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# An Expressive Jurisprudence of the Establishment Clause

Ivan E. Bodensteiner  
*Valparaiso University School of Law*

Alex Geisinger

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# An Expressive Jurisprudence of the Establishment Clause

Alex Geisinger\* and Ivan E. Bodensteiner\*\*

## I. Introduction

Scholars recognize that government acts are expressive; that is, they affect the “social meaning” of behavior.<sup>1</sup> Nowhere are the expressive effects of government acts more significant than when they affect an individual’s understanding of her ability to practice her religion. When government allows a crèche to be placed on public property or provides educational vouchers that are used primarily at religious schools, its acts send signals to the population about what the community and the government prefer.<sup>2</sup> As Justice O’Connor has observed, a religious symbol displayed on government property carries a message that affects one’s understanding of him or herself as an “insider” or “outsider,” favored or disfavored by the political community.<sup>3</sup>

Yet while scholars have recognized that Establishment Clause cases are best understood as analyzing government’s expressive acts,<sup>4</sup> they have yet to develop a comprehensive theory of just how government acts actually express particular meanings. Without such a theory, efforts to

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\* Associate Dean and Professor of Law, Valparaiso Law School. The authors would like to thank Professors Rosalie Levinson and Michael Stein for their helpful thoughts and comments. They also greatly benefited from a faculty workshop at Drexel University School of Law. Extraordinary research assistance was provided by Jennifer Hagermann. All errors are, of course, the authors’ alone.

\*\* Professor of Law, Valparaiso Law School.

1. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 956-57 (1995); see also, David Cole, *Faith and Funding: Toward an Expressive Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 586 (2002) (stating that private and public conduct can be expressive).

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

3. *Id.* (“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.”).

4. See Cole *infra* note 121; Hill, *infra* note 121.

develop a meaningful Establishment Clause jurisprudence remain unsuccessful. The purpose of this article is to provide such an expressive theory. The article turns to both social and cognitive psychology to develop a model of expressive effects based on the way in which government acts affect beliefs about one's relationship to community or government. This belief-change theory suggests that the primary means by which government acts can affect belief is through the process of inference. When the government places a crèche on public property, for example, such an act can lead to reasonable inferences about the religious preferences of both government and the community. Such changes in belief can, in turn, affect the utility of acting in accordance with religious beliefs not preferred by the government or community. By understanding the way in which inference works—in particular the effects of pre-existing beliefs and logical consistency on one's inferential processes—a full expressive theory will be developed.

Once the theory is developed, the article applies it to a number of Establishment Clause cases and ultimately, discusses the theory's implications for Establishment Clause jurisprudence. The article will proceed as follows: Section Two will provide a short introduction to existing Establishment Clause jurisprudence to highlight some of the difficulties and shortfalls of the way in which such cases are currently handled. Section Three will provide a detailed model of the expressive theory while Section Four will apply the theory to a number of Establishment Clause cases. Finally, we will discuss the implications of the expressive theory for Establishment Clause jurisprudence in Section Five. It is our hope by the end of the article to have established a different, more comprehensive and intuitively satisfying test of Establishment Clause violations. We hope also to shed some significant light on current problems in existing Establishment Clause jurisprudence along the way.

## II. The First Amendment and Religion

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . .”<sup>5</sup> While the first two clauses, the Establishment Clause and the Free Exercise Clause, most obviously address religion, in recent years the Freedom of Speech Clause has become an important source of religious freedom.<sup>6</sup> Even though the First Amendment explicitly restricts the actions of Congress, these three clauses apply to state and local government by incorporation into the

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5. U.S. CONST. amend. I.

6. See Section II.B below.

Due Process Clause of the Fourteenth Amendment.<sup>7</sup>

A. *Religion Clauses*

The language of the First Amendment leaves little doubt that the goal of the Free Exercise Clause is to promote religious freedom.<sup>8</sup> One view of the Establishment Clause is that it is a “co-guarantor” of religious freedom because any “state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”<sup>9</sup> In his plurality opinion in *Van Orden v. Perry*,<sup>10</sup> Justice Rehnquist said the Court’s decisions, “Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation’s history . . . [and] [t]he other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.”<sup>11</sup> He also refers to the “difficulty of respecting both faces.”<sup>12</sup>

One of the difficulties in interpreting the religion clauses is the fact that history provides little guidance. Professor Tribe described three primary views of religion among the Framers:

[A]t least three distinct schools of thought . . . influenced the drafters of the Bill of Rights: first, the evangelical view (associated primarily with Roger Williams) that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained”; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) “against ecclesiastical depredations and

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7. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause and applying it to the states); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause and applying it to the states); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Freedom of Speech Clause and applying it to the states). Recently some Justices have questioned the full incorporation of the Establishment Clause. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring) (questioning whether the Establishment Clause should be applied to the states because they should be allowed to “pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.”).

8. U.S. CONST. amend. I. (stating “Congress shall make no law . . . prohibiting the free exercise” of religion).

9. *Lee v. Weisman*, 505 U.S. 577, 592 (1992); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 232 (1963) (Brennan, J., concurring) (“The inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause.”).

10. *Van Orden v. Perry*, 545 U.S. 677 (2005).

11. *Id.* at 683 (plurality opinion).

12. *Id.*

incursions”; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.<sup>13</sup>

Justice Brennan suggests that the use of history in interpreting the religion clauses is complicated by the changes between their adoption in 1791 and the present.<sup>14</sup> He said,

our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews, but as well of those who worship according to no version of the Bible and those who worship no God at all.<sup>15</sup>

This article assumes that the religious freedom “face” of the Establishment Clause is the dominant “face.”<sup>16</sup> With this assumption, religious freedom becomes the core value of the religion clauses. We will suggest that the Court’s Establishment Clause jurisprudence, at least as applied recently, allows government to erode religious freedom because the Court fails to recognize how government acts affect individuals. We will also focus our discussion on the Court’s efforts to analyze the messages sent by the government acts it considers. As its decisions demonstrate, the Court does little to explain how government acts carry religious messages. Rather, in most cases, the Court simply makes conclusory statements with little support that the message carried by a government act is either secular or religious in nature.<sup>17</sup> Before developing our expressive theory, we will review briefly the Court’s approaches in Establishment Clause cases.

Professor Erwin Chemerinsky identifies “three major competing approaches to the establishment clause”: first, “strict separation”; second, “neutrality;” and third, “accommodation/equality.”<sup>18</sup> To explain

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13. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1158-59 (2d ed. 1988).

14. *Abington*, 374 U.S. at 240 (Brennan, J., concurring).

15. *Id.*

16. We recognize there are other views, including the view that the Establishment Clause is simply jurisdictional, i.e., it places religion within the jurisdiction of the states rather than the federal government. *See, e.g.*, Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843, 1844, 1849 (2006). It is not the purpose of this article to justify the assumption; others have written in support of the argument that the primary purpose of the Establishment Clause is to promote religious freedom. *See, e.g.*, Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155, 1557 (2004).

17. *See, e.g.* *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

18. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES*, 1192-98

what is meant by strict separation, Professor Chemerinsky refers to *Everson v. Board of Education*,<sup>19</sup> where the Court said “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”<sup>20</sup> Government neutrality toward religion requires that it not “favor religion over secularism or one religion over others.”<sup>21</sup> Recently, he says, several justices “have advanced a ‘symbolic endorsement’ test in evaluating the neutrality of a government’s action.”<sup>22</sup> Endorsement and its different variations will be discussed below. Lastly, “under the accommodation approach the government violates the establishment clause only if it literally establishes a church, coerces religious participation, or favors one religion over others.”<sup>23</sup> This, too, will be discussed below. With the exception of strict separation, these three approaches are reflected in the Court’s jurisprudence at least since 1971.<sup>24</sup> Following is a brief description of the dominant “tests” utilized in Establishment Clause cases, as well as a discussion of the limited insights provided by the Court into the relationship between government acts and religious freedom.

### 1. *Lemon* Test

Often attacked, but never overruled, the Court continues to utilize at least a modified version of the test established in *Lemon v. Kurtzman*,<sup>25</sup> where the Court held two state statutes, both providing state aid to church-related elementary and secondary schools, unconstitutional.<sup>26</sup>

Justice Burger, writing for the Court, noted that the Establishment Clause was intended to afford protection against three main evils: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>27</sup> He then identified the “cumulative criteria” developed by the Court over many years, indicating that three tests could be gleaned from the cases.<sup>28</sup> “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

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(Aspen 3rd ed. 2006).

19. *Id.* at 1192.

20. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

21. Chemerinsky, *supra* note 18, at 1193.

22. *Id.* at 1194.

23. *Id.* at 1196.

24. *See infra* Section II.A.1-3.

25. *See, e.g.,* *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-69 (2002).

26. *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971).

27. *Id.* at 612.

28. *Id.*

foster ‘an excessive government entanglement with religion.’”<sup>29</sup> Both the Pennsylvania and Rhode Island statutes were found unconstitutional because they “foster[ed] an impermissible degree of entanglement,” which is determined by examining “the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>30</sup> While it does not necessarily lead to strict separation, the approach taken in *Lemon* is more consistent with strict separation than either endorsement or coercion.

Recent cases help demonstrate the current status of the *Lemon* approach. In *McCreary County v. American Civil Liberties Union*,<sup>31</sup> the Court upheld a preliminary injunction requiring that two counties’ displays of the Ten Commandments on the walls of their courthouses be removed. Writing for the Court, Justice Souter concluded that the displays violated the purpose prong of the *Lemon* approach.<sup>32</sup> Rejecting an invitation to abandon the purpose prong, Justice Souter said that

[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides. Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the “understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. . . .”<sup>33</sup>

Justice O’Connor concurred, stating that “the goal of the [Religion] Clauses is clear: to carry out the Founders’ plan of preserving religious liberty to the fullest extent possible in a pluralistic society.”<sup>34</sup> She agreed there was a violation of the Establishment Clause because the purpose behind the display at issue “conveys an unmistakable message of endorsement to the reasonable observer.”<sup>35</sup> While this case, given the history of the display and the post-litigation efforts to disguise the purpose,<sup>36</sup> presented an obvious message of endorsement, none of the Justices provided a meaningful explanation of the process by which a court arrives at the conclusion that a display such as the Ten

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29. *Id.* at 612-13 (citations omitted).

30. *Id.* at 615.

31. *McCreary County v. ACLU*, 545 U.S. 844 (2005).

32. *Id.* at 881.

33. *Id.* at 860 (citations omitted).

34. *Id.* at 882 (O’Connor, J., concurring).

35. *Id.* at 883.

36. *Id.* at 850.

Commandments in the Courthouse conveyed such an “unmistakable message.”

The same day *McCreary* was decided, the Court, without a majority opinion, upheld the display of a monument, inscribed with the Ten Commandments, on the Texas State Capitol grounds in *Van Orden v. Perry*.<sup>37</sup> Joined by three other Justices, Justice Rehnquist said:

[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.<sup>38</sup>

Justice Breyer concurred, supplying the critical fifth vote needed to uphold the display.<sup>39</sup> He described the case as a “borderline case,” for which he sees “no test-related substitute for the exercise of legal judgment.”<sup>40</sup> To him, while the “Court’s prior tests provide useful guideposts—and might well lead to the same result the Court reaches today—no exact formula can dictate a resolution to such fact-intensive cases.”<sup>41</sup> He concludes that while the display communicates both a religious message and a secular message, it “conveys a predominantly secular message.”<sup>42</sup> What is perhaps most surprising, given the fact that *Van Orden* and *McCreary* were decided on the same day, is the limited effort made by the plurality to explain just how the message in *Van Orden* was primarily secular while the message in *McCreary* was not.<sup>43</sup> Aside from general observations about the passive nature of the *Van Orden* display and its surroundings, little guidance is given regarding the process or framework for making this distinction.<sup>44</sup>

The decision in *Zelman v. Simmons-Harris*,<sup>45</sup> upheld the Ohio voucher program through which state aid could be used for parochial schools.<sup>46</sup> The Court in *Zelman* found no violation of the effects prong of the *Lemon* test.<sup>47</sup> Justice Rehnquist, for the Court, said prior cases

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37. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

38. *Id.* at 686 (plurality opinion).

39. *Id.* at 698.

40. *Id.* at 700 (Breyer, J., concurring).

41. *Id.* (citations omitted).

42. *Id.* at 702.

43. *Id.* at 703.

44. *See, e.g., id.* at 702-03.

45. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

46. *Id.* at 644.

47. The result in *Zelman* was predictable after the decision in *Mitchell v. Helms*, 530 U.S. 793 (2000), where the Court upheld a federal program through which the federal government distributes funds to state and local government agencies, which in turn lend educational materials and equipment to public and private schools, with the amount



make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.<sup>48</sup>

He went on to say that the “incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.”<sup>49</sup> Again, the basis for this significant conclusion—that by giving money to individuals government has insulated itself from conclusions regarding its religious preferences—is not discussed.<sup>50</sup>

Thus, while *Lemon* has survived, it has been modified, particularly in financial aid cases, in a way that makes it less protective of religious liberty. Justice O’Connor, in her concurring opinion in *Zelman*, referred to the *Lemon* test as a “central tool in our analysis of [Establishment Clause] cases,” and indicated that the Court has “folded the entanglement inquiry into the primary effect inquiry.”<sup>51</sup> Further, she said the opinion in *Zelman* “clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, or, as I have put it, of ‘endors[ing] or disapprov[ing] . . . religion.’”<sup>52</sup> Clearly, the *Lemon* approach has been diluted when it is interpreted to tolerate the voucher program at issue in *Zelman*. A modified version of the *Lemon* test, at least the second prong

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depending on enrollment. *Mitchell*, 530 U.S. at 801. Many of the private schools receiving the aid in Jefferson Parish, Louisiana, are religiously affiliated and “pervasively sectarian.” *Id.* at 804. There was no majority opinion; Justices O’Connor and Breyer, concurred and supplied the votes needed for a 6-3 vote upholding the program as implemented in Jefferson Parish. *Id.* at 793. However, they wrote separately because they were troubled by the breadth of the plurality, particularly the fact that the “plurality’s rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content,” and because the plurality “rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible.” *Id.* at 837. They were concerned that government aid distributed on a per capita basis, as opposed to “true private choice,” would affect perception and send a message of endorsement where religious indoctrination was supported by government by virtue of a per capita program. *Id.* at 842-43. The majority would characterize the vouchers at issue in *Zelman* as “true private choice.” *Zelman*, 536 U.S. at 652.

48. *Zelman*, 536 U.S. at 652.

49. *Id.*

50. *Id.*

51. *Id.* at 668 (O’Connor, J., concurring).

52. *Id.* at 669 (citations omitted).

of it, is incorporated in the endorsement test.<sup>53</sup>

## 2. Endorsement Test

One of the leading proponents of the endorsement or neutrality approach on the Court was Justice O'Connor.<sup>54</sup> She said, in *Lynch v. Donnelly*, that “[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”<sup>55</sup> In *Lynch*, the Court upheld the inclusion of a crèche in a city’s annual Christmas display, located in a private park in the downtown shopping district, because the context of the display detracted from the crèche’s religious message.<sup>56</sup> In contrast, a crèche display at issue in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,<sup>57</sup> was held unconstitutional because unlike the crèche in *Lynch*, “nothing in the context of the display detracts from the crèche’s religious message.”<sup>58</sup> Moreover,

[t]he *Lynch* display composed a series of figures and objects, each group of which had its own focal point. Santa’s house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a “talking” wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.<sup>59</sup>

The display of a Hanukkah menorah, also at issue in *Allegheny County*, survived the constitutional challenge because, although it is a religious symbol, its “message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.”<sup>60</sup> The Court noted that the menorah was next to a Christmas tree display that also included a sign saluting liberty and, therefore, the display “simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season which has attained a secular status in our society.”<sup>61</sup> Justice O’Connor concurred,

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53. See *infra* Section II.A.2.

54. 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).

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

56. *Id.* at 680-81.

57. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

58. *Id.* at 598.

59. *Id.*

60. *Id.* at 613-14.

61. *Id.* at 616.

but indicated her analysis of the message sent by the display differs from that of Justice Blackmun.<sup>62</sup> She concluded that

the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty does not have the effect of conveying an endorsement of religion. . . . In my view, the relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs. . . . The message of pluralism conveyed by the city's combined holiday display is not a message that endorses religion over nonreligion.<sup>63</sup>

Thus, even in cases where the Court makes efforts to describe its basis for analyzing the meaning presented by a government display, the factors used in the analysis vary.

Different versions of the symbolic endorsement approach can be found in *Capitol Square Review and Advisory Board v. Pinette*,<sup>64</sup> in which the Court held that it was a violation of the Free Speech Clause of the First Amendment to preclude the Ku Klux Klan from erecting a large Latin cross in the park across from the Ohio statehouse, and that allowing the display would not violate the Establishment Clause. Justice O'Connor, joined by Justices Souter and Breyer concurring, concluded that the cross should be allowed because a reasonable observer would not perceive it as an endorsement of religion since there was "a sign disclaiming government sponsorship or endorsement," which helps "remove doubt about the state approval of [the] religious message."<sup>65</sup> She also said that the endorsement test must be applied "from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share" and

must be deemed aware of the history and context of the community and forum in which the religious display appears [and] the general history of the place in which the cross is displayed. . . . An informed member of the community will know how the public space in question has been used in the past.<sup>66</sup>

Justice Stevens dissented, saying there is symbolic endorsement if a reasonable person observing the display would perceive government

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62. *Id.* at 632 (O'Connor, J., concurring).

63. *Id.* at 632, 634-35.

64. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

65. *Id.* at 776 (O'Connor, J., concurring).

66. *Id.* at 780-81.

support for religion.<sup>67</sup> He states,

If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect non-adherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.<sup>68</sup>

Justice Stevens was critical of Justice O'Connor's reasonable person, indicating that her person "comes off as a well-schooled jurist, a being finer than the tort-law model."<sup>69</sup> Clearly, the Stevens version of the endorsement approach is more protective of religious liberty than Justice O'Connor's approach.

### 3. Coercion Test

There are two different versions of the coercion test, which Professor Chemerinsky characterizes as the accommodation approach.<sup>70</sup> Justice Kennedy, writing for the Court in *Lee v. Weisman*,<sup>71</sup> applied his version of coercion to a graduation prayer made part of the official school graduation ceremony and found it inconsistent with the Establishment Clause.<sup>72</sup> He stated:

[t]he undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.<sup>73</sup>

Justice Scalia's version, outlined in his dissenting opinion joined by Justices Rehnquist, White and Thomas in *Lee v. Weisman*,<sup>74</sup> would find a violation of the Establishment Clause only where government acts are "backed by threat of penalty."<sup>75</sup> According to Justice Scalia, the

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

68. *Id.* at 799-800.

69. *Id.* at 800 n. 5.

70. See Chemerinsky, *supra* note 18, at 1196.

71. *Lee v. Weisman*, 505 U.S. 577 (1992). Justices Blackmun, Stevens, O'Connor, and Souter, joined Kennedy's opinion but also wrote separately to clarify that while coercion violates the Establishment Clause, it is not necessary to show coercion in order to establish a violation of the Establishment Clause. *Id.* at 599-631 (concurring opinions).

72. *Id.* at 593.

73. *Id.*

74. *Id.* at 631.

75. *Id.* at 642 (Scalia, J., dissenting).

“Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that ‘[s]peech is not coercive, the listener may do as he likes.’”<sup>76</sup> His opinion is critical of Justice Kennedy’s version of coercion, because he says it equates coercion and pressure.<sup>77</sup> In most cases, Justice Kennedy’s version of coercion may result in the same holding as the endorsement approach; however, Justice Scalia’s version of coercion would result in a violation of the Establishment Clause only where government creates a religion or adopts a law requiring certain religious practices.<sup>78</sup> In short, if Justice Scalia’s version prevails, there should be very few violations of the Establishment Clause.<sup>79</sup>

#### 4. Our Nation’s History

At least one case, *Marsh v. Chambers*,<sup>80</sup> ignores most Establishment Clause jurisprudence and upholds the constitutionality of a state legislature employing a Presbyterian minister to begin each session with a prayer because that practice is “deeply embedded in the history and tradition of this country.”<sup>81</sup> Ignoring the religious message of such behavior altogether, Justice Burger rests his decision on the fact that this unique, unambiguous, and unbroken history of more than two hundred years leaves little doubt that Nebraska’s practice is part of the fabric of our society.<sup>82</sup> Justice Rehnquist, joined by three other Justices, takes essentially the same approach in *Van Orden*,<sup>83</sup> where he indicates his “analysis is driven both by the nature of the monument and by our Nation’s history.”<sup>84</sup> Citing *Marsh v. Chambers* and listing our government’s numerous “acknowledgements” of “our Nation’s heritage,” Justice Rehnquist concludes that the Texas display of the Ten Commandments does not violate the Establishment Clause.<sup>85</sup> Justice Breyer, in his concurring opinion, finds the forty-year history of the monument significant in that it was uncontested, thus indicating “as a

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76. *Id.*

77. *Id.* at 640-43.

78. *Id.* at 640.

79. In fact, Justice Scalia’s approach arguably makes the Establishment Clause redundant because when government coerces religious belief it presumably violates the Free Exercise Clause. Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 S. CT. REV. 123, 134.

80. *Marsh v. Chambers*, 463 U.S. 783 (1983).

81. *Id.* at 786.

82. *Id.* at 792.

83. *Van Orden v. Perry*, 545 U.S. 677 (2005).

84. *Id.* at 686 (plurality opinion).

85. *Id.* at 678.

practical matter of *degree* this display is unlikely to prove divisive.”<sup>86</sup> It is not readily apparent why a durable practice, such as the one in *Marsh* dating back to 1791, should be insulated from an Establishment Clause attack.<sup>87</sup>

### B. *Religion and Freedom of Speech*

When government restricts religious speech, it can be challenged under the Free Speech Clause of the First Amendment. Because a restriction on religious speech is a content-based restriction, or possibly a viewpoint-based restriction, it triggers strict scrutiny analysis.<sup>88</sup> The defendant government may attempt to justify its restriction on religious speech by arguing that to allow the religious speech on government property or to fund the religious speech would violate the Establishment Clause.<sup>89</sup> Here the Establishment Clause becomes a defense when the government argues that it has a compelling interest in avoiding a violation of the Establishment Clause.<sup>90</sup>

Several of these cases have arisen in the context of an educational institution that gives student groups access to school facilities, but denies access to religious groups out of concern that allowing such access would violate the Establishment Clause. The court has consistently rejected this defense. For example, in *Good News Club v. Milford Central School*,<sup>91</sup> the Court held that the school had created a “limited public forum,” which can be restricted by group or topic,<sup>92</sup> but not by viewpoint. It rejected the Establishment Clause defense by concluding that the exclusion of the Good News Club was viewpoint based; that is, it was excluded because it addressed permissible topics from a religious perspective.<sup>93</sup> While the school permitted discussion of topics “such as

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86. *Id.* at 704 (Breyer, J., concurring).

87. As demonstrated by *Brown v. Board of Education*, 347 U.S. 483 (1954), it is better to end unconstitutional practices late instead of ratifying them by Supreme Court decision.

88. See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

89. See generally *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

90. *Id.*

91. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98.

92. This suggests a school could exclude religious groups, or religion as a topic.

93. 533 U.S. at 111-12. This determination is not obvious and was contested by three Justices in dissent. *Id.* at 132-33, 138. Justice Stevens said there are three categories of speech for “religious purposes”—first, religious speech about a particular topic from a religious point of view; second, religious speech that amounts to worship; and third, religious speech that is “aimed principally at proselytizing or inculcating belief in a particular religious faith.” *Id.* at 130 (Stevens, J., dissenting). He said the school prohibited the use of its facilities for “religious purposes,” intending to allow the first category, but excluding the second and third types. *Id.* at 132-33. Justice Souter, joined by Justice Ginsburg, said *Good News* intended to use the school facilities “for an

child rearing, and of ‘the development of character and morals from a religious perspective,’”<sup>94</sup> it precluded the Good News Club because it determined its activities to be religious in nature—“the equivalent of religious instruction itself.”<sup>95</sup> Having concluded that the school engaged in viewpoint discrimination, and therefore had to satisfy strict scrutiny, the court rejected the school’s Establishment Clause argument.<sup>96</sup> Relying on several earlier decisions,<sup>97</sup> the Court rejected the Establishment Clause defense because the Club’s meetings were held after school hours, were not sponsored by the school, and were open to any student who obtained parental consent, not just Club members.<sup>98</sup> The school argued that because its policy involves elementary school children, the children will perceive that the school is endorsing the Club and will feel coercive pressure to participate because the Club’s activities take place on school grounds, even though they occur after school hours.<sup>99</sup> Justice Thomas, speaking for the Court, gave five reasons why this argument was unpersuasive.<sup>100</sup> First, allowing the Club to speak on school grounds would ensure neutrality, not threaten it.<sup>101</sup> Second, in determining whether the community would feel coercive pressure to engage in the Club’s activities, the relevant community is the parents, not the children, because the children cannot attend without their parents’ permission and, therefore, cannot be coerced into engaging in the religious activities.<sup>102</sup> Third, even if, as suggested in earlier cases, elementary school children are more impressionable than adults, this is not significant here because “we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during non-school hours merely because it takes place on school premises where elementary school children may be present.”<sup>103</sup> Fourth, even if the possible misperceptions by school children were considered, there is no support for the theory that small children would perceive endorsement

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evangelical service of worship calling children to commit themselves in an act of Christian conversion,” which is clearly a use that would violate the Establishment Clause. *Id.* at 138 (Souter, J., dissenting).

94. *Id.* at 108.

95. *Id.* at 104.

96. The Court did not decide whether government’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination because it determined the school did not have a valid Establishment Clause interest.

97. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

98. 533 U.S. at 113-14.

99. *Id.*

100. *Id.* at 114-115, 117-118.

101. *Id.* at 114.

102. *Id.* at 115.

103. *Id.*

here because the meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom, the instructors were not school teachers, and the children in the group were not all the same age as in the normal classroom setting.<sup>104</sup> Fifth,

even if we were to inquire into the minds of school children in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.<sup>105</sup>

A related case, *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>106</sup> involved a state university's refusal to give student activity funds to a student organization, Wide Awake Publications, the goal of which was "[t]o publish a magazine of philosophical and religious expression," "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multi-cultural backgrounds."<sup>107</sup> The University established a student activities fund "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'"<sup>108</sup> Among other things, it authorized payment of outside contractors for the printing costs of a variety of student publications.<sup>109</sup> However, the University withheld authorization for payments on behalf of Wide Awake because it primarily "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality."<sup>110</sup> As in *Good News Club*, the student organization challenged the denial as a violation of the Free Speech Clause and the Court interpreted the University's action as viewpoint discrimination, subject to strict scrutiny, because it justified its denial of funds to Wide Awake "on the ground that the contents of Wide Awake reveal an avowed religious perspective."<sup>111</sup> Justice Kennedy, writing for the majority, concluded that funding Wide Awake would not violate the Establishment Clause because the program at issue is neutral toward religion.<sup>112</sup> Justice Souter, joined in dissent by Justices Stevens, Ginsberg and Breyer, stated that "[u]sing public funds for the direct subsidization of preaching the word is

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104. *Id.* at 117.

105. *Id.* at 118.

106. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

107. *Id.* at 825-26.

108. *Id.* at 824.

109. *Id.* at 822.

110. *Id.* at 827.

111. *Id.* at 832.

112. *Id.* at 840.



categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.”<sup>113</sup>

The plaintiffs in this line of cases are obtaining relief based on the Free Speech Clause, rather than the religion clauses. In rejecting the Establishment Clause defense raised by the government in these cases, the Court decided that providing the access or the funds requested by the plaintiffs would not constitute a violation of the Establishment Clause.<sup>114</sup> This does not mean that the Free Speech clause trumps the Establishment Clause; rather, it means only that in these situations providing the access or the funds sought by the plaintiffs would not violate the Establishment Clause.<sup>115</sup>

### C. Summary

Existing Establishment Clause jurisprudence is a confused amalgam consisting of at least three distinct approaches to issues of how government acts affect individuals’ religious behavior. While some general trends—particularly a trend to decrease the protections of religious freedom—can be gleaned from recent decisions, none of these decisions provides a meaningful basis for distinguishing between acts that do and do not affect an individual’s ability to practice his or her religion. Rather in most cases the Court provides only conclusory statements regarding whether the messages sent by the government are secular or religious with little analysis of the basis for such conclusions.

It seems clear that Establishment Clause protection from the government is shrinking and, as a result, it plays almost no role in assuring religious freedom. In the key area of financial aid to religious institutions, *Zelman* means that the government need only have a secular purpose and use private citizens as the conduit through which the aid passes before it reaches a religious institution.<sup>116</sup> This allows government to subsidize religious instruction and proselytizing at “pervasively sectarian” institutions. Public displays of religious symbols will be allowed unless government is careless and displays religious symbols standing alone without articulating a secular purpose.<sup>117</sup> Private displays of religious symbols and religious speech on government

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113. *Id.* at 868 (Souter, J., dissenting).

114. *Good News v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

115. *Good News Club*, 533 U.S. at 113-19 (2001).

116. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

117. *Van Orden v. Perry*, 545 U.S. 677 (2005); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

property designated as a limited forum will generally be protected by the Free Speech Clause of the First Amendment, with very little interference from the Establishment Clause.<sup>118</sup> The Establishment Clause still has some bite when the government sponsors prayer at school events, such as graduation and football games, although this may be precarious with two new justices.<sup>119</sup> We believe the Court is closing its eyes to the true effects of government acts, such as displaying religious symbols, funding religious institutions, and allowing religious activities and displays on government-owned property, and how these acts restrict religious freedom. Further, we believe expressive law has much to add to this discussion. None of the three dominant tests—*Lemon*, endorsement, and coercion—is necessarily inconsistent with the Establishment Clause goal of religious liberty, with the possible exception of Scalia’s version of coercion. The key is in determining what constitutes an endorsement, what makes one feel like an outsider, and what causes one to feel subtle pressure or coercion. Expressive law provides a framework in which to explore these questions and thereby assists in identifying government acts that detract from religious freedom.

### III. Expressive Theory

Expressive law examines the connection between law and the social meaning of particular behaviors.<sup>120</sup> In the case of the Establishment Clause, many authors have recognized the relevance of this inquiry for analyzing the meaning of government acts in the religious sphere.<sup>121</sup> While many scholars note the relevance of the expressive inquiry to Establishment Clause questions, none to date have attempted to develop and apply an expressive model of how government acts affect the social meaning of acting in accordance with one’s religious beliefs. This Section develops a comprehensive, rational choice-based model of expressive law and explains the need-reinforcement process that

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118. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

119. In *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the most recent decision striking down government-sponsored prayer at a school event, Justice O’Connor voted with the majority and Justice Rehnquist dissented along with Justices Scalia and Thomas. Assuming their replacements, Justices Roberts and Alito, join Justices Scalia and Thomas, the decision becomes much closer.

120. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

121. See generally David Cole, *Faith and Funding: Toward an Expressive Model of the Establishment Clause*, 75 S. CAL. L. REV. 559 (2002); Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine & Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1874-91 (2004); Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669 (2003).

underlies individuals' desires for community approval. In later sections, the model is applied to an analysis of Establishment Clause jurisprudence.<sup>122</sup>

A. *The Reasoned Action Model*

Traditional economics literature operates from the premise that people act rationally to maximize their own utility when choosing among alternatively available courses of conduct.<sup>123</sup> Under this framework, known as "rational choice theory," law operates by varying the cost to an individual of satisfying her preferences through the use of exogenous sanctions such as fines or imprisonment.<sup>124</sup> For any given activity, increasing the associated cost will decrease an individual's desire to choose that opportunity; conversely, a decrease in cost will encourage an individual to satisfy her desire by choosing that opportunity.<sup>125</sup> In other words, manipulating the opportunity set available to a given actor will alter her subsequent choices. This standard economic account has proved a useful baseline method for modeling human behavior, and thereby predicting the effects of particular policies.<sup>126</sup>

Expressive law seeks to understand the relationship between law and the social meaning of a particular behavior.<sup>127</sup> While some authors

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122. See *infra* Section IV.B.1-3.

123. See WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 99-103 (8th ed. 1999); see also MARK PERLMAN & CHARLES R. McCANN, JR., *THE PILLARS OF ECONOMIC UNDERSTANDING: FACTORS AND MARKETS* 301 (2000) (describing the market as a "model of allocative efficiency"); see generally, Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002) (our Expressive Theory is based on the comprehensive discussion of expressive law contained therein).

124. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650 (2000) [hereinafter McAdams, *Expressive Law*] ("In the vision of law that dominates economics-influenced legal theory, law imposes sanctions to solve problems."). McAdams uses this axiom as a departure point for his version of expressive law theory. See *id.*

125. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (for a discussion of this point made in the context of criminal activity).

126. Two Nobel laureates defend this model from the perspective that preferences are relatively static and that studying variable taste is a futile endeavor. See George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV., 76 (1977).

127. See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998) (describing the role of law in the development of social norms, and socioeconomic law and economics, which seeks to inject psychological and social factors related to wealth and race into otherwise "neutral" economic analyses); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) [hereinafter Lessig, *The Regulation*] (examining the social construction of orthodoxy and its place in the law); McAdams, *Expressive Law*, *supra* note 124 (suggesting that law may be alternatively conceptualized for its expressive, as well as its traditionally acknowledged, enforcement

consider the social, or symbolic, meaning of certain legal doctrines or decisions, others consider the impact that law may have on mediating the social meaning of an activity.<sup>128</sup> The crucial element of this analysis is the nexus between law, norms, and social meaning. In certain situations, law, or other forms of government action, may cause individuals to alter their own behavior because either the action induces them to change their tastes (internalization) or creates a fear of bearing social sanctions (second order sanctions).<sup>129</sup> This article is primarily concerned with the latter scenario, where government acts may affect individual behavior because the individual fears social sanction.

Our expressive theory is based on the reasoned action model of decision-making, which identifies two factors affecting an individual's intent to undertake a behavior.<sup>130</sup> These factors are the individual's attitude toward the behavior itself and her beliefs about what other people think of the behavior. The reasoned action model is diagrammed in Figure 1.<sup>131</sup>

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functions); Cass R. Sunstein, *Law, Economics, & Norms: On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (considering how legal statements might be designed to change social norms).

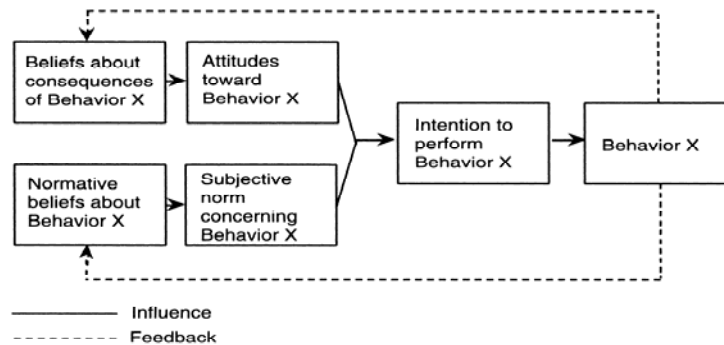
128. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 681-83 (1998).

129. See Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002) (for a review of the development of the field and the nuances contained therein, as the above account is synthesized and abbreviated).

130. MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH* 13-18 (1975).

131. Figure 1 is derived from RUSSELL VEITCH & DANIEL ARKKELIN, *ENVIRONMENTAL PSYCHOLOGY: AN INTERDISCIPLINARY PERSPECTIVE* 109 (1995). For additional sources of support for the reasoned action model, see Icek Ajzen & Martin Fishbein, *Attitudinal and Normative Variables as Predictors of Specific Behavior*, 27(1) J. PERSONALITY & SOC. PSYCHOL. 41 (1973); Icek Ajzen & Martin Fishbein, *The Prediction of Behavior from Attitudinal and Normative Variables*, 6(4) J. EXPERIMENTAL SOC. PSYCHOL. 466 (1970). For a recent overview of research in this area, see Icek Ajzen, *Nature and Operation of Attitudes*, 52 ANN. REV. PSYCHOL. 27 (2001) (reviewing research published between 1996 and 1999).

Figure 1



As the model suggests, an individual decides whether to engage in particular behaviors by reasoning about how (a) good or bad, and (b) likely or unlikely, the outcomes associated with a given behavior (called the “behavioral attitude”). An individual also considers the amount and quality of social pressure to engage or not engage in that specific behavior (referred to as the “subjective norm”). The behavioral attitude and subjective norm combine to determine an individual’s intent to act.<sup>132</sup> Thus, understanding one’s attitude toward a behavior and one’s belief about the subjective norm can help to determine<sup>133</sup> one’s desire to undertake that behavior.<sup>134</sup>

### B. Beliefs as the Building Blocks of Attitude

While the subjective norm is defined in terms of an individual’s

132. See VEITCH & ARKKELIN, *supra* note 131, at 110-12 (explaining the theory and relating it to environmental perception). One interesting aspect of the model is that it helps us understand when attitude and behavior are inconsistent; i.e., when one is predisposed positively toward a behavior but still does not undertake the behavior given the subjective expectations regarding social pressure.

133. The model itself can be deceptively simple. In particular, the model conceives of the individual in a vacuum, uninfluenced by social context. Intentions to act, of course, rely significantly on social context. For example, an individual may have different attitudes toward an activity based on the normative group to which she belongs. See generally ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT: THE ROLE OF NORMS AND GROUP MEMBERSHIP (Deborah J. Terry & Michael A. Hogg eds., 2000) (Criminals, for example, think differently about crime than police, and an individual may have a different attitude toward pollution in her business community than in her home or family community.).

134. Note that intending to undertake a behavior and actually acting are not always the same. See Lessig, *The Regulation*, *supra* note 127, at 955-57. There may be physical limitations to behavior. See *id.* Thus, I may desire to climb a mountain, but weather, geography, or physical exhaustion may keep me from so doing. See *id.* (noting that physical limitations may keep us from doing what we want).

beliefs about what others think of a behavior, it is more difficult to conceive of the concept of attitude in terms of belief.<sup>135</sup> This article is most concerned about the relationship between government behavior and the subjective norm. However, attitude formation and the structure of belief must be understood in order to provide a complete model of how government acts affect beliefs. Attitude toward a behavior can be defined as a function of individuals' beliefs about the consequences of the behavior,<sup>136</sup> the certainty of their beliefs, and their evaluations (either positive or negative)<sup>137</sup> of those consequences.<sup>138</sup> This relationship can

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135. See VEITCH & ARKKELIN, *supra* note 131, at 109. We will discuss in much greater detail the subjective norm in *infra* Section III.C.

136. See FISHBEIN & AJZEN, *supra* note 130, at 218 (One potentially significant limitation on the effective use of a belief-based theory is the fact that any behavior is associated with a virtually limitless number of beliefs, thus significantly limiting the ability to analyze the effect law will have on attitude. However, only a relatively small number of beliefs affect our attitude. Due to limited attention span, apprehension, and information processing abilities, individuals can only process a small number of beliefs at any single time. Thus, although an individual may have a large number of beliefs that, if given time, she could recall about a particular behavior and its consequences, only a maximum of between five and nine of these beliefs underlie her attitude.).

137. Evaluation of a consequence simply means that one thinks positively or negatively about the consequence of an action. Consider one's attitude toward wearing a seatbelt. We can see that certain consequences of wearing a seatbelt are generally positively evaluated (e.g., safety), while certain consequences are generally negatively evaluated (e.g., discomfort). Evaluations of consequences are formed by standard processes of conditioning. See, e.g., *id.* at 277 (noting that evaluations in the end, must be accounted for by the process of conditioning). These processes include: operant conditioning, classical conditioning, and vicarious conditioning. See VEITCH & ARKKELIN *supra* note 131, at 105-07.

138. The elements of the belief-based theory are as follows:

- (1) An individual holds many beliefs about a given object; i.e., the object may be seen as related to various attributes, such as other objects, characteristics, goals, etc.
- (2) Associated with each of the attributes is an implicit evaluative response, i.e., an attitude.
- (3) Through conditioning, the evaluative responses are associated with the attitude object.
- (4) The conditioned evaluative responses summate, and thus
- (5) on future occasions the attitude object will elicit this summated evaluative response, i.e., the overall attitude.

FISHBEIN & AJZEN, *supra* note 130, at 29. The theory of belief-based attitude and intent has its roots in the earliest work of Professor Fishbein. See, e.g., Martin Fishbein, *An Investigation of the Relationships Between Beliefs About an Object and the Attitude Toward That Object*, 16 HUM. REL. 233 (1963). For a description of the belief-based theory of attitude and intent formation, this Article will rely primarily on FISHBEIN & AJZEN, *supra* note 130, which remains the most comprehensive exegesis of the theory. It should, however, be noted that the theory has been further elaborated in a number of articles—sometimes responding to criticism—by Professors Fishbein, Ajzen, and others. Compare Vernon E. Cronen & Richard L. Conville, *Fishbein's Conception of Belief Strength: A Theoretical, Methodological and Experimental Critique*, 42(2) SPEECH MONOGRAPHS 143 (1975) (criticizing the theory) and Joseph R. Priester & Monique A. Fleming, *Artifact or Meaningful Theoretical Constructs?: Examining Evidence for Nonbelief-and Belief-Based Attitude Change Processes*, 6(1) J. CONSUMER PSYCHOL. 67 (1997) (criticizing the theory) with Martin Fishbein & Susan Middlestadt, *Noncognitive*

be expressed by the equation  $A_o = \sum b_i e_i$ , where A is the attitude toward behavior O, b is the belief about O (i.e., the subjective certainty that O will result in consequence i), e is the evaluation of the consequence, and n is the number of beliefs.<sup>139</sup>

This theory of beliefs, as the basis of attitude, can be correlated with the subjective expected utility theory of behavioral science. According to this concept, when a person has to make a behavioral choice, he will select that alternative which has the highest subjective expected utility (i.e., the alternative which is likely to lead to the most favorable outcomes).<sup>140</sup> This can be stated as  $SEU = \sum SP_i U_i$  where  $SP_i$  is the subjective probability that the choice of this alternative will lead to some outcome  $i$  and  $U_i$  is utility of the outcome  $i$ .<sup>141</sup> This model can be recast in terms of beliefs about consequences—that is,  $SP=b$  and  $U=e$  or the equation  $A_o = \sum b_i e_i$ .<sup>142</sup>

Consider a simple example of the attitude toward wearing a seatbelt while driving. An individual may have the following salient belief about the behavior, which she evaluates positively—it will provide more protection in case of an accident—and the following salient beliefs, which she evaluates negatively—it will be uncomfortable, and it will restrict her movement. The certainty with which she holds these beliefs, in conjunction with her evaluations of each of these outcomes, can determine her attitude regarding the behavior. To see why, assume a simple scale of certainty that runs from 0 (no certainty) to +100 (strong certainty) and a similar scale for evaluation -100 (strong dislike) to +100 (strong like). Applying these factors could have the following results:

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*Effects on Attitude Formation and Change: Fact or Artifact?*, 4(2) J. CONSUMER PSYCHOL. 181 (1995) (responding to criticism and analyzing a number of critical studies and arguing that the contribution of factors other than belief based expectancy-value measures to the prediction of attitude can be seen as a methodological artifact of using inappropriate measures) and Martin Fishbein & Susan E. Middlestadt, *A Striking Lack of Evidence for Nonbelief-Based Attitude Formation and Change: A Response to Five Commentaries*, 6(1) J. CONSUMER PSYCHOL. 107 (1997) (arguing that most criticism avoids assessing the belief-based structure that underlies attitude formation).

139. FISHBEIN & AJZEN, *supra* note 130, at 30-31.

140. *Id.*

141. *Id.*

142. *Id.*; see also Lynn R. Anderson & Martin Fishbein, *Prediction of Attitude From the Number, Strength, and Evaluative Aspect of Beliefs About the Attitude Object: A Comparison of Summation and Congruity Theories*, 2(3) J. PERSONALITY & SOC. PSYCHOL. 437 (1965) (arguing that basic summation of belief and evaluation yields significantly better predictions of attitude than congruity theory).

Figure 2

Belief	Certainty	Evaluation	Be
Protects me in accidents	+30	+90	+2700
Restricts movement	+40	-40	-1600
Is uncomfortable	+40	-50	<u>-2000</u>
		$A_o = \sum b_i e_i$	-900

Based on these beliefs alone, the individual would be inclined not to wear a seatbelt when driving, but such an inclination would not be very strong (an overall negative utility of only -900).

### 1. The Anatomy of Belief

Beliefs<sup>143</sup> result from three different, but related, processes. At their very base, beliefs are formed as the result of an individual's direct sensory perception of the world (descriptive belief).<sup>144</sup> For example, if an individual sees Robert and Tom standing next to each other, she may come to the conclusion that Robert is taller than Tom. This is a simple process of descriptive belief development. Inferential beliefs, on the other hand, are logical conclusions formed from descriptive and other beliefs.<sup>145</sup> Thus, if an individual sees Peter is taller than Robert, she may conclude that Peter is also taller than Tom, even if she does not see them together. This belief is simply the result of applying logical processes to prior belief. Finally, beliefs may be formed based on information provided by a third party.<sup>146</sup> Thus, if an individual is told that Peter is taller than Tom, she may reach such a conclusion regardless of pre-existing knowledge of Tom's and Peter's heights.

Similarly, after a period of economic prosperity with low unemployment rates, if an individual reads in a reputable newspaper that unemployment rates are consistently increasing, it is likely that the individual will change his belief about unemployment rates specifically. Further, through inferential processes, this information will influence the individual's belief regarding the general robustness of the American economy.

Beliefs about consequences of behavior can be held with different

143. A belief is a conviction or feeling of the truth of some proposition or the reality of some being or phenomenon. WEBSTER'S NEW INT'L DICTIONARY 200 (3d ed. 1993).

144. *Fishbein & Azen, supra* note 130, at 131-32.

145. *Id.* at 132, 143-45.

146. *Id.* at 133.



degrees of certainty. In the case of informational belief, the trustworthiness of the speaker and other factors will affect certainty.<sup>147</sup> In the case of inferential beliefs, one's certainty is a function of either probabilistic or evaluative consistency.<sup>148</sup> Evaluative consistency is a function of whether individuals evaluate objects or behaviors positively or negatively in relation to one another.<sup>149</sup> Negative or positive evaluations tend to be consistently held.<sup>150</sup> Thus, if an individual positively values religious freedom, but has a negative attitude toward China, she is likely to form the inferential belief that China has no religious freedom.<sup>151</sup> Such a conclusion maintains the relation between her evaluation of China and religious freedom. Probabilistic consistency, on the other hand, refers to the logic used to develop an inferential belief.<sup>152</sup> The better the logical reasoning, the more certainty with which a belief is held.<sup>153</sup> For example, a person might hold the following two beliefs.

(1) The People's Republic of China is a communist country.

(2) Communist countries do not have religious freedom.

On the basis of these beliefs, she might form the inference that China does not have religious freedom.<sup>154</sup> Such a conclusion is logically consistent, and thus likely will be held with a similarly high degree of certainty.<sup>155</sup>

In sum, beliefs are created in one of three ways: through direct experience, through inferential reasoning, or through the provision of information by third parties. Further, belief formation is constrained by

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147. Note that the willingness to accept information is itself a function of descriptive and inferential belief regarding the trustworthiness and veracity of the source of the information. Thus, if a gossip magazine writes that Tom Cruise and Madonna are having a baby, one may be less willing to accept this information than if it were published by the New York Times. Further, a message's information may be mediated by its ability to be comprehended and the attention given to it by its audience. See FISHBEIN & AJZEN, *supra* note 130, at 452 (examining the significance of source factors in the production of communication effects and the persuasion process).

148. *Id.* at 145.

149. *Id.* at 114-15.

150. *Id.*

151. *Id.* at 144.

152. *Id.*

153. Note, however, that probabilistic consistency does not need to exactly follow the rules of formal logic. *Id.* at 145.

154. *Id.*

155. Note, as well, that the certainty of inferential beliefs is additive; thus, if one does not believe with certainty that communist countries have no religious freedom, his lack of certainty will transfer to his concluding belief. FISHBEIN & AJZEN, *supra* note 130, at 144.

either logical or evaluative consistency; and belief certainty is itself a function of these factors. Thus, while individual beliefs change, individuals are not blank slates; their prior experience and evaluations will affect their ability to change their attitudes and affect the certainty with which they hold their beliefs.

### C. *The Need-Reinforcement Principle*

We must now turn our attention to the subjective norm. Our analysis will consist of two parts. The first part describes why individuals care about what community members think of them and how community norms arise. Along the way, we will shed some light on the nature of community. Second, we will place beliefs about the subjective norm alongside an attitude to provide a basic model from which government activity's effects on individual behavior may be analyzed.

#### 1. The Game-Theoretic Model of Norms

To begin, we will consider the way in which the interdependence of rational self-interested individuals leads to the development of community norms.<sup>156</sup> Most law and economics scholars conceive of norms in game-theoretic terms as arising from cooperation problems that confront rational individuals acting in their own self-interest.<sup>157</sup> A classic example of a cooperation problem is the "prisoner's dilemma," which presents two rational self-interested individuals who must choose between alternate strategies.<sup>158</sup> In the circumstance of the game, pursuit of individual self-interest leads to worse results for each individual than if he or she cooperates with the other.<sup>159</sup>

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156. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) [hereinafter McAdams, *Origin, Development, and Regulation of Norms*].

157. See, e.g., Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2126 n.235 (1996); Steven A. Hechter, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 7-8 (1999); Steven A. Hechter, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 BERKELEY TECH. L.J. 877, 902-03 n.90 (2001); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 797 n.52 (1998); Elmer J. Schaefer, *Predicting Defection*, 36 U. RICH. L. REV. 443, 462 (2002) (discussing social norms, specifically signaling, as an answer to defections in prisoner's dilemma problems with cooperation theories).

158. David Crump, *Game Theory, Legislation, and the Multiple Meaning of Equality*, 38 HARV. J. LEGIS. 331, 409-410 (2001).

159. The most successful strategy is the well-known "tit-for-tat" strategy that emerged victorious from a number of computer tournaments run by Robert Axelrod. See generally *id.* at 377 (2001). Following the tournaments, Axelrod simulated natural selection with sixty-three programs by adjusting the number of offspring produced in each successive round based on a strategy's performance in the previous round. *Id.*

Take, for example, the following scenario between prisoners Row and Column, who are placed in separate cells at the police station and are being questioned. If one inmate tells on the other, the tattler will be let off for cooperation, and the other prisoner will get a three-year sentence. If neither tells, each will be found guilty of a lesser offense of one year in prison. If both tell, each will be convicted of a more significant offense and incarcerated for two years. The options and consequences can be diagrammed as follows, in Figure 3:

**Figure 3**

	Cooperate (withhold)	Defect (tell)
Cooperate (withhold)	1/1	3/0
Defect (tell)	0/3	2/2

Given these circumstances, Row will always tell. Here is why. First, assume that Column will tell. If Row does not do likewise, he will get three years in jail; if he does tell, he will receive a two-year sentence. Now assume that Column does not tell. Row will not be imprisoned if he tells, and he will be punished with one year in jail if he remains silent. In these circumstances, it is better for the self-interested Row to tell, regardless of Column's actions. The dominant strategy for both players will therefore be to tell, resulting in each getting locked up for two years. By contrast, if neither tells, each gets only one year in jail. Consequently, the pursuit of individual self-interest by Row and Column leads to worse results than if they had cooperated and both withheld information.

While defection is the dominant strategy in a one-time play of the prisoner's dilemma, cooperation is a natural result of such a problem in situations where the parties will play the game a substantial number of times.<sup>160</sup> Let us assume that Column and Row are now, respectively, a wholesaler and retailer of goods. They desire to create a relationship whereby Column will supply the goods at a certain cost. If Column delivers the quality of goods agreed upon, both parties will make two. If

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After one thousand rounds of play, weak programs became extinct, and so did some predatory programs that had survived by exploiting dwindling programs lower in the food chain. *Id.* Interestingly, in this game designed to simulate Darwinian natural selection, tit-for-tat won again, just as it had in Axelrod's tournaments. *Id.*

160. ERIC A. POSNER, LAW AND SOCIAL NORMS 19 (2000) (developing the foundation for a theory of norms as signals of one's cooperativeness).

Column cheats and sends goods of lesser quality, he will make three and Row will make zero. However, Row will end their relationship and Column will have to look for other cooperative partners. A similar result would occur if Row cheats—for example, by challenging the quality of adequate goods and withholding full payment. Assuming a desire to play for a number of times, it is better for the parties to cooperate than to sever their ties, because making two regularly is better than making three a few times, while also developing a reputation for being untrustworthy, and thus losing future cooperative opportunities. As Professor Eric Posner has pointed out, “logic shows that the optimal move is always to cooperate.”<sup>161</sup> Norms are, in turn, artifacts of the long term cooperation of these rational individuals.

## 2. Deficiencies in the Game-Theoretic Model of Norms

The game-theoretic model of norm formation is, of course, extremely parsimonious. In particular, it does little to identify specifically the way in which individual beliefs or preferences can be linked to the behavioral standards embodied by norms. Nor does the game-theoretic model provide an understanding of why individuals comply with norms. Our expressive theory uses the concept of need-reinforcement in conjunction with the basic social psychology of norms and groups to inform the rational choice model and, in particular, provide an understanding of these issues. By identifying norms as reflections of aggregate preference and normative behavior as a signal of the importance of group standing to an individual, the model provides a framework for considering how estimations of group preference inform and affect behavior.

This model leads to a particular view of groups and norms. Pursuant to the rational choice perspective, groups are the result of individuals coming together for the mutual satisfaction of their own needs.<sup>162</sup> The individual is the basic unit of such a conception of the group,<sup>163</sup> and interdependence is the basic force that holds these

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161. *Id.* at 16 (Posner also suggests that the logic of cooperation extends to games involving more than two players by assuming that everyone has sufficient information about other people’s past activities. Thus, defection from one pairwise transaction will not lead to a “clean slate” in the next pairwise transaction.)

162. *See, e.g.*, MUZAFER SHERIF, *GROUP CONFLICT AND COOPERATION: THEIR SOCIAL PSYCHOLOGY* (1966) (illustrating how shared identity and group organization arise as derivative phenomena from interdependence between group members).

163. FLOYD HENRY ALLPORT, *SOCIAL PSYCHOLOGY* (1924) (This concept has its roots in some of the earliest work of social psychology. As early as 1924, psychologists argued that the individual was the only psychological reality and that there was nothing in the group that was not in the individual.)

individuals together.<sup>164</sup> In this sense, the group is simply a reflection, or aggregation, of the individuals that comprise it, and the idea of a group as something other than a collection of individuals is meaningless.<sup>165</sup> The idea of a social norm within this framework is, in turn, simply the reflection of the aggregate preferences of the individuals that comprise the group.<sup>166</sup> That is, norms are the reflection of the perceived majority position of any group of individuals and can be determined by simply combining the individual positions of the majority of group members.<sup>167</sup>

It is difficult, however, to reconcile this view of normative behavioral standards with the notion that normative behavior provides information as to one's willingness to cooperate with other group members. The connection between certain moral norms, such as "do unto others as they would do unto you" and one's cooperativeness is apparent. It becomes more difficult to see the relationship between other norms—for instance, eating hot dogs at a baseball game—and one's cooperative nature.<sup>168</sup> Posner has attempted to solve this problem by describing norms as behavioral equilibria that result from people signaling their discount rates to one another.<sup>169</sup> He suggests that preferences regarding the value of future payoffs differ among the population.<sup>170</sup> Thus, people with low discount rates are less likely to defect from a cooperation game because they value future payoffs higher than most. Posner deems such people "good types."<sup>171</sup> In order to distinguish themselves from bad types, good types engage in behaviors that signal their higher discount rate.<sup>172</sup> Because they value future payoffs more highly, good types are willing to undertake more expensive signaling behaviors.<sup>173</sup> Norms, to Posner, are the behavioral equilibria

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164. John C. Turner, *Social Categorization and the Self-Concept: A Social Cognitive Theory of Group Behavior*, 2 *ADVANCES IN GROUP PROCESSES* 77, 79 (1985) [hereinafter Turner, *Social Categorization and the Self-Concept*].

165. See FLOYD HENRY ALLPORT, *SOCIAL PSYCHOLOGY* 260 (1924) (arguing that the individual is the only psychological reality and that there is nothing in the group that is not in the individual).

166. See Turner, *Social Categorization and the Self-Concept*, *supra* note 164, at 80.

167. *Id.* at 82.

168. See Richard H. McAdams, *Signaling Discount Rates: Law, Norms and Economic Methodology*, 110 *YALE L.J.* 625, 676-78 [hereinafter McAdams, *Signaling Discount Rates*] (reviewing *LAW AND SOCIAL NORMS* by Eric A. Posner) (McAdams asserts that it would be inefficient for all of these behaviors to act as signals of cooperativeness. Instead, he suggests, the most efficient way to create a reputation for cooperativeness is, simply, to cooperate with others.).

169. POSNER, *supra* note 160, at 19-23.

170. *Id.* at 18.

171. *Id.* at 19.

172. *Id.*

173. *Id.*

that result from good and bad types signaling their discount rates.<sup>174</sup> While Posner's effort continues to be the most comprehensive attempt to explain norm formation, and, in particular, to explain the normative basis for a number of specific behaviors, it has been subject to criticism.<sup>175</sup>

### 3. The Social-Psychological Model of Norms

The social-psychological model provides a simpler explanation of how abiding by norms reflects an individual's cooperativeness. The explanation is grounded in the mutual attraction that arises between individuals who are interdependent.<sup>176</sup> This attraction is rooted in the operation of a need satisfaction or "reinforcement" principle: mutual liking between group members reflects the extent to which positive, gratifying, or rewarding outcomes are associated directly or indirectly with being in a cooperative relationship with each other.<sup>177</sup> The greater the perceived rewards of group membership, the greater the attraction to the group and the less likelihood of defection.<sup>178</sup>

Normative pressure is, in turn, an external force that affects an individual's behavior only to the extent that she is concerned about others to whom she is attracted.<sup>179</sup> Put simply, if an individual wants to do something she perceives is not condoned by other group members, and there is a sense of mutual liking or attraction between her and the other group members, she risks disapproval from others to whom she is attracted.<sup>180</sup> A group member that seeks esteem is thus required to

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174. *Id.*

175. *See, e.g.,* Steven A. Hetcher, *Commentaries on Eric Posner's Law and Social Norms: Cyberian Signals*, 36 U. RICH. L. REV. 327, 359 (2002) ("Posner errs, then, by using signaling of discount rates as the sole explanation for norms."); Dan M. Kahan, *Commentaries on Eric Posner's Law and Social Norms: Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 371 (2002) (stating that "Posner's signaling model, as it stands . . . should not be trusted to guide public policy even provisionally for four distinct reasons"); *see also* McAdams, *Signaling Discount Rates*, *supra* note 168.

176. Turner, *Social Categorization and the Self-Concept*, *supra* note 164 at 121.

177. *Id.*

178. *Id.*

179. Rational choice scholars intuitively understand this attraction. *See, e.g.,* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1592-93 (2000) ("Business, politics, love, and war cause people to form relationships with each other. These relationships create opportunities for mutual benefit from cooperation and also opportunities for people to exploit each other.").

180. JOHN C. TURNER ET AL., *REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY* 20 (1987). "[W]here people perceive, believe or expect to achieve mutual satisfaction from their association, they will tend to associate in a solitary fashion, to develop positive interpersonal attitudes and to influence each other's attitudes and behavior on the basis of their power to satisfy needs for information and reward each other." *Id.*

estimate which behaviors are approved by other group members.<sup>181</sup> The more uniformly held and highly valued the preference, the more likely it will assert normative force.<sup>182</sup>

Returning to the example of individual attitude toward seatbelt use, consider two different possible levels of belief regarding the norm. In one case imagine that the individual believes that most of the group (about 90%) approves of seatbelt use, and, in the other, she believes only a small majority of the group (say 60%) approves of seatbelt use. Depending on her own beliefs regarding seatbelt use, this difference may have an impact on her willingness to undertake the practice.

These differences can be measured in terms of their impacts on expected utility. Recall that the individual may evaluate the procedure both positively, as providing greater safety, and negatively, as reducing comfort and mobility. Assume that only these two beliefs and a belief regarding the subjective norm are relevant to the behavior. Assume further that beliefs about the behavior are held constant—the individual prefers not to use seatbelts, but does not hold this preference very strongly (as set forth above, -900 units). The certainty with which she holds beliefs about the norm will thus determine her willingness to undertake the behavior. Consider the effect on utility in the situation when certainty of belief regarding the subjective norm drops from 95 to 30, as set forth in Figures 4 and 5.

**Figure 4**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>Be</b>
Will be socially approved	+95	+10	+950
Protects me in accidents	+30	+90	+2700
Restricts movement	+40	-40	-1600
Is uncomfortable	+40	-50	<u>-2000</u>
		$A_o = \Sigma b_i e_i$	+50

181. Scott, Robert, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV., 1603, 1615 (2000) (discussing the Bayesian nature of normative reasoning).

182. *Id.*

**Figure 5**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>Be</b>
Will be socially approved	+30	+10	+300
Protects me in accidents	+30	+90	+2700
Restricts movement	+40	-40	-1600
Is uncomfortable	+40	-50	<u>-2000</u>
		$A_o = \Sigma b_i e_i$	-600

Because the individual's understanding of the uniformity with which a belief is held (+30 versus +95) impacts her estimation of normative sanction, she will feel constrained to act by normative control in the former case (because the utility is +50) and not constrained in the latter (where the utility is -600).

Now, consider that the individual member values group membership much more strongly. Thus, her negative evaluation of the normative consequences of acting out of step with group attitudes will be much more substantial (assuming an evaluation for this example of -50). This evaluation will result in conformity regarding a much larger number of behaviors, as illustrated in Figure 6.

**Figure 6**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>Be</b>
Will be socially approved	+30	+50	+1500
Protects me in accidents	+30	+90	+2700
Restricts movement	+40	-40	-1600
Is uncomfortable	+40	-50	<u>-2000</u>
		$A_o = \Sigma b_i e_i$	+600

In such a case, even a small perceived certainty (+30) of sanction will result in conformity.

The more an individual conforms to perceived group norms, the more likely other group members are to perceive her to be strongly attracted to the group. Her willingness to abide by group norms reflects her deep value of acceptance by the community. This is particularly the case when individuals exhibit group conformity with less certain norms that are not universally held. This commitment to group membership acts as a strong signal of the emerging individual's unwillingness to defect from cooperative endeavors with other group members.

The need-reinforcement addition to the basic rational choice model



of behavior thus establishes a very particular view of group and norm formation with the rational individual at its core. Norms arise only because rational individuals attain benefits from interacting with others, and thus develop a free-standing desire for others' acceptance.<sup>183</sup> Individuals attempt to determine the preferences of the majority, and failure to act in accordance with the view of others negatively impacts one's perceived attractiveness to other group members.<sup>184</sup> The higher one values group membership, the less likely she is to defect from cooperative endeavors.<sup>185</sup>

The need-reinforcement principle provides a basis for including in the model of expressive effects of law a separate preference for esteem from others.<sup>186</sup> The reasoned action model describes this desire for esteem as the subjective norm.<sup>187</sup> The desire for esteem will join other preferences that underlie an individual's attitude to determine the utility of any particular behavior.<sup>188</sup> This comprehensive model will allow us to analyze the way in which government behavior affects individual calculations of the utility of acting in accordance with religious preferences.

#### IV. Application of the Expressive Theory to Government Actions with Religious Implications

The relationship among government, individuals, and community is complex and difficult to capture in any comprehensive way. When government acts, such as approving the exhibition of a crèche or Christmas tree on public property, have religious implications exactly how do such actions affect an individual's understanding of her relationship to her community?<sup>189</sup> This section applies the expressive

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183. Turner, *Social Categorization and the Self-Concept*, *supra* note 164.

184. Scott, *supra* note 181.

185. See Figures 5 & 6 in III.C.3. and accompanying text.

186. See Figure 1 in III.A. and accompanying text; *see also* note 122.

187. See note 142 and related text.

188. *Id.*

189. We should note that government behavior may also directly affect perceptions of one's access to government. For example, when a city places a crèche on its property, such an act may lead an individual to infer that the city officials self-identify as Christians. As we will discuss, there will be situations where government acts influence individual beliefs either through direct information provision or reasonable inferences of one's ability to interact with government. *Infra* Section IV.A.2.a. Lack of a fully-realized expressive theory, however, has led the court to fuse concerns about one's relationship to community and government—this is particularly apparent in Justice O'Connor's notion that government acts affect one's beliefs about standing in "political community." As we will discuss, perceptions of one's relationship to community is often mediated through the fact that government is perceived to represent the majority. However, the message sent about community often also carries with it a message about government itself. To the extent the message is one of limited access, we will argue that

theory described above to answer these questions. This article also seeks, by the end of this section, to set out a framework of how government action results in expressive harms on which a consistent analysis of alleged Establishment Clause violations can be based.

A. *The Connection Between Government Acts and Individual Beliefs About Access to Government and the Subjective Norm*

Our expressive theory suggests that government acts can carry information through either direct or inferential mechanisms. This information can affect individual beliefs regarding the preferences of government, as well as affect beliefs about what individuals in the community prefer—that is, it can provide information on the subjective norm. When government acts to affect beliefs about the subjective norm, this, in turn, will affect calculations of the expected utility of acting in a way that contradicts normative belief. Finally, because the process by which information is carried will often be one of inference rather than direct information provision, the way in which pre-existing beliefs will impact ultimate beliefs about community and group sentiment is considered.

1. Some Preliminary Thoughts

a. Must the Act Affect Behavior or Belief?

Our analysis begins by considering the way individuals gather information regarding government and community beliefs as a result of government action. Before beginning, however, one or two divisions in the Supreme Court's Establishment Clause jurisprudence must be pointed out, as they will inform the structure of the analysis. First, the Court is divided as to whether a violation of the Establishment Clause requires a government act to simply affect beliefs, or whether the act must coerce individuals to behave contrary to their religious beliefs or in accordance with the privileged religious belief. Second, if affect on belief is enough to form the basis for an Establishment Clause violation, the question becomes belief about what—one's relationship to government or one's relationship to community? This article comments briefly on this jurisprudential division here and will continue to address these competing theories where necessary in the exposition of the expressive model.

The Court's jurisprudence diverges between those who find a

violation when a government act affects beliefs and those who require the act to be coercive. In analyzing whether acts violate the Establishment Clause, advocates of the endorsement test generally review government acts for their effects on belief.<sup>190</sup> Thus, under the endorsement test, government acts can run afoul of the Establishment Clause simply by sending the wrong message to members of the political community.

Other Justices, however, do not believe that effects on one's belief alone rise to the level of an Establishment Clause violation.<sup>191</sup> These Justices would require that the government act be directly coercive before finding an Establishment Clause violation.<sup>192</sup> Thus, those who apply a test of coercion will only find an Establishment Clause violation

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190. As Justice O'Connor writes:

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.

*Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). *See also* *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in judgment) (citations omitted).

([B]ecause our concern is with the political community writ large, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort. . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].)

*See also* *Bd. of Educ., Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits. As I have previously noted, 'the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community.'").

191. In *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Scalia was joined by Justices Rehnquist, White, and Thomas. *Id.* at 631-46.

192. As Justice Scalia has written:

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," . . . I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that "speech is not coercive; the listener may do as he likes."

*Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (citations omitted).

when the government does more than speak. Generally, they will find such a violation only when the government creates a monetary or other penalty for religious behavior.

b. Are Beliefs About One's Standing in Community, One's Access to Government, or Both Relevant to the Expressive Inquiry?

The second difference which must be considered in developing an expressive Establishment Clause theory concerns the uncertainty in current jurisprudence between government and community. Assuming, as advocates of the endorsement test do, that effects on belief are enough to violate the Establishment Clause, the requisite effect on belief is still unclear. In particular, endorsement test advocates are not clear whether a government act must affect beliefs about one's relationship to government or to one's community to violate the Establishment Clause. Rather, these Justices speak in terms of the government act affecting one's belief about connection to "political community."<sup>193</sup> The language seems to suggest something more than just relationship to government, but, at the same time, suggests that "community" interest is somehow circumscribed by politics.

Similar uncertainty exists within the coercion jurisprudence. While most of the Justices that apply the coercion test seem to support Justice Scalia's notion that, to be coercive, the act must carry a penalty, Justice Kennedy has written that coercion need not be the result of direct sanction only.<sup>194</sup> He has recognized that coercion can occur as a result of social pressure to conform.<sup>195</sup> That is, a government's act can affect behavior through the indirect means of community pressure, and not just from a direct sanction such as a fine.<sup>196</sup> Justice Scalia takes issue with this reasoning.<sup>197</sup> He believes that the "deeper flaw" in the Court's opinion is that an Establishment Clause violation hinges on the "precious question" of "whether there was state-induced 'peer-pressure' coercion."<sup>198</sup> In any case, the question of whether a government act can

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193. Justice O'Connor referred to "political community" in several of her opinions; in *Capitol Square v. Pinette*, 515 U.S. 753 (1995), she was joined by Justices Souter and Breyer. *Id.* at 779-80.

194. *Lee v. Weisman*, 505 U.S. at 593-94.

195. *Id.*

196. Justice Kennedy, in *Lee v. Weisman*, said "[t]he undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* at 593.

197. *See id.* at 640 (Scalia, J., dissenting).

198. *Id.* at 640-41 (Scalia, J., dissenting).

The deeper flaw in the Court's opinion does not lie in its wrong answer to the

be coercive as a result of social pressure has led at least one proponent of the test to suggest that behavior mediated through social mechanisms can violate the Establishment Clause.

This uncertain jurisprudence poses important issues for any expressive framework. In developing our framework, the moving targets created by these competing theories are addressed. Ultimately, this article argues that the court must treat beliefs about access to government as distinct from beliefs about fitting into community, as these different beliefs reflect two distinct cognitive processes, and some Establishment Clause cases reflect concerns regarding only one of these relevant mechanisms. Additionally, this article concludes that acts that affect either of these beliefs violate the Establishment Clause.

We also hope to shed light on the relationship between belief and coercion. Generally, we argue that when normative belief changes, such a change becomes coercive in the sense that it changes the expected utility of acting in accordance with one's religious beliefs. On the other hand, not all changes in normative belief will actually change behavior. With these issues in mind, we can now apply the expressive theory to Establishment Clause cases.

## 2. How Government Acts Affect Beliefs About Access to Government and the Subjective Norm

### a. Government Acts and Beliefs About Community Sentiment

Establishment Clause jurisprudence is concerned with the relationship between government acts and beliefs about one's relationship to community,<sup>199</sup> with the focus on the ways government actions may affect the subjective norm.<sup>200</sup> As a general matter, this can happen through any process where the religious symbol displayed by the

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question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and, dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

*Id.* (citations omitted) (emphasis omitted).

199. Schragger, *supra* note 121, at 1847-77.

200. *See supra* Section III.C.3. (discussing the subjective norm).

government serves to provide information on the beliefs of the community. Returning to the discussion of information provision,<sup>201</sup> two very specific means through which this information is carried can be identified: direct information provision—for example, through statements made about the religious symbol—or inferential processes.

Let's return to our crèche example. When a crèche is displayed on public property, it is possible that a person will receive direct information on community sentiment and/or infer from the display the community's sentiment<sup>202</sup> about Christianity. In the case of direct information, one may simply hear from other community members how they feel about the crèche. In this sense, the information on belief is transmitted directly by the community members, and the crèche is simply the trigger for such communication. If, for example, one hears a number of neighbors making very laudable comments about the display, and none suggesting it is bad, one may conclude from such comments that members of the community value Christian beliefs. Similarly, if the local newspaper carries a story reporting the positive reception of the symbol, or, if the symbol becomes the focus of a community celebration, one may also conclude that the community generally values Christian beliefs.

On the other hand, the crèche may actually serve as the source of information on community sentiment through the process of inference. Indeed, this is the likely mechanism by which government behavior will provide information on community sentiment.<sup>203</sup> The key to understanding how government acts may result in inferences about community sentiment lies in the fact that people equate government acts with the desires of the majority of the populace the government serves<sup>204</sup>—that is, people generally believe government serves the majority. In the crèche example, the observer may reason that: 1) government serves the interests of the majority; 2) the display is of a Christian image; and 3) thus the majority of the community values Christian beliefs. In such cases, a person will draw information on majority belief from a government act specifically because the government is supposed to represent the beliefs of the community. Compare this to a situation where a private individual displays a crèche on his or her front yard. In such a case it may be easy to infer that the

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201. See *supra* Section III.B.1.

202. We, of course, do not mean to suggest in this case that a “community” can have its own sentiment. Rather, in keeping with rational choice models of groups, here we simply mean that the majority of community prefers Christianity.

203. See *supra* Section II.B.1.

204. See Geisinger, *supra* note 129, at 69-71; see generally Yural Feldman and Janice Nadler, *The Law & Norms of File Sharing*, 43 SAN DIEGO L. REV. 577 (2006); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000).

individual values Christian beliefs, but the individual's acts do not directly implicate the beliefs of the majority or even others in the community.<sup>205</sup>

Specifically in terms of the expressive model, the new inferential or direct information affects belief certainty regarding the subjective norm.<sup>206</sup> Returning to the model, recall that belief certainty reflects the likelihood that a particular consequence of a behavior will occur.<sup>207</sup> The subjective norm, in turn, is one's subjective perception of the aggregate preferences of individuals within the community.<sup>208</sup> The more certain one is that the preference is held strongly and by a large number of community members, the more certain one is that acting against that preference will not receive community esteem. A change in the subjective norm will also affect the expected utility of acting in accordance with one's religious beliefs. Figure 7 diagrams this effect regarding the willingness of a Jewish man to wear a yarmulke.

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205. Richard H. McAdams has recognized one significant limitation to this inferential mechanism. Drawing from the findings of public choice theory, he argues that many individuals now believe that government serves the interests of concentrated capital and not the majority of voters. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 360-61 (2000). While this may be the case, it is likely that local government is less captured by concentrated capital, and this concern will not be as relevant in local political arenas. *Id.* Also, while many people may see government as captured by special interests, not all people do. Indeed, it is likely that many people still equate government with majority will. McAdams recognizes this possibility and suggests that a "soft form" of public interest belief exists where individuals have concerns about concentrated capital, but still believe in some amount of majority representation. *Id.* at 361-62. Our framework recognizes this limitation and suggests that inferences of community norms will only exist in conditions where observers connect government acts to majority beliefs.

Note one interesting inferential variation on this observation. One may, as Robert Cooter suggests, consciously pursue the cooperative opportunities that most benefit him or herself. *See generally*, Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, 78 B.U. L. REV. 903 (1998). Obviously, people with wealth are quite likely the "best" cooperative partners because they have the most resources with which to engage in cooperative endeavors. Thus, if one believes that wealth "controls" government behavior, he or she may infer from displays of majority religious images that the best cooperative partners prefer a certain religion, and thus be affected not because the majority of community members' beliefs are reflected by the government's behavior, but because the majority of cooperative power is reflected by government. This would change behavior at a very conscious level in situations where one sought to cooperate with the power elite.

206. *See* Sections III.A. and III.B

207. *Id.*

208. *Id.*

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**Figure 7**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>Be</b>
Wearing a Yarmulke satisfies religious obligations	+80	+50	+4000
Will decrease esteem	+30	-60	<u>-1800</u>
		$A_o = \sum b_i e_i$	+2200

**After Information Changes Belief About Community Preference (i.e., the Subjective Norm):**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>Be</b>
Wearing a Yarmulke satisfies religious obligations	+80	+50	+4000
Will decrease esteem	+40	-60	<u>-2400</u>
		$A_o = \sum b_i e_i$	+1600

In this example, the change in the subjective norm did not change the behavior it only decreased its utility. There may be other religious behaviors that are not as highly valued as wearing a Yarmulke, for which this particular change in normative certainty would also change behavior. Of course, there will also be people who value social esteem more highly for whom even a slight change in certainty regarding the subjective norm will also change utility enough so as to change behavior. The implications of this observation are discussed further in Section V.<sup>209</sup> Now, it is enough to have demonstrated that government behaviors actually affect individuals' understanding of the social norm.

b. Beliefs About Access to Government: Government as a Cooperative Partner

Behind the desire for esteem is a recognition that being a group member provides cooperative benefits. While the desire for esteem is built on the general attraction individuals develop to other group members with whom they achieve cooperative goals, there are cases where individuals consciously recognize their dependence on a particular

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209. See *infra* Section V.



individual to achieve their goals.<sup>210</sup> One of these cases is when the cooperative partner is the government. Government is different than many other cooperative partners in that it has monopoly power over a number of benefits that individuals may seek. Only with government approval can one get permission to build on or change the use of property, post signs, or even drive a car.<sup>211</sup> In this sense, government is not just another potential cooperator, but a privileged and powerful one.

Many Establishment Clause cases reflect a relatively simple understanding of this concept.<sup>212</sup> When the government acts, sometimes the act provides information about what group(s) the government favors. Intuitively individuals know that a government display of a religious symbol can make one feel, as Justice O'Connor has described it, like an "insider" or "outsider"—part of the group or not.<sup>213</sup> This feeling, however, is not the result of the act providing direct information regarding who government favors. Rather, the act—like all other acts—is filtered through the same mechanism individuals use to ascertain the preferences of others.<sup>214</sup> By ascertaining the aggregate preferences of others, individuals can make determinations about what behaviors the group prefers and, knowing these behaviors, they can choose to act in accordance with group preference or against it.<sup>215</sup>

Put another way, to know aggregate preference, one must figure out individuals' preferences. When one knows what the majority of the group prefers, her attraction to the group will lead her to feel pressure to act similarly. In the case of government, a similar mechanism is at work. However, individuals are interested in ascertaining the aggregate preferences only of government employees and not all members of society. Such understanding will influence one's belief regarding the willingness of government to cooperate with her. The intuition is clearly one of individuals being insiders or outsiders, but the source of the intuition falls back on individuals' understanding of the importance of showing that they value members of the group by acting in conformity with the groups norms.<sup>216</sup>

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210. See Cooter, *supra* note 205, at 922 (arguing that we act in accordance with norms because of an awareness that doing so will provide us with cooperative opportunities and other benefits).

211. Of course this monopoly power is subject to some limitations. One may be entitled to build on or use her property a particular way because the law provides for such use. There are, however, at best a limited number of cases where government discretion is not permitted.

212. See Sections III.A-B.

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

214. For a general discussion of the subjective norm, see Section III.B.3. For a discussion of the different forms of belief, see Section III.B.1.

215. See Section III.B.3.

216. See *supra* Section III.C (for a more complete discussion of this phenomenon.)

Let's return to the example of a Jewish man who wants to determine whether he should wear a Yarmulke. In addition to his concerns about standing in the community, he may expect that one day he will have to go to city hall to get a building permit or for some other government service. He must determine whether the people he will encounter in city hall will likely cooperate with him or not.<sup>217</sup> The process he follows in making this determination is the same as in any other case.<sup>218</sup> He must either get direct or inferential information on the individuals' preferences.

Note, however, that there are some differences in the government and community preference analysis. The main difference concerns the inferential mechanism utilized. In the case of providing community information, the government act is a signal because of preexisting beliefs that government represents the preferences of the community. In the case of providing information on government preference, the government act directly relates to the beliefs of the actor. That is, an individual may infer from the fact that government officials display a particular symbol, that such officials generally believe in the symbol's meaning. In this sense, the government display is exactly like a private display. When one passes by a house decorated for Christmas, it is likely that one would infer that the residents are Christian and thus prefer Christian values.<sup>219</sup>

Under the expressive theory, a government act that provides direct

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217. Note that there is a strong connection between community standing and access to government in situations where government employees are also members of the community. A Yarmulke worn in the community will be equally visible to government employees in the community as to other community members. Thus, a Jewish man, in this situation, will be concerned about wearing a Yarmulke in town as well as when he goes to city hall.

218. Note that there is a strong connection between community standing and access to government, especially when individuals who work in government also live in the community. However, these two are not the same. As we will discuss, the process of gathering information about government is different than about the community.

219. One may object that it is irrational to infer a preference of an individual in government based on an act that the individual did not influence in any way. For example, why should someone assume the preferences of a member of the zoning commission from the decision to display a crèche made by the mayor? In a world of perfect information and rational thought this may be a valid complaint. However, it is quite clear that people do not process information in the way this would suggest. For example, certain heuristics may affect our understanding of government employee belief. The representativeness and availability heuristics suggest that a mayor or other visible and representative figure may affect our perceptions of government employee's beliefs. See Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 ALA. L. REV. 1, 21-24 (2005). Even absent the influence of heuristics, people may simply believe that government employees are beholden to those who appoint them or lead them and will thus act in accordance with elected officials' desires. The existence of the crèche will, in turn, provide a basis for inferring the officials' desires.

information, or reasonably influences one's inferences<sup>220</sup> of his or her access to government, would violate the Establishment Clause. The main basis for this argument concerns the monopolistic nature and power of government. Consider an individual in a community comprised of different attitudes. While the individual may not find an optimal cooperative relationship with any one person, the variety of perspectives and competition for cooperation will likely ensure some ability to find and work with others. Government is an economically powerful individual actor with whom individuals must cooperate to attain certain goals.<sup>221</sup> Well-developed notions of equal protection suggest that government is required to treat all people equally.<sup>222</sup> Consequently, when government acts to demonstrate favoritism toward one religious group, these notions of equal protection are violated.<sup>223</sup>

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220. As we will discuss more completely below, pre-existing beliefs matter. If, for example, a government official has made numerous previous statements about a need to accommodate Jewish beliefs in government, but has also stated a dislike for Muslims, a reasonable Muslim may well infer from a display of a crèche and a menorah that he or she is not a preferred member of the community. If, however, the government is comprised of Muslims and has frequently stated the importance of accommodating Jews and Christians, it may be more difficult for the person to reasonably infer from the behavior that he or she is not a preferred member of society. This is not to say that the government behavior does not violate the Establishment Clause. In a world of limited resources, it is, of course, fair to assume that efforts to accommodate one group will leave less resources available to accommodate another. The key is to understand that pre-existing beliefs influence inferences, and thus must be considered in determining whether a government display actually influences perceptions of government's willingness to cooperate with certain groups of individuals.

221. See *supra* Section III.

222. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Plaintiffs claimed the Village conditioned their access to water service on their granting the Village a 33-foot easement, while others had to grant only a 15-foot easement, because they had filed an unrelated, unsuccessful lawsuit against the Village stated a claim for relief based on traditional equal protection analysis. *Id.* at 563. "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564. See also *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that law will be just than to require that laws be equal in operation.

*Id.*

223. See *Larson v. Valente*, 456 U.S. 228, 255 (1982) (holding a statute, which

i. The Importance of Pre-existing Belief

The fact that government behavior will generally work through inferential mechanisms to influence belief-certainty requires consideration of the pre-existing beliefs from which these inferences flow. Remember from the earlier discussion of inference that, as a general matter, inference is guided by logical processes and the need for evaluative consistency.<sup>224</sup> Thus, to the extent one has a certain set of beliefs, such beliefs will greatly influence inferences drawn from any government behavior.

Consider two people in two different communities. In one community, Jane has heard time and again from many sources that town officials are strong advocates of Christian ideals. Indeed, the mayor regularly commented in his campaign about the importance of his Christian beliefs as to how he will govern. The town itself also has many private sources of information regarding the community's Christian nature. Jane also has a rudimentary understanding of existing law and knows that the display of Christian images alone on government property is generally violative of the Establishment Clause.

Jim, on the other hand, is a member of a diverse community comprised primarily of Muslims and Hindus with a number of other religions, such as Judaism and Christianity, represented in much smaller numbers. Now assume that the government displays a crèche and a Hanukkah Menorah on public property in both communities. In the first community, Jane is likely not to see the display of these symbols as

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limited tax exempt status to those religious organizations that received more than half of their total contributions from members or affiliated organizations, unconstitutional). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," *id.* at 244, and "[f]ree exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations," *id.* at 245. *See also* Bd. of Educ., Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 702 (1994) (expressing concern about whether the state legislature, which created a separate school district for the Satmar community, would provide that same benefit equally to other religious and non-religious groups). In one Free Exercise case, the Court was willing to tolerate the fact that politically connected religions will obtain accommodations that other religions will not. *See* Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 890 (1990) (recognizing that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but concluding that is an "unavoidable consequence of democratic government"). However, in another Free Exercise case, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), the Court held that ordinances prohibiting religious animal sacrifice that were aimed at the Santeria worship service (i.e. their goal was suppression of religion) were unconstitutional because they could not satisfy strict scrutiny. *Id.* at 546-47. In contrast to the situation in *Smith*, these ordinances were not laws of general applicability. *See id.*

224. *See infra* Section III.B.

indicative of government's embrace of a plurality of religion or even Judaism. Rather, belief and evaluative consistency will likely lead Jane to assume that the government primarily wants to display a Christian symbol, but is coerced by the law to display another symbol as well. Jim, on the other hand, may see the government effort as reflecting a desire of elected officials to embrace or reach out to the minority groups within the community.<sup>225</sup>

The point, of course, is that different pre-existing beliefs lead to different inferences. This observation may, at first, seem daunting; the number of different pre-existing beliefs can lead to a virtually limitless number of different inferences to be drawn from any particular government act. If such a result is the case, then developing an Establishment Clause jurisprudence will be impossible because each case will stand on its own.<sup>226</sup> This sense of futility is, however, misplaced. The existence of a framework for analysis of Establishment Clause violations provides exactly the type of guidance that the courts need for undertaking an analysis of the expressive effects of government behavior. Courts will still be left to consider individual facts, but will be able to place such facts in a coherent framework for consideration.

There are two specific issues that must be addressed in analyzing inferences in Establishment Clause cases. The first concerns whether the pre-existing belief is legally valid. The second concerns whether the inference drawn from a government act with religious implications is reasonably drawn from these legally valid beliefs. Ultimately, under the expressive theory, the Establishment Clause is violated if a government act provides information or leads to reasonable inferences drawn from legally valid pre-existing beliefs that an individual is favored or disfavored by government, or in the community, as a result of his or her religious beliefs.

At the core of each case will be a particular government act in a particular community. This will serve to narrow the potential for considering pre-existing beliefs a great deal. One of the keys to judicial analysis will be to consider what the pre-existing beliefs of the plaintiffs are and whether or not the beliefs are well-founded and legally valid. If individuals testify to the basis for their beliefs and inferences, these sources can be tested. For example, one may be able to root his or her belief in such factors as the number of religious institutions in the town, media reports regarding religious matters or institutions, and the

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225. Note that if Jim is of a majority religious faith in the community—say he is Muslim—he may still believe that his access to government has been decreased. *See supra* Section IV.A.

226. *See generally* Cole, *supra* note 121, at 564 (noting that the endorsement test, as applied by the Court, is vague and indeterminate); Hill, *supra* note 121, at 492-93.

prevalence of discussions or private displays of religious images. The existence of these factors can be established relatively easily.

Similarly, which of these beliefs are given legal validity could also be addressed. Thus, if one individual believed that Jews like clean streets, and thus challenged government street sweeping as a violation of the Establishment Clause because it showed a preference for Jews, a court could consider whether that individual's underlying belief, even if sincerely held, is valid or not valid, as it is not based in any particular Jewish doctrine. Note that this analysis does not require a court to determine the truth or falsity of a person's religious beliefs or doctrines because the court is asking whether one individual's assessment of a religious group's preference related to the condition of streets is in fact accurate.<sup>227</sup>

Another issue concerns whether the expressive analysis should be based on actual pre-existing beliefs or on the beliefs of a representative, well-informed community member. For example, consider a person who lives in a particular town, but only goes downtown a few times a year, including once a year during the holiday season, to do some shopping. Every year she passes by the main government building downtown and sees a live nativity or crèche. From this, and without any other information, she forms a belief regarding the importance of Christian beliefs to the community. Because she is Muslim, this belief makes her feel like an outsider and also leads her to not wear her headscarf downtown. Can her limited experience provide the basis for an Establishment Clause violation? On the one hand, one would recognize that the government action causes the individual to change her belief about the consequences of her actions. On the other hand, it ignores mediating information that is known in the general community.

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227. As a general matter, the Court is willing to look at the sincerity of an asserted religious belief, but it will not determine the truth or falsity of the religious belief or doctrine. See *United States v. Ballard*, 322 U.S. 78, 86-88 (1944). However, in *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), the Court was willing to distinguish between faith and mode of life, with the latter not rooted in religious belief. Later, in *Frazee v. Ill. Dep't. of Empl. Sec.*, 489 U.S. 829, 833-35 (1989), the Court clarified *Yoder*, holding that the support of an "organized religious denomination" is not necessary and protecting an individual's observance of the Sunday Sabbath even though he arrived at his belief from his interpretation of the Bible, rather than the tenet or teaching of an organized religious body. See also *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 715-16 (1981) (holding it was beyond the judicial function and competence to examine whether Thomas, who argued that his faith precluded him from working in the armaments plant making tank turrets, or other Jehovah's Witnesses, who worked in the plant and found it "'scripturally' acceptable," correctly understood the commands of their faith). In the Establishment Clause context, the Court will have to consider the legal validity of belief. Failure to do so would result in inferences of Establishment Clause violations for such a wide variety of government acts that government itself would be unable to function in a meaningful way.

Finally, and perhaps most importantly, the reasonableness of one's inferences can also be tested. Using the tools of logic and evaluative consistency, one could readily determine whether an inference could be drawn reasonably from certain established pre-existing beliefs. For example, if one establishes that he believes his town to be pro-Christian, a response to the display of a Hanukkah menorah as a pro-Christian act would be difficult to sustain. Of course, the inference that government is somehow privileging Jews might be reasonable in such a case.<sup>228</sup>

The expressive model provides a comprehensive framework upon which the affects of government acts on individuals of a particular religion can be based. In this sense the expressive model can supplant the many different tests currently being used to analyze Establishment Clause cases. Those tests, as we have discussed, reflect a variety of different notions on the relationship of government to religion. Unlike those tests, however, the expressive model provides a means for directly linking legal determinations to the goal of promoting free exercise of religion. The model ultimately suggests that an Establishment Clause violation should, in general, be found when government behaviors make individual religious behavior more costly. Obviously, one may differ with regard to how much he or she believes the Establishment Clause is intended to promote religious freedom. We will consider the way in which these differing standards may be incorporated into the expressive analysis in Section V. For now we plan to apply our expressive model to demonstrate how it would answer a number of issues that currently exist in Establishment Clause jurisprudence. We hope to demonstrate, in our application, that in courts' analyses of Establishment Clause cases, they have often ignored the factors most relevant to determinations of whether a government act is impinging on religious freedom. This is not to say that the Supreme Court has decided these cases incorrectly. Rather, it is to demonstrate the importance of properly linking government behavior to religious action instead of relying on conclusory assumptions that provide little guidance for the resolution of future cases and that are ultimately, intuitively unsatisfying.

*B. Application of the Expressive Model to Some Specific Issues in Establishment Clause Jurisprudence.*

Now that an expressive theory of law for analysis of potential Establishment Clause violations has been laid out and described, we will apply the theory first to a number of issues that the court has confronted

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228. See *supra* Section IV.A.3 (discussing the relationship between inferences regarding access to government and inferences regarding one's standing in the community).

in developing its Establishment Clause jurisprudence and then to a number of Establishment Clause cases. What we hope to demonstrate in the application is that the expressive theory provides a better method of analyzing Establishment Clause issues than existing jurisprudence does. In particular, we hope to demonstrate that the Court has generally ignored important contextual facts that will, in most cases, play significant roles in ultimately determining whether a government's behavior has actually affected an individual's practice of religion. When the Court ignores such factors, its decisions are often intuitively unsatisfying because they do not reflect realistic understandings of the effects of government behavior on belief.

### 1. Historical Existence of Religious Objects

One issue in Establishment Clause jurisprudence is how to treat religious objects that have long been on public property. Some courts find that such government displays somehow lose their religious significance and become, instead, secular or historical, and thus hold that they do not violate the Establishment Clause.<sup>229</sup> To the extent historical existence is a factor, this article argues that it is a factor not because the religious significance of the object has somehow been removed, but because one who understands that the object has been in a public place for some time has less of a basis for inferring that the object represents the current beliefs of either the existing government or community.<sup>230</sup>

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229. See, e.g., *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247, 250-51 (3d Cir. 2003), in which the court addressed a challenge to a bronze plaque accepted by the County in 1920 and placed on the courthouse façade, where it has remained for over eight decades. The plaintiffs requested removal in 2001. *Id.* at 250. Reversing a permanent injunction ordering removal of the plaque, the court stated:

[W]e think that the appropriate focus of our inquiry is on the events of 2001, when the Commissioners declined to remove the plaque. Applying the "endorsement test," we conclude that: (1) the reasonable observer would be aware of the approximate age of the plaque and the fact that the County has done nothing since it was erected to highlight or celebrate the plaque; (2) because of the plaque's age and its placement on an historic Courthouse, the reasonable observer would believe that the plaque itself is historic; and (3) the reasonable observer would not believe that the County's inaction was motivated by a desire to endorse religion, or some religious practice such as Sabbatarianism, but rather by a desire to preserve a longstanding plaque. As such, the overall effect of the display, when viewed in the context of its history, does not appear to be an endorsement of religion.

*Id.* at 251. See also *Modrovich v. Allegheny County, Pa.*, 385 F.3d 397, 399-400 (3d Cir. 2004); *supra* Section II.A.4.

230. In his concurring opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005), Justice Breyer cast the deciding vote in upholding the Texas display of the Ten Commandments and discussed the significant fact that "40 years passed in which the presence of the monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner)." *Id.* at 702 (Breyer, J., concurring). Noting there was not evidence to suggest



However, to suggest that such items can never provide the basis for an Establishment Clause claim would be to misunderstand the ways even historical images can influence beliefs.

For example, consider a Ten Commandments sculpture that has been in a local courthouse for a long period of time. Initially, one may argue that the primary inferences to be drawn from such an image would be that the sculpture reflects an image of early law and is not intended to reflect the religious beliefs of the community. Moreover, to the extent the sculpture was erected many years ago, its existence on the courthouse steps will provide little information on the current beliefs of people in either government or the community.

This does not, however, end the inquiry. There may be many ways in which the religious symbol provides information on government and community. If, for example, the community is Judeo-Christian and there has been recent discussion of the Ten Commandments monument by members of the government, the religious preferences of the government or the community will likely be evoked by the display.<sup>231</sup> Similarly, the location of the object either on the periphery or as the focus of a display, as well as the nature of the symbol itself, will all affect a determination of whether a reasonable person with valid pre-existing beliefs would

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this was due to “a climate of intimidation,” he said:

[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to ‘engage in’ any ‘religious practice[e],’ to ‘compel’ any ‘religious practice[e],’ or to ‘work deterrence’ of any ‘religious belief.’ Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.

*Id.* at 702-03 (citations omitted).

This analysis misses the point in that it ignores the social pressure on residents not to challenge the display. There is a reason why Establishment Clause challenges to religious symbols displayed by government are often brought by organizations, like the ACLU, or “Doe” plaintiffs, i.e. social pressure. Most people find it against their interest to publicly challenge such government displays and this is the very reason we believe such displays are unconstitutional.

231. See, e.g., *Glassroth v. Moore*, 335 F.3d 1282, 1285-86 (11th Cir.), *cert. denied* 540 U.S. 1000 (2003) (While a judge on a Circuit Court in Alabama, Judge Moore placed a plaque depicting the Ten Commandments behind the bench in his courtroom and routinely invited clergy to lead prayer at jury organizing events. He campaigned successfully for the position of Chief Justice on the state Supreme Court, during which he was referred to as the “Ten Commandments Judge,” and after he was elected, he fulfilled his campaign promise by installing the Ten Commandments monument in the rotunda of the Alabama State Judicial Building. At the public unveiling of the monument, Justice Moore delivered a speech commemorating the event and indicating its location was “fitting and proper” because it would remind judges, attorneys, and visitors “that in order to establish justice, we must invoke ‘the favor and guidance of Almighty God.’”).

infer from the symbol a loss of access to government or a change in his or her understanding of the community norm. Thus, the Court's decision-making process should not make historical existence the dispositive factor in such a display's violation of the Establishment Clause. Under the expressive theory, an analysis of the reasonable inferences associated with each particular display is necessary.

## 2. Aggregating Religious and Secular Symbols.

A number of cases have dealt with situations where a religious image is aggregated with secular images.<sup>232</sup> The Supreme Court generally finds that such aggregation of images does not violate the Establishment Clause. Rather, the Court holds that such aggregation changes the meaning of the display from a religious message to a secular one.<sup>233</sup> Yet, as we have just discussed regarding historical objects, focusing just on the image without consideration of any other factors ignores the important context within which the display exists. For example, if a person lives in a heavily Christian community and has a valid and strong basis to believe that the current government intends to promote Christianity, he or she will be less likely to infer that the government is displaying the religious image as something other than a religious symbol.<sup>234</sup> Further, if the person understands that it is against the law to simply display images from one faith without aggregating them with secular images, it will be absolutely possible and, indeed, reasonable for the person to infer that the other symbols are there only

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232. See, e.g., *County of Allegheny v. ACLU, Greater Pittsburgh Chap.*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

233. Justice O'Connor, in her concurring opinion in *County of Allegheny*, described *Lynch* as follows:

In reversing the lower court's decision, which held that inclusion of the crèche in the holiday display violated the Establishment Clause, the Court stressed that the lower court erred in 'focusing almost exclusively on the crèche.' 'In so doing, it rejected the city's claim that its reasons for including the crèche are essentially the same as its reasons for sponsoring the display as a whole.' When viewed in the 'context of the Christmas Holiday season,' the Court reasoned, there was insufficient evidence to suggest that inclusion of the crèche as part of the holiday display was an effort to advocate a particular religious message. The Court concluded that Pawtucket had a secular purpose for including the crèche in its Christmas holiday display, namely, 'to depict the origins of that Holiday.'

*City of Allegheny*, 492 U.S. at 624, (O'Connor, J., concurring) (citations omitted) (emphasis omitted).

234. If a non-Christian sees a crèche on the lawn surrounding city hall, she will recognize it as a Christian symbol and no matter how many secular symbols accompany the crèche, it will have the same effect on her as a crèche standing alone—this is a Christian town and I am an outsider—because it still shows the government's preference for Christianity.

because they need to be, and thus will adjust his or her sense of the value of Christian belief in society accordingly. Certainly, as well, one will infer a lack of access to government.

3. Private Displays on Government Property and Disclaimers:  
*Capitol Square Review and Advisory Board v. Pinette*

Certain government-owned property, such as streets and parks, are viewed as a “public forum” for purposes of the First Amendment and freedom of speech.<sup>235</sup> Government regulation of speech in such a public forum must satisfy strict scrutiny, if the regulation is viewpoint or content-based.<sup>236</sup> Thus, government may not have the authority to ban religious speech in a public park.<sup>237</sup> Most government-owned property is not automatically considered a public forum.<sup>238</sup> However, government can designate such property as a forum for speech.<sup>239</sup> In doing so, government may make a choice, either designating the property as a public forum or as a limited public forum—meaning the speech can be limited by group or topic, but may not be limited by viewpoint.<sup>240</sup> When government designates an area, such as the square surrounding the statehouse, as a forum for speech and a private party displays a religious symbol, Establishment Clause concerns arise.<sup>241</sup> This was the situation in *Capitol Square Review and Advisory Bd. v. Pinette*<sup>242</sup> when the Ku Klux Klan displayed a Latin cross, “the principal symbol of Christianity around the world,” on the Capitol Square.<sup>243</sup> The Klan’s application for a permit was denied, and it sued claiming a violation of the Free Speech Clause of the First Amendment.<sup>244</sup> In response, the state raised an Establishment Clause defense, arguing that the government would have violated the Establishment Clause if it had granted the permit.<sup>245</sup>

Several concurring Justices (O’Connor, Souter, and Breyer), who agreed with the plurality in concluding that the display would not violate the Establishment Clause, discussed the role of a disclaimer in applying the endorsement test.<sup>246</sup> Along with its application for a permit, the Klan indicated “that the cross would be accompanied by a disclaimer, legible

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235. See *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

236. See *id.*

237. See *id.*

238. *Id.*

239. *Id.*

240. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

241. See generally *id.*

242. *Id.* at 779-80.

243. *Id.* at 792 (Souter, J., concurring).

244. *Id.* at 758 (Scalia, J., plurality).

245. *Id.* at 759.

246. See *id.* at 772-83 (O’Connor, J., concurring).

‘from a distance,’ explaining that the cross was erected by private individuals ‘without government support.’<sup>247</sup> Because the state could have granted the application subject to the condition that the “Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference that the cross was there to ‘demonstrat[e] the government’s allegiance to, or endorsement of, the Christian faith,’”<sup>248</sup> or that the state “could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no endorsement from the State,”<sup>249</sup> these Justices concluded the flat denial of the permit was not narrowly tailored.

The Court’s conclusion regarding the expressive impacts of the cross attempts to treat the symbolic nature of the image without thorough consideration of the context of the decision. Without such context, the decision becomes intuitively uncertain. As we have discussed above, a proper expressive analysis would consider context. Assume that, for example, other facts exist from which a reasonable person would infer that the mayor of the town has beliefs sympathetic to the Klan. Perhaps the mayor was a member of a group with some ties to the Klan in the not-too-distant past. Moreover, the local paper has quoted him as saying that true Americans are Christian and has printed disparaging comments he made about African Americans.<sup>250</sup> Maybe it is known in the community that the mayor keeps company with a number of known Klan members. Other facts may exist that give rise to the inference that the disclaimer was put in place only to protect the government from Establishment Clause challenges and not because of a true effort to distance the town from the beliefs of the Klan. All these facts, when

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247. *Id.* at 793 (Souter, J., concurring).

248. *Id.* at 794 (citations omitted).

249. *Id.*

250. This may seem an unbelievable set of facts, but both facts have recently been reported in newspapers. Congressman Goode of Virginia, for example, has been quoted regarding his views of Christians and America in his recent attacks on Keith Ellison’s decision to be sworn in using a Koran. See Brian DeBose, *Jefferson’s Koran Used In Ceremony: First Muslim In Congress Hails Religious Freedom as ‘Foundation’*, WASHINGTON TIMES (D.C.), Jan. 5, 2007, at A10; Shanna Flowers, *Muslims are Americans, too*, THE ROANOKE TIMES (Virginia), Dec. 28, 2006, at B1; *The Goode Book, According to Virgil*, THE ROANOKE TIMES (Virginia), Dec. 21, 2006, at B8; *Goode’s Intolerance*, L.A. TIMES, Dec. 26, 2006, at 34; Joel Havemann, *House Member Seeks Restrictions on Muslims*, L.A. TIMES, Dec. 22, 2006, at 36.

Former Senator George Allen’s now infamous “Macaca” comment and Virginia delegate Frank Hargrove’s recent comment that Blacks should just get over slavery are two recent examples of how politician’s comments have been taken to indicate prejudice against African Americans. See Michael Paul Williams, *GOP Losing War For Black Voters’ Hearts*, RICHMOND TIMES, Feb. 5, 2007, at B1; see also Gregory Kane, *M-word Articulates Another Stereotype*, BALTIMORE SUN, Feb. 7, 2007, at 1B.

established, would likely give rise to inferences regarding decreased access to government for Jews, Muslims, and other non-Christians.

Of course, the few established facts in *Capitol Square Rev. & Advisory Bd. v. Pinette* suggest the opposite.<sup>251</sup> In particular, the Klan's application was denied, and the town demonstrated a willingness to fight the display in substantial litigation.<sup>252</sup> The absence of all similarly relevant facts in the case, however, leaves the decision unsupported. Moreover, the absence of facts also leaves little in terms of guideposts regarding future decisions on cases of this kind.

In sum, the Court's existing Establishment Clause jurisprudence is currently lacking due primarily to the inability to apply a full model of how government acts cause expressive effects to the underlying facts of each case analyzed. As a result, existing jurisprudence provides little guidance regarding the disposition of future cases. To the extent existing jurisprudence does develop guideposts, such guideposts are often unsatisfying because they do not resonate intuitively with our own understandings of how government acts actually affect beliefs and behavior. The expressive test provides a mechanism for overcoming these concerns.

#### 4. Government Financial Aid to Religious Institutions

As discussed above, recent Supreme Court decisions, particularly *Zelman v. Simmons-Harris*,<sup>253</sup> allow the government to fund religious institutions as long as there is a secular purpose, such as education, and the government dollars get to the religious institution as a result of a private decision. Education vouchers were upheld, even though the private schools in the Cleveland area are predominantly Catholic and "pervasively sectarian."<sup>254</sup> The Court subjects financial aid to the same analysis it applied to government displays of religious symbols, even though the secular purpose for the financial aid is more real and apparent than in the religious symbols cases where the secular purpose is always difficult to identify.<sup>255</sup>

Here, the *Zelman* situation is utilized to demonstrate the application of expressive law to the financial aid cases. The state of Ohio created a pilot project scholarship program for one school district in the state, the Cleveland School District (CSD), which was among the worst

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251. See generally 515 U.S. 753 (1995).

252. See *id.* at 757-60.

253. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

254. *Id.* at 692.

255. See generally *id.*

performing public school districts in the nation.<sup>256</sup> There were around 75,000 children in the CSD, the majority of whom were from low-income and minority families.<sup>257</sup> Fifty-six private schools located within the boundaries of the CSD participated in the program, forty-six (82%) of which were affiliated with a religious institution, and thirty-five of those forty-six were Catholic schools.<sup>258</sup> Around 3,700 students participated in the voucher program and 96.6% of those students enrolled in private religious schools.<sup>259</sup> Only 128 of them were enrolled in private, non-religious schools and, although public schools in the adjacent school districts were eligible for the vouchers, none of them chose to participate.<sup>260</sup> The financial aid (vouchers) covered 90% of the private school tuition, up to \$2,250 per child of families below 200% of poverty, and 75% of the private school tuition, up to \$1,875 per child of other eligible families.<sup>261</sup> The program also made tutorial aid available for students who remained in the public schools.<sup>262</sup> During the year in question, the religious schools within the CSD received around 8.2 million dollars in government aid.<sup>263</sup>

The expressive test suggests that the Court's decision to allow voucher programs in any situation where the government money gets to the religious institution through a private individual is overbroad. Again, the expressive test finds such a bright-line rule intuitively unsatisfying because of its failure to consider context. Indeed, the limited facts available about the Cleveland program demonstrate the kind of basis from which a reasonable person might infer that the government program is benefiting certain religions. For example, the children in the CSD had five options: the regular public schools, which were not good; public magnet schools, which were already quite crowded (there were twenty-three of these with around 13,000 children); a small number of community public schools of small size (there were ten of these with around 1,900 children); adjacent public schools (none of these participated); and a private school, forty-six of which were affiliated with a religion.<sup>264</sup> For each eligible child, a voucher was issued to the parents, who selected one of the eligible schools at which to "spend" the voucher.<sup>265</sup>

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256. *Id.* at 644.

257. *Id.*

258. *Id.* at 681.

259. *Id.* at 703.

260. *Id.* at 646.

261. *Id.*

262. *Id.*

263. *Id.* at 664-65.

264. *Id.* at 647-49.

265. *See id.* at 647.

Given the limited options in the Cleveland program, it is foreseeable that a large percentage of the students would go to religious private schools. Moreover, the Cleveland program made no effort to lessen the effects of religion on these students by asking the private religious schools to permit “voucher” students to not take religious classes if they desired. A reasonable person, understanding these facts, may determine that the Cleveland program expressed a government interest in promoting religion both through funding of religious schools and providing for increased religious education. The fact that the money was distributed to private individuals over whom the government had no control certainly mediates against an inference that government was promoting specific religions. However, because it privileged this fact over all other factors, the Court failed to consider the true expressive effects of the government behavior in this case. Moreover, failing to recognize the importance of context creates little incentive for the parties in an Establishment Clause lawsuit to adduce the evidence necessary to make a full evaluation of the expressive effects of government action.

## V. Implications for Establishment Clause Jurisprudence

The expressive model provides significant benefits not found in the current tests applied to Establishment Clause claims. The notion that government acts violate the Establishment Clause whenever they lead to reasonable inferences that change an individual’s sense of access to government or standing in the community provides a direct link between a government act and concerns of freedom of religion. The expressive model suggests that an Establishment Clause violation should, in general, be found when government behaviors make individual religious behavior more costly.<sup>266</sup> A number of other issues, however, remain to be considered under such a view of the Establishment Clause. Most of these issues ultimately implicate the breadth of protection given to religious freedom under the Establishment Clause. We will consider those concerns in this Section.

### A. *Coercion v. Belief: Two Sides of the Same Coin?*

Returning to the earlier example of a woman choosing whether to wear a headscarf when she goes downtown in her community, we can explain the relationship between coercion and beliefs in more detail. When the government act affects the woman’s belief about the beliefs of others (the subjective norm), it will also affect her calculation of the likelihood of being socially sanctioned. The expected utility of wearing

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266. See, e.g., notes 214-17 and related text.

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the headscarf will decrease.

**Figure 8**  
**Pre Government Act**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>be</b>
Headscarf worn to respect God	+90	+40	+3600
Town values Christian behaviors	+40	-60	<u>-2400</u>
		$A_o = \sum b_i e_i$	+1200

**Post Government Act**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>be</b>
Headscarf worn to respect God	+90	+40	+3600
Town values Christian behaviors	+50	-60	<u>-3000</u>
		$A_o = \sum b_i e_i$	+600

The expected utility of wearing a headscarf has changed; the information provided by the government act has made it more costly for her to act on her beliefs publicly.<sup>267</sup>

Of course, there are different types of coercion. As we have discussed, Justice Scalia has written that the only type of coercion that he deems to violate the Establishment Clause is direct coercion.<sup>268</sup> Many justices who apply the coercion test would seemingly agree with Justice

267. We recognize here that changing expected utility does not necessarily mean an individual will not undertake the behavior. As we will discuss shortly, the behavior will change only if the change in belief certainty will change the expected utility of acting in accordance with one's religious beliefs from a positive utility to a negative utility. See *infra* Section V.B. Coercion, however, in the framework used by Justice Scalia and economists is nothing more than an external cost associated with undertaking a particular behavior. If the government were to fine people for undertaking a religious behavior it may not stop the behavior but it would certainly be coercive.

268. *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J. dissenting) (Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that "[s]peech is not coercive; the listener may do as he likes."). *Id.* (citations omitted).



Scalia.<sup>269</sup> However, Justice Kennedy clearly would not.<sup>270</sup> He believes that coercion can be the result of social sanctions.<sup>271</sup> Justice Scalia's analysis of coercion reflects the basic rational actor model that underlies the expressive framework, by, for example, treating law as an external cost on the satisfaction of preference.<sup>272</sup> Yet, Justice Scalia simply gets his rational actor model of coercion wrong. Advocates of rational choice theory clearly recognize that rational individuals do care about esteem from others.<sup>273</sup> While the social sanctioning mechanism is not direct—in that it does not come directly from the government, but works through the intermediary of society—such a difference is of little consequence in terms of its affect on the freedom of an individual to act in accordance with her religious beliefs. In the case of a fine, imprisonment, or social esteem loss, the government act coerces the individual to not act in accordance with her religious beliefs. The direct/indirect distinction is meaningless. It would allow government to use social punishments that are often more powerful than small fines to accomplish the goals of limiting religious freedom.

Justice Scalia would further suggest that the act of abiding by social norms is an act of respecting the values of others.<sup>274</sup> At some level, this may be the case. However, making something an act of respect does nothing to decrease the likelihood of social sanction. In essence, Justice Scalia is somehow attempting to rewrite the way people should react to the government act, replacing concerns over one's own belief with a

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269. These Justices seemingly agree with Justice Scalia regarding the need for “direct” coercion as compared to Justice Kennedy's approach, which would allow coercion to occur through social processes. See notes 188-89.

270. See *id.* and accompanying text.

271. *Id.*

272. Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. Rich. L. Rev. 367 (2002).

273. See POSNER, *supra* note 160; Cooter, *supra* note 205; McAdams, *Origin, Development, and Regulation of Norms*, *supra* note 156.

274. Assuming the worst, that a nonparticipating graduate is “subtly coerced” to stand during the prayer, Justice Scalia says this does not “remotely establish” participation or the appearance of participation in the prayer because if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a “reasonable dissenter . . . could believe that the group exercise signified her own participation or approval?” Quite obviously, it cannot. I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally. *Lee v. Weisman*, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting) (emphasis omitted). Of course, this ignores the fact that government has no interest in “fostering respect” for the government-sponsored prayer or religion at issue in this case.

pride in being respectful of others.<sup>275</sup> He is, in essence, asking people to divorce themselves from their basic cognitive makeup. He assumes that people can easily expunge the deeply embedded desires for esteem and social belonging that have developed over millennia as a result of social interaction.

*B. How Much Is Enough? Does Coercion Have to Change Behavior?*

Another implication of the expressive model deals with the perceived differences between coercion and affect on belief. Such a difference is illusory. Rather, the real perceived difference is one between whether the government act results in a change in behavior that is easily verified objectively or simply decreases the utility of a continued behavior. Let's return to our example of a Jewish man who wants to wear a yarmulke in a community that displays a crèche. Assume that the display has a small effect on belief certainty, but affects no particular behavior because overall utility of each behavior remains the same.

**Figure 9**  
**Belief Before Crèche is Displayed**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>be</b>
Wearing yarmulke satisfies religious requirements	+80	+50	+4000
Will decrease community esteem	+30	-60	<u>-1800</u>
		$A_o = \sum b_i e_i$	+2200

**Figure 10**  
**Belief After Crèche Changes Belief About Community Preference to Increase Certainty of Sanction (the Subjective Norm):**

<b>Belief</b>	<b>Certainty</b>	<b>Evaluation</b>	<b>be</b>
Wearing yarmulke satisfies religious requirements	+80	+50	+4000
Will decrease community esteem	+40	-60	<u>-2400</u>
		$A_o = \sum b_i e_i$	+1600

The crèche will have an affect on belief and on the expected utility of undertaking a particular behavior, but it does not change this individual's

275. *See id.*

willingness to wear a yarmulke in this case. As previously discussed, this act is still coercive. However, the coercion does not result in a change in behavior. Thus, it is more difficult to prove the coercive nature of the act. One may claim the act effected his ease or comfort of wearing a yarmulke, but this type of testimony will likely have little persuasive effect if the individual continues to wear it.

Of course, the above model is generally not reflective of reality. In most cases there will be a distribution of effects on different people. Some of the people affected will evaluate the importance of following religious rules more highly and some less so. Similarly, some individuals will evaluate esteem from the community more highly than others. For those who value community esteem highly and are less strongly committed to religious practices, such acts as the display of a crèche will be more likely to change their behaviors. Further, there are any number of behaviors that may be effected by the change in certainty regarding the subjective norm besides wearing a yarmulke. For example, the same person may be less concerned about bowing her head while a Christian prayer is said because she does not actually take part in such prayer, but goes along with the behavior because of the social costs of failing to do so.<sup>276</sup> In such cases, behavior that is contrary to religious belief is being changed through coercive pressure. It is thus highly unlikely that a government act will not have an effect on religious behavior in most instances. Where it does not change behavior, however, it may still be having a coercive effect.

Clearly, the notion that affects on belief are enough to violate the Establishment Clause is congruent with the endorsement test and its requirement that government acts only affect beliefs about one's status as an insider or outsider. It is less clear whether those who require coercion would similarly agree. Generally, the coercion test focuses on the nature of the coercion—that it be the result of a formal penalty. As previously demonstrated, this distinction makes little sense. Social sanctions can be even more coercive in terms of their affects on expected utility than government sanctions, such as penalties or prison.<sup>277</sup> The nature of the penalty, and not its effect, thus dominates the coercion test approach. One could assume a situation where a penalty does not change behavior. For example, assume the government penalizes wearing a yarmulke in public with a \$50 fine and that this penalty is rarely enforced. Such a government act would be considered coercive even if no one changed their behavior in response to it. This is because individuals recognize

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

277. See James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 *YALE L.J.* 1055 (1998).

such external costs—whether they are in the form of monetary fines or social sanctions—as a restriction on the free exercise of religion, regardless of the effect on behavior.

*C. Concerns Regarding Impacts on Outgroup Members*

Thus far, this Article has been concerned with the way the messages created by government's religious acts affect in-group members. That is, when the group is defined as the community served by the government, the focus has been on the effect of the act on the beliefs of people in the community. At first blush, this seems like the proper inquiry. Norm scholars have recognized that in-group messages are much more persuasive than out-group messages.<sup>278</sup> However, the expressive theory also provides an understanding of how government acts may work through religious inferences to affect out-group members. In particular, it suggests that, to the extent an out-group member is interested in joining the community and knows of the signals, he or she may feel coerced not to join the community. Put simply, if government behavior leads to inferences that the community does not value an individual's religious beliefs or prefers another belief, he or she will be less likely to move.

The processes by which information is received by out-group members would be similar to any other inferences or direct information. To the extent they visit the community, out-group members gather information based on their personal experiences. They see the private signals—the bumper stickers, store displays, and home displays—that reflect the religious preferences of the community. The expressive analysis could be used to consider whether a reasonable inference of community or government preference could be drawn from the government display.

A separate matter, however, concerns individuals who do not have such experiences. In these cases, knowledge of a particular government display may be actually more influential. That is, absent other information, the individual will be more likely to see the government behavior as reflective of community sentiment.<sup>279</sup> The same requirements of reasonable inference can be placed on an out-group member as an in-group member. What the expressive analysis makes clear, however, is the threshold concern that government behavior affects

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278. See Robert J. Aalberts & Kenneth C. Fonte, *Is Section 2C of the Model Code of Judicial Conduct Justified? An Empirical Study of the Impropriety of Judges Belonging to Exclusive Clubs*, 8 GEO. J. LEGAL ETHICS 597, 608-12 (1995).

279. This, of course, is subject to pre-existing beliefs that connect government to majority and not to concentrated capital. See *supra* Section III.A.2.b.i.

individuals who are not members of the community. While current expressive jurisprudence asks only about those in the political community, it may need to be expanded to consider such out-group members.

## VI. Conclusion

Government acts convey information, both directly and inferentially. When government acts, such as the display of religious symbols on government property, convey information about the religious preferences of government, that information may affect our religious freedom by making acting in accordance with religious beliefs more costly. If one's exercise of a particular religious belief places her at a disadvantage in the community, socially, politically or economically, then she has been deprived of religious freedom. The same is true if the fact that she is not a religious person has this effect. Even if she chooses to exercise her religious belief and risk the resulting disadvantage, government has required her to make a choice that she should not have to make. By examining what reasonable inferences a person might draw from the government acts at issue, courts will be in a better position to assess the actual effect of the acts on religious freedom. Of course, a wide variety of factors, including an individual's pre-existing beliefs and the actions of individuals in the community, will affect the reasonableness of her inferences. While the process is not a complete departure from the endorsement or subtle coercion approaches taken by members of the Court, the use of a comprehensive expressive model will lead to a better assessment of the actual effect of government acts on religious freedom.