*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 504 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998); Gaven A. Ehrlich & Richard H. Gramzow, *The Politics of*

point here is not to try to unravel those complexities. It is not even to argue with any confidence that the psychological literature on the relationship between group affirmation and self-affirmation is relevant here. It is only to point out that armchair psychology, much like armchair economics or armchair anthropology, is a dubious basis on which to erect a major doctrine of our constitutional jurisprudence.

#### IV. COLONIZING THE CORE

As the preceding discussion already began to suggest, the deeper patterns embedded in the two doctrinal stories I have been telling are not only substantive. They also go to the very structure of legal reasoning itself.

##### *A. Cases at the Edge*

To begin with, I want to consider that both the “reasonable expectation of privacy” and “endorsement” tests were born in the context of a central, defining challenge in legal reasoning—deciding borderline cases.

Let us return to *Katz* and *Lynch*. It is easy to sympathize with the frustrations that Justice Harlan and Justice O’Connor, respectively, must have felt. The majority opinion in each case explicitly or implicitly framed the problem as one of categorization. Despite its rhetorical gesture to the proposition that the Fourth Amendment protected “people,” not “places,” the majority in *Katz* was effectively asking whether a phone booth was more like a home or more like an open field.<sup>222</sup> And the majority in *Lynch* was asking whether a crèche, included as part of a larger, putatively “secular,” public Christmas display, was more like a devotional act or more like a gallery of religious paintings in a public museum.<sup>223</sup>

Both the *Katz* and *Lynch* majorities gave reasons for their respective conclusions.<sup>224</sup> They engaged in the typical legal hermeneutic of analogy and distinction, trying to find relevant resemblances to, and differences from, prior and hypothetical cases.<sup>225</sup> They also relied, though, on a certain degree of sheer situation-sense (probably right in *Katz* and wrong in *Lynch*) and, in the end, on some sheer hand-waving.<sup>226</sup> That combination of rational casuistry and semi-articulate instinct is the stuff of many judicial decisions.<sup>227</sup> It is what judges do. But it is also very easy to criticize, and very tempting to try to transcend.<sup>228</sup>

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*Affirmation Theory: When Group-Affirmation Leads to Greater Ingroup Bias*, 41 PERSONALITY & SOC. PSYCHOL. BULL. 1110 (2015).

<sup>222</sup> See *Katz v. United States*, 389 U.S. 347, 351–53 (1967).

<sup>223</sup> See *Lynch*, 465 U.S. at 683–86.

<sup>224</sup> See *id.*; *Katz*, 389 U.S. at 351–53.

<sup>225</sup> See *Lynch*, 465 U.S. at 683–86; *Katz*, 389 U.S. at 351–53.

<sup>226</sup> See *Lynch*, 465 U.S. at 685–87; *Katz*, 389 U.S. at 354–59.

<sup>227</sup> See generally CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

<sup>228</sup> For a similar argument in the context of moral reasoning, see generally ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988).

Justice Harlan in *Katz* and Justice O'Connor in *Lynch* were trying to provide a single metric—grounded directly on a grand principle—that could decide these and other cases.<sup>229</sup> Their mistake was not necessarily in identifying the “reasonable expectation of privacy” and the “reasonable observer” of an “endorsement of religion” as relevant considerations in their respective contexts. I have already conceded that fully rounded-out theories and doctrines of Fourth Amendment privacy and First Amendment disestablishment might well need to pay some attention to the psychological and affective dimension.<sup>230</sup> Rather, the mistake was in elevating those considerations beyond their rightful place. By that move, both Justice Harlan and Justice O'Connor, and the many others influenced by their formulations, engaged in a classic fallacy in reasoning.<sup>231</sup>

*Katz* and *Lynch* were both culturally specific borderline cases. Justice Harlan and Justice O'Connor identified some of the considerations that might be relevant to decent efforts at formulating the situation-sense necessary to decide such borderline cases. Attending to the question of what sort of expectations users have when they enter (or used to enter) phone booths might be a helpful way to think about whether a phone booth is in significant ways like a home. Attending to the views of a “reasonable observer” about whether a display “endorses” religion might be a helpful way to think about how to “read” a cultural object, such a crèche, included in a larger Christmas display and to decide whether it is no more constitutionally problematic than a religious painting in a secular museum.<sup>232</sup>

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<sup>229</sup> See *Lynch*, 465 U.S. at 687–89 (O'Connor, J., concurring); *Katz*, 389 U.S. at 360–62 (Harlan, J., concurring).

<sup>230</sup> See discussion *supra* Part II.

<sup>231</sup> Logicians call it the “fallacy of hasty generalization” or “converse accident.” See IRVING M. COPI, CARL COHEN & DANIEL E. FLAGE, *ESSENTIALS OF LOGIC* 73 (2d ed. 2007); see also CHINUA ASUZU, *JUDICIAL WRITING: A BENCHMARK FOR THE BENCH* § 8.2.8 (2016) (ebook).

<sup>232</sup> To be sure, the display of religious art and devotional objects in secular museums can raise different, equally complex, legal, moral, theological, and aesthetic questions. See, e.g., James Clifton, *Truly a Worship Experience? Christian Art in Secular Museums*, 52 RES: ANTHROPOLOGY & AESTHETICS 107 (2007); Jon Daehnke & Amy Lonetree, *Repatriation in the United States: The Current State of the Native American Graves Protection and Repatriation Act*, 35 AM. INDIAN CULTURE & RES. J. 87 (2011); Moira G. Simpson, *Is There Space for Spirituality in the Contemporary Museum?*, 8 MUSEUMS & SOC. ISSUES 22 (2013); see also Gedicks, *supra* note 49, at 642, 648–49.

A further complication, peculiar to *Lynch* and similar cases, is that any cultural reading of the meaning of any object such as the crèche in its specific context would ideally consider a larger confounding variable—Christmas itself. I have argued elsewhere that certain “secular” institutions, such as marriage or the seven-day week, contain, whether we like it or not, inextricably intertwined religious dimensions. Dane, *supra* note 146, at 1129. If Christmas is to be treated the same way—something about which I have real doubts—then the situation of the crèche becomes especially complex. See Dane, *supra* note 33, at 3. In a real sense, it raises an intractable problem: allowing it would breach the jurisdictional division between

In fact, that sort of limited and modest use of reasonable expectations in the privacy context or the reasonable observer in the Establishment Clause context would have resembled the “reasonable reader” test in defamation law that I just discussed at the end of the last section.<sup>233</sup> In particular, more modest and specific versions of both tests would have come into play, not as the first question in every case, but only in those specific circumstances in which a context-sensitive cultural reading of the situation was necessary to help inform the normative and doctrinal analysis. To be sure, even in culturally specific cases such as *Katz* and *Lynch*, culturally specific readings should—as I emphasized earlier—always be measured against larger normative considerations, lest they acquiesce in the dulling of the public’s own critical faculties.<sup>234</sup> Nevertheless, they might well be useful, and arguably indispensable. The same, however, cannot be said of cases closer to the core. With respect to the Establishment Clause, for example, it does not require much context-specific cultural reading to see that official prayer practices, as were at issue in *Engel v. Vitale*,<sup>235</sup> *Marsh*,<sup>236</sup> and *Town of Greece*<sup>237</sup> are governmentally sponsored *religious* acts. The real question in all these cases is how we understand the normative principles underlying the American church-state dispensation and the specific constitutional doctrines that try, however clumsily, to give them life.

### *B. From the Edge to the Core*

The problem, then, is that the courts and academics allowed formulas such as endorsement and expectation of privacy to spread from the borderline cases at the

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church and state, but banning it would contribute to the dilution of the religious meaning of Christmas and the appropriation (even theft) of its symbolic capital for purely religious ends. *See id.* at 6, 10.

Consider, then, a hypothetical different case involving a crèche in a context stripped of the additional complexities introduced by the Christmas dilemma. Imagine a town installing a display in a public park “celebrating families.” And imagine that the display included a traditional crèche, showing the Holy Family in a manger, but also a variety of other scenes of iconic, loving families—real and fictional—including a few appropriate Presidential families, the family gathered around the table in Norman Rockwell’s “Freedom from Want” Thanksgiving painting, and Bambi and his mother. The crèche would be included in such an assemblage not as an example of great art or a historical moment, as it might be in a museum, but rather as part of the “celebration” of a substantive value. The relevant constitutional question in that case would be whether the crèche, in the context of such a “celebration,” should be regarded as a devotional object, akin to a devotional act such as prayer in a public school. Answering that question would require some degree of situation-sense, and something like a notion of “endorsement” might be helpful shorthand for unpacking what that situation-sense was trying to discern.

<sup>233</sup> *See supra* notes 215–17 and accompanying text.

<sup>234</sup> *See discussion supra* Section II.B.1.

<sup>235</sup> 370 U.S. 421, 423–24 (1962).

<sup>236</sup> 463 U.S. 783, 784 (1983).

<sup>237</sup> 134 S. Ct. 1811, 1815 (2014).

edge to the core. They did not merely build on the deeper constitutional meanings at stake—whether the Fourth Amendment idea that it is up to the law, sensitive to but not bound by tradition and culture, to enshrine zones of protection from government intrusion or the First Amendment idea that—possibly subject to various complex exceptions—“a union of government and religion tends to destroy government and to degrade religion.”<sup>238</sup> Instead, they displaced those deeper principles, or at least tried to. And the result has not been pretty.

The new formulations—understood as overarching principles at the core rather than tools to aid understanding at the periphery—are shallow and opaque. They lead to absurdities such as Justice Kagan’s remarkable comment in her dissent in the *Town of Greece* case: “If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint.”<sup>239</sup>

At the same time, the new tests have not succeeded in eliminating the embarrassment of casuistic-sounding case-by-case splitting, dicing, and drawing of fine distinctions. To the contrary, these formulations have simply generated a whole new process of judicial elaboration and occasional over-elaboration.

The colonizing of the core by the edge is, as noted, a species of a classic fallacy. It is also, though, a recurring temptation in modern legal reasoning more specifically. It recurs partly because judges and lawyers overlook the truth that the last stage in legal analysis necessarily differs from the steps before it. Principles are important; they can and should frame the conversation and set the stage. But the reach of principles, to paraphrase Charles Fried’s wonderfully evocative image, stops twenty feet off the ground.<sup>240</sup> Those last few feet must be occupied by “the artificial Reason of the law”—the working out of detailed doctrine.<sup>241</sup>

Paradoxically, though, the temptation to let the edge bleed into the core also proceeds, I think, from this age’s suspicion of the self-confident values embodied in those cores. Hence the appeal of the psychological and the empirical. And hence the effort to measure “reasonable expectations” and depend on “reasonable observers.” Thus, in a word, the untoward substitution of “reasonableness” for reason.

### C. *The Double Failure of Legal Nerve*

Let me put it another way: The common law tradition has always held in creative tension two stories of how it proceeds. The first story posits the existence of broad

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<sup>238</sup> *Engel*, 370 U.S. at 431.

<sup>239</sup> *Town of Greece*, 134 S. Ct. at 1851 (Kagan, J., dissenting).

<sup>240</sup> See Fried, *supra* note 6, at 56–57.

<sup>241</sup> *Id.* at 57; see Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 3–4 (1994); Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFF. L. REV. 291, 324 (2014); Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191, 1221–22 (1987); Dane, *supra* note 118, at 290.

but powerful principles that can at least guide the way toward specific conclusions, though rarely with the determinate force that some might crave.<sup>242</sup> The second story looks to the iterative accumulation of precedents and reasoning by analogy as the messy but necessary path to a broader wisdom.<sup>243</sup> The most satisfying accounts of the common law do not merely juxtapose or balance these two strains of the tradition but try to make them cohere.<sup>244</sup> In a recent article, Martin Stone, in his reformulation of some of the ideas of Ernest Weinrib, argues that immanent principles, such as corrective justice, are not meant to be determinate guides to deciding specific cases.<sup>245</sup> Nor are they even the “goals” of common law adjudication in the first place.<sup>246</sup> Rather, they are the best and most normatively coherent *explanations* for what is going on in individual, inevitably context-sensitive and fact-specific, legal judgments.<sup>247</sup> I do not want to endorse all the details of Stone’s account here. Even if I did, translating his argument about the structure of private law into the realm of public law—and especially constitutional law—would be treacherous. But I do want to borrow his insight.

The traditional defense of the “ruined tenement” against official encroachment was not a determinate Fourth Amendment “test” in the modern sense.<sup>248</sup> But it was, along with other ideas, an explanation for what judges were trying to do when they decided whether a particular physical space under a particular circumstance was protected from a warrantless search. Similarly, Justice Black’s warning, echoing James Madison, “that a union of government and religion tends to destroy government and to degrade religion” did not determine exactly where, or even how high, the wall of

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<sup>242</sup> See Dennis J. Sweeney, *The Common Law Process: A New Look at an Ancient Value Delivery System*, 79 WASH. L. REV. 251, 265 (2004) (“Whether the source is the constitution, a statute, or a prior judicial decision, all rules must be applied before they become law. In at least one sense, then, the rules do not dictate the result. Indeed, in the common law tradition, the function of rules is guidance. Common law processes allow the courts to tailor broad principles and general rules to the demands of the particular case before the court. It is always the general being applied to the particular. ‘Thus, one possible answer to our initial question (‘what is law?’) is that, at least in ‘common law,’ *law is application*—application of legal norms by individuals in ordinary interactions.’ Common law processes include, at a minimum, a case in controversy, identification of a general principle, and application of that principle to the specific case in controversy, employing canons of construction and interpretation, standards of review, equity, juries, and a judge exercising discretion at every stage of the process. Even if a case is not strictly speaking one of first impression, the nuances of a specific fact pattern will amplify or explain established precedent. Thus, a new statement of the law results from the resolution of the case.” (footnotes omitted)).

<sup>243</sup> See, e.g., Fried, *supra* note 6, at 51–52.

<sup>244</sup> See generally LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2d ed. 2016).

<sup>245</sup> See Martin Stone, *Legal Positivism as an Idea About Morality*, 61 U. TORONTO L.J. 313, 313–19, 332–35 (2011).

<sup>246</sup> See *id.*

<sup>247</sup> See *id.* at 333–34.

<sup>248</sup> See *supra* notes 83–87 and accompanying text.

separation between church and state should be erected.<sup>249</sup> But it did explain the wall itself and judicial efforts to map it in individual cases.

That is not to say that *every* case can or should be decided only on the basis of casuistry. The decisions in some cases do follow directly from the deeper principles at hand. That was true, for example, of *Engel*, the first of the great school prayer decisions (whose lesson about allegedly “nonsectarian” prayer Justice Kagan simply ignored in her *Town of Greece* dissent).<sup>250</sup> But other cases are best served by patient analogizing, rigorous legal reasoning, and a certain degree of unapologetic hemming and hawing.

The contemporary doctrinal “tests” of “reasonable expectation of privacy” and “endorsement of religion” as understood by the “reasonable observer” thus reflect a double failure of legal nerve. To begin with, they implicitly renounce constitutional law’s mission to articulate strong, occasionally deeply countercultural, principles of its own and not merely defend psychological sensitivities (such as “privacy” or “endorsement”). And at the same time, they try—unsuccessfully it turns out—to short-circuit the patient iterative process of inductive decision-making and reasoning by analogy.

## V. THE ROAD NOT TAKEN, AND THE WAY AHEAD

### A. Contemporary Law’s Impatience with the Law

The three themes discussed in this Article form a certain natural progression, from a specific substantive concern (the role of psychology and feelings in constitutional law) to a more general temptation in legal discourse (trying to escape to the realm of the empirical) to a purely methodological problem in contemporary legal reasoning (insufficiently appreciating the legitimate place of casuistry and induction). That same progression, however, might also suggest a serious tension in my argument. After all, I have described both the resort to feelings and the escape to the empirical as often shallow, insufficiently theorized efforts to avoid deeper, complex, and controversial questions of principle. Yet the claim of the last section is that courts seem intent on trying, however unsuccessfully, to apply overarching principles to all cases, and avoiding (or purporting to avoid) mere reasoning by situation-sense or analogy.

There is no contradiction. Given my own prejudices, I am myself sometimes tempted to imagine that an emphasis on feelings or on mere empiricism reflects a rejection of values. But that is not true. Emphasizing psychology and feelings *is* a value. And many efforts at solving legal questions by resort to empirical facts are

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<sup>249</sup> See *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

<sup>250</sup> See Dane, *supra* note 3, at 631. The Regents Prayer struck down in *Engel* read: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” *Engel*, 370 U.S. at 422.

grounded, often explicitly, in values. That is certainly true of constitutional originalism, for example. What is really going on has less to do with an avoidance of values (though there is some of that too) than with an impatience with legal discourse's distinctive tools for articulating, reimagining, and integrating complex and sometimes disparate values. Hence the rush to feelings and to the empirical. And hence also the impatience with casuistry, in lieu of a necessarily doomed effort to decide every case by way of some overarching principle. It really is of a piece.

### *B. Alternative Past*s

It is not difficult to imagine how the genuine insights voiced in *Katz* and *Lynch* could have led to very different frameworks of analysis. One such framework might have looked something like this: The Constitution embodies a set of rules and principles that establish certain places, activities, and pockets of information as zones protected from unwarranted government prying. In some cases, understanding the scope of those zones of protection is self-evident. Other cases require a more nuanced situation-sense. Developing that situation-sense might sometimes involve looking to “expectations of privacy,” which is to say the prevalent cultural reading of a place, activity, or pocket of information. But such “expectations of privacy” can never have the last word, lest we either unduly restrict the legitimate powers of the government or, conversely, allow acquiescence unduly to expand the intrusive reach of government. The point, though, is not that certain “expectations of privacy” are mistaken because they are in some mysterious sense “unreasonable,” but rather that they are “unreasonable” because they are normatively at odds with the deeper commitments of the constitutional scheme. Finally, in some—maybe many—cases, even those deeper commitments will only be able to guide the inquiry, without necessarily yielding determinate results. That is where induction, analogy, and the incremental development of legal doctrine must step in to bridge the gap.

Another such framework might have looked something like this: The Constitution embodies a set of rules and principles defining the basic shape of the American religion-state dispensation. In some cases, understanding the requirements of that dispensation is self-evident. Other cases require a more nuanced situation-sense. Developing that situation-sense might sometimes involve looking to whether the prevalent cultural reading of a challenged practice would understand it as an “endorsement of religion.” But such perceptions of “endorsement” can never have the last word, lest we either unduly restrict the legitimate power of government to acknowledge the role of religion in the nation or, conversely, allow the lulling of our imaginations unduly to end up corrupting, degrading, or trivializing. The point, though, is not that certain perceptions of “endorsement” are mistaken because they are in some mysterious sense “unreasonable,” but rather that they are “unreasonable” because they are normatively at odds with the deeper commitments of the constitutional scheme. Finally,

in some—maybe many—cases, even those deeper commitments will only be able to guide the inquiry, without necessarily yielding determinate results. That is where induction, analogy, and the incremental development of legal doctrine must step in to bridge the gap.

### C. Possible Futures

But real life took a different turn. We are where we are. As noted earlier, the courts themselves have begun to respond to critiques of both the actual “reasonable expectation of privacy” and “endorsement” tests.<sup>251</sup> But that does not mean that they are even beginning to treat the deep neuroses in our legal culture that helped spawn those tests in the first place.

I have already said something about two of the most recent cases touching on the Establishment Clause, in which the endorsement test has played a refracted role or little role at all.<sup>252</sup> As I also emphasized, though, these developments do not necessarily portend good news: in a deep sense, the ascendancy of the endorsement test, for however long it lasted, helped suck the doctrinal and conceptual energy out of reasoned conversation about the meaning of the Establishment Clause.<sup>253</sup> In its wake, we are left with an unproductive debate between the substantive principle of equal respect championed by the Court’s “liberals” and a more formal equality principle being pressed by the Court’s “conservatives.”<sup>254</sup>

The current state of play with respect to the Fourth Amendment is muddier. The very fact that the Court, while recognizing the limits of the reasonable expectation of privacy test, is also less clear about the road ahead, might give it the space in which to chart some new and productive directions. Or, it might just lead down another dead end.

Consider again the current hot-button case on the Supreme Court’s docket, *Carpenter*. The question in *Carpenter* is whether the government must secure a warrant to obtain cell phone location data—electronic records pointing to the probable location of criminal suspects at certain specified times—from those suspects’ cell phone companies.<sup>255</sup>

*Carpenter* poses something of a conundrum. On the one hand, some commentators have argued that, if the Court were simply to apply longstanding doctrinal categories, *Carpenter* would be an “easy case.”<sup>256</sup> Cell phone users voluntarily allow cell

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<sup>251</sup> See *supra* notes 19–24, 41–47 and accompanying text.

<sup>252</sup> See *supra* notes 161–79 and accompanying text; see also *supra* notes 147–58 and accompanying text.

<sup>253</sup> See discussion *supra* Section II.B.2.

<sup>254</sup> See *supra* text accompanying notes 160–79.

<sup>255</sup> See *United States v. Carpenter*, 819 F.3d 880, 884–86 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (June 5, 2017) (No. 16-402).

<sup>256</sup> E.g., Orin Kerr, *Symposium: Carpenter and the Eyewitness Rule*, SCOTUSBLOG (Aug. 4,

phone companies to acquire and store their location data, which under traditional “third-party doctrine” would deprive that information of Fourth Amendment protection.<sup>257</sup> Indeed, in this context, the cell phone companies are in a sense “eyewitnesses” to suspects’ activities, and “[t]he government can always talk to eyewitnesses.”<sup>258</sup> Moreover, the cell phone location data in the hands of cell phone companies constitute “business records” that would not ordinarily require a warrant.<sup>259</sup>

Nevertheless, at least two forces complicate this apparently straightforward conclusion. First, if we treat reasonable expectations of privacy as a cultural or sociological phenomenon, it seems apparent that ordinary people “do not like the idea of being tracked” and only reluctantly share their location information with their cell phone providers, let alone with the government.<sup>260</sup> This by itself would suggest a deep and revealing disconnect between actual (and reasonable) expectations of privacy and the various doctrinal rubrics (such as the “third-party doctrine”) that have accreted over the years on the basic framework established in the first place by the notion of a “reasonable expectation of privacy.”

Second, cases such as *Carpenter* do not merely pose doctrinal puzzles. They demand some serious thinking about the nature of privacy in our new era of massive data collection and pervasive electronic tracking.<sup>261</sup> In recent years, the Court has begun to recognize that new technologies require new constitutional approaches.<sup>262</sup> One temptation is to try to cut through the haze of the “reasonable expectation of privacy” test by retreating to old sureties such as property law.<sup>263</sup> The Court has already held that the common-law trespass test for Fourth Amendment violations remains in place, after all, apart from and in addition to the newer “reasonable expectation of privacy” test.<sup>264</sup> During the *Carpenter* oral argument, Justice Gorsuch intriguingly suggested

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2017, 1:39 PM), <http://www.scotusblog.com/2017/08/symposium-carpenter-eyewitness-rule/> [<https://perma.cc/CZ3L-WFLT>].

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681, 738 n.365 (2011).

<sup>260</sup> See Dave Deasy, *TRUSTe Study Reveals Smartphone Users More Concerned About Mobile Privacy than Brand or Screen Size*, TRUSTARC (Sept. 5, 2013), <http://www.trustarc.com/blog/2013/09/05/truste-study-reveals-smartphone-users-more-concerned-about-mobile-privacy-than-brand-or-screen-size/> [<https://perma.cc/4VUR-CCPA>]; see also Freiwald, *supra* note 259, at 736.

<sup>261</sup> See generally, e.g., Brief of Amici Curiae Electronic Frontier Foundation et al. in Support of Petitioner, *Carpenter v. United States*, No. 16-402 (U.S. Aug. 14, 2017); Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. ANN. SURV. AM. L. 553 (2017); A. Michael Froomkin, *Regulating Mass Surveillance as Privacy Pollution: Learning from Environmental Impact Statements*, 2015 U. ILL. L. REV. 1713; Tokson, *supra* note 21.

<sup>262</sup> See generally Robert S. Litt, *The Fourth Amendment in the Information Age*, 126 YALE L.J. F. 8 (2016).

<sup>263</sup> See, e.g., Baude & Stern, *supra* note 3, at 1825–27.

<sup>264</sup> *United States v. Jones*, 565 U.S. 400, 406–07 (2012).

that although the cell phone location data was in the hands of a “third party,” the phone user might still have a distinct “property” right of his or her own in that information.<sup>265</sup> And at least some scholars have suggested abandoning the “reasonable expectation of privacy” test entirely in favor of an approach grounded squarely in “positive law,” though not exclusively formal property rights.<sup>266</sup>

These sorts of suggestions and proposals are appealing in their move away from the psychological focus of the *Katz* test. But much like the turn to ideas of “equality” in Establishment Clause jurisprudence, they might achieve a modicum of apparent clarity by deflecting even more sharply any serious effort to grapple with the deep questions of principle that should at least inform constitutional inquiry. It might also turn out that it is simply not possible to fit together under one seamless master principle the various ways—old and new, small-scale and massive, physical and virtual, consciously willed and automatic—in which information is produced, shared, and stored.<sup>267</sup>

#### D. “*The Artificial Reason of the Law*” and the World in Which We Live

To move forward in both the Establishment Clause and Fourth Amendment contexts will therefore require a willingness both to articulate some basic values that do not merely depend on affective perceptions such as “endorsement” or “expectations of privacy” and a recognition that, even once those values have been articulated,

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<sup>265</sup> One thing *Jones* taught us is—and reminded us, really, is that the property-based approach to privacy also has to be considered, not just the reasonable expectation approach.

So, if we put aside the reasonable expectation approach for just a moment, *Katz*, *Miller*, *Smith*, and ask what is the property right here, let’s say there is a property right. Let’s say I have a property right in the conversion case I posited with your colleague, so that if someone were to steal my location information from T-Mobile I’d have a conversion claim, for example, against them for the economic value that was stolen.

Wouldn’t that, therefore, be a search of my paper or effect under the property-based approach approved and reminded us in *Jones*?

Transcript of Oral Argument at 51–52, *Carpenter v. United States*, No. 16-402 (U.S. Nov. 29, 2017) (italization of case names added); see also Will Baude, *Thoughts on Property and Positive Law After the Carpenter Oral Argument*, WASH. POST: VOLOKH CONSPIRACY (Nov. 30, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/30/thoughts-on-property-and-positive-law-after-the-carpenter-oral-argument> [<https://perma.cc/5AQR-TVRRP>].

<sup>266</sup> See Baude & Stern, *supra* note 3, at 1825.

<sup>267</sup> Cf. Brian H. Bix, *The Promise and Problems of Universal, General Theories of Contract Law*, 30 *RATIO JURIS* 391, 400–01 (2017) (arguing that general theories that try to capture entire bodies of law can “distract us from developing properly contextual legal rules”).

actual cases will still need to be decided incrementally, patiently, and very possibly by way of a patchwork of specific doctrines and lines of precedent. Lawyers and judges need to move past the neuroses of contemporary legal culture and recommit to the “artificial reason of the law.” At the end of the day, then, this Article is, in part, a plea for at least a certain sort of legal formalism—not the illusory axiomatic, determinate, legal formalism that was the straw man of legal realists,<sup>268</sup> but a more modest, yet self-confident, formalism that understands law’s distinctive role, in concert with other normative languages, in both framing and shaping the world in which we live.

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<sup>268</sup> See, e.g., BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010); Brian Z. Tamanaha, *Balanced Realism on Judging*, 44 VAL. U. L. REV. 1243 (2010).