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I. INTRODUCTION

Adzan Bedonie is a Navajo woman who speaks no English, holds tightly to traditional Navajo beliefs, and lives in a one-room hogan on the wrong side of the line drawn by a federal court to partition Navajo and Hopi lands.[1] The law that mandates her relocation and thus threatens to sever what for her is a spiritual connection to the land on which she lives[2] offers a potential escape route: Congress provided for a limited number of life estates for older individuals subject to relocation.[3] But Adzan Bedonie, like most elderly Navajo, has not applied for a life estate, because traditional Navajo beliefs preclude *any* discussion of one's death or of preparation for it.[4]

Hodari D., a young black man who lives in Oakland, California, was standing with three or four of his friends one spring evening when they were approached by two police officers; all of the young men ran away. Hodari was pursued on foot by one of the officers, was seen to

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1. Hattie Clark, *Lands Lost*, Christian Sci. Monitor 16 (Oct. 22, 1987). The history of the Navajo-Hopi land partition is complex. The major points of reference are as follows: An 1882 Executive Order created a reservation for the Hopi "and such other Indians as the Secretary of the Interior may see fit to settle thereon." Executive Order of President Chester Arthur (Dec. 16, 1882), reprinted in *Healing v. Jones*, 210 F. Supp. 125, 129 n.1 (D. Ariz. 1962). Over time, increasing numbers of Navajo came to reside within the boundaries of the 1882 reservation. In 1962, a three-judge district court, acting under authority of Pub. L. No. 85-547, 72 Stat. 403 (1958), set aside one-sixth of the reservation for exclusive Hopi use but gave the Navajo and Hopi Tribes "joint, undivided, and equal interests" in the remainder, which came to be called the Joint Use Area (JUA). *Healing*, 210 F. Supp. at 192. The Navajo-Hopi Relocation Act of 1974 conferred jurisdiction on the U.S. District Court for Arizona to partition the Joint Use Area and mandated a 50-50 division of the lands. Pub. L. No. 93-531, 88 Stat. 17124, codified as amended at 25 U.S.C. §§ 640d-640d-28 (1988 & Supp. 1992). The Act required relocation but established various relocation benefits for Navajo and Hopi residents who lived on the "wrong side" of the partition lines. 25 U.S.C. §§ 640d-13-14 (1988). Adzan Bedonie is among the more than 10,000 Navajo subject to relocation as a consequence of the partition order; she is one of an estimated 250-450 individuals who have not applied for relocation assistance. For a more detailed account of the history of the Navajo-Hopi dispute, see Hollis A. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 Ariz. L. Rev. 371 (1985). See also generally Jerry Kammer, *The Second Long Walk* (U. of N. M., 1981).

2. Clark, Christian Sci. Monitor at 16 (cited in note 1). See also Whitson, 27 Ariz. L. Rev. at 387 (cited in noto 1) (explaining that "[t]o the people of the JUA, the land is their spiritual connection with future generations").

3. A 1980 amendment te the 1974 Relocation Act made available life estate leases for residents who were disabled or at least 49 years of age. 25 U.S.C. § 640d-28 (1988).

4. Clark, Christian Sci. Monitor at 16 (cited in note 1); Whitson, 27 Ariz. L. Rev. at 379 (cited in note 1).

discard a small rock that proved to be crack cocaine, and was captured a moment later. The Supreme Court ruled against Hodari's attempt to suppress the cocaine as evidence, on the ground that Hodari had not been "seized" within the meaning of the Fourth Amendment when he saw the officer running toward him.[5] Writing for the Court, Justice Scalia suggested as well that the State's concession that it lacked the reasonable suspicion necessary to justify stopping Hodari was overly hasty: "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police . . . arguably contradicts proverbial common sense. See Proverbs 28:1 ('The wicked flee when no man pursueth')."[6]

Justice Stevens provided another perspective on Hodari's behavior:

> The Court's gratuitous quotation from Proverbs 28:1 . . . mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority.[7]

As little as Adzan Bedonie and Hodari D. otherwise may have in common, they share the "spirit-murdering"[8] experience of being required to answer to authorities whose assessments of reality they do not share, a cultural imposition not likely borne by persons more closely aligned with mainstream values.[9] Individual autonomy has at best an attenuated meaning in these circumstances.[10] Equality norms

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5. *California v. Hodari D.*, 499 U.S. 621 (1991).
6. Id. at 623 n.1.
7. Id. at 630 n.4 (Stevens, J., dissenting).
8. The term is Pat Williams's. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. Miami L. Rev. 127 (1987).
9. The two selected examples present quite different forms of cultural variation from the mainstream. Although some features of present-day Navajo life may be conditioned by contact with, and repression by, non-Indian culture, the traditional beliefs at issue in Adzan Bedonie's case are part of a fully developed indigenous culture that has existed for centuries independently of Euro-American society. In contrast, the aspect of Hodari's world implicated by his instinctual flight from authority likely is constructed in large part by the larger society that surrounds him. Though some facets of his experience undoubtedly reflect surviving elements of African culture, a very significant proportion of what it means to be a black male in this society is determined by *whites*. See Frederick Hord, *African Americans, Cultural Pluralism and the Politics of Culture*, 91 W. Va. L. Rev. 1047 (1989); Tracey Maclin, *"Black and Blue Encounters"- Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Valp. U. L. Rev. 243, 250-62 (1991).
10. The proposition that individual autonomy may require cultural self-definition is discussed in Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953, 1010-13 (1993); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 306-11 (1986);

are negatively impacted as well, because Adzan and Hodari are denied avenues of self-definition arguably open to persons situated nearer the culture's normative center.[11] Their experiences impel consideration of the ways law might foster and preserve cultural pluralism.[12]

This Article examines one as-yet-unexplored strategy for pursuing pluralist values—the use of subjective experience as an element of legal doctrine, and of constitutional doctrine in particular. One example of the sort of rule at issue here would be the following: governmental interference with family interests, *as defined by the subjective experience of the constitutional challenger,* must be justified as necessary to serve compelling government interests.[13] A rule of this nature offers, on its face, the potential to foster cultural pluralism by providing the same level of constitutional protection to *every* individual's experienced interests—here, family interests. However, closer examination reveals that this doctrinal technique carries with it as much peril as promise.

Part II of this Article includes a sketch of the case for cultural pluralism and a brief comparison of doctrinal appeals to subjective experience with other available means of implementing pluralist

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Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L. J. 1329, 1389-92 (1991).

11. This argument is developed more fully in the text accompanying notes 14-16.

12. For the purposes of this Article, "pluralism" does not refer to interest group pluralism, but rather to the value of permitting, and perhaps encouraging, racial and ethnic groups to retain significant portions of their group culture and identity. "Assimilationism" disfavors the retention of distinct racial or ethnic identities. See Kevin M. Fong, Comment, *Cultural Pluralism*, 13 Harv. C.R.-C.L. L. Rev. 133, 136-37 (1978); Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 Minn. L. Rev. 993 (1991); Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 Harv. L. Rev. 525, 528-33 (1990). See also Iris Marion Young, *Justice and the Politics of Difference* 156-91 (Princeton U., 1990); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129, 2130-32 (1992); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 Harv. C.R.-C.L. L. Rev. 371 (1992); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 San Diego L. Rev. 1043, 1062-70 (1988); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219, 291-99.

I use interchangeably the terms "multiculturalism," "pluralism," "cultural pluralism," and "cultural diversity." I do not mean to assert that cultural pluralism is always the preferred goal of law, but only that it is worthy of exploration. See notes 17-20 and accompanying text. I do assume, for the sake of discussion, that cultural pluralism can be pursued in an integrated society; I take no position on the virtues of cultural separatism. For a thoughtful comment on the question of separatism, see Gary Peller, *Notes Toward a Postmodern Nationalism*, 1992 U. Ill. L. Rev. 1095.

13. This rule in fact may have been proposed by Justice Brennan, in *Bowen v. Gilliard*, 483 U.S. 587 (1987). See notes 161-70 and accompanying text.

values in law. The remainder of the Article describes, evaluates, and draws some conclusions from representative constitutional cases in which the Supreme Court has closely approximated the paradigmatic use of subjective experience as a doctrinal variable. Part III canvasses three categories of cases: the Fourth Amendment cases that develop the "subjective expectation of privacy" doctrine, the Establishment Clause cases in which Justice O'Connor sets forth her "messages of endorsement" test, and a group of three unrelated cases in which individual Justices appeal to subjective experience in dissent. Part IV then collects and elaborates on the observations developed in Part III.

I conclude in Part IV.A that the Court's record in employing subjective experience as a doctrinal variable is little short of dismal—its appeals to subjective experience generally have *anti*-pluralist consequences. However, I also argue in Part IV.B that the Court's failure to make constructive use of subjective experience as a constitutional variable may be attributed in large part to an institutional consideration: the impulse to avoid explicit normative constitutional discourse whenever possible. In Part IV.C I conclude that focusing more directly on the pluralist implications of the doctrinal strategy in question may rehabilitate it as a means of implementing pluralist values.

II. AN OVERVIEW OF STRATEGIES FOR IMPLEMENTING CULTURAL PLURALISM

The case for cultural pluralism as social policy has two strands. First, some attention to pluralism may be necessary in order to vindicate other core societal values such as individual autonomy and equality. In addition, in some respects cultural diversity has been a part of the Euro-American tradition from the beginning. These two strands are intertwined.

I was brought up with the "melting pot" approach to problems of multiculturalism: assimilation was seen as the obviously desirable, and seemingly sole, means of achieving unity in what was often described as a nation of immigrants. However, the images associated with the melting pot story were comfortable ones that generally featured Caucasian immigrants from Europe whose "differences" rarely amounted to more than the facts that they didn't speak English, they often adhered to beliefs and practices that could easily be seen as implicating only "private" concerns, such as religious beliefs and

differing approaches to family life, and sometimes they had a slightly darker skin color than we were used to seeing.[14] For many European immigrants, assimilationism apparently imposed no intolerable costs.[15]

Partly due to the Eurocentric focus of the "melting pot" story, we didn't think about, nor were we forced to confront, the ways assimilationism impacts other societal norms such as autonomy and equality. These three values collide most vividly in cases like those of Adzan and Hodari, because they strongly suggest that the power of cultural self-definition may be crucial to individual autonomy, and, as a corollary, that equality norms cannot be realized when some are afforded opportunities for self-detormination that others are not.[16] In each of these instances, the power of a legal regime whose basic presuppositions are not wholly shared *as a cultural matter* constrains the individual's power to pursue life on his or her own terms; persons nearer the cultural mainstream likely do not experience the loss of personhood implicit in the stories of Adzan and Hodari. The autonomy and equality costs of legal assimilationism—a regime of culturally uniform legal rules that hold some individuals to standards that express and embody a universe of meaning wholly foreign to their own experience of life—may go unrecognized under the "melting pot" story of American culture.

Of course, the cultural homogeneity that is the goal of assimilationism is not the sole American ideal. In addition to equality and autonomy, we also recognize the value of cultural diversity per se,[17] at least in some circumstances, most notably with respect to the protection of freedom of speech and religion.[18] But speech and religion

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14. See, for example, Israel Zangwill, *The Melting Pot* 33 (Macmillan, 1914) (claiming that "America is God's Crucible, the great Melting-Pot where all the races of Europe are melting and re-forming").

15. This observation is not meant to suggest that assimilation imposed *no* burdens on European immigrants.

16. It should be obvious that cultural differentiation serves autonomy and equality values only when the cultural identity at issue is optional rather than mandatory. It is cultural *self*-definition that is under consideration here, not externally imposed categorization.

17. See generally John Dewey, *The Principle of Nationality*, in Jo Ann Boydston, ed., 10 *The Middle Works, 1899-1924* (S. Ill. U., 1976); Nathan Glazer and Daniel Patrick Moynihan, *Beyond the Melting Pot* (M.I.T., 2d ed. 1970); Andrew M. Greeley, *Why Can't They Be Like Us?* (Institute of Human Relations, 1969); Michael Novak, *The Rise of the Unmeltable Ethnics* (Macmillan, 1972); Peter Schrag, *The Decline of the WASP* (Simon and Schustor, 1971); Karst, 64 N.C. L. Rev. at 325-36 (citod in note 10).

18. Consider, for example, Justice Douglas's acknowledgment of the value of cultural diversity: "The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide

do not begin to encompass the variety of ways cultures vary.[19] Stories like those of Adzan Bedonie and Hodari D. illuminate the importance of, and provide the strongest argument for, expanding our pluralist horizons beyond the traditional First Amendment arena.

However, this Article does not require the reader's assent to the proposition that multiculturalism is the preferred mode of social life in every instance. Rather, the choice between assimilationism and cultural pluralism presents a dilemma at every level of social policy: on the one hand, constituting ourselves as a single society requires the articulation and implementation of at least some shared norms; on the other hand, living within a normative framework that one does not share may strip life of its most fundamental source of meaning—the ability to decide for oneself what that meaning will be. Legal rules pose this dilemma most sharply, because of the coercive power of law: the full weight of law's violence[20] is arrayed against the personal autonomy of the individual who, like Adzan or Hodari, does not share in the normative underpinnings of society's legal rules.

One key ingredient in the resolution of the pluralist dilemma, the question whether a pluralist *legal* regime is desirable, is inevitably affected by the question whether such a regime is possible. Thus, one important element in what should be an ongoing dialogue about the extent to which we are, or want to be, a culturally pluralist society must be the examination of available strategies for implementing pluralism at the level of legal rules.[21] Most frequently, cultural pluralism is pursued via discretionary or categorical techniques.[22]

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diversities tolerated by the First Amendment under one flag." *DeFunis v. Odegaard*, 416 U.S. 312, 334 (1974) (Douglas, J., dissenting) (emphasis added).

19. In addition, singling out those aspects of culture for special protection may itself be an expression of Eurocentrism. Other values, such as closeness te the land, or communal styles of living, may be equally or even more important in other cultures.

20. Robert Cover most persuasively characterized law's coercive power as violence. Robert M. Cover, *Violence and the Word*, 95 Yale L. J. 1601 (1986).

21. Legal mechanisms that foster cultural diversity may themselves exhibit an individualist or a group-regarding focus. In this Article "pluralism" is a generic term that denotes the goal of diversity rather than any specific means of achieving it. In contrast, for example, Robert Post associates "pluralism" with group-based approaches and characterizes as "individualist" a legal regime that pursues diversity values by focusing on the individual. See Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 Cal. L. Rev. 297 (1988).

Both the individualist and the group-rights strategies present the potential for conflict between the individual's and the group's interests along the dimension of cultural diversity. See, for example, Martha Minow, *Pluralisms*, 21 Com. L. Rev. 965, 968-70 (1989) (discussing group and individual interests at stake in *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); Post, 76 Cal. L. Rev. at 303-04; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (pitting tribal interest in self-determination against a woman's interest in freedom from sex discrimination).

22. An additional option that this Article does not explore would be accession by the majority to complete self-determination and self-governance by a subordinate group. See Minow,

First, policymakers may attempt to be more sensitive to the cultural perspectives of those affected by their decisions. For example, congressional drafters might have informed themselves more fully on the ways traditional Navajo would view their participation in the process of claiming an exemption from the policy of relocation. Perhaps another, more culturally appropriate method of providing the equivalent of life estates could have been identified. In general, the broad discretion inherent in the act of policymaking renders this area of the law a fertile ground for the accommodation of cultural differences.[23]

Second, officials charged with the implementation and enforcement of laws often are granted considerable discretion, which they can and sometimes do exercise with an eye toward cultural diversity.[24] In the case of the Navajo-Hopi relocation program, for example, the Office of Navajo and Hopi Relocation never has pursued involuntary relocation of individuals who stated they would not move as directed by the Navajo-Hopi Relocation Act.[25] Though discretionary enforcement generally has more critics than proponents, it remains an *available* technique for preserving cultural autonomy.[26]

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21 Conn. L. Rev. at 970-71 (cited in note 21). I assume, for the sake of debate in this Article, that the (culturally defined) majority wishes to, and will, retain ultimate control over cultural subgroups. Thus the realm of legal options under consideration is limited by the presumed existence of a social hierarchy so defined.

23. See Martha Minow, *Foreword: Justice Engendered,* 101 Harv. L. Rev. 10, 70-95 (1987).

24. However, much of the standard literature has been overtly or implicitly critical of discretion in enforcement. See generally Kenneth C. Davis, *Discretionary Justice; A Preliminary Inquiry* (L.S.U., 1969); Kenneth C. Davis, *Police Discretion* (West, 1975); Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey* (Stanford U., 1973); Denis J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford U., 1986); George C. Christie, *An Essay on Discretion,* 1986 Duke L. J. 747; Ronald Dworkin, *The Model of Rules,* 35 U. Chi. L. Rev. 14 (1967), reprinted in Ronald Dworkin, *Taking Rights Seriously* 14 (Harvard U., 1977); Symposium, *Discretion in Law Enforcement,* L. & Contemp. Probs. 1 (Autumn 1984).

25. Navajo-Hopi Relocation Housing Program Reauthorization Act of 1991, Hearings on S. 1720 before the Senate Select Committee on Indian Affairs, 102d Cong., 1st Sess. 19 (1991) (statement of Carl J. Kunasek, Commissioner, Office of Navajo and Hopi Indian Relocation). However, the ONHIR intends to increase its pressure on residents of partitioned lands to move "voluntarily." Id. at 19-20.

26. Criticism of discretion as inimical to cultural pluralist values can be found in American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (Hill & Wang, 1971); Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 Wis. L. Rev. 1359; Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women,* 7 Harv. Women's L. J. 57 (1984). Proponents of discretion as a vehicle for promoting cultural diversity include Joel F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (Russell Sage Foundation, 1986); Harold E. Pepinsky, *Better Living Through Police Discretion,* L. & Contemp. Probs. 249 (Autumn 1984).

Each of these first two options may be enhanced by giving focused consideration to subjective experience; it can illuminate otherwise hidden social and cultural factors that affect normative judgment in these areas of legal discretion. The first step in understanding these covert influences is to identify the experiential boundaries of one's own normative orientation.[27] Second, one should seek out information concerning experiences, and the generalizations built upon them, that are different from one's own. Attending to others' stories is one important and increasingly recognized means of expanding one's experiential base and thus of promoting the adoption of pluralist policies and influencing the exercise of discretion in law in ways that accommodate cultural diversity. By illuminating others' visions of reality and of life's purposes and ideals, storytelling can dislodge existing mindsets and expose members of the dominant culture to the richness of experience diversity has to offer.[28] The decisionmaker who

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27. Note that the relationship between subjective experience and the normative is not unidirectional. Norms impact subjective experience as much as experience influences norms. Consider, for example, the phenomenon of consciousness-raising. The term refers te a sequence of events in which the way one describes one's own experience changes over time as a consequence of evolution in the normative lens through which the experiences in question are viewed. This change in normative framework can affect experience so deeply tbat the individual may feel compelled to disavow the accuracy of any earlier characterization of "what happened." In a sense, the experience as later understood and described is not the same experience as tlie earlier one. See Barbara Flagg, *Women's Narratives, Women's Story*, 59 U. Cin. L. Rev. 147, 149-51 (1990) (book review).

28. Storytelling is an expansive term that has been described as encompassing:

> at least three different subjects: the place in legal education and doctrine of the personal stories of actual people; the stories that legal doctrines tell about the world, its problems and its potential; and the way in which stories are or can be used strategically as a method to enhance the quality of communication between actors in legal settings such as law offices and courtrooms.

Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 Rutgers L. J. 79, 80-81 (1991) (book review). I emphasize here the recounting of individuals' actual, lived experience and its impact on legal doctrine. The voluminous and rapidly expanding literature on legal sterytelling also includes Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 Mich. L. Rev. 2459 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 Va. L. Rev. 95 (1990); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511 (1992); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. Cal. L. Rev. 2231 (1992); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 Mich. L. Rev. 2073 (1989); Gerald Torres and Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L. J. 625; Rebin West, *Love, Rage and Legal Theory*, 1 Yale J. L. & Feminism 101 (1989). Perhaps the paradigm of storytelling in legal analysis is Patricia J. Williams, *The Alchemy of Race and Rights* (Harvard U., 1991).

takes a variety of experiential perspectives into account has thereby improved her prospects of reaching more informed, fully considered, and therefore more satisfactory normative judgments than would have been the case had she relied on her own experience alone.[29] Expanding the range of experiential perspectives upon which decisions are based can help reduce the impact of unexamined and perhaps unwanted cultural and social influences on discretionary policymaking and policy implementation.[30] Storytelling also can illuminate the harms of existing practices and laws as they are experienced by members of subordinate cultures; so employed, outsiders' stories can engage the conscience of those in power in the direction of more inclusive policymaking and practice.[31] The non-

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29. For example, even though race is a highly salient element of nearly all social interactions, white people tend not to identify as a racial characteristic the whiteness of other whites. As a result, we often associate the notion of race, and racial issues, with people of color. When we attempt to think through racial issues, then, we are much too likely to consider our racially contingent perspective neutral, and to identify the perspectives of people of color as "biased" or "self-interested." See Flagg, 91 Mich. L. Rev. at 969-79 (cited in note 10). Following the general lines set out in the text, we should acquire the habit of identifying ourselves and our judgments as distinctively white, and at the same time should seek to learn about and try te understand the perspectives of nonwhites. The broader base this approach provides can help prevent the unwitting imposition of white norms in circumstances in which race-specific criteria are disfavored, or can contribute to the formation of a sounder basis for their adoption when that is the appropriate course of action.

30. In James Boyd White's words:

> Reading texts composed by other minds in other worlds can help us see more clearly (what is otherwise nearly invisible) the force and meaning of the habits of mind and language in which we have been brought up, as lawyers and as people, and to which we shall in all likelihood remain unconscious unless led to perceive or imagine other worlds. We can thus learn to read humanistic texts with an eye to understanding: the language and culture in which they are composed; the art by which actors in the worlds defined by these languages (and the authors of texts written in them) struggle to come to torms with them; and the kind of ethical and political relations that speakers within the world of the text, and the author of the text in his writing of it, create with their respective interlocutors. In all three respects we can hope to find in them a ground for the criticism of our own world, of our own texts, and of our own relations with others.

James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 Harv. L. Rev. 2014, 2023 (1989) (book review).

The law and literature movement, of which James Boyd White's work is an example, places somewhat different emphasis on the relation between legal analysis and storytelling than do tbe works cited in noto 28. See Baron, 23 Rutgers L. J. at 81 n.15 (cited in note 28) (explaining that "the precise relationship between the storytelling and law and literature 'movements' remains unclear"). For examples of the law and literature approach, see James Boyd White, *Heracles' Bow* (U. of Wis., 1985); Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4 (1983); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 Mich. L. Rev. 543 (1988); Symposium, *Law and Literature*, 60 Tex. L. Rev. 373 (1982); Symposium, *Law and Literature*, 39 Mercer L. Rov. 739 (1988). A compilation of sources in both the storytelling and law and literature traditions can be found in James R. Elkins, *A Bibliography of Narrative*, 40 J. Legal Educ. 203 (1990).

31. Some of the literature concerning the regulation of racist speech provides the most striking examples of the use of stories to illuminate experienced harms and so to prod the

coercive character of narrative makes it especially well suited to the task of influencing discretionary decisionmaking.

However, the relative lack of constraint inherent in discretionary judgment and storytelling, and in other perspective-broadening devices as well, marks the weakness of each as techniques for affecting social policy. Anti-assimilationist policies can be effectuated through the discretion of members of the dominant culture only to the extent that those persons are aware of the existence of cultural norms other than their own, capable of comprehending unfamiliar ways of seeing the world, willing to take others' norms seriously as proper guides for action, and flexible and deferential enough to implement pluralist insights in ways that are acceptable to members of the subordinate group.[32] In practice, an expanded base of experiential information can affect social policy only to the extent that insiders permit. Neither anti-assimilationist purposes nor techniques for broadening experiential perspectives entails a *binding* commitment to achieving cultural pluralism on the part of the majority culture.[33]

Consequently, some commentators have advocated a third strategy for implementing pluralism: legal doctrines that mandate different treatment for members of different groups.[34] The potential benefit of this approach is evident: under an overtly plural legal re-

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conscience of the (white) majority. See, for example, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L. J. 431; Matsuda, 87 Mich. L. Rev. 2320 (cited in note 28).

32. The tendency of members of the dominant culture to exercise discretion in assimilationist ways accounts in part for the interest of some minority scholars in defending rights-based approaches to law. See, for example, Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1381-84 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 303-07 (1987); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9, 40-44 (1989); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 413 (1987); Rebert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 L. & Ineq. J. 103 (1987).

33. For more extended discussion of the ways discretion impacts pluralist values, see generally the sources cited in note 26.

34. Examples of this approach include: some sex-specific classifications, such as pregnancy disability leave; overtly race-dependent application of existing legal doctrines, see, for example, Maclin, 26 Valp. U. L. Rev. 243 (cited in note 9) (arguing that race should be taken into account in Fourth Amendment seizure cases); nonremedial race-conscious "affirmative action," see Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986), and Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L. J. 705; and religion-based exemptions from otherwise applicable legal requirements, as in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

gime,[35] no individual need be held to standards that are not her own, culturally speaking. The value of autonomy, at least, would be fully realized.[36] Each would be subject only to the commands of her own cultural norms.[37]

At the same time, the weaknesses of the different treatment, or categorical, strategy for achieving multiculturalism are equally evident. Some bases of classification are just culturally impermissible; different treatment on the basis of race, for example, is often thought to violate a central equality norm.[38] Even when a classification is not problematic on its face, different treatment almost always carries with it a message of inferiority.[39] Different treatment presupposes a norm from which those who are "different" diverge; since the majority standard constitutes that norm, minority values and the different treatment that implements them generally are cast as secondary, deriva-

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35. The categorical strategy is closely aligned with a group-rights approach to diversity. See Post, 76 Cal. L. Rev. at 305 (cited in note 21).

36. There is considerable disagreement whether equality can be achieved in a regime of categorical differences; the classic example is the debate over the different treatment of women, as, for instance, in the case of pregnancy disability leave. The two sides are set forth in Linda J. Krieger and Patricia N. Cooney, *The* Miller-Wohl *Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U. L. Rev. 513 (1983) (stating that biological differences mandate different treatment designed to yield equal outcomes), and Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984-85) (arguing that treatment of pregnancy-related disabilities in the employment context should be based on an androgynous model). It should be noted that Wendy Williams's approach—seeking to formulate gender-neutral solutions that take into account the needs of both women and men—is a variant of option number one, the use of discretion in policymaking to accommodate cultural differences. Williams's analysis should make it clear that it is possible te foster pluralism within the confines of gender-neutral laws.

Of course, the pregnancy disability debate is concerned with biological differences between women and men. Robin West is a leading proponent of the view that there are, in addition, important cultural differences between the sexes (that perhaps are themselves biologically based). See, for example, Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women's L. J. 81 (1987).

37. Thus, regimes of categorical differentiation are distinct from regimes of legal pluralism, defined as "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs." John Griffiths, *What Is Legal Pluralism?*, 24 J. Legal Pluralism 1, 2 (1986). See also Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y Rev. 869 (1988).

38. See, for example, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that all raco-specific classifications, including those designed to benefit racial minorities, are subject to strict judicial scrutiny). This colorblindness conception of equality has been criticized in, for example, T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. Colo. L. Rev. 325 (1992); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Colum. L. Rev. 1060 (1991); Flagg, 91 Mich. L. Rev. at 1010-13 (cited in note 10); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 Stan. L. Rev. 1 (1991); Gary Peller, *Race Consciousness*, 1990 Duke L. J. 758.

39. This point is developed fully in Martha Minow, *Making All the Difference* 49-78 (Cornell U., 1990).

tive, and at least to that extent, inferior.[40] Equality values are again compromised, though in a different sense. In addition, attempts at categorical pluralism are necessarily assimilationist to the extent that a single criterion or set of criteria is necessary to decide which differences do, and do not, "count."[41]

The inherent deficiencies of the discretionary and categorical strategies for implementing cultural pluralism in law impel a search for alternatives. Several constitutional doctrines appear to embody a fourth approach—the incorporation of subjective experience as an element of legal doctrine.[42] This technique has the potential, at least on its face, to provide for the effectuation of cultural pluralism within the confines of a single rule uniformly applicable to all. Thus, it seems to carry neither of the disadvantages described in connection with the discretionary and categorical strategies. In contrast with the discretionary approach, employing subjective experience as a component of legal doctrine would leave a decisionmaker no choice but to respect the variety of individual experiences. At the same time, the indeterminate content of that subjective component would circumvent the normative difficulties associated with the categorical approach.[43]

For example, housing occupancy ordinances frequently are drafted in ways that disadvantage lesbian and gay families. Such ordinances often treat married and unmarried couples differently; because legal marriage is not an option for same-sex couples, their housing options are constrained by provisions regulating the number of "unrelated persons" who may occupy a dwelling unit.[44] The first discretionary strategy would encourage policymakers to formulate occupancy regulations in a more inclusive manner; for instance, one might substitute "domestic partners" for "married couple" in existing

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40. Id.

41. See Post, 76 Cal. L. Rev. at 314 (cited in note 21).

42. See, for example, text accompanying note 13.

43. However, because pluralist values are mediated through individual experience, this fourth option does carry the risk of subordinating the interests of a cultural subgroup to the interests of the individual.

44. For example, University City, Missouri defines "family" as "[a]n individual or married couple and/or the children thereof with not more than two (2) other persons related directly to the individual er married couple by blood or marriage; or a group of not more than three (3) persons, living together as a single housekeeping unit in a dwelling unit." University City, Mo., Property Maintenance Code § PM-201.0 (1992). A separate provision limits occupancy of a dwelling unit to a single family, as defined. Id. § PM-403.4 (1992). Together, these ordinances permit individual adults and married couples to reside as a family with any number of their children, but unmarried couples, including lesbians and gays, may not have more than one child living with them. These provisions are typical of housing regulations in the St. Louis, Missouri metropolitan area.

definitions of "family."[45] Under the second discretionary alternative, officials responsible for enforcing occupancy provisions would simply "look the other way" with respect to lesbian and gay families. It's evident, however, that neither of these approaches offers security; each is effective only to the extent that the authorities are willing and politically able to pursue it. The third, categorical, option would be illustrated in this setting by a provision that limited the category of domestic partners to same-sex couples, for example, by establishing a city registry for that purpose.[46] This approach is designed to place committed homosexual relationships on a par with heterosexual marriages. The normative dangers of this strategy should be apparent; undoubtedly many would view such an ordinance as granting "special rights" to lesbians and gay men. Finally, the fourth, subjective, means of implementing pluralist objectives would eschew any normative definition of "family"; it would allow individuals to define family relationships for themselves.[47] This subjective approach seems to combine security and even-handedness. Every family unit would be afforded the same recognition, and none could be seen as having been singled out for "special treatment."

Of course, *legislation* incorporating a subjective definition of "family" is just another variant of the first strategy—the pursuit of pluralism in policymaking. In contrast, a subjective definition of constitutionally protected family interests would have more far-reaching consequences. In its capacity as a guarantor of individual rights, setting the limits of permissible government intrusion on individual autonomy, constitutional law is a uniquely effective arena in which to employ the subjective experience strategy for implementing multiculturalism. Thus, this Article will focus on the use of subjective experience as a component of constitutional doctrine.

The logical way to begin examining the strategy of appeals to subjectivity is by exploring the settings in which it already appears to

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45. In the example cited in note 44, for instance, the revised ordinance would read: "*Family*: An individual or two (2) domestic partners and/or the children thereof. . . ." I use "domestic partners" in this example to include same-sex couples and unmarried heterosexuals.

46. To date, domestic partnership ordinances have defined the category in ways inclusive of heterosexual partnerships. See, for example, Minneapolis Municipal Code, Title 7, Ch. 142.20 (1991); San Francisco Admin. Code § 62.2 (1991). Some private corporations, however, have extended domestic partnership benefits only to partners of homosexual employees. See Sandra Sugawara, *Firm Widens Benefits for Gay Employees*, Washington Post A1 (Sept. 7, 1991).

47. Until September 1993, St. Charles, Missouri, defined "family" as "[a]n individual or two (2) or more persons who are related by blood or marriage living together and occupying a single housekeeping unit, or a group of persons living together by joint agreement and occupying a single housekeeping unit." St. Charles, Mo., Code § 30-5 (1992).

be in use. Part III of this Article examines several representative constitutional doctrines and reaches the conclusion that in application, the strategy falls well short of its promise; in practice, doctrines that seem to incorporate appeals to subjective experience tend to have anti-pluralist consequences. However, consideration of the subjective experience strategy should not be abandoned too hastily. Part IV speculates on the reasons existing attempts to employ this approach have been unsuccessful in pluralist terms and sets forth guidelines for its more productive use. As this Article will show, subjective experience can be a fruitful doctrinal mechanism, if employed with caution in the context of pluralism-regarding constitutional provisions.

III. A REVIEW OF REPRESENTATIVE CASES

This Part contains descriptive analyses of representative constitutional cases in which the Supreme Court, or individual Justices, seemingly have appealed to subjective experience as a ground of decision.[48] Subjective experience appears to have been employed as an element of doctrine in two substantive areas: the Fourth Amendment subjective expectation of privacy cases and certain Establishment Clause cases, in which government action is measured against a test, proposed by Justice O'Connor, that regards as impermissible activity that sends messages of endorsement of religion.[49]

The Fourth Amendment is a pluralism-regarding constitutional provision only in the same sense as any individual rights guarantee: it is desigued to limit the manner in which government may intrude on

48. There are, of course, other constitutional doctrines that appear to appeal to subjectivity; the question whether an individual has waived his or her *Miranda* rights is one example. See *North Carolina v. Butler*, 441 U.S. 369 (1979) (stating that the relevant test is "whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case"). In general, the doctrines that seemingly appeal to subjective experience, but are not reviewed in this Article, exhibit patterns similar to those that are described herein.

49. Justice O'Connor's "messages of endorsement" test has not been adopted by a majority of the Court, but it has influenced the majority's analysis in several cases. See, for example, *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting from Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488-89 (1986) (referring to a "message of state endorsement of religion" and citing O'Connor's *Lynch* concurrence with approval); *Grand Rapids Sehool Dist. v. Ball*, 473 U.S. 373, 389 (1985) (stating that when a message of endorsement is conveyed, "a core purpose of the Establishment Clause is violated," and citing Justice O'Connor's *Lynch* concurrence with approval); *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quoting O'Connor's *Lynch* concurrence with approval).

individuals' lives.[50] At the same time, the doctrines that implement Fourth Amendment values must be responsive to the need of law enforcement officials for bright-line rules that efficiently guide conduct in the field.[51] In this sense, the Fourth Amendment is not a provision deeply infused with pluralist norms. Nevertheless, the existing doctrine that defines a Fourth Amendment "search" purports to incorporate a subjective component. Part III.A examines and evaluates this ostensible doctrinal appeal to subjectivity; I conclude that in its actual operation, this doctrinal strategy has *anti*-pluralist consequences.

In contrast with the Fourth Amendment, the Religion Clauses clearly are designed to promote pluralist values.[52] Thus, the Establishment Clause should provide fertile ground for the incorporation of subjective experience as a doctrinal component. However, Part III.B describes the ways the "effects" prong of Justice O'Connor's "messages of endorsement" test also falls short with respect to pluralist values.

Finally, Part III.C describes three unrelated cases in which individual Justices appealed to subjective experience in support of positions they articulated in dissent. Of course, none of these cases represents the full doctrinal development of the element of subjectivity to which the appeal was made. Nevertheless, each will be useful in Part IV for fleshing out the implications of the Fourth Amendment and Establishment Clause cases with respect to the circumstances in which appeal to subjective experience is appropriate, and the guidelines that should be followed when it is.

A. The Fourth Amendment: Subjective Expectations of Privacy

The Fourth Amendment provides:

> 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.[53]

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50. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 367 (1974).

51. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1473 (1985).

52. See Karst, 64 N.C. L. Rev. at 357-61 (cited in note 10); Michael W. McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1, 1.

53. U.S. Const., Amend. IV.

The warrant, probable cause, and reasonableness requirements of the Fourth Amendment apply only to governmental searches and seizures; accordingly, whether an official activity is a "search" (or a "seizure") is a crucial first step in determining whether Fourth Amendment guarantees have been violated.[54]

The Supreme Court has recognized that not every official invasion or examination of one's person or property is a "search" in the constitutional sense. The current test was first set forth in *Katz v. United States*,[55] which addressed the question whether electronic surveillance of a telephone conversation constitutes a Fourth Amendment search. The case required the Court to reconsider its previous focus on the concept of "constitutionally protected areas" because the facts presented no physical intrusion into such an area: the FBI had attached an electronic listening device to the exterior of a public telephone booth regularly used by Katz. The Court concluded that a trespass-like analysis was no longer appropriate:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[56]

Therefore, even though Katz was visible to others through the glass of the telephone booth, his conversations were what he intended to keep private, and so he did not automatically relinquish protection of his conversations by using a public telephone. Moreover, the Court held that physical intrusion was not a necessary condition of a Fourth Amendment search.[57]

The Court's new analysis of what constitutes a "search" was elaborated by Justice Harlan in a concurring opinion:

> [T]here 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." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being

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54. A comprehensive treatment of the relevant Fourth Amendment doctrine and principles can be found in Wayne R. LaFave, 1 *Search and Seizure: A Treatise on the Fourth Amendment* §§ 2.1-2.7 (West, 2d ed. 1987).

55. 389 U.S. 347 (1967).

56. Id. at 351-52 (citations omitted).

57. Id. at 353.

> overheard, for the expectation of privacy under the circumstances would be unreasonable.[58]

Justice Harlan's formulation of the *Katz* rule soon became the version most often adopted by the lower courts[59] and was accepted by a majority of the Supreme Court in 1979.[60]

Note first that the "actual (subjective) expectation" prong of Justice Harlan's test is not genuinely subjective.[61] The requirement is that the individual "have exhibited" a subjective expectation of privacy, which is to say that the existence of such an expectation is tested ultimately by an objective standard—the individual's conduct.[62] Claims of actual subjective expectations of privacy that arise in connection with types of behavior ordinarily thought not to manifest such expectations will not be credited. For example, a grower who placed a marijuana plant on his front porch, in a location easily visible from the street, would not be heard to argue that he had a subjective

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58. Id. at 361 (Harlan, J., concurring). Note, however, that Justice Harlan soon repudiated the "subjective" component of his *Katz* formulation. *United States v. White*, 401 U.S. 745 (1971), presented the question whether government eavesdropping on a conversation via a microphone voluntarily attached to one of the participants constituted a search in the Fourth Amendment sense. The Court concluded that it did not; a plurality reasoned that the defendant had assnmed the risk of exposure when he voluntarily conveyed information to another. Justice Harlan wrote in dissent:

> The analysis must, in my view, transcend the search for subjective expectations or legal attributions of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translato into rules the customs and values of the past and present.
>
> Smce it is the task of the law to form and project, as well as to mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.
>
> The question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.

Id. at 786 (Harlan, J., dissenting).

This argument will be considered further at notes 208-13 and accompanying text.

59. See LaFave, 1 *Search and Seizure* § 2.1(b) at 306 & n.48 (cited in note 54).

60. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

61. See Eric Dean Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. Rev. 725, 743-44 (1985). This is not to suggest that this element can or should be purely subjective in the strict sense.

62. James Tomkovicz has noted as well that there is a choice to be made between the expectation of the particular individual and the expectations of "people in general." James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 Hastings L. J. 645, 653 (1985). The latter approach would convert the first prong into the equivalent of a "reasonable person" standard. Id. at 678 n.142. See note 205 and accompanying text.

expectation of privacy because he didn't think anyone would notice it.[63]

The second prong of Justice Harlan's test requires that a subjective expectation of privacy "be one that society is prepared to recognize as 'reasonable.'" There are two distinct concepts of reasonableness embedded here.[64] The example Justice Harlan presents, a conversation held where others might overhear, represents what I'll call empirical unreasonableness: even a subjectively held expectation of privacy may be characterized as unreasonable if, in the observer's view, the empirical risk of exposure is significantly greater than the individual subject realizes. For example, it's empirically unreasonable to assume complete privacy in a conversation carried on in the presence of bystanders. However, there is another sense of unreasonableness that might appropriately be applied in this context. One might pursue the normative inquiry whether a given subjective expectation of privacy is one that *should* be afforded constitutional protection. That is, a subjective expectation of privacy is normatively reasonable if, and only if, it represents the sort of interest the Fourth Amendment is designed to protect.[65]

This inherent ambiguity in the notion of reasonableness accounts for the tendency of courts to conflate the two parts of Justice Harlan's *Katz* test.[66] The *first* prong implicates an assessment of reasonableness in the empirical sense, as a means of resolving the question whether an individual has *exhibited* a subjective expectation

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63. The implications of the fact that subjective experience must be "exhibited" in some objectively identifiable manner will be explored in the text accompanying notes 223-40.

64. Neither should be confused with the general Fourth Amendment requirement that a search or seizure be "reasonable"; the issue here is whether Fourth Amendment requirements are applicable at all.

65. This distinction between empirical and normative reasonableness was recognized, in different terms, in Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U. L. Rev. 968, 982-83 (1968). Mary Coombs appears to employ the terms "empirical" and "normative" in the sense nsed in this Article. See Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Cal. L. Rev. 1593, 1614 (1987).

66. See Wayne R. LaFave, *The Forgotten Motto of* Obsta Principiis *in Fourth Amendment Jurisprudence*, 28 Ariz. L. Rev. 291, 297 (1986).

The first prong briefly was afforded independent significance in *California v. Ciraolo*, 476 U.S. 207 (1986), in which Chief Justice Rehnquist apparently conceded that building a double fence—the outer one six feet high and the inner one ten feet high—manifested a subjective expectation of privacy with respect to the marijuana plants growing within. Id. at 211. However, the Court immediately cast doubt on its own assessment, arguing (a) that it need not address the issue because the state had conceded the point, (b) that the plants might have been visible from the top of a double-decker bus, and (c) intimating that manifesting a subjective expectation of privacy in regard to observations from the ground might not be dispositive of the question as to observations from the air. Id. at 211-12. See LaFave, 28 Ariz. L. Rev. at 297-98.

of privacy.[67] The second prong should be concerned only with the normative dimension of reasonableness; at this stage the analysis should explicitly articulate and address relevant Fourth Amendment values.[68] However, an examination of the cases in which the Supreme Court has resolved the question whether a subjectively held expectation of privacy is "reasonable" reveals that the Court almost always relies on its empirical, rather than its normative, connotation.[69]

In some cases the Court has resolved the empirical reasonableness question by relying on the fact that the individual *voluntarily* exposed relevant information to public view. For example, in *United States v. Knotts*,[70] narcotics investigators had placed a beeper inside a container of chemicals they believed to be destined for use in the manufacture of illicit drugs. The beeper enabled them to trace the container from its point of purchase to its ultimate destination at a secluded cabin. In regard to the question whether the government's use of the beeper to track the defendant's automobile constituted a search for Fourth Amendment purposes, the Court said:

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.[71]

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67. To spell it out, characterizing behavior as empirically reasonable in this sense is to say that the behavior manifests a subjective intent to preserve privacy; describing conduct as empirically unreasonable is te say that a reasonable person who subjectively intended to keep a matter private would not have behaved in that manner because the empirical risk of exposure was too great.

68. Wayne LaFave has argued quite persuasively that the normative inquiry should be the focus of the Court's analysis. LaFave, 28 Ariz. L. Rev. at 299 (cited in note 66) (quoting Erwin Griswold, *Search and Seizure: A Dilemma of the Supreme Court* 39 (U. of Nebraska, 1975), and Amsterdam, 58 Minn. L. Rev. at 403 (cited in note 50)). See also Justice Harlan's dissent in *White*, quoted in relevant part in note 58. However, these commentators appear to take the view that the normative inquiry should be the *exclusive* avenue of analysis in these cases, a position I do not fully endorse. See notes 208-13 and accompanying text.

69. For representative general criticism of the *Katz* test, see Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L. J. 329, 334-38 (1973); Edmund W. Kitch, Katz v. United States: *The Limits of the Fourth Amendment*, 1968 S. Ct. Rev. 133, 137-40; Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229, 1248-56 (1983); Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 Vand. L. Rev. 1077, 1086-96 (1987).

70. 460 U.S. 276 (1983).

71. Id. at 281-82. The Court's implicit claim of reliance on empirically reasonable expectations was underscored a year later in *United States v. Karo*, 468 U.S. 705 (1984), which held that

Similarly, in *California v. Greenwood*,[72] the Court held that individuals have no reasonable expectation of privacy in the garbage placed outside the home for collection by a regular garbage collection service. The Court reasoned that "respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."[73]

Empirical reasonableness analysis has played a subsidiary role in another line of cases, in which defendants voluntarily revealed to third parties information that in turn was passed along to government authorities. The disposition of these cases has rested primarily on a normative analysis: the Court has adopted the view that in conveying the information in question to another, the individual assumes the risk that it then may be shared with others, including government officials.[74] However, an empirical element is present as well. The scope of the risk the individual is deemed to have assumed logically must be coextensive with the extent of the information voluntarily conveyed.[75] Thus, it's important to determine the range of information actually voluntarily conveyed. In *United States v. Miller*,[76] for instance, the prosecution introduced various bank records in support of its case that the defendant had operated an illegal distilling operation. Regarding the defendant's motion to suppress the bank documents, the Supreme Court concluded that he had no legitimate[77]

"the monitoring of a beeper in a private residence, *a location not open to visual surveillance*," constitutos a search with respect to those having a privacy interest in the residence. Id. at 714 (emphasis added). It's not entirely clear, however, whether the location of the beeper within a residence, or the fact that it revealed information "that could not have been obtained through visual surveillance," was of primary significance in *Karo*. See LaFave, 1 *Search and Seizure* § 2.7(d) at 530-31 (citod in note 54).

72. 486 U.S. 35 (1988).

73. Id. at 40 (footnotes omittod).

74. On this assumption of risk reasoning, see Tracey Machin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 Am. Crim. L. Rev. 669, 681-83 (1988). See generally JoAnn Guzik, Note, *The Assumption of Risk Doctrine: Erosion of Fourth Amendment Protection Through Fictitious Consent to Search and Seizure*, 22 Santa Clara L. Rev. 1051 (1982).

75. Consequently, if, as this Article will argue, the Court's empirical assessment is mistaken, the individual may be seen to have assumed a greater (or lesser) risk of exposure than actually is warranted. See text accompanying notos 92-110.

76. 425 U.S. 435 (1976).

77. Clark Cunningham has pointed out that *Miller* marks the point at which the Court began to substitute "legitimato" for "reasonable" expectations of privacy. Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 Iowa L. Rev. 541, 578-83 (1988). While my angle of analysis is somewhat different than his, I agree that the shift has significance. In my view, it exacerbates the confusion

expectation of privacy in them: "All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."[78] Similarly, in *Smith v. Maryland*[79] the Court held that an individual has no reasonable expectation of privacy in the numbers dialed from the telephone in his own home. The investigative activity at issue in that case was the installation, at a central telephone office, of a pen register on the defendant's home telephone line. Again, the Court concluded that the information in question had been voluntarily exposed to others.[80]

A second, distinct aspect of the question of empirical reasonableness is illustrated by cases in which the Court concluded that measures taken to preserve privacy were not effective as an empirical matter. For example, *Oliver v. United States*[81] addressed the continuing post-*Katz* validity of the "open fields" doctrine, which denies Fourth Amendment protection to areas so characterized.[82] Narcotics investigators entered Oliver's property to search for marijuana plants in spite of a locked entrance gate and posted "No Trespassing" signs. In the course of reaffirming the open fields rule, the Court touched on empirical reasonableness:

> [A]s a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner

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between empirical and normative reasonableness to the extent that "legitimate" has a distinctly normative connotation.

78. *Miller*, 425 U.S. at 442.

79. 442 U.S. 735 (1979).

80. The Court opined: "When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed." Id. at 744.

A third case follows this pattern as well. In *California v. Greenwood*, 486 U.S. 35 (1988), the Court supplementod the "exposure to the public" argument described above in the text accompanying notes 70-73 with an assumption of the risk approach: "[R]espondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collecter, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so." Id. at 40.

81. 466 U.S. 170 (1984).

82. The "open fields" doctrine was set forth in *Hester v. United States*, 265 U.S. 57, 59 (1924). For an argument that the doctrine should not have survived *Katz*, see LaFave, 1 *Search and Seizure* § 2.4(a) at 426-29 (cited in note 54).

> Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air.[83]

In *California v. Ciraolo*[84] the Court, apparently with some reluctance,[85] acknowledged the existence of a subjective expectation of privacy in a back yard completely enclosed by a six-foot outer fence and a ten-foot inner fence. However, defendant's expectation of privacy was judged unreasonable with respect to observation of the enclosure by police from an aircraft flying at an altitude of 1000 feet: "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed."[86] Even the individual who erects the elaborate fencing present in this case is not, the Court said, "'entitled to assume' his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard."[87]

The most recent in this line of subjective expectation of privacy cases is also the one that most explicitly turns on a question of empirical reasonableness. The issue presented in *Florida v. Riley*[88] was whether surveillance of a greenhouse and its contents from a helicopter flying at an altitude of 400 feet constituted a Fourth Amendment

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83. 466 U.S. at 179. At the same time, the Court proffered a more explicitly normative basis for the holding: "There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." Id. For a discussion criticizing both the empirical and normative aspects of *Oliver*, see generally Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. Pitt. L. Rev. 1 (1986).

84. 476 U.S. 207 (1986).

85. See note 66.

86. *Ciraolo*, 476 U.S. at 213-14. The relevance of the observer's vantage point was underscored in *Florida v. Riley*, 488 U.S. 445 (1989). A plurality of the Court indicated that a distinction should be made between subjective expectations of privacy with respect to observation from the ground and from the air:

> Riley no doubt intended and expected that his greenhouse would not be open te public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in *Ciraolo*, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet. . . .

Id. at 450 (plurality opinion). None of the remaining five Justices took issue with this vantage-point distinction, and indeed their analyses imply agreement with the plurality on this question.

87. *Ciraolo*, 476 U.S. at 214-15. In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), a case decided the same day as *Ciraolo*, the Court applied similar reasoning to the aerial surveillance by an administrative agency of a commercial chemical manufacturing complex, even though the surveillance technique required the use of a sophisticated and expensive aerial mapping camera. The complex, the Court held, was "open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras." Id. at 239.

88. 488 U.S. 445 (1989).

search. A plurality of the Court concluded that the defendant's subjective expectation of privacy was not reasonable, largely because the flight did not violate applicable flight regulations.[89] Five Justices, however, agreed that the proper inquiry was whether there was sufficient flight activity at 400 feet to render the defendant's subjective expectation of privacy from the air empirically unreasonable:

> If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.[90]

Nevertheless, the Court held that the surveillance was not a search for constitutional purposes because Justice O'Connor concluded that the defendant had not met his burden of proof with respect to the rarity of helicopter overflights.[91]

In sum, the Supreme Court repeatedly has found it appropriate to appeal to a notion of empirical reasonableness to defeat claims to Fourth Amendment protection. If, in the Court's judgment, there is a basis for concluding that information an individual subjectively desires to keep private nevertheless has been exposed to some segment of the public, or to a party to a business transaction, government acquisition of that information will not constitute a Fourth Amendment search. However, the Court's application of this empirical sense of reasonableness frequently is implausible.[92] In a clear majority of the

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89. Id. at 451 (White, J., writing for the plurality) (stating, "We would have a different case if flying at that altitude had been contrary to law or regulation."); id. at 452 (O'Connor, J., concurring) (stating, "In my view, the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations. . . ."); id. at 456 (Brennan, J., dissenting) (noting, "[The plurality] opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be.").

90. 488 U.S. at 455 (O'Connor, J., concurring). See also id. at 464-65 (Brennan, J., dissenting) (explaining that "I find little to disagree with in Justice O'Connor's cencurrence, apart from its closing paragraphs. A majority of the Court thus agrees that the fundamental inquiry is . . . whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet."); id. at 467 (Blackmun, J., dissenting) (stating that "Justice Brennan, the two Justices who have joined him, and Justice O'Connor all believe that the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet. Again, I agree.").

91. Id. at 455 (O'Connor, J., concurring). Justice O'Connor thus provided the fifth vote for the proposition that Riley's expectation of privacy was not reasonable.

92. Critical commentary on this aspect of the cases has been extensive. Examples include Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 Vand. L. Rev. 1289, 1313-17 (1981); John M. Burkoff, *When Is a Search Not a "Search?" Fourth*

above cases, the actual extent, or risk, of exposure of activities or information that the individual intended to keep private seems to have been significantly less than the Court apparently considered it to be.[93]

In three of these cases, *Miller*, *Smith*, and *Greenwood*, the voluntary activity at issue involved exposure of personal information, in the course of a routine business transaction, to the other party involved. Each case rested ultimately upon the normative judgment that the individual had assumed the risk, "in revealing his affairs to another, that the information [would] be conveyed by that person to the *Government*,"[94] a proposition that itself is the object of extensive

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Amendment Doublethink, 15 U. Toledo L. Rev. 515, 537-41 (1984); Clifford S. Fishman, *Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent*, 29 Cath. U. L. Rev. 557, 566-74 (1980); Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. Crim. L. & Criminol. 319, 329-33 (1984); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 Ind. L. J. 549, 564-67 (1990); Wayne R. LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. Crim. L. & Criminol. 1171, 1172-78 (1983); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 S. Ct. Rev. 173, 209-13; Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. Crim. L. & Criminol. 1, 24-53 (1989); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 Minn. L. Rov. 583, 598-623 (1989); David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 Minn. L. Rev. 563, 601-05 (1990); Tomkovicz, 36 Hastings L. J. at 690-93 (cited in note 62); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum. L. Rov. 1137, 1195-1209 (1987).

93. A recent empirical study provides some additional support for the argument that follows. Two researchers undertook to examine existing expectations of privacy by "obtain[ing] information about how people react to various types of investigations undertaken by the police." Christopher Slobogin and Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 Duke L. J. 727, 733 (1993). Subjects in the study were asked to rate on an "Intrusiveness Rating Scale" (ranging from 0, representing "Not At All Intrusive," to 100, representing "Extremely Intrusive") 50 hypothetical situations in which persons or property were searched or seized by government agents. Id. at 735-36. In addition, they were asked to assume that the individual, or owner of the property, at issue was innocent and that the search or seizure was nonconsensual. Id. at 736. The results of the survey were compiled to produce a ranking of the 50 hypotheticals, which revealed that, for example, "Looking in foliage in public park" was deemed least intrusive (Mean = 6.48; Rank = 1) and "Body cavity search at border" was seen as most intrusive (Mean = 90.14; Rank = 50). Id. at 738-39.

Because the survey tested attitudes regarding searches by government agents, it has a somewhat different focus than the arguments presented in this Article, which revolve around expectations concerning exposure of private information to the public. Nevertheless, the study constitutes an interesting addition to the already substantial criticism of the Court's interpretation of societal attitudes, and indirectly contributes to the argument that its empirical assessments often are erroneous as well.

94. *Miller*, 425 U.S. at 443 (emphasis added). The Court grounded this proposition in a series of previously decided "participant monitoring" cases, in which the Court held that the government did not conduct a Fourth Amendment search when one party to a conversation wore a concealed microphone. See *United States v. White*, 401 U.S. 745 (1971); *On Lee v. United States*, 343 U.S. 747 (1952).

criticism.[95] However, each outcome also turned on an empirical assessment of the *extent* of the voluntary disclosure;[96] these assessments are not persuasive.[97] In *Miller,* the government was interested in an overall pattern of activity that in all likelihood would not have been apparent to the bank's employees.[98] In *Smith,* the Court argued that telephone users in fact do not "harbor any general expectation that the numbers they dial will remain secret."[99] The accuracy of this claim depends on the actual practices of a given telephone company and the degree to which its practices are made apparent to the average service subscriber. The best evidence of each would seem to be the subscriber's telephone bill. If, as the Court's discussion in *Smith* suggests,[100] the telephone company ordinarily identified and billed individually for long distance but not local calls, the most empirically reasonable assumption would appear to be that no records of the latter were being kept. Finally, the Court's observation in *Greenwood* that the trash collector might have sorted through the trash left at

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For discussion of this aspect of the cases, see Cunningham, 73 Iowa L. Rev. at 581 (cited in note 77); Joseph D. Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement,* 69 J. Crim. L. & Criminol. 425, 438-44 (1978); Maclin, 25 Am. Crim. L. Rev. at 681-82 (cited in note 74); Guzik, Note, 22 Santa Clara L. Rev. at 1064-66 (cited in note 74).

95. It should be apparent that exposure to private individuals is not equivalent to exposure to the government in the perception of ordinary persons. "The fact that our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in adding to those risks." Amsterdam, 58 Minn. L. Rev. at 406 (cited in noto 50); "[T]he enormous power of government makes the potential consequences of its snooping into people's private lives far more ominous than those of snooping by a private individual or firm." Posner, 1979 S. Ct. Rev. at 176 (cited in noto 92);

> [In several cases the Court] failed to appreciate that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all," and that there is a dramatic difference, in privacy torms, between revealing bits and pieces of information sporadically to a small and often select group for a limited purpose and a focused police examination of the totality of that information regarding a particular individual.

LaFave, 28 Ariz. L. Rev. at 304 (cited in note 66) (quoting *Smith v. Maryland,* 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).

96. See text accompanying notes 74-80.

97. Justice Marshall set forth perhaps the best general statement of this criticism: "Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released te other persons for other purposes." *Smith,* 442 U.S. at 749 (Marshall, J., dissenting). See also LaFave, 28 Ariz L. Rev. at 297-99 (cited in note 66).

98. Slobogin and Schumacher's empirical study revealed a relatively high perception of intrusiveness regarding "Perusing bank records" by the police: Mean = 71.60; Rank = 38. Slobogin and Schumacher, 42 Duke L. J. at 738 (cited in noto 93).

99. *Smith,* 442 U.S. at 743.

100. See id. at 745 (arguing, in response to the contention that the tolephone company in that case usually did not record local calls, that "[t]he fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference").

curbside[101] does not appear to reflect reality. One might foresee, or be expected to foresee, the possibility that a trash collector, or other employees of the disposal company, might sift through garbage, but that is most likely to occur after one's discards have been commingled with those of others. It is far more likely that one's refuse would be searched by someone hoping to discover items of value, in which instance the seeker would be relatively unconcerned with the identity of the items' previous owner, than by an individual interested in uncovering information about the person who discarded the material searched.[102]

The remaining cases raised questions concerning the extent to which private information had been revealed to the *public*, either voluntarily or involuntarily through underestimation of the empirical chance that the matter in question would be exposed to public view. In most of these cases, the investigation that took place was much more focused and particularized than the scrutiny one would expect to result from exposure to the public.[103] In *Knotts*, for example, any member of the public could have observed the defendant traveling on public roads, but it's highly unlikely that any would have been interested in tracing his entire route from Minneapolis, Minnesota to Shell Lake, Wisconsin.[104] In *Oliver*, police had to bypass a locked gate and a "No Trespassing" sign to enter the suspect's property. To the extent that an ordinary member of the public who behaved similarly would have been subject to trespass sanctions, the Court's claim that the fields in question were accessible to the public greatly overstates the

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101. *Greenwood*, 486 U.S. at 40-41.

102. Searching celebrities' trash for personal information might be one exception. See *Editorial*, Washington Post A18 (July 10, 1975) (discussing the search of Henry Kissinger's garbage).

103. See LaFave, 28 Ariz. L. Rev. at 301 (cited in note 66). Similar reasoning applies to the cases in which information was voluntarily conveyed in the course of a business transaction. In *Miller*, for example, the official investigation was more focused than any bank observation would have been, because specific records were sought only subsequent to the development of other incriminating evidence; the bank records in that case would not have been meaningful standing alone. See *Miller*, 425 U.S. at 437-38.

104. In LaFave's words, "Only an army of bystanders, cenveniently strung out on the route and who not only 'wanted to look' but also wanted to pass on what they observed to the next in line, would—to use the language in *Knotts*—have sufficed to reveal all of these facts to the police." LaFave, 28 Ariz L. Rev. at 303-04 (cited in note 66). In addition, the Court's claim that the defendant's route over the public streets was a matter open to "anyone who wanted to look" was belied by the fact that at one point the pursuing officers lost visual contact with the suspect; they were able to resume the surveillance only with the aid of a helicopter, which was able to pick up the beeper sigual approximately an hour after it had been lost. *United States v. Knotts*, 460 U.S. 276, 278, 281 (1983).

practical risk of intrusion.[105] Similarly, in *Ciraolo* and *Riley* the investigative activity was conducted by air, in a relatively low-flying craft, and with particular attention to the defendants' property.[106] Persons flying in the ordinary course of events over the property at issue probably would have experienced difficulty identifying either the particular plot or the specific nature of the items claimed to be "visible" from the air:

> [T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against.[107]

Greenwood may provide the lone "exception to the rule"; there the Court's empirical assessment may have been relatively accurate.[108] Because the garbage at issue in *Greenwood* had been placed outdoors in plastic bags easily torn open by animals as well as humans, it

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105. In these two cases, Slobogin and Schumacher's study is somewhat at variance with the argument presented in the text. Their survey scored "Using a beeper to track car" at Mean = 54.46; Rank = 18, and "Search of cornfields surrounded by fence and 'No Trespassing' signs" at Mean = 56.58; Rank = 21. Slobogin and Schumacher, 42 Duke L. J. at 738 (cited in note 93). Note, however, that both have mean scores above 50.

106. *Dow Chemical* presents similar facts, with the exception that the aircraft was flying at higher altitudes, a disadvantage ameliorated by the use of a sophisticated aerial surveillance camera. See *Dow Chemical Co. v. United States*, 476 U.S. 227, 229 (1986).

107. *Ciraolo*, 476 U.S. at 223-24 (Powell, J., dissenting) (citation omitted). Or, as Wayne LaFave puts it:

> [The claim that any member of the flying public could have seen into Ciraolo's yard] brings te mind my most recent experience with air travel, my flight to Tucson just a few days ago. As we started our descent to the Tucson Airport, I glanced out the window to the terrain below and then exclaimed to my wife, "I'll be damned, Loretta, look what Paul Marcus has growing in his backyard!"

LaFave, 28 Ariz. L. Rev. at 300 (cited in note 66). A similar, though less colorful, argument was advanced in *Riley*, 488 U.S. at 465 (Brennan, J., dissenting).

The *Riley* surveillance was viewed as relatively unintrusive by the subjects in the Slobogin and Schumacher study. The hypothetical "Flying 400 yards above backyard in helicoptor" scored Mean = 40.32 and Rank = 10. Slobogin and Schumacher, 42 Duke L. J. at 738 (cited in note 93).

This result is not entirely inconsistent with the *Riley* dissenters' assessment of empirical reasonableness. First, the hypothetical does not necessarily reflect the *Riley* facts. Its intrusiveness score likely would have been higher had it been phrased as "Hovering 400 feet above backyard in helicopter." Second, even if the perceived intrusiveness of "hovering" were as low as the "flying" hypothetical suggests, it is possible for either activity to be relatively unintrusive but nevertheless *rare*.

108. The empirical study tends to support this conclusion. "Going through garbage in opaque bags at curbside" was seen as relatively unintrusive, even when conducted by the police. The Mean for this hypothetical was 44.95; Rank = 13. Slobogin and Schumacher, 42 Duke L. J. at 738-39 (cited in noto 93).

wasn't wholly inappropriate to conclude that there was a relatively high risk of exposure of the contents to public view.[109] Even in this case, however, the trash in fact was exposed to an unusually intense and specific degree of scrutiny.[110]

Taken together, the subjective expectation of privacy cases exhibit a stunning inability on the Court's part to assess empirical reasonableness in a plausible manner. It's not too difficult to construct an explanation, however. First, the empirical question in these cases generally has functioned to forestall candid discussion of the problem of normative "reasonableness."[111] This displacement of normative concerns that should be the central focus[112] of the Fourth Amendment analysis[113] is made possible in part by the ambiguity in the notion of reasonableness described earlier.[114] This ambiguity permits the Court to move back and forth between the two inquiries without acknowledging that it is doing so. Accordingly, the best explanation for the implausibility of the Court's empirical

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109. It does not follow that Greenwood assumed the risk of exposure to the police. See note 95.

110. The Court's assessments of empirical reasonableness are defective on a third front as well: In several cases defendants had made some extraordinary effort to conceal their activity from public view. In *Knotts* the individual under surveillance had made evasive driving maneuvers; the *Oliver* defendant had locked his gate and posted "No Trespassing" signs. Ciraolo had erected two fences around his property, and the inner one was ten feet high. Riley was growing his plants inside a greenhouse whose contents were obscured from ground-level view by trees, shrubs, and his mobile home. The complex photographed in the *Dow Chemical* case was a 2000 acre facility guarded by "elaborate security" measures, presumably for the purpose of protecting the company's trade secrets. Each of these unusual, though hardly unique, precautions against public exposure is relevant to the assessment of empirical risk because it likely will be effective in reducing that risk. Though they do not directly establish that the Court's empirical assessments are incorrect, at minimum the existence of these privacy-preserving measures supports the conclusion that the subjective expectations of privacy entertained by the defendants in these cases were empirically more reasonable than they would have been had the precautionary measures not been taken.

111. Compare Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 Syracuse L. Rev. 647, 666-75 (1988); Serr, 73 Minn. L. Rev. at 625 (cited in note 92).

112. But not necessarily its exclusive focus. See note 68.

113. "The ultimato question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished te a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the fourth amendment inexorably requires the Court to make." Amsterdam, 58 Minn. L. Rev. at 403 (cited in note 50). See also *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (quoted in note 58); LaFave, 28 Ariz. L. Rev. at 299 (cited in note 66).

114. To reiterate the distinction, the empirical reasonableness assessment should measure whether there is in fact a significant risk that a private matter will be exposed to the view of others in the ordinary course of events. That is distinct from the question of normative reasonableness—whether a given expectation of privacy is one that should be afforded constitutional protection.

reasonableness analyses is that they are driven, covertly, by unarticulated conclusions regarding normative reasonableness.[115]

Pluralist values are negatively affected when, as appears to be the case here, the doctrinal appeal to subjective experience functions as little more than an empty rhetorical device that serves as a vehicle for suppressed normative judgments. A more candid consideration of the Fourth Amendment values that produce a "free and open society"[116] could have two salutary effects. First, it would relieve pressure on the empirical reasonableness analysis that determines when the individual can be said to have exposed, or risked exposing, otherwise private matters; perhaps absent existing normative motivations, more plausible empirical conclusions would be reached. In addition, suppressing normative debate concerning any substantive constitutional norm is inherently anti-pluralist; it impedes consideration of diverse values and experiences that might inform the normative constitutional judgment.[117]

It appears, then, that in pluralist terms the doctrinal appeal to subjective experience is a failure in the existing Fourth Amendment expectation of privacy cases. These results, however, at least in part, may be the consequence of the relatively weak connection between the doctrinal goals at stake in these cases and pluralist values in general.[118] Further consideration of the lessons of the Fourth Amendment decisions will therefore be deferred pending evaluation of the Establishment Clause and "dissent" cases.

B. The Establishment Clause: Messages of Endorsement

The standard generally used by the Supreme Court for resolution of Establishment Clause cases was first set forth in *Lemon v. Kurtzman*.[119] The *Lemon* test has three prongs: "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

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115. Compare Cunningham, 73 Iowa L. Rev. at 579-80 (discussing *Miller*), 581-82 (discussing *Smith*) (cited in note 77).

116. Amsterdam, 58 Minn. L. Rev. at 403 (cited in note 50). See note 113.

117. See text accompanying notes 27-31.

118. See text accompanying notes 50-51.

119. 403 U.S. 602 (1971). For a helpful overview of the Religion Clauses, see generally Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L. J. 409 (1986).

government entanglement with religion.'"[120] The *Lemon* rule has been the object of a great deal of academic and judicial discussion, much of it critical,[121] but it remains the dominant doctrinal vehicle for analysis of Establishment Clause claims.

In 1984 Justice O'Connor articulated a proposed "clarification" of the *Lemon* rule. In *Lynch v. Donnelly*,[122] the Supreme Court addressed the question whether a municipal Christmas display that included a nativity scene or creche was permissible under the Establishment Clause. The Court majority upheld the constitutionality of the challenged display, following the general contours of the *Lemon* analysis. Justice O'Connor concurred in the opinion of the Court, but also wrote separately to propose a "refinement" of the *Lemon* test. In her view, it would be helpful to interpret the first two prongs[123] of the *Lemon* rule to emphasize the messages sent by challenged government activity, by inquiring whether the latter operates as governmental endorsement or disapproval of religion.[124] Accordingly, the

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120. *Lemon*, 403 U.S. at 612-13 (citation omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

121. See, for example, Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 128 (Macmillan, 1986) (noting that "[s]ometimes the Justices make distinctions that would glaze the minds of medieval scholastics"); Phillip B. Kurland, *The Religion Clauses and the Burger Court*, 34 Cath. U. L. Rev. 1, 10 (1984) (characterizing his description of the cases as "sound[ing] like it derived from Alice's Adventures in Wonderland"); Laycock, 47 Ohio St. L. J. at 450 (cited in note 119) (claiming that "the three-part test has been so elastic in its application that it means everything and nothing"); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Cal. L. Rev. 847, 848 (1984) (arguing that "by repeating these slogans we come no closer to understanding what is really at stake"); Mark Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 Wm. & Mary L. Rev. 997, 997 (1986) (revealing that "virtually everyone who has thought about the religion clauses . . . finds the Supreme Court's treatment of religion clause issues unsatisfactory").

122. 465 U.S. 668 (1984).

123. Justice O'Connor's approach retains the "entanglement" prong of the *Lemon* test. See the passage quoted in note 126.

124. Commentary on Justice O'Connor's proposal has been extensive. Among the admirers are Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 Notre Dame L. Rev. 151 (1987); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 Harv. C.R.-C.L. L. Rev. 503 (1992); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. Rev. 1049 (1986); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495 (1986); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L. Rev. 592, 610-11 (1985); W. Scott Simpson, Comment, Lemon *Reconstituted: Justice O'Connor's Proposed Modifications of the* Lemon *Test for Establishment Clause Violations*, 1986 B.Y.U. L. Rev. 465.

Commentators largely critical of the "messages of endorsement" proposal include Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987); Note, *Developments in the Law: Religion and the State*, 100 Harv. L. Rev. 1606, 1647-50 (1987); James M. Lewis and Michael L. Vild, Note, *A Controversial Twist of* Lemon: *The Endorsement Test as the New Establishment Standard*, 65

"purpose" prong should be understood to ask "whether government's actual purpose is to endorse or disapprove of religion"; the "effects" prong asks "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[125]

The "effects" prong of Justice O'Connor's "endorsement" test should be understood to implicate the subjective experience of those who observe challenged government activity. Interpreted in light of O'Connor's rationale for her "endorsement" proposal—concern over the harms to outsiders occasioned by government messages regarding religion—the most plausible reading of her distinction between the message government means to send and the message "in fact convey[ed]" is that the latter reflects the actual experience of the observers.[126] In the context of the *Lynch* facts, therefore, the "effects"

Notre Dame L. Rev. 671 (1990); Michael M. Maddigan, Comment, *The Establishment Clause, Civil Religion, and the Public Church*, 81 Cal. L. Rev. 293, 300-01, 330-34 (1993).

125. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

126. Id. Justice O'Connor described the underlying rationale for her "messages of endorsement" approach as follows:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement 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.

Id. at 687-88.

The view that the "effects" prong of O'Connor's endorsement test is an appeal to subjectivity is shared by several commentators. Steven Smith, for example, says: "In *Lynch*, [O'Connor] implied that the relevant perceptions would be those of real human beings—the actual flesh-and-blood citizens of Pawtucket, or perhaps of the nation as a whole." Smith, 86 Mich. L. Rev. at 291 (cited in note 124). However, it's also possible to read O'Counor as having proposed only a "reasonable person" test. See, for example, Karst, 27 Harv. C.R.-C.L. L. Rev. at 514 (citod in note 124) (stating that "the relevant inquiries are whether government action is undertaken with the purpose to endorse religion, or is reasonably perceived as endorsing religion"). This interpretation receives some support from the fact that in one passage of her *Lynch* opinion, Justice O'Connor describes the distinction between the "purpose" and "effects" prongs of her proposed test as resting on the difference between the "intention of the speaker and the 'objective' meaning of the statement in the community." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). To the extent that she's suggesting that a statement has only a single meaning in the community, this language is consistent with the "reasonable person" interpretation of the "effects" prong. On the other hand, this is the same passage that Smith characterizes as implying that "the relevant perceptions would be those of real human beings," and Martha Minow has described O'Connor's use of "objective" here as "unfortunate." Minow, 101 Harv. L. Rev. at 47 (cited in note 23). In addition, even Karst, who is the commentator most clearly adhering to the "reasonable person" interpretation, acknowledges that O'Connor's "objective observer" construct—apparently roughly equivalent, in Karst's view, to the "reasonable observer"—is not consistent with her underlying "harms to outsiders" rationale. Karst, 27 Harv. C.R.-C.L. L. Rev. at 516 (cited in note 124) (stating, "It extracts the endorsement inquiry from real people's sense that government is labeling

question was whether the inclusion of a creche in the city's Christmas display in fact communicated to those who saw it a message of municipal endorsement of Christianity. The obvious problem is that a range of messages likely will be actually conveyed by the display.[127] Justice O'Connor's discussion of the message sent by the *Lynch* display is worth quoting at length:

> Pawtucket's display of its creche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the creche. Although the religious and indeed sectarian significance of the creche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.
>
> These features combine to make the government's display of the creche in this particular physical setting no more an endorsement [than other, permissible] governmental "acknowledgements" of religion . . . . The display of the creche likewise serves a secular purpose—celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion.[128]

This passage illustrates three possible strategies for resolving the question of what message was in fact sent by the creche display: reliance on the Justice's own perceptions ("I believe"), unsubstantiated generalization ("generally is not understood"), and the imposition of explicitly normative constraints on the range of acceptable subjective experience ("cannot fairly be understood"). The first of these strategies, privileging one's own experience and perspective, is inconsistent with a central norm of judicial decisionmaking, and accordingly is not an approach that is openly acknowledged. The second potential

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them as outsiders—the very concern that Justice O'Connor properly saw as the main justification for the endorsement test."). Therefore, I proceed on the assumption that, properly read in context, O'Connor's "effects" prong constitutes an appeal to subjectivity.

127. Several commentaters have recognized this as a central problem for the "messages of endorsement" test. See, for example, Karst, 27 Harv. C.R.-C.L. L. Rev. at 515-16 (cited in note 124); Marshall, 59 S. Cal. L. Rev. at 533-34, 536-37 (cited in note 124); Smith, 86 Mich. L. Rev. at 291-95 (cited in note 124); Tribe, 98 Harv. L. Rev. at 611 (cited in note 124); Note, 100 Harv. L. Rev. at 1648 (cited in note 124); Lewis and Vild, Note, 65 Notre Dame L. Rev. at 688-90 (cited in note 124).

128. *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring) (citation omitted).

avenue of resolution has an empirical cast, as it appears to rely on what is "generally" the case, but Justice O'Connor disavowed this method a bit further on in her *Lynch* opinion:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.[129]

This leaves a central role for the third strategy, the reinterpretation of subjective experience through a normative lens.[130] Represented in *Lynch* by the concept of what the observer might "fairly" understand to be the message sent by the creche display, this third approach became prominent in Justice O'Connor's subsequent "messages of endorsement" opinions.

The concept of the "objective observer" became the principal vehicle for the elaboration of Justice O'Connor's normative strategy in the cases that followed *Lynch*. In *Wallace v. Jaffree*,[131] Justice O'Connor explained that in assessing the effects of a challenged moment of silence statute, "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[132] In addition, she said:

> In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer" is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.[133]

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129. Id. at 693-94.

130. The "objectification" of subjective experience described here is somewhat different from the requirement that subjective experience be exhibited in an objectively identifiable manner, discussed earlier in connection with the Fourth Amendment subjective expectation of privacy cases. Justice O'Connor appears to want to narrow the range of experiences that "count" even more than would be accomplished by application of the "exhibited" requirement; not all of the experiences manifested in an appropriato manner will be credited under her proposal. See note 186 and accompanying text.

131. 472 U.S. 38 (1985).

132. Id. at 76 (O'Connor, J., concurring).

133. Id. at 83 (citation omitted) (discussing the need to reconcile the commands of the Establishment and Free Exercise Clauses).

In *Estate of Thornton v. Caldor, Inc.*[134] the Court considered an Establishment Clause challenge to a Connecticut statute that required private businesses to permit employees not to work on their chosen Sabbath. O'Connor concurred in the Court's opinion holding the challenged law unconstitutional, and again wrote separately as well:

> In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance. . . . There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it.[135]

O'Connor's "objective observer" analysis became more explicitly normative in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[136] She concurred in the Court's judgment that the exemption for religious organizations from the employment discrimination provisions of Title VII is constitutional, at least as applied to nonprofit activities. Justice O'Connor reasoned that:

> Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer *should* perceive the government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.[137]

More recently, the "objective observer" has been displaced by explicit discussion of the normative contours of "endorsement." In

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134. 472 U.S. 703 (1985).

135. Id. at 711 (O'Connor, J., concurring) (citation omitted).

In two additional cases decided during the 1984 Term, Justice O'Connor downplayed the role of the "objective observer." In *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985), she agreed with the Court majority that a "Community Education" program funded with public monies was constitutionally impermissible; the majority had relied in part on the reasoning that the program had the effect of creating a "symbolic union of government and religion," although the opinion did not mention the "objective observer." Id. at 389-92; see id. at 398-400 (O'Connor, J., concurring). However, Justice O'Connor disagreed with the majority with respect to the same district's "Shared Time" program for the reasons stated in her dissenting opinion in *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, she asserted that "[i]n light of the ample record [of professionalism or the religious differences between teachers and students], an objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools." Id. at 425 (O'Connor, J., dissenting). O'Connor's *Aguilar* opinion did not address the concept of "symbolic union" advanced by the majority in *Grand Rapids*.

136. 483 U.S. 327 (1987).

137. Id. at 349 (O'Connor, J., concurring) (emphasis added).

County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,[138] Justice O'Connor concluded that although the case involved the display of a creche on public property, the facts were distinguishable from the facts of *Lynch*. She concluded that the Allegheny County Christmas display did indeed send a "message of endorsement":

> I agree that the creche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community. . . . In contrast to the creche in *Lynch*, which was displayed in a private park in the city's commercial district as part of a broader display of traditional secular symbols of the holiday season, this creche stands alone in the county courthouse. The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community." . . . The Court correctly concludes that placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity.[139]

Similarly, the "objective observer" played no role in *Board of Education of Westside Community Schools v. Mergens*.[140] Writing for a plurality, Justice O'Connor responded in three ways to the argument that permitting a student religious group to use school facilities after hours would convey a message of endorsement of religion. She argued that "secondary school students are . . . likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis;"[141] that "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate;"[142] and that "[t]o the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion."[143] It's especially remarkable that Justice O'Connor omitted reference to the perceptions of the "objective observer" because the petitioners in *Mergens* had argued that "an objective observer in the position of a secondary

138. 492 U.S. 573 (1989).

139. Id. at 626-27 (O'Connor, J., concurring) (citations omitted). Justice O'Connor's discussion of the second issue in the case, the display of a menorah alongside a Christmas tree, was similar in style; the "objective observer" again was absent from the analysis. See id. at 632-37.

140. 496 U.S. 226 (1990).

141. Id. at 250 (opinion of O'Connor, J.).

142. Id. at 251.

143. Id. at 252.

school student will perceive official school support for [the] religious meetings."[144]

The need for some account of the way one decides what message is actually conveyed by a government activity has been apparent from the beginning of this line of cases. In *Lynch*, for example, Justice Brennan drew a conclusion about the message sent by the challenged display that was the direct opposite of that reached by Justice O'Connor:

> The "primary effect" of including a nativity scene in the city's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the city's decision to include the creche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the creche, thereby providing "a significant symbolic benefit to religion. . . ." The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.[145]

Justice Brennan's interpretation of the message conveyed by the Pawtucket nativity display underscores the obvious fact that any government activity will send different messages to different observers. Thus, to become a plausible approach, the "effects" prong of Justice O'Connor's "messages of endorsement" test must provide some means of identifying the subjective experiences that will be credited, and those that will not.

Justice O'Connor, however, has failed to provide even a starting point for such an analysis. She offers no discussion of the criteria that make the "objective observer" "objective"; the content of the "objective observer's" perceptions are not to be discovered by any empirical method of examining the cultural context in which a challenged government action has taken place; and Justice O'Connor provides no guidelines for determining the "social facts" that comprise the subject of "judicial interpretation."[146] O'Connor does tell us that the "objective observer" is "acquainted with the text, legislative history, and implementation" of the statutes challenged under the Establishment Clause, but those characteristics are more relevant to

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144. Id. at 249.

145. *Lynch*, 465 U.S. at 701 (Brennan, J., dissenting) (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982)).

146. See text accompanying note 129.

the "purpose" prong of her test than to resolving the question of whose experiences "count."[147] Accepting Justice O'Connor's distinction between the two prongs of her "messages of endorsement" test at face value leads to the conclusion that the "objective observer" has a decidedly weak connection to any lived experience. In the most recent case, *Mergens*, Justice O'Connor appears to have abandoned the "objective observer" altogether, without providing any substitute.

Perhaps one should infer that, as in the subjective expectation of privacy cases, there is some suppressed reading of the substantive constitutional provision at issue driving O'Connor's understanding of the content of the "objective observer's" perceptions.[148] The difficulty with this interpretation, however, is that it is wholly inconsistent with the underlying rationale of her "messages of endorsement" approach. The "purpose" and "effects" prongs of Justice O'Connor's Establishment Clause test have no referents other than the messages sent by government activity. In regard to the "effects" prong in particular, there is ostensibly no component of the test other than the message in fact conveyed.[149] To hypothesize an independent interpretation of the Establishment Clause that explains her reading of the content of the "message conveyed" is to repudiate O'Connor's fundamental conception of the "messages of endorsement" doctrinal formulation—that because it sends an impermissible message of exclusion, government endorsement or disapproval of religion is per se a constitutional violation.

Another possible explanation for the conclusions reached by Justice O'Connor concerning messages of endorsement is that the vacuum created by the absence of explicit normative selection among competing subjective experiences[150] has been filled by her own

147. In addition, we learn that the "objective observer's" perceptions are influenced by his understanding of the Free Exercise Clause, at least to the extent that he would not perceive as an endorsement of religion a government activity mandated by the Free Exercise requirement. See text accompanying note 133.

148. And those of the students whose perceptions were credited, or anticipated, in *Mergens*. See text accompanying notes 141, 143.

149. See noto 126 for an argument that this is a subjective component.

150. An example of the sort of normative discourse that would be appropriato is provided by the Harvard Note on Religion and the Stato; it argues that this problem should be resolved by privileging the perspective of the "minority or nonadherent." Note, 100 Harv. L. Rev. at 1648 (cited in note 124). This approach converts the doctrinal appeal to subjectivity into a normative inquiry. For further discussion of this stratogy, see text accompanying notes 230-32.

The Court's opinion in *Grand Rapids* illustrates another normative solution to the problem of perspective. Justice Breiman selected the perspective of the schoolchildren attending the publicly supplied classes as the perspective that should "count." See *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 391-92 (1985). However, he provided no explanation of this choice.

perceptions of the messages implicit in government's actions. Several commentators have suggested that she appears to impute to the "objective observer" the perspective that is in fact her own,[151] a conclusion reinforced by her tendency to underscore arguments with the weight of her own beliefs: "Pawtucket's display of its creche, *I believe*, does not communicate a message [of endorsement];"[152] "*[i]n my view*, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of Sabbath observance;"[153] "*in my view*, the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion."[154]

The two explanations may not be wholly distinct. Justice O'Connor's own perceptions may be influenced by a subliminal understanding of what symbolic activity the Constitution does and does not prohibit. If so, the second explanation, like the first, ultimately hypothesizes that O'Connor's analysis of subjective experience is affected by the presence of unarticulated constitutional norms.[155] To this extent, this Establishment Clause doctrine bears some similarity to the subjective expectation of privacy cases.

The outcomes in both lines of cases are notably assimilationist; it's obvious that many individuals do not share the perceptions of Justice O'Connor's "objective observer," just as few would find plausible the empirical assessments in the expectation of privacy cases. Pluralism is disserved as well by the imposition of unarticulated norms; in each context, careful examination of the strategy of

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William Marshall has proposed a different approach; he argues that "if the Court can agree upon the appropriate initial perspective to employ in establishment cases, the range of individualized interpretations will be profoundly limitod." See Marshall, 59 S. Cal. L. Rev. at 538 (cited in note 124). However, the "perspectives" he advocates adopting in three different establishment contoxts are not selected from the subjective experiences of individuals, but represent positions on the spectrum of normative interpretation of the Establishment Clause itself. See id. at 541 (discussing the "separationist" perspective); id. at 545 (discussing the "accommodationist" perspective); id. at 548 (discussing "qualified neutrality"). Thus, this proposal falls victim te the argument advancod in the text accompanying notos 148-49; it repudiates the "message in fact convey[ed]" conception of the "effects" test.

151. See, for example, Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated or Rejected?*, 4 Notre Dame J. L. Ethics & Pub. Pol'y 513, 545 (1990); Marshall, 59 S. Cal. L. Rev. at 536 (cited in note 124); Mark Tushnet, *The Constitution of Religion*, 18 Conn. L. Rev. 701, 711 n.52 (1986). Others have noted more generally that the test provides an avenue for the introduction of the Justices' perceptions. See, for example, Marshall, 59 S. Cal. L. Rev. at 535 n.235; Smith, 86 Mich. L. Rev. at 292 n.105 (cited in note 124).

152. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added).

153. *Thornton*, 472 U.S. at 711 (O'Connor, J., concurring) (emphasis added).

154. *Amos*, 483 U.S. at 349 (O'Connor, J., concurring) (emphasis added).

155. This inference is strengthened by the information that the "objective observer's" perceptions are affected by his understanding of the Free Exercise Clause. See text accompanying note 133.

doctrinal appeal to subjective experience reveals that it can be understood as functioning in practice to suppress a normative constitutional analysis that nevertheless remains operative, and that may be dispositive of the final outcome of the cases. As discussed earlier, reaching normative conclusions without explicit consideration of pluralist concerns is more likely than not to result in anti-pluralist outcomes.[156] Thus, in neither instance does the doctrinal appeal to subjectivity deliver what it promises—enhancement of pluralism in law.

The one, perhaps significant, difference between the Fourth Amendment and Establishment Clause cases is that O'Connor's "effects" prong is proffered in the context of a constitutional provision thoroughly infused with pluralist values. Part IV of this Article contends that the presence, or absence, of larger pluralist objectives should be an important factor in deciding whether to pursue the strategy of doctrinal appeals to subjective experience. Before proceeding to a more complete synthesis of the lessons of the Fourth Amendment and Establishment Clause cases, however, I will review some less fully developed appeals to subjectivity.

C. The Rhetorical Use of Subjective Experience in Dissents

This subpart reviews three cases—*Bowen v. Gilliard*,[157] *DeShaney v. Winnebago County Department of Social Services*,[158] and *United States v. Kozminski*[159]—in which individual Justices[160] apparently appealed to subjective experience in support of positions they articulated in dissent. Accordingly, none of these cases reflects a fully developed doctrinal appeal to subjectivity. However, the cases do exhibit some of the same features seen in the Fourth Amendment and Establishment Clause contexts, and they will prove useful in Part IV as examples for the application of the prescriptive guidelines set forth there.

In *Bowen v. Gilliard*[161] the Court took up a challenge to certain provisions of the Deficit Reduction Act of 1984, which Congress had

156. See text accompanying note 117.
157. 483 U.S. 587 (1987).
158. 489 U.S. 189 (1989).
159. 487 U.S. 931 (1988).
160. As it happens, each of the dissenting opinions reviewed here was authored by Justice Brennan. However, he was joined by Justice Marshall in *Gilliard* and *Kozminski*, and by Justices Blackmun and Marshall in *DeShaney*. They will be referred to collectively as "the dissenters."
161. 483 U.S. 587 (1987).

enacted to amend the federal Aid to Families with Dependent Children (AFDC) program.[162] The statutory change affected the computation of family income for the purpose of determining the level of assistance for which a family unit would be eligible. Previously, an aid recipient could exclude from the family computational unit any child for whom support payments were being made, regardless of the amount of support the child received. The amendment required the inclusion in the filing unit of all children living in the home, but at the same time allowed the first fifty dollars in child support paid for each child to be excluded from the total family income. Thus, even if child support payments for any child exceeded fifty dollars per month, that income would not have affected the total aid available for the other children under the former scheme. Under the revised program, however, the amount of support over fifty dollars would be subtracted from the AFDC payments, thus lowering the net family income.

The majority relied heavily on precedent in selecting the standard of review appropriate to the challengers' due process claim; those precedents dictated deference to Congress's plenary power to define the scope of entitlement programs.[163] The Court did address the challengers' contention that some form of heightened scrutiny would be appropriate because the statutory provisions at issue interfered with "a family's fundamental right to live in the type of family unit it chooses,"[164] taking the view that family interests are implicated only in the case of "an act whose design and direct effect are to 'intrud[e] on choices concerning family living arrangements.'"[165] In contrast, the Court viewed the *Gilliard* case as involving a challenge to one provision of a "complex social welfare system"[166] that only incidentally impacted the specifics of family living arrangements. The statute easily passed muster under rationality review.

In dissent, Justice Brennan contended that heightened scrutiny was the appropriate standard of review because the government intrusion into family life effected by the statutory scheme was substantial. Brennan focused his attention on the relationship between the child and the noncustodial parent, and in doing so, emphasized the

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162. Id. at 589. The challengers also raised a takings claim. Id. at 597.

163. Thomas Ross describes the reliance on precedent in this case as an example of the rhetoric of "helplessness." See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 Geo. L. J. 1499, 1529-30 (1991).

164. *Gilliard*, 483 U.S. at 601.

165. Id. at 602 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977)).

166. *Gilliard*, 483 U.S. at 602 (quoting *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977)).

subjective experience of the child.[167] He argued that providing for the material needs of a child is an important way in which a noncustodial parent, usually the father, can maintain an ongoing relationship with his child.[168] The new scheme would limit the amount of support that could be provided by a parent outside the home for the use of a specific child, and thus would interfere with that avenue of interconnection. In addition, Justice Brennan cited evidence suggesting that a noncustodial father's willingness to visit and maintain a relationship with his children is intertwined with his ability to provide for their material support.[169]

From the child's perspective, then, the new statutory scheme had considerable potential to disrupt the child's relationship with a parent living outside the home. Justice Brennan built his case with the stories of specific individuals, illustrating the negative effects of the new scheme on children's lives. In one case, for example, a noncustodial father who was opposed to his child being on welfare stopped making child support payments and ceased visiting his child after the new law took effect. The child's emotional distress was evident:

> Sherrod is very upset that his father no longer visits him. He frequently asks me why his daddy does not come to see him anymore. Since the time his father has stopped visitation, Sherrod has begun to wet his bed on a frequent basis. Also since the visitation stopped, Sherrod has become much more disruptive, especially in school. Furthermore, his performance in school seems to have declined.[170]

The harm that the Court majority characterized as nothing more than a financial loss—a reduction in AFDC benefits—thus acquired a very different meaning when viewed through the lens of the child's experience of familial relationships.

Justice Brennan afforded somewhat different analytic significance to subjective experience in his dissent in *DeShaney v. Winnebago County Department of Social Services*.[171] In that case, the Court considered a Section 1983 claim that Joshua DeShaney had been de-

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167. The "subjective" character of Justice Brennan's argument may be highlighted by comparison with the more traditional approach in Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. Ill. L. Rev. 367.

168. *Gilliard*, 483 U.S. at 615 (Brennan, J., dissenting).

169. Id. at 617 (citing a national study analyzing nonfinancial aspects of father-child relationships after divorce).

170. Id. at 621-22 (quoting Appendix to Jurisdictional Statement at 26a-27a).

171. 489 U.S. 189 (1989).

prived of his liberty without due process of law when the state Department of Social Services (DSS) failed to protect him against repeated beatings by his father, with whom he lived. The last of these incidents caused such severe brain damage that Joshua was left profoundly retarded. The Court held that the Constitution imposes no duty on the state to protect its citizens against invasions of liberty committed by private actors.[172]

Justice Brennan argued in dissent that the majority's distinction between action and inaction would not hold up under careful examination, especially in the context of the precedents on which the majority had relied.[173] However, even assuming that some distinction between state action and inaction was appropriate, the facts of the *DeShaney* case, in Brennan's view, dictated the conclusion that the state *had* acted with respect to Joshua. Each person who suspected that Joshua was being abused relayed his concerns to authorities who ultimately transmitted the information to DSS, and it was up to DSS to make the final decision to leave Joshua with his father or to remove him from that home:

> In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him.[174]

Brennan's argument turns on an empirical claim: given the existence of DSS, the average person would be inclined to rely on that agency as the sole means of responding to suspicions concerning child abuse.

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172. Id. at 202-03. For thoughtful discussion of this aspect of the case, see Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich L. Rev. 2271 (1990); Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 Duke L. J. 1078; Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 Vand. L. Rev. 1665 (1990); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 Geo. Wash. L. Rev. 1513 (1989); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 S. Ct. Rev. 53; Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv. L. Rev. 1, 5-14 (1989); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. Rev. 247 (1990).

173. *DeShaney*, 489 U.S. at 204-08 (Brennan, J., dissenting).

174. Id. at 209-10.

The problem of subjective experience was presented by the briefs in *United States v. Kozminski*,[175] but a majority of the Court opted for a doctrinal standard that obviated any need to take subjective experience into account. The Kozminskis were dairy farmers who had, for a period of years, employed two mentally retarded men as laborers under conditions of such hardship and squalor that federal authorities ultimately charged them with having violated their "employees'" rights to be free of involuntary servitude.[176] Both of the federal statutes under which the Kozminskis were charged, and eventually convicted, were interpreted by the Court to incorporate or track the Thirteenth Amendment's definition of "involuntary servitude."[177] The Court concluded that the relevant statutes prohibit only compulsion of services through physical or legal coercion; Justice Brennan wrote separately to express his disagreement with that position.[178]

The government argued in *Kozminski* that "involuntary servitude" should encompass "the compulsion of services by any means that, from the victim's point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice."[179] Both the majority and Justice Brennan viewed this purely subjective approach as unworkable because it failed to provide adequate notice of what conduct was prohibited.[180] Justice Brennan went on to propose an "objective" standard that would avoid the notice problem but would also recognize, and pro-

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175. 487 U.S. 931 (1988).

176. For an overview of Thirteenth Amendment jurisprudence, see G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (Houston L. Rev., 1976). Two recent articles argue for extension of the concept of involuntary servitude. See Akhil Reed Amar and Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 Harv. L. Rev. 1359 (1992); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480 (1990).

177. The Kozminskis were convicted under 18 U.S.C. § 241 of conspiring to deprive the two men of their Thirteenth Amendment right to be free from involuntary servitude and of holding the men to involuntary servitude in violation of 18 U.S.C. § 1584. The Supreme Court concluded that Congress intended "involuntary servitude" to have the same meaning in the Thirteenth Amendment and § 1584. *Kozminski*, 487 U.S. at 945.

178. The Supreme Court corrected the Sixth Circuit regarding the applicable legal standard, but the judgment of the lower court was affirmed for other reasons. See id. at 953. Justice Brennan concurred in the judgment of the Court, but proposed an interpretation of "involuntary servitude" different from that of either the Sixth Circuit or the Supreme Court majority. Id. at 961-65 (Brennan, J., concurring in the judgment). Because Justice Brennan's opinion concurring in the judgment of the Court disagrees with, and proposes an alternative to, the Court's view of the appropriate legal standard, it is treated here as a dissent.

179. *Kozminski*, 487 U.S. at 949; see Brief for the United States at 33, *United States v. Kozminski*, 487 U.S. 931 (1988) (No. 86-2000) (on file with the Author).

180. *Kozminski*, 487 U.S. at 949; id. at 960-61 (Brennan, J., concurring in the judgment).

scribe, methods of coercion other than physical or legal means. He concluded that:

> Congress clearly intended to encompass coercion of any form that actually succeeds in reducing the victim to a condition of servitude resembling that in which the slaves were held before the Civil War. While no one factor is dispositive, complete domination over all aspects of the victim's life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slavelike condition of servitude.[181]

The requirement that coercion actually succeed in producing a condition of servitude need not be applied, Brennan said, in cases of physical or legal coercion; in such cases concerns about fair notice already would have been met.[182]

Justice Brennan's proposed supplement to the Court's rule is not entirely objective, however.[183] The practical success of various methods of coercion will depend to a considerable extent on the individual characteristics of the person to whom they are applied. The poignancy of the *Kozminski* case derives in large part from the fact that the defendants had been taking advantage of the diminished mental capacities of their two mentally retarded employees; the techniques of coercion actually used in all probability would not have been effective in coercing persons of average intelligence to remain on the Kozminskis' farm. Justice Brennan's proposal accommodates actual experience to the extent that the application of his standard in specific cases will be determined largely by the subjective experience of the individuals who are the objects of particular coercive techniques.

These three dissenting opinions present a somewhat different perspective on the use of subjective experience than do the Fourth Amendment and Establishment Clause cases. In two of the three instances, it's unclear whether the dissenters really intend to propose *doctrines* that turn on the analysis of subjective experience. In *Gilliard*, Justice Brennan seems to suggest that *every* interest subjectively experienced as implicating family concerns should be characterized as a family interest for constitutional purposes.[184] In another case, however, Justice Brennan perhaps would find that an interest experienced as one of "family" should not be so categorized in the

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181. Id. at 962-63 (Brennan, J., concurring in the judgment) (citation omitted).

182. Id. at 965.

183. I will argue in Part IV that there is no bright line to be drawn between "subjective" and "objective" rules. See text accompanying notes 223-24.

184. In two additional cases Justice Brennan has used language suggestive of a pluralist conception of "family." See *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting); *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) (Brennan, J., concurring).

constitutional sense. His position is not fully developed in *Gilliard*. Similarly, in *DeShaney*, Justice Brennan appears to take the view that state action is present whenever a consensus of appropriately interested adults considers the state to have acted. Again, it's not wholly clear whether he would place any limits on this generalization.

However, in at least one important respect, the dissents are similar to the two doctrines considered earlier. In each instance, the dissenting opinion fails to provide any explanation of the way it selects the subjective experience it credits. Not all children experience the loss of material support as the loss of all emotional ties with a noncustodial parent; not every concerned adult would interpret the existence of a Department of Social Services as foreclosing other avenues of aid for an abused child; and perhaps some mentally retarded adults, as well as persons of average intelligence, would have found effective ways to resist and escape the Kozminskis' coercive behavior. In no case does the opinion writer address the reasons for crediting the subjective experience of some to the exclusion of others'.

In sum, although the cases in which a dissenting opinion introduces subjective experience present interesting variations on the problem of doctrinal appeals to subjective experience, they add no startlingly new insights or perspectives. In these dissents, the use of subjective experience appears largely result-driven; the dissenters are no more likely than Court majorities to provide rationales for their take on the content of subjective experience, and they often are unclear about the doctrinal significance of the experience-oriented analyses they undertake. However, these cases will help flesh out the lessons that may be extracted from the Fourth Amendment and Establishment Clause cases.

IV. ASSESSING DOCTRINAL APPEALS TO SUBJECTIVITY

A. Preliminary Observations

Several generalizations emerge from this review of the Supreme Court's doctrinal encounters with subjective experience. First, in these constitutional cases, subjective experience is never truly subjective; the lived experience of real people is always filtered through one objective lens or another. At a minimum, some objective manifestation of subjective experience must be present for that experience to be cognizable by others. Some doctrines incorporate formal

recognition of this element of objectivity, such as the Fourth Amendment requirement that the individual have "exhibited" a subjective expectation of privacy,[185] but it necessarily is present whether formally acknowledged or not. In addition, a somewhat different, more explicitly normative sort of objective filter might be imposed on subjective experience in doctrinal contexts that call for limitations on the range of subjective experiences that "count."[186] Both types of objective filter inevitably function as constraints on the degree to which doctrinal appeals to "subjective experience" can be genuinely subjective.

The second observation that emerges from this examination of the settings in which subjective experience appears to have been afforded doctrinal signficance is that the Court has been unable to provide any credible account of the way it decides *which* objective overlay to impose. As noted earlier, the Court's concept of "reasonable" expectations of privacy is widely viewed as an indefensible assessment of empirical reasonableness, and the Court provides little or no explanation of the reasoning behind its conclusions on that question.[187] Similarly, it's evident that Justice O'Connor's "objective observer" has specific subjective experiences that are not universally shared; to many, the content of those experiences is improbable in the extreme, but she offers no explanation of the method by which she selected them.[188]

The final generalization arising from the decided cases is that resolution of the subjective experience problem tends to be driven by concerns that properly should not influence the analysis at all. Because the opinions omit any plausible normative or descriptive analysis of the sort that should be employed to define the objective contours of subjective experience, the influence of extrinsic normative or personal considerations appears to be the best explanation for the Court's conclusions concerning subjective experience. In the subjective expectation of privacy cases, the outcomes appear to be driven by unarticulated Fourth Amendment values; the "objective observer" seems to be defined by Justice O'Connor's own perceptions of messages of endorsement.[189]

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185. See text accompanying notes 61-63.

186. For example, crediting the experiences of "minorities and nonadherents" represents a normative selection among appropriately exhibited experiences of endorsement in the Establishment Clause context. See note 150.

187. See notes 92-110 and accompanying text.

188. See text accompanying notes 146-47.

189. However, the outcomes ultimately may have been influenced here, too, by unarticulated constitutional norms. See text accompanying note 155.

Taken together, these reflections on the decided cases suggest that the move to incorporate subjective experience into doctrine serves only a rhetorical, superficially legitimating function; subjective experience is not really being taken seriously for its own sake. Justice O'Connor's proposed Establishment Clause doctrine provides the clearest illustration of this point. Her proposal is based on her recognition that one facet of the harm sought to be prevented by that constitutional provision occurs when religious outsiders receive a message that they are not full members of the community. However, that raises a problem of perspective. The Pawtucket creche sent a "message of endorsement" to some persons who saw it, and sent no such message to others. But because O'Connor fails to explain why she credits the experience of the latter, and not the former, the appeal to subjectivity is empty. What has become of the harm experienced by the group of viewers who *do* perceive the creche as a message endorsing a religion other than their own? The motivating principle that ostensibly drives O'Connor's doctrinal proposal—concern about status harms—is negated by the way the proposed rule is applied. The ultimate inference that perhaps Justice O'Connor credited her own perception of the creche display only underscores the conclusion that introducing subjectivity into doctrine does nothing more than serve as a superficial means of evading serious engagement with the normative constitutional question at issue.

Pluralism seems to be a two-time loser in these cases. The Justices' woefully incorrect assessments of the empirical reasonableness of subjective expectations of privacy in the Fourth Amendment cases and of the messages actually received in the religion cases impose obvious and significant costs on the individuals who would have received constitutional protection from government intrusion, or from government endorsement of religion, had their actual subjective experiences been credited in the ways the doctrines in question suggest. Furthermore, especially in the Fourth Amendment context, the net result is that the outcomes of the cases are determined by application of constitutional norms that never are articulated or openly discussed.[190] The most powerful and coercive of all norms are those that are viewed as neutral, natural, and

190. In the Establishment Clause cases that turn on the "effects" prong of Justice O'Connor's test, substantive constitutional norms cannot account for the outcomes unless one abandons the fundamental justification for that prong—the view that *receiving* a message of endorsement of religion constitutes a constitutional violation. See text accompanying notes 148-49.

inevitable. A regime of unstated, and hence undebated, norms is far more likely to promote assimilationism than pluralism.

However, it's premature to conclude that the Court's dismal record in handling the problem of subjective experience is the consequence of some inherent flaw in the strategy of doctrinal appeals to subjectivity. The difficulty may be attributable more to institutional concerns than to the nature of subjective experience itself. The following section explores the possibility that the Court's doctrinal encounters with subjective experience have been significantly affected by discomfort with explicit normative discourse.

B. An Institutional Explanation

The Court's struggles with the problem of subjective experience may be understood as the consequence of a desire to avoid engaging in explicitly normative constitutional decisionmaking. A good deal of modern constitutional discourse is conditioned by what generally is termed "the counter-majoritarian difficulty."[191] The perceived problem is that judicial review of legislative decisions grants unelected, life-tenured judges the power to overrule the will of the democratic majority; absent some "objective"[192] strategy of constitutional interpretation, the invalidation of legislative choices is unjustified, because it would represent the imposition of personal choices rather than the implementation of limits on the majority's will as set forth in the constitutional text itself.[193] Preoccupation with the counter-majoritarian difficulty has spawned a variety of rhetorical moves in Supreme Court opinions seemingly designed to reclaim the legitimacy that ostensibly would be lost were judges to acknowledge the contingency of the substantive choices they make. These strategies include claims to "strict interpretation" of the constitutional text, appeals to history, tradition, or consensus, and (often strained) reliance on precedent.[194] In general, today's constitutionalism exhibits a pronounced reluctance to engage in explicit normative discourse.[195]

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191. Alexander M. Bickel, *The Least Dangerous Branch* 16 (Yale U., 2d ed. 1986).

192. In this context, I use "objective" to mean any strategy that appeals to a source independent of the judge herself.

193. See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 823-27 (1985); Gary Peller, Neutral Principles *in the 1950's*, 21 U. Mich. J. L. Ref. 561, 599-604 (1988).

194. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1244-46 (1987).

195. See Robert M. Cover, *Justice Accused* (Yale U., 1975); Ross, 79 Geo. L. J. at 1511-13 (cited in note 163) Laurence Tribe, *The Puzzling Persistence of Process-based Constitutional Theories*, 89 Yale L. J., 1063 (1980).

This approach to judicial review may account for the Court's adoption of some of the constitutional doctrines that incorporate subjective experience. The impulse to turn first to the question whether an individual lacked the requisite expectation of privacy, for example, may be explained as a retreat from the relatively less comfortable alternative of making explicit normative decisions concerning the privacy interests that should, or should not, be protected by the Fourth Amendment. Similarly, Justice O'Connor's proposed Establishment Clause test appears initially to permit the decisionmaker to avoid declaring what is the "real" message of a government action; the underlying rationale for her test suggests recognition of constitutional harm in *any* message of endorsement subjectively received.

At the same time, the inclination to avoid explicitly normative decisionmaking may account for the Court's failure to explain the way it assesses subjective experience once it has been adopted as an element of doctrine. Because it's necessary to view subjectivity through one or more objective lenses, some form of normative judgment is unavoidable. However, the Court's tendency to evade overt normative choice militates against resolving the problem of objective filters on subjective experience in a candid manner. Accordingly, the opinions are replete with unsupported and conclusory judgments concerning the content of subjective experience.

These attempts to avoid explicit normative discourse have had demonstrably adverse effects on the Court's ability to engage in the rational development of constitutional doctrine. For example, in the Court's approach to the question of empirical reasonableness in the Fourth Amendment cases, the normative filter overlaid on subjective experience seems to derive from the substantive constitutional guarantee itself. In contrast, an inquiry that focused appropriately on the first prong of the *Katz* test would address the circumstances in which it can be said to be empirically reasonable—or unreasonable—to assume that an activity intended to be kept from public view actually will remain so. As the cases reveal, the Court has been unable to develop a plausible account of empirical reasonableness and instead appears to have used this issue as a vehicle for covert resolution of the central constitutional question of which privacy interests should be brought within the ambit of the Fourth Amendment's guarantees. Manipulating one normative inquiry in the service of another clearly is not a desirable mode of analysis; moreover, the most crucial portion of the constitutional

analysis never is explicitly addressed, but is wholly resolved sub silentio.

Overcoming the Court's resistance to explicit normative discourse might help avoid the principal errors exhibited in the cases that this Article reviews.[196] A willingness to engage in candid discussion of constitutional norms could render unnecessary any appeal to subjective experience in some instances.[197] Even when doctrinal resort to subjectivity remains useful,[198] straightforward articulation of the objective criteria that determine which subjective experiences "count" would be helpful and might generate more plausible outcomes. However, the institutional concerns that historically have prompted the Court to avoid normative discourse will not disappear overnight; the temptation to adopt doctrinal appeals to subjective experience as an evasive strategy is always present.

C. Incorporating Subjective Experience

Because subjective experience is always and inevitably viewed through some objective filter or lens, the technique under consideration here carries with it an inherent tendency toward covert normativity. In combination with the institutional impulse just described, the strategy of doctrinal appeal to subjectivity appears fraught with peril, from a pluralist perspective. However, these same insights provide a basis for formulating guidelines that might mitigate the anti-pluralist drift of this approach, and thus point in the direction of its more productive use.

First, the strategy of doctrinal appeal to subjective experience should be employed only in circumstances in which the potential benefits outweigh the risks. Because the present concern is with the pluralist potential of doctrinal appeals to subjectivity, this strategy would appear to be an option best selected when one's doctrinal objective is inherently pluralist. When pluralism is not prominently at stake, resorting to subjective experience offers no clear benefit over

196. See generally Ronald Dworkin, *Law's Empire* (Belknap Press, 1986); Tribe, 89 Yale L. J. 1063 (cited in note 195).

197. By implication, subjective experience should not be employed as a doctrinal substitute for explicit debate concerning constitutional norms. As argued previously, the Court's apparent attempts to appeal to subjective experience as an evasive maneuver have been consistently unsuccessful, and the suppressed normativity that results is antithetical to genuine cultural pluralism. The Court's normative interpretation of constitutional provisions should be based on reasoning openly expressed.

198. As it is, for example, in the cases discussed in Part IV.C.2.

more explicitly normative approaches, but at the same time raises a risk of obscuring the normative work that must be done.

In addition, awareness of the risk of covert normativity counsels a judicious use of doctrinal appeals to subjective experience, even in those instances in which pluralist values *are* implicated. Thus, the second guideline that emerges from examining the decided cases is that when subjective experience is accorded doctrinal significance, it should be overlaid with objective filters that are as normatively open[199] as possible. Each objective filter imposed on subjective experience carries with it the risk of covert assimilationism; only a thorough attempt to approximate as nearly as possible the full range of actual subjective experience can vindicate pluralist values.

Applying these guidelines would alter the doctrinal approaches in most of the cases under review in this Article. Part IV.C.1 considers the implications of the first proposed guideline—that doctrinal appeals to subjective experience should be employed only when the policy or principle motivating the specific doctrinal provision in question is inherently pluralist. Part IV.C.2 looks at the application of the second guideline—that appeals to subjectivity should be implemented through objective criteria that are as open as possible to the full range of actual subjective experience. Finally, Part IV.C.3 describes an indirect method of incorporating subjective experience in constitutional doctrine.

1. Are Pluralist Values at Stake?

On reflection, the Court need not appeal to subjective experience in *DeShaney*[200] or the Fourth Amendment subjective expectation of privacy cases because pluralist values are not prominently implicated. In contrast, the Establishment Clause cases provide an example of an inherently pluralist context in which appeal to subjectivity might be worthwhile. The two remaining cases, *Gilliard*[201] and *Kozminski*,[202] shed light on the boundaries of this guideline.

As the proposed guideline suggests, the inquiry regarding doctrinal appeals to subjectivity begins with the question whether a given doctrinal provision is designed to implement pluralist values.

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199. This term is explained in the text accompanying notes 224-25.
200. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).
201. *Bowen v. Gilliard*, 483 U.S. 387 (1987).
202. *United States v. Kozminski*, 487 U.S. 931 (1988).

DeShaney, however, does not directly implicate any substantive constitutional value. As framed by the Supreme Court, the case addressed a state action problem: whether the state should be held liable for the acts of a private individual when the state has done nothing more than stand by and allow the individual's harmful conduct to proceed unchecked. Nevertheless, the insight that doctrinal appeals to subjective experience should be closely linked to pluralist values sheds some light on the role subjective experience should play in a doctrinal formulation of Justice Brennan's views on the case.

Justice Brennan argued that the average citizen or agency employee who was concerned about Joshua DeShaney would have relied on the Department of Social Services to investigate claims of possible abuse and to take appropriate steps to correct the situation.[203] Given that widespread experience, he contended, the law should deem the state to have acted with respect to Joshua.[204] However, Justice Brennan set forth no general principle that would enable one to determine whether the state has acted in the relevant sense. The implicit rule of his *DeShaney* opinion thus seems te be that, as a matter of law, the state should be viewed as having acted whenever the average or reasonable person thinks that it has.

Although Justice Brennan's proposed resolution of the case superficially appeals to subjective experience, it's crucial to note that it appeals not to the diversity of experience, but to an experience that in his view is likely to be widely shared. In this sense, the value at stake is not pluralist in nature; experiences that diverge from those of the average person need not be credited. Justice Brennan's position in *DeShaney* therefore constitutes an objective normative or empirical claim rather than an example of the appropriate use of subjective experience in doctrine.[205]

Similar considerations counsel against the use of a doctrinal appeal to subjective experience in the Fourth Amendment cases. In

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203. *DeShaney*, 489 U.S. at 208 (Brennan, J., dissenting).

204. Id. at 210-11.

205. It doesn't follow that a "reasonable person" standard should be employed ouly in assimilationist contexts; the pluralist potential of such a standard can be affected by the manner in which it's implemented. If, as is implicit in *DeShaney*, a judge must determine what the "reasonable person" would think or do, as a matter of law, the standard functions as an objective test. In some instances, however, this sort of standard is treated as a fact question for a jury; in that case, it operates in a more pluralist manner, at least to the extent that it may take on different substantive contours in different communities. See Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 Minn. L. Rev. 277, 294-303 (1984) (explaining that in tort law, the "reasonable person" standard functions as a device for turning over to juries, as issues of fact, questions that need not be answered in any uniform way).

Justice Harlan's original formulation, the *Katz* test had two prongs: the requirement that the individual have "exhibited an actual (subjective) expectation of privacy," and the question whether the expectation is "one that society is prepared to recognize as 'reasonable.'"[206] These two doctrinal elements intersect in a manner different than Justice Harlan's formulation suggests.[207] The first prong necessarily incorporates a requirement that a subjective expectation be manifested in some objectively ascertainable manner. Justice Harlan's second prong incorporates two distinct notions of reasonableness, which I've labeled "empirical" and "normative" reasonableness. However, empirical reasonableness is intimately bound up with the first prong's requirement that there be an objective manifestation of subjective expectations of privacy. Properly understood, the second prong, which represents the core substantive Fourth Amendment inquiry, asks exclusively whether protection of a given expectation of privacy is consistent with the values of a "free and open society."

At a minimum, it can be concluded that the empirical and normative questions are distinct inquiries that should not be intertwined. In addition, the second prong of the *Katz* test leaves no room for a doctrinal appeal to subjective experience, because that prong raises a purely normative question that should be concerned exclusively with the interpretation and application of Fourth Amendment values. Any potential role for subjective experience, therefore, must be in connection with the first prong.

The focus of the present inquiry is whether this first prong, if retained as a separate element of doctrine, should be framed as an appeal to subjectivity or as an objective, normative inquiry. According to the proposed gnideline, the answer depends on the extent to which this specific doctrinal provision is designed to embody pluralist values. On reflection, this element of the *Katz* test is not inherently pluralist; rather, like *DeShaney*, it concerns an empirically or normatively constructed "reasonable person." Consideration of a classic argument against retention of the first prong of Justice Harlan's test best makes the point.[208]

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206. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

207. This analysis is set forth more fully in the text accompanying notes 61-68.

208. This argument is set forth in Amsterdam, 58 Minn. L. Rev. at 384 (cited in note 50); Burkoff, 15 U. Toledo L. Rev. at 527-30 (cited in note 92); LaFave, 1 *Search and Seizure* § 2.1(c) at 308-09 (cited in note 54).

The argument that there is no need for *any* "subjective" doctrinal component at all begins with the observation that the existence of a subjective expectation of privacy is not a sufficient condition for the conclusion that the privacy interest should receive Fourth Amendment protection. At the same time, the argument goes, having a subjective expectation of privacy is not a necessary condition of Fourth Amendment protection, either. Suppose the government were to "announc[e] half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance."[209] Surely that government behavior should not be dispositive of, or even affect, the normative Fourth Amendment inquiry, no matter how successful it might be in altering actual privacy expectations. If subjective expectations of privacy are neither necessary nor sufficient for the conclusion that a given interest should receive Fourth Amendment protection, it would seem that subjectivity is, at best, an unnecessary doctrinal element.[210]

However, even if it's correct that subjective experience, in the most literal sense, is irrelevant to the Fourth Amendment concept of "search," it doesn't follow that an explicitly objective analysis of empirical reasonableness would be equally inapposite. Suppose that an expectation of privacy is empirically unreasonable not because of a pattern of government intrusiveness, but because the risk of exposure to ordinary persons is too great to justify an empirical conclusion that the matter is likely to remain private in the ordinary course of events.[211] One might well argue that whenever an expectation of privacy is empirically unreasonable for this sort of reason, it is necessarily an expectation that should not receive Fourth Amendment protection.[212] Accordingly, the empirical reasonableness inquiry could resolve some cases without resort to the normative question central to the second prong. Furthermore, because the two inquiries are analytically distinct, framing them as two separate doctrinal entities might produce a net gain in clarity.[213]

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209. Amsterdam, 58 Minn. L. Rev. at 384.

210. Examples of the purely normative approach to this Fourth Amendment question can be found in Christepher Slobogin, *The World Without a Fourth Amendment*, 39 U.C.L.A. L. Rev. 1 (1991); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47 (1974).

211. For example, one cannot have an empirically reasonable expectation of privacy in a marijuana plant cultivated in the plain view of passers-by.

212. See Serr, 73 Minn. L. Rev. at 627 (cited in note 92).

213. The evil to be avoided is duplication of the existing defect—the intertwining of the empirical and normative assessments of reasonableness. If one abandoned the first prong of Justice Harlan's test entirely, the question of empirical reasonableness would be subsumed within the normative inquiry; the question whether a reasonable person would have oxpected a particular item of information to remain private as an empirical matter would be part of asking

This "defense" of the first prong of the *Katz* test demonstrates that its retention would not be justified by a desire to promote pluralist values. The object would be to create a category of circumstances in which the individual reasonably could be said to have exposed, or to have risked exposing, private matters otherwise enjoying Fourth Amendment protection. Although the existence of the Fourth Amendment guarantees themselves might well be a pluralism-regarding aspect of the Constitution, the enterprise of specifying conditions under which expectations of privacy would be deemed empirically unreasonable is not. Indeed, the dominant value here is predictability: law enforcement officers must be able to identify with some degree of certainty the circumstances under which Fourth Amendment guarantees, and their concomitant procedures, do and do not apply. This constitutional provision is not designed to accommodate variations in individuals' expectations regarding the risk of exposure of matters they subjectively wish to keep private.

In contrast, some doctrines and core constitutional values are intimately connected to cultural pluralism. Unlike the expectation of privacy cases, Justice O'Connor's Establishment Clause "messages of endorsement" test exemplifies a question concerning which the case for doctrinal recourse to subjective experience appears quite compelling.

Justice O'Connor's point that government may violate the constitutional prohibition against "establishing" religion through symbolic as well as substantive means is well taken; government messages of endorsement or disapproval can significantly affect status in the community.[214] Accordingly, the case for recognizing her "purpose" prong is persuasive: there should be little difficulty in

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whether a privacy expectation is one that should be protected in a "free and open society." It is not obvious that the risk of conflating the two inquiries would be smaller than it is under the existing approach. On the other hand, the difficulty would not disappear even assuming that the "subjective" prong of the test, if retained, could be appropriately distinguished from the normative prong. Because arriving at the conclusion that a given expectation of privacy is empirically unreasonable would make the normative analysis unnecessary, there would always be an incentive to explore the empirical question first. The potential to reproduce exactly the current pattern of allowing covert normative conclusions to drive the empirical analysis is clearly present. Thus, the choice between the two options is not an easy one to make.

214. The foundation for Justice O'Connor's doctrinal modification of the *Lemon* test is quoted in note 126. It is the object of an incisive criticism in Smith, 86 Mich. L. Rev. at 309-13 (cited in note 124). However, I disagree with Smith's implicit conclusion that there is no place for doctrines that attempt to reduce the degree of the alienation he describes as "an inevitable cost of maintaining government in a pluralistic culture." Id. at 313.

For a defense of the concept of "status harm," see Karst, 27 Harv. C.R.-C.L. L. Rev. at 512-30 (cited in note 124).

finding a constitutional violation when the government intentionally sends a message endorsing or disapproving a particular religion. The "effects" prong follows naturally: there should be room for finding a violation as well when, regardless of the message intended to be sent, the one subjectively received is one of endorsement or disapproval.[215]

The "messages of endorsement" test fleshes out a constitutional provision intimately connected with pluralist values; identifying another area of constitutional law as thoroughly and unambiguously infused with concern for cultural diversity as the First Amendment would be difficult.[216] Indeed, the pluralist thrust of the Establishment Clause provides the undergirding for the "effects" prong of Justice O'Connor's test: it makes it plausible to argue that a constitutional violation should be found whenever the government in fact sends a message that is perceived to endorse religion. Thus the "effects" prong, in principle, illustrates a highly appropriate use of the strategy of doctrinal appeal to subjective experience. It represents a superficially perfect doctrinal expression of pluralist values.[217]

The two remaining cases illuminate the boundaries of the first proposed guideline. *Bowen v. Gilliard*[218] illustrates the difficulty of deciding whether a doctrinal provision implicates cultural pluralism. *United States v. Kozminski*[219] demonstrates that pluralist values do not necessarily exist in isolation.

In *Gilliard* the Supreme Court concluded that a challenged alteration in AFDC requirements did not impinge upon constitutionally protected family interests. Justice Brennan, in dissent, appeared to take the position that any government decision that is experienced as intruding on a family interest should be deemed an intrusion on family in the constitutional sense, and so should trigger strict scrutiny of the government action. As previously indicated, it's not absolutely clear whether Justice Brennan meant to take the position that *every* subjective experience of family should constitute a protected interest. If his true view were that there *are* limits—that some subjectively experienced "family" interests are not to be afforded constitutional protection—under the proposed guideline the preferred approach would be to engage in normative analysis. Justice Brennan would be

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215. The argument that O'Connor's "effects" prong should be read as an appeal to subjectivity is set forth in note 126.

216. Martha Minow, *The Free Exercise of Families*, 1991 U. Ill. L. Rev. 925, 936.

217. However, the virtue it possesses in theory is undone by its implementation in the persona of the "objective observer." See text accompanying notes 223-33.

218. 483 U.S. 587 (1987).

219. 487 U.S. 931 (1988).

expected to reach, and articulate, an explicitly normative conclusion concerning the scope of constitutionally protected family interests.[220] On the other hand, Justice Brennan in fact may have held the view that *every* subjective experience of family is constitutionally significant.[221] In this case, the proposed guideline approves a doctrinal appeal to subjective experience as a means of protecting the widest possible range of diverse family interests.

The descriptive question whether Justice Brennan meant to endorse a limited or an all-inclusive conception of the range of protected family interests presupposes that there is no consensus on the degree to which the constitutional "family" value implicates cultural pluralism as a matter of constitutional interpretation. Were there such a consensus, as is the case, for example, with respect to the Establishment Clause, the Constitution itself would dictate the preferred doctrinal course. However, the role of "traditional family values"—in other words, the appropriateness of an assimilationist interpretation of family—is hotly contested in this society. Consequently, one must first reach a conclusion on the normative question whether the constitutional value at issue *should* be given a pluralist interpretation before applying the first proposed guideline, which looks to the pluralist content of a specific doctrinal provision.

Like "family," the concept of involuntary servitude at stake in *Kozminski* presents a difficult interpretive task along the assimilationist/pluralist dimension, though with a somewhat different twist. Separate and competing pluralist and assimilationist values are present in this context. The notion of involuntariness suggests there may be a diversity-regarding component of the fundamental constitutional norm itself: what is prohibited is a condition in which the individual is held to service against his *individual* will.[222] At the

220. Even under this scenario the role of subjective experience can be significant. It's relatively easy to take into account the interests and experiences of traditional families, but the contribution made by the evidence reproduced in Justice Brennan's opinion is that it makes vivid the perspective of outsiders—here, children whose father lives outside the home and has difficulty providing for them. Recounting their experience is designed to exert pressure on whatever unexamined assumptions the Justices may have concerning the nature of the family, and to prompt the Court to consider expanding the constitutional definition of family te include this sort of interest. Note, however, that this approach would not constitute the doctrinal appeal to subjective experience that is the focus of this Article; rather, it's an example of the option discussed in the text accompanying notes 22-24.

221. An eloquent statement of this position can be found in Minow, 1991 U. Ill. L. Rev. 925 (cited in note 216).

222. This interpretation is consistent with the government's position that a violation could be predicated in part on a showing that the victim "*believed* that he was left . . . with no tolerable al-

same time, because this constitutional prohibition—and the criminal statutes that track it—are designed to regulate conduct, arguably there is a need for greater determinacy as to what is disallowed than is possible with any standard incorporating subjective experience. The presence of substantive concerns that pull in a non-pluralist direction raises the inference that the subjective experience strategy is not likely to be productive in this setting. However, Justice Brennan's dissent in *Kozminski* illustrates an indirect method of accommodating subjective experience, which will be discussed in Part IV.C.3.

2. Implementing Appeals to Subjectivity

The first generalization drawn from reviewing the decided cases was that in doctrinal contexts subjective experience is never absolutely subjective; it is inevitably overlaid with some objective screen or filtering mechanism.[223] One might argue that this fact alone means that doctrinal appeals to subjectivity necessarily subvert pluralism because it demonstrates that to some extent normative judgment is unavoidable.[224] That would be an overstated conclusion, however.

The inevitability of objective overlays on subjective experience *does* mean that no bright line may be drawn between objective and subjective doctrinal components. The distinction between objectivity and subjectivity is more subtle: there is a continuum of objective filters that might be overlaid on subjective experience, ranging from relatively porous objective standards that operate to validate most, if not all, actual subjective experiences, to relatively dense requirements that function to exclude from further doctrinal consideration some significant portion of the actual range of lived experiences. Objective filters that are relatively porous can be described as normatively open, in the sense that they impose relatively fewer normative requirements on the subjective experience filtered through them.

It should be apparent that pluralism is served when subjective experience is viewed through a relatively porous objective filter, and it is disserved when the objective lens is relatively dense.[225]

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ternative but to remain in the master's service." Brief for the United Statos at 33, *United States v. Kozminski*, 487 U.S. 931 (1988) (No. 86-2000) (emphasis added) (on file with the Author).

223. See text accompanying notes 185-86.

224. An analogous argument is made in some detail with respect to the law of contracts in Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L. J. 997 (1985).

225. Note, however, that objective filters can be evaluated along dimensions other than their numerical impact. If viewed as an objective filter on subjective experience, a "reasonable person" standard, for example, may capture the experience of most individuals but nevertheless fail to

Consequently, whenever a doctrinal appeal to subjective experience is employed as a means of vindicating pluralist values,[226] it should incorporate the most porous objective filter possible. Justice O'Connor's "messages of endorsement" test, as she elaborates it, provides an example of what *not* to do.

The "effects" prong of Justice O'Connor's test seemingly requires reference to subjective experience.[227] However, it's evident that any governmental activity will engender a variety of responses. Justice O'Connor's proposed solution, the "objective observer" construct, operates as a relatively dense filter on subjective experience.[228] Whatever the content of the "objective observer's" experience, substantial numbers of people will not share the perspective that is privileged.[229] The "objective observer" thus eviscerates the test's pluralist potential.

As unsatisfactory as the "objective observer" requirement appears to be, the problem to which it attempts to respond is not easily resolved. Every doctrinal appeal to subjectivity must confront the fact that the range of human experience is virtually infinite. It's likely that there will always be at least one individual who sees a message of endorsement of religion in *any* government activity. Justice O'Connor's "objective observer" seems intended to reduce to a manageable level the range of subjective experiences that can be credited for Establishment Clause purposes.

In effect, the "objective observer" functions in the same way as more explicitly normative limits on the range of subjective experience, such as the strategy of privileging the experience of "minorities and nonadherents."[230] However, this sort of approach, if dense enough, converts the appeal to subjectivity into a disguised form of normativ-

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vindicate pluralist values, if there are one or more culturally distinct groups that do not share the norms that make the reasonable person "reasonable." The ultimate assessment that a particular instance of doctrinal appeal to subjective experience is, or is not, pluralist cannot be reduced to a simple formula.

226. Most of the analysis in this Article assumes that furthering pluralist values is the only goal one might appropriately pursue in appealing to subjective experience as an element of doctrine, but I leave open the (distant) possibility that there may be other legitimate ends as well.

227. The argument that O'Connor might not have intended to propose a subjective test at all is discussed in note 126.

228. As noted earlier, the "objective observer" appears to be fading from the scene in more recent cases, but no substitute has yet appeared as a potential solution to the problem of subjectivity. See text accompanying notes 138-44.

229. The cases in which Justice O'Connor asserts that the "objective observer" "should" perceive a certain message only exacerbate the density of the objective lens. See, for example, *Corporation 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).

230. Note, 100 Harv. L. Rev. at 1648 (cited in note 124).

ity that the courts should avoid.[231] The characteristics that define the range of experiences to be credited are themselves the product of normative choice; they would more constructively be implemented by candid discussion of those norms themselves.[232] Pluralist goals are not advanced by resort to subjective experience viewed through dense objective filters.

Although the "objective observer" overlay is an objective filter similar in density to the "credit the experience of minorities and nonadherents" approach, it is even less satisfactory, because there is no way to discern its implicit normative contours. Thus, the "objective observer" is a hopelessly ineffective means of implementing pluralist values. In contrast, the fundamentally pluralist insight that a constitutional harm occurs whenever a message of endorsement is *received* might be implemented by a minimal requirement that an individual's subjective experience—here, an experience of governmental endorsement of religion—be exhibited in *some* culturally intelligible manner. This is a porous objective overlay; almost all actual experiences will pass through it and thus receive recognition in the subsequent constitutional analysis.[233]

Of course, adopting this approach would require a commitment to a thoroughly pluralist understanding of the "effects" prong of the "messages of endorsement" test. Several commentators have argued that this is not a workable position.[234] My own view is that the test might nevertheless be acceptable if confined to analysis of purely symbolic government activity, such as the holiday displays at issue in

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231. Furthermore, it may not solve the problem of subjectivity at all; it should be apparent that "minorities and nonadherents" likely do not share among themselves just one perception of government messages of endorsement, or of anything else. If what is meant is just a limit on the range of experiences that "count," the argument in the text still applies—that this is a relatively dense filter on subjective experience that might be expressed more profitably as simple normative choice.

232. To illustrate, the decision to credit the experiences of minorities and nonadherents is itself a normative choice that should be debated on its own merits. The characteristics of "minorities and nonadherents" that arguably justify the decision to privilege their perspective can be expressed straightforwardly as norms governing the constitutional analysis per se.

233. This proposal might be *too* porous. Suppose, for example, that an individual raised an Establishment Clause objection to the grizzly bear portrayed on the emblem of the state of California, on the ground that the grizzly was held sacred by some Native Americans; that person thus perceived the state emblem to send a message of endorsement of that religion. I believe this hypothetical could be resolved through an explicit normative account of the concept of "religion," but were that not the case, the Court would have to devise some additional objective test that would effectively exclude that person's experience from the range of experiences that count for Establishment Clause purposes.

234. See, for example, Smith, 86 Mich. L. Rev. at 291 (cited in note 124) (explaining that "the result would be government paralysis"); Note, 100 Harv. L. Rev. at 1649 n.39 (cited in note 124) (claiming "it appears to allow disaffected religious minorities to veto *any* government action that they view as imposing religious values on them").

Lynch and *Allegheny County*, and the moment of silence laws in question in *Wallace*. Even supposing that application of this test would result in the proscription of all such symbolic activity, one can plausibly argue that the government interests implicated in those instances ought to give way to the pluralism embedded in the Establishment Clause.[235]

However, setting forth a new doctrinal approach is not the central goal of this Article. Rather, the proposal is intended to illustrate the point that some doctrinal incorporation of subjective experience may be appropriate in some constitutional contexts, and that the variability of subjective experience is not necessarily disqualifying. *If* there is a constitutional harm to be redressed whenever a message of endorsement is actually conveyed,[236] there must be some recourse to subjective experience at the level of doctrine, and by definition, no reason exists to privilege some experience over others. What is needed, therefore, is a doctrine that as nearly as possible accepts all subjective experience for what it is.

At the same time, any doctrinal formulation that does credit a broad range of subjective experiences in the manner just described has the potential to paralyze government.[237] Thus, it should be emphasized that the two guidelines set forth in this Article are designed to operate in tandem. The impact of a subjective experience variable is most likely to be judged acceptable when pluralist values are most directly and least controversially at stake. Accordingly, just as pluralist objectives militate in favor of imposing only porous objective filters on subjective experience, the potentially broad reach of the doctrinal strategy under consideration here counsels that the strategy be employed only in the context of relatively clear constitutional commitments to pluralism.

For example, the question whether "family" ought to be given a pluralist interpretation for purposes of constitutional analysis is much more controversial than the analogous question regarding "religion."

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235. Kenneth Karst makes a similar proposal. Karst, 27 Harv. C.R.-C.L. L. Rev. at 505-08 (cited in note 124).

236. One might simply abandon the "effects" prong and find a constitutional violation only in those instances in which government intends to send a message of endorsement or disapproval. However, this would not adequately capture the underlying motivation of Justice O'Connor's "messages of endorsement" approach: the prohibition of symbolic activity that *communicates* a stance on religion. For example, the creche displayed alone on the Allegheny County Courthouse staircase might not have been intended to send a message of endorsement, but there is no doubt that it did so. The harm is the same, or very nearly so, even in the absence of intent.

237. See sources cited in note 234.

Consequently, though it would not be difficult to formulate a constitutional doctrine with respect to family interests that would conform to the second guideline,[238] this is not an area in which satisfaction of the first guideline is a given.[239] Defining family interests with reference to subjective experience, then, provides an example of the salutary use of subjectivity only for those who come down in favor of a thoroughly pluralist interpretation of constitutionally protected family interests.[240]

3. An Avenue of Further Exploration

Justice Brennan's proposal in *United States v. Kozminski*[241] illustrates another method of solving the dilemma of subjective experience in a manner consistent with pluralist values. *Kozminski* posed the question whether some doctrinal mechanism could be found that would take account of the mental capacity of the two mentally retarded adults who were coerced into remaining at work on the defendants' farm through means that likely would not have been effective with adults of normal intelligence. The government argued for a purely subjective test: the victim's *belief* that there were no tolerable alternatives should be an adequate predicate for a showing of involuntary servitude.[242] Justice Brennan instead offered what amounts to a sophisticated "objective manifestation" test: a condition of involuntary servitude exists whenever certain objective criteria, such as complete domination over all aspects of the victim's life, are met.

Justice Brennan's test incorporates the desired accommodation of the victims' subjective experience because in practice the objective conditions of involuntary servitude will be more easily reached when defendants attempt to enslave mentally retarded victims; the same means are more likely to hold the individual against his will in the latter cases. At the same time, as Brennan recognizes, the test is best not characterized as fundamentally subjective, and in that sense is not an example of the doctrinal strategy that is the principal topic of

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238. For example, one might adopt the rule that every family interest, as defined by the subjective experience of the constitutional challenger, should be afforded constitutional protection.

239. In contrast, I think it uncontroversial that the Religion Clauses demarcate an area in which pluralist values are central.

240. As does Martha Minow, for example. See Minow, 1991 U. Ill. L. Rev. 925 (cited in note 216).

241. 487 U.S. 931 (1988).

242. See note 222.

this Article.[243] On its face, Brennan's approach looks to external, objective criteria of involuntary servitude, rather than to the subjective experiences of individuals.

At first glance, Justice Brennan's proposal might seem vulnerable to the charge of suppressed normativity: as is the case with other normative lenses, looking to objective manifestations of subjective experience provides a vehicle for the intrusion of unexamined normative judgments.[244] However, I believe this criticism is not persuasive as applied to Brennan's *Kozminski* proposal.

First, this is not a case in which the appeal to subjective experience serves a legitimating function. Because Justice Brennan's proposed test is explicitly *objective*, there is no danger that normative debate will be concealed behind an ostensibly subjective doctrinal component. Brennan's standard impels explicit normative debate over the nature of the objective conditions that would constitute involuntary servitude.

In addition, this is an area in which values of notice and predictability loom as large as pluralism. At least in its criminal statute incarnation, the constitutional provision in question prohibits certain kinds of conduct. It's well settled that another constitutional provision, the Due Process Clause, requires that a reasonable person be adequately notified of the proscribed conduct. Resort to a more nearly "subjective" standard, therefore, would be inappropriate; adequate notice could not be guaranteed under such a regime.

At the same time, the virtue of Justice Brennan's proposal is that it accommodates a range—arguably, the full range—of subjective experience within the confines of a genuinely objective test. The conditions he sets forth as manifestations of involuntary servitude will be attained by varying means and degrees of coercion in different cases, depending to a significant extent on the subjective experience of the individual victim. Thus, pluralist values—here, the individual's subjective experience of servitude—can be vindicated in this setting without resort to the more risky technique of incorporating subjective experience as an explicit element of doctrine.[245]

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243. As noted earlier, "objective" and "subjective" are used here as relative terms. See text accompanying notes 223-25.

244. For a similar argument, see Dalton, 94 Yale L. J. at 1039-66 (cited in note 224).

245. The Brennan strategy does present the risk that the objective conditions of servitude could be defined in a manner that would credit only a subset of the range of actual experiences of servitude. However, because normative debate in this case would have to be explicit, the risks posed by the alternative, which implicate covert normativity, seem even greater.

The *Kozminski* dissent illustrates a different sort of doctrinal recognition of subjective experience. A relatively complex and explicitly normative "objective manifestation" analysis may be employed in some circumstances to vindicate the full range of actual subjective experience. This strategy of implicit appeal to subjectivity may be especially useful when there is no direct or workable way for an explicit doctrinal component to accommodate the range and variety of actual experience.

V. CONCLUSION

The implications of this review of existing doctrinal appeals to subjectivity for "outsiders" like Adzan Bedonie and Hodari D. are not readily captured in a compact concluding statement. Perhaps the central lesson is that there are no easy answers, no simple formulas that implement the "rule of law" ideal and at the same time accommodate the cultural diversity that these two individuals represent.[246] However, though the Supreme Court has not compiled a particularly strong record regarding the use of subjective experience as an element of constitutional doctrine, there may be room for limited optimism. Focusing more clearly and directly on the objective of accommodating cultural pluralism might revitalize the technique of employing doctrinal appeals to subjective experience in constitutional doctrine.

Accordingly, two guidelines that have emerged from this Article's review of the existing cases may be useful in rehabilitating the strategy of doctrinal appeal to subjective experience. First, the decision whether to appeal to subjective experience in doctrine should be determined by the pluralist or assimilationist character of the substantive constitutional or doctrinal provision at stake. Appeal to subjectivity is unlikely to be a worthwhile doctrinal strategy when assimilationist values loom large, because in those cases there is relatively little to be gained in pluralist terms, while the strategy of appeal to subjective experience always raises a risk of reintroducing unarticulated norms. Second, even when subjective experience can appropriately foster pluralist values, it should be employed in a manner that does not operate as de facto assimilationism; a doctrinal

246. The reader will note that I propose no solution to the specific problems Adzan and Hodari face. I chose their stories in preference to ones that might be more closely related to the doctrines under review in this Article as a means of illustrating the proposition stated in the text—there are no easy answers to the problem of cultural diversity.

appeal to subjectivity should incorporate an objective filter that is as normatively open as possible.

These guidelines establish a baseline for future attempts to incorporate subjective experience as an element of constitutional doctrine. If followed, they hold out the promise that the strategy of doctrinal appeal to subjectivity might evolve beyond its present tendency to lapse into covert normativity. The stories of Adzan Bedonie and Hodari D. impel continued exploration and evaluation of all available strategies of inclusion.