Social Capital in Constitutional Law: The Case of Private Norm Enforcement Through Prayer at Public Occasions

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“It’s time to forget hate crime legislation, and introduce a love crimes bill. This bill would prohibit intolerance of anyone who loves God so much that he cannot tolerate his fellow man.”

Stephen Colbert1

Abstract

Distinguishing private action from government action is the first question of constitutional law. The distinction blurs most when the government and private actors jointly cause harm. Not surprisingly, then, the Supreme Court’s cases in this gray area have been inconsistent. For example, state court enforcement of a private racially restrictive covenant is government action, but agency placement of a child in a home where the child is abused is private action. The ad hoc nature of these decisions reflects a reluctance to fully embrace joint government-private causation of constitutional harm: Without a limiting principle, doing so would threaten to convert all private action into government action.

The concept of “social capital” provides a needed limiting principle. Social capital is the value that lies in one’s network of relationships. Specifically, social capital creates value through enforceable trust: That is, members of a community trust that other members will follow certain norms of behavior, and that trust is enforced by a threat of informal punishment (e.g., ostracism) for violating the community’s norms. Constitutional law ought to recognize that government action can interact with private norms (created by enforceable trust) and, in doing

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1 The Colbert Report (Comedy Central television broadcast May 7, 2007).
so, burden constitutional values. When necessary, courts should alter constitutional doctrine to take account of this interaction.

This Article argues that the government violates the Constitution when a private group improperly uses government power or property to enforce the group’s social capital. Through enforceable trust, social capital leads to predictable behavior—adherence to group norms. When government regulates in an area with strong social capital, that government action might also have predictable effects. The Supreme Court already holds the government responsible for the predictable effects of mandatory disclosure laws on unpopular groups, that is, groups whose beliefs or behavior violate prevailing norms. When the government requires an unpopular group to disclose its members, and disclosure will likely lead to threats and harassment against the members, the disclosure law violates the First Amendment.

This Article extends the lessons of social capital to the case of private prayer at public occasions. Consider a private prayer recited at a public high school football game. If all in attendance are at liberty to object to or abstain from the prayer, the prayer would not violate current Establishment Clause doctrine. Yet, objecting to the prayer may violate local norms of religious belief or practice, opening a person to harassment and retaliation, just as the disclosure law did to members of unpopular groups. The religious objector falls into a gap in Establishment Clause protection, and this Article proposes a legal test to close the gap. The Article then concludes by suggesting how social capital can inform analysis of other constitutional law doctrines.

Introduction

The distinction between private and government action lies at the heart of constitutional law. This is because the Constitution, with one exception, applies only to government actors. Consequently, the Constitution restricts the government’s power to discipline or fire its employees, but it says nothing about a private employer’s power to do so. So identifying what counts as government action draws the outer boundary of constitutional law.

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2 See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

The line between government and private action blurs most when government and private actors jointly cause harm. Not surprisingly, then, the Supreme Court’s case law in this gray area is at times inconsistent. For example, the Constitution does not apply to a state social services department (a government actor) that negligently returns a child to an abusive home where the father (a private actor) subsequently beats the child to death.\(^5\) But the Constitution does apply to a state law (government action) that requires public disclosure of campaign contributions that leads neighbors and private employers (private actors) to harass members of unpopular political parties.\(^6\) In each case, the government joins with private actors to cause the harm, so why the different outcomes? The Court’s Establishment Clause can be similarly inconsistent. Prevailing doctrine bars the government from either endorsing religion or coercing religious exercise.\(^7\)

Applying this test, the Court has reached opposing conclusions. On the one hand, a purely private religious display on public property, such as a Latin Cross erected in a public park, might

\(^4\) Of course, Congress and the state legislatures and have enacted laws that regulate these actions by private employers. See, e.g., 42 U.S.C. § 2000e-2(a)(1) (2000) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .”).


\(^7\) See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2006).
violate the Establishment Clause. On the other hand, purely private prayer at a public occasion, such as a high school graduation or football game, will not. In both cases, the government is involved with private actors, yet the underlying (and unexplained) assumption is that purely private prayer poses no danger of endorsement or coercion while the display does.

This inconsistency perhaps reflects a hesitance to fully embrace a theory of joint government-private causation of constitutional harm. This makes some sense: Without a

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9 See Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290, (2000); see also Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001), cert. denied, 534 U.S. 1065 (2001) (school district did not violate the Establishment Clause by allowing students to vote on whether to include unrestricted student-led messages in a high school graduation ceremony); Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000), rehearing en banc denied, 248 F.3d 1032 (11th Cir. 2001), cert. denied, 533 U.S. 916 (2001) (school district does not violate the Establishment Clause by allowing genuinely student-initiated religious speech at student events); Doe v. School Dist. of the City of Norfolk, 340 F.3d 605 (8th Cir. 2003), rehearing and rehearing en banc denied (Oct. 16, 2003) (in school district with past, informal practice of allowing school board members to speak when their child was in the graduating class, parent’s prayer at high school graduation was private speech that did not violate the Establishment Clause); Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003), rehearing en banc denied, 341 F.3d 312 (4th Cir.) (6-6 vote denying en banc rehearing of decision holding that VMI’s pre-supper prayer at mess hall violated the Establishment Clause), cert. denied, 541 U.S. 1019 (2004); Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897 (W.D. Mich. 2000) (no Establishment Clause violation when parents read Bible stories in classroom during recess).
limiting principle, such a theory threatens to convert all private action into government action. To illustrate this potential slippery slope, consider a parent’s decision to raise her child in a particular religious faith. State family law grants parents custody and decision making authority over their children. With the state standing ready to defend the parent-child relationship, other family, friends, or members of the community cannot force themselves into that relationship and overrule the parent’s decision. So while the ultimate decision is made by a private actor (the parent), the state protects and aids that choice. The state could be said to indirectly endorse the parent’s choice of religious exercise or belief.

In this Article, I argue that the concept of “social capital” provides a needed limiting principle. Social capital is the value that lies in one’s network of relationships. Specifically, relationships create value by allowing a person to better achieve her ends. For example, a social network of friendly neighbors can make it less costly to take vacations, as your neighbors will look after your house. This value, in turn, depends on an enforceable trust among neighbors: That is, neighbors can trust that each will follow certain norms of behavior (here, faithfully watching one another’s homes), which trust is enforced by a threat of informal punishment (e.g., ostracism) for violating the applicable norms. This Article argues that the government can

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10 See Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. PENN. L. REV. 1697, 1699 (1996) (“A norm can be understood as a rule that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior. . . . [A] norm is like a law, except that a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law.”).
violate the Constitution when a private group uses government power or property to enforce the
group’s norms, and thereby its social capital.\textsuperscript{11}

The free speech case \textit{Brown v. Socialist Workers ’74 Campaign Committee}\textsuperscript{12} illustrates
how government action can aid the preservation of private social capital and, in doing so, violate
the Constitution. There, the State of Ohio required political parties to publicly disclose the
names of their volunteers and contributors. The local Socialist party claimed that disclosure had
led private employers and others to retaliate against its members. In the local community, one
norm apparently was opposition to certain political beliefs, and members of the Socialist party
violated that norm. The violation would have gone undetected, and the norm of political
orthodoxy unenforced, if Socialist party members could hide their affiliation. The state’s

\begin{footnotes}
\footnote{11 For other works discussing social capital in the law, see Douglas W. Allen & Clyde G.
Reed, \textit{The Duel of Honor: Screening for Unobservable Social Capital}, 8 \textit{Am. L. & Econ. Rev.}
81 (2006); Ronit Dinovitzer, \textit{Social Capital and Constraints on Legal Careers}, 40 \textit{Law & Soc’y
Rev.} 445 (2006); Maurice R. Dyson, \textit{Racial Free-Riding on the Coattails of a Dream Deferred:
Can I Borrow Your Social Capital?}, 13 \textit{Wm. & Mary Bill RTS. J.} 967 (2005); Sheila R. Foster,
\textit{The City as an Ecological Space: Social Capital and Urban Land Use}, 82 \textit{Notre Dame L. Rev.}
527 (2006); John P. Heinz, Paul S. Schnorr, Edward O. Laumann, & Robert L. Nelson, \textit{Lawyers’
Roles in Voluntary Associations: Declining Social Capital?}, 26 \textit{Law & Soc. Inquiry} 597
(2001); Stephen Macedo, \textit{The Constitution, Civic Virtue, and Civil Society: Social Capital as
Substantive Morality}, 69 Fordham L. Rev. 1573 (2001); Jason Mazzone, \textit{When Courts Speak:
\footnote{12 459 U.S. 87 (1982).}
\end{footnotes}
disclosure law, however, made this impossible, and in doing so, aided enforcement of the local norm. The Court held that this violated the First Amendment.\textsuperscript{13}

A similar dilemma arises in the public prayer context. To see this, consider an atheist student attending a public high school football game in a community with strong norms about religious belief and behavior. Assume that the football game begins with a prayer that is completely private, and all in attendance are at liberty to object to or abstain from the prayer. Under current Supreme Court doctrine, this prayer poses no constitutional problem.\textsuperscript{14} Yet, objecting to the prayer may reveal the student as a deviant or non-conformist. And in some communities, such a student might face harassment and retaliation just as surely as did the Socialist party members in Ohio. The religious objector is unprotected, falling in a gap in our Establishment Clause jurisprudence.

This Article argues that the same social capital argument that protects members of unpopular political parties from private retaliation should also protect religious dissenters, minorities, and non-believers. This argument enters the current debate over the role of social norms in legal decision making.\textsuperscript{15} In doing so, this Article neither questions the wisdom,

\begin{footnotesize}
\textsuperscript{13} Id. at 100-101.
\textsuperscript{14} See infra notes 183–186 and accompanying text.
\end{footnotesize}
efficiency, or justice of the underlying norms, nor advocates changing those norms. Instead, the main argument is that constitutional law ought to recognize how government action can interact with private norms and, in doing so, burden constitutional values. When necessary, courts should stand ready to alter constitutional doctrine to take account of this interaction.

This Article has five Parts. Part I defines the social capital concept that provides the framework for the remainder of the Article. Part II then examines cases involving mandatory disclosure of association membership lists. These cases show how legal doctrine can properly acknowledge and address the concerns raised by government bolstering of private social capital. Part III then applies the social capital analysis to expose an important gap in the Court’s current Establishment Clause jurisprudence: Purely private prayer at secular public occasions. The Court assumes that such prayers work no constitutional harm, but the social capital analysis proves this assumption wrong. Part IV then proposes a test that closes that gap. The Article then concludes with a suggestion for future application of the social capital framework in constitutional law.

I. Defining Social Capital

Social capital refers to a network of relationships that either helps or hinders the plans of a rational actor.  

Waldron, Are Constitutional Norms Legal Norms?, 75 FORDHAM L. REV. 1697 (2006);

Paul S. Adler and Seok-Woo Kwon, Social Capital: The Good, the Bad, and the Ugly, in KNOWLEDGE AND SOCIAL CAPITAL: FOUNDATIONS AND APPLICATIONS at 94 (Eric L. Lesser ed. 2000) (“social capital is ‘located’ not in the actors but in their relations with other actors.”);
value,\textsuperscript{17} or it keeps a person from obtaining or doing those things.\textsuperscript{18} A simple example illustrates the point. Consider two families living next door to one another on the same street. Suppose that one family would like to go on vacation. To do so, they will need someone to watch their house, care for their lawn and pets, and pick up their mail. One option — call it the “market option” — would be for the family to hire someone to perform these tasks. This choice entails a host of costs: The family must identify firms that provide that service, compare prices and quality of service, verify the trustworthiness of the various firms (as by checking references), and make final arrangements for the service. All of these costs (and more) are the price of using the market to solve a problem — what economists call “transaction costs.”\textsuperscript{19}

("social capital is a quality created between people, whereas human capital is a quality of individuals."); James S. Coleman, \textit{Social Capital in the Creation of Human Capital}, 94 \textit{Am. J. Soc.} S95, S98 (1988) (“Unlike other forms of capital, social capital inheres in the structure of relations between actors and among actors.”). Social capital is also described as relationships that facilitate collective action. Collective action faces several obstacles, such as agency, organization, and information costs; social capital can help overcome these costs. The difference is only the unit of measurement — the group or the individual. Otherwise, the analysis remains the same. Here, I adopt the individual view.

\textsuperscript{17} See Coleman, \textit{supra} note 16, at S98 (“social capital is productive, making possible the achievement of certain ends that in its absence would not be possible.”).

\textsuperscript{18} Cf. Joel Sobel, \textit{Can We Trust Social Capital?}, 40 \textit{J. Econ. Lit.} 139, 144-45 (2002) (comparing social capital to physical capital).

\textsuperscript{19} The term “transaction costs” is defined more specifically below, but a good general definition is as follows: “[T]ransaction costs include the costs of identifying the parties with
If the family has a good, close relationship with the family next door, they have another option — call it the “social capital option” — of asking their neighbors for help. The social capital option can reduce or eliminate some of the market’s transaction costs. For example, the family could reduce the costs of identifying a house-sitter by asking the neighbors for references. Or the family could reduce the risk of hiring a stranger by asking the neighbors to “keep an eye” on the house-sitter. Or the family could avoid the marketplace entirely by asking the neighbors to watch their house. In each case, the neighbor relationship — which is a form of social capital — mitigates the transaction costs of the market solution.

Of course, calling on one’s neighbors entails its own costs. For example, the neighbor relationship is a two-way street, and asking a neighbor to watch your house implies a willingness to reciprocate. Further, maintaining the good neighbor relationship likely depends on following the neighborhood’s unwritten norms, such as picking up after your dog, no loud noises after dark, or keeping one’s yard neat. Break one of these norms, and you pay the price of lost social capital. Keeping the norms, however, may be costly. A person will choose to maintain social capital if its benefits outweigh these costs.\(^{20}\)

The remainder of Part I rigorously defines social capital, identifying how it works and why it arises. (Parts II and III use this definition to analyze cases of joint private-government whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the cost of enforcing any bargain reached.” A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (2d ed. 1989). Transaction costs are in addition to the actual cost of the underlying good or service that is ultimately purchased.

action.) Section A begins by explaining in more detail the types of transaction costs posed by market exchanges. Section B then explains that one source of social capital is something called “enforceable trust.”21 The “trust” part of the equation means that people in close relationships trust each other to behave in predictable ways. If I ask my neighbors to watch my house, I trust that they will not neglect the task or steal from me. The “enforceable” part of the equation means that predictable behavior arises when the community can enforce sanctions for deviant behavior.22 If my neighbors neglect my house or steal from me, they risk being ostracized.

21 Alejandro Portes & Julia Sensenbrenner, *Embeddedness and Immigration: Notes on the Social Determinants of Economic Action*, 98 AM. J. SOC. 1320, 1332 (1993). Portes and Sensenbrenner discuss other sources of social capital, such as value introjection, reciprocity transactions, and bounded solidarity. *Id.* at 1323-26. For example, they define value introjection as “[s]ocialization into consensually established beliefs.” *Id.* As is noted below, these other types of social capital may be at work in the different constitutional law contexts discussed. For purposes of analyzing whether government action is bolstering social capital, however, the enforceable trust version of social capital is most relevant because private groups may be using the government to impermissibly aid enforcement of the group’s trust.

22 See Coleman, *supra* note 16, at S105 (“In some . . . cases, the norms are internalized; in others, they are largely supported through external rewards for selfless actions and disapproval for selfish actions.”); Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, ANN. REV. SOC. 1, 7 (1998) (people may obey “internalized norms” because “they feel an obligation to behave in this manner.”). There is also social capital built on an individual, one-on-one basis: “If A does something for B and trusts B to reciprocate in the future, this establishes an expectation in A and an obligation on the part of B. This obligation can be
Section C then explains more precisely how the enforceable trust associated with social capital can reduce transaction costs — one benefit of social capital. And section D then explains the main cost of social capital — the expectation of reciprocal behavior and adherence to community norms.

A. Social Capital and Transaction Costs

In the world of perfect competition, market exchanges are instantaneous and costless. Willing buyers and willing sellers magically find one another, as if moths drawn to a flame, and effortlessly bargain to the single market clearing price. This unreal snapshot is most students’ introduction to micro-economics because its simplifying assumptions focus attention on the key insights that are the discipline’s foundation.

Before long, however, simplifying assumptions are discarded, and economic study turns to the added complexity of the real world. One such complexity is that market exchanges are conceived as a credit slip held by A for performance by B.” Coleman, supra, at S102; see Richard H. Pildes, The Destruction of Social Capital Through Law, 144 U. PENN. L. REV. 2055, 2064 (1996) (discussing a norm of “specific or local reciprocity” that “is reciprocity as mutual exchange in direct, one-to-one interactions.”); Portes & Sensenbrenner, supra note 21, at 1326 (describing the social capital created by “reciprocity exchanges” as creating a “[n]orm of reciprocity in face-to-face exchanges”). Here, the focus is on social capital within groups.

24 See Ronald Coase, The Coase Theorem and the Empty Core: A Comment, 24 J. L. & ECON. 183, 187 (1981) (“While considerations of what would happen in a world of zero transaction costs can give us valuable insights, these insights are, in my view, without value except as steps on the way to the analysis of the real world of positive transaction costs.”).
costly, and these transaction costs can prevent mutually beneficial exchanges.\textsuperscript{25} For example, a seller charging $5 for a widget has room to bargain with a buyer who values the widget at $6.\textsuperscript{26} But if it costs the buyer and seller more than $1 to find each other and negotiate, the parties no longer have room to bargain, and no transaction occurs. As noted above, market transactions entail several types of costs; for present purposes, the most relevant are search costs, negotiation costs, agency costs, enforcement costs, and opportunistic behavior.\textsuperscript{27} I briefly describe each in turn.


\textsuperscript{26} The textbook answer is that the exact price will depend on the parties’ relative bargaining skill. DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 20 (2000)

\textsuperscript{27} Not all commentators include agency costs as a transaction cost. See COOTER \& ULEN, supra note 25, at 91 (excluding agency costs); but see POLINSKY, supra note 19, at (including
Search costs are those costs associated with finding a contracting partner in the marketplace and discerning that partner’s proposed contracting terms. Consider a person looking for a body shop to fix her damaged car. The person faces the opportunity cost of the time spent looking through the phone book, calling repair shops, and bringing the car in for an estimate. The person also faces out-of-pocket expenses of the phone calls and any transportation (gas, wear and tear on the car, etc.) involved in bringing the car for an estimate. And any other costs associated with identifying possible body shops will be additional search costs. Generally, these costs will “tend to be high for unique goods or services, and low for standardized goods and services.”

Next, once our car owner has found one or more suitable body shops, she faces negotiation costs — the costs of settling on the terms of the parties’ bargain. For our car agency costs. Regardless of how one categorizes an agency cost, because it is a type of cost that is eliminated or reduced by social capital, I discuss it here.

See Cooter & Ulen, supra note 25, at 91 (search cost “involves finding someone who wants to buy what you are selling or sell what you are buying”).

“The opportunity cost of any decision is the foregone value of the next best alternative that is not chosen.” William J. Baumol & Alan S. Blinder, Economics: Principles and Policies 36 (3d ed. 1985). For example, suppose that instead of calling body shops, our car owner would have been at work earning $150. The $150 in forgone income is an “opportunity cost” of the time spent calling the body shops.

Cooter & Ulen, supra note 25, at 92 (“To illustrate, finding someone who is selling a 1957 Chevrolet is harder than finding someone who is selling a soft drink.”).

Id. at 91-92.
owner, this includes the opportunity cost of time spent determining the price, whether to use manufacturer original parts or less expensive after-market parts, when the owner can get the car back, whether she gets a loaner car, what additional work the body shop is authorized to perform, and other similar terms. There is also the cost of putting the parties’ agreement into writing.\textsuperscript{32}

All costs associated with finalizing the parties’ bargain are negotiation costs.

After the deal is struck and the car is at the body shop, our car owner faces agency costs, which are costs incurred when an agent acts contrary to the interests of her principal. Two main agency costs are monitoring of and shirking by the agent.\textsuperscript{33} In the car repair scenario, the car owner is the principal, and the body shop is the agent. Assume that the body shop promised to use only manufacturer original parts, and that the body shop charges for those more expensive parts. It is in the customer’s interest that the promised parts be used.\textsuperscript{34} Conversely, it is in the

\textsuperscript{32} \textit{Id.} at 92. While this cost seems fairly small in our body shop scenario, it will be substantial in large commercial transactions where legions of lawyers spend hours writing contract clauses for significant contingencies. Indeed, one author has argued that lawyers play the important role of transaction cost managers. \textit{See} Lisa Bernstein \textit{The Silicon Valley Lawyer as Transaction Cost Engineer?}, 74 OR. L. REV. 239 (1995).


\textsuperscript{34} If the parts are not used, the transaction is not Pareto efficient — both parties are not made better off by the transaction. \textit{See} HAL R. VARIAN, \textit{INTERMEDIATE MICROECONOMICS: A MODERN APPROACH} 15-16 (5th ed. 1999) ("[I]f we can find a way to make some people better
body shop’s immediate financial interest to use cheaper, after-market parts, but charge for the more expensive original parts. The car owner faces a problem if she can neither be at the body shop off without making anybody worse off, we have a Pareto improvement. If an allocation ... is such that no Pareto improvements are possible, it is called Pareto efficient.”). While the body shop is made better off (because they received more money for the cheaper parts), the car owner is worse off because she paid for expensive original parts but received cheaper imitation parts.

Of course, it may not be in the body shop’s long-term interest to do so, because discovery of such behavior may ruin the shop’s reputation. See Friedman, supra note 26, at 145-47 (discussing reputation as an informal means to enforce contracts); Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 Mich. L. Rev. 1724, 1749 (2001) [hereinafter Bernstein, Cooperation]; Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992) [hereinafter Bernstein, Diamond].

In using this hypothetical, I do not take sides on the issue whether after-market parts are of the same quality as original equipment manufacturer parts. See Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005); Berry v. State Farm Mut. Auto. Ins. Co., 9 S.W.3d 884, 894-95 (Tex. App. 2000) (“we cannot say as a matter of law that all non-OEM parts are substandard and that insurers must pay for new OEM parts in every claim, regardless of the age or condition of the covered vehicle prior to the accident or the quality of available non-OEM parts.”). It is enough, for purposes of this discussion, that the principal was promised the latter but the agent has an incentive to use the former.
shop to ensure that the proper parts are used nor easily detect substitution of inferior parts. Put simply, the body shop has an incentive to cheat, and the car owner may have little ability to prevent or detect cheating.

Left unaddressed, the agency problem would either lower the amount the body shop could charge or even prevent a transaction from occurring. One response simply accepts the agency problem and adjusts the price accordingly. For example, the car owner would discount the amount she is willing to pay by the likelihood that the body shop will use after-market

37 The agency problem arises from the parties’ asymmetric information — the body shop knows more about the replacement parts than does the car owner. A similar agency problem arises in the lawyer-client relationship, where the lawyer knows more about the relevant law than does the client. See COOTER & ULEN, supra note 25, at 405.

38 This is a form of the asymmetric information problem addressed by Stigler’s classic article on used cars. See George A. Akerlof, The Market for “Lemons”: Quality Uncertainty and the Market Mechanism, 84 Q. J. ECON., 488 (1970). Stigler discussed the case where used car sellers knew whether their car was a lemon or a good used car, but buyers could not tell. Absent some way to overcome this asymmetric information, the buyer would discount the amount she is willing to pay for a good used car by the probability that the car is in fact a lemon. At this discounted price, no seller would be willing to sell a good used car, leaving only lemons in the marketplace. Thus, uncorrected, asymmetric information can chase quality goods from the marketplace. Much of Stigler’s (and others’) work addressed ways in which market participants try to overcome the problem of asymmetric information.
parts. There are several possible strategies for overcoming this agency problem. For example, the car owner could ask for the part’s packaging or invoice, or have the work inspected after completion. Or the body shop might find some way to assure the car owner that she will not be cheated, such as by offering a warranty. Regardless of the method chosen, overcoming the agency problem is costly — and these costs are also part of agency costs.

Enforcement costs are the costs of remedying a breach of the parties’ agreement. In our example, suppose that the body shop installs after-market parts and the car owner detects this breach. The car owner must now seek a remedy. One possibility is to confront the body shop and demand performance as promised. This option entails the opportunity cost of time spent dealing with the body shop and doing without one’s vehicle for additional time. If the body shop demurs, the car owner is put to the much more costly route of formal remedies, the most costly of which would be litigation. But even less formal processes, such as working through the Better

39 If the discount is large enough, it may reduce the price below the level where the body shop can profitably provide manufacturer original parts. In this case, the agency problem may eliminate one option from the marketplace.

40 See Amitai Aviram, A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems, 22 YALE L. & POL’Y REV. 1, 20 (2004) (discussing enforcement costs). Even with a warranty, the car owner will want to take some steps to ensure performance. For, if the body shop’s breach is undetectable, then the warranty is useless. So, the warranty does not eliminate the need for monitoring by the car owner. Rather, it serves as a signal of quality to the car owner, who will now be willing to pay more for the body shop’s services.

41 See FRIEDMAN, supra note 26.

42 See COOTER & ULEN, supra note 25, at 94.
Business Bureau or a consumer mediation service, entail substantial opportunity costs and out-of-pocket expenses. While the range is quite wide, any breach entails at least some enforcement costs.  

Last, there is the cost of opportuntic behavior. Assume that the body shop performs the work precisely as promised, but that when the owner goes to pick up the vehicle, the mechanic says, “You can’t have your car back unless you pay an extra $100.” Of course, the body shop has no legal right to demand this payment. But given they have the car, and the owner needs the car, they are betting that you will find paying $100 more attractive than resorting to legal remedies. This opportunistic behavior entails several costs. The car owner 

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43 See id. (“In general, enforcement costs are low when violations of the agreement are easy to observe and punishment is cheap to administer.”). 

44 See POLINSKY, supra note 19, at 18 (“Although strategic behavior does not necessarily generate any out-of-pocket costs or costs associated with lost time, it . . . is like other transaction costs in that it may prevent the parties from reaching an efficient agreement.”); see also COOTER & ULEN, supra note 25, at 38-42. Another example of such opportunistic behavior might be a monopolist who cultivates a reputation for predatory price-cutting in response to market entry. 

45 Of course, they are also betting that such behavior will not harm their long-term profitability by creating a reputation for underhanded dealing. In the case of a body shop, depending on the size of the community, this may not be a realistic assumption. Conversely, if the car owner is unlikely to harm the body shop’s reputation, as may be the case if the car owner is a tourist, then the behavior may be successful. (This explains why tourist traps exist — it may be too costly for tourists to accumulate and communicate the information necessary to signal future tourists about the vendor’s reputation.) Given reports of similar strategic behavior in other
will once again face the opportunity cost of time spent dealing with the opportunistic behavior, as well as the out-of-pocket expense of doing so. Further, if the car owner pays, there may be a misallocation of resources.\textsuperscript{46} If the body shop’s price originally had been $100 higher, the car owner might have selected another shop or opted to sell the car.\textsuperscript{47} By misallocating resources, opportunistic behavior imposes further costs.

Social capital can reduce each of the above transaction costs. This possibility lies in social capital’s promise of enforceable trust — that people can trust that others will behave consistent with known norms of behavior. The next section explains the nature of enforceable trust; section C then explains how enforceable trust reduces transaction costs.

\textbf{B. Social Capital as Enforceable Trust}

industries, the need to preserve reputation is not always a barrier to such conduct. \textit{See infra} note 97.\textsuperscript{46}

The $100 is economic rent, meaning an amount earned above the total economic costs of performance (which includes opportunity costs). Presumably, the body shop agreed to make the repairs at a price at or near its total economic cost of performance, with the price closer to cost the greater the competition. So, any additional payments would be economic rent. Also, with sunk costs, the buyer may be willing to pay anything up to the value of the car. \textit{See} FRIEDMAN, \textit{supra} note 26, at 153-56.\textsuperscript{47}

Of course, it could also be the case that the original price was more than $100 below the car owner’s reserve price, and there is no other shop offering the repair at a better price even with the additional $100. In that case, there would not be a misallocation of resources, only reallocation of the consumer’s surplus. That is, unless the parties incurred further costs due to the $100 demand. The costs of such rent-seeking activity make the allocation less efficient.
As noted above, enforceable trust has two parts — trust and enforceability. 48 Let us take them in that order.

The trust involved in social capital is the belief of members of a community that other members will behave in a predictable manner. The predictable behavior — whether it be honesty, keeping one’s word, or religious belief or practice — can be described as adherence to the community’s norms. While the word “norm” may suggest a qualitative or substantive judgment about the origin or content of the behavior, no such judgment is entailed. Indeed, a norm can be destructive, such as one prescribing racial or ethnic discrimination. 49 So, a norm is simply behavior that a member of a community can rely on other members to follow.

The predictability that makes trust possible comes from the further belief that the norms are enforceable, that is, the community will punish those who violate the norms. 50 Punishment is meted out through sanctions, which include anything from damaging the offender’s property to ostracizing the offender. To actually enforce adherence to community norms, the expected

48 Portes & Sensenbrenner, supra note 21, at 1332.
49 See infra notes 100–105 and accompanying text.
50 Id. (“[T]rust exists in economic transactions precisely because it is enforceable by means that transcend the individuals involved.”). The predictability necessary for social capital need not rest on fear of punishment. For example, predictability may come from a person’s preference for certain behavior. For example, a person’s religious or moral beliefs may lead her to prefer (or no longer prefer) certain activities. Such preferences may cause a person to abstain from gambling, certain foods, dancing, or alcohol. This predictability, in turn, may make a person a more attractive employee, business partner, friend, spouse, or life partner. I do not address this aspect of social capital.
sanction must exceed the expected benefit of deviant behavior.\textsuperscript{51} The expected sanction, in turn, depends on two variables: (1) the magnitude of the sanction, and (2) the likelihood of imposing the sanction.\textsuperscript{52} The remainder of this section examines the factors affecting these two variables. To illustrate how a community might sanction deviant behavior, the following discussion returns to the community of neighbors living on the same street. We assume that one neighborhood norm prohibits stealing a newspaper from a neighbor’s property.

1. **Magnitude of the Sanction**—The sanction for violating a community’s norms can take two main forms. First, the community could simply withhold benefits normally enjoyed by members. In our hypothetical neighborhood, the benefits of membership range from small to quite large.\textsuperscript{53} For example, one might derive simple pleasure from polite interaction among one’s neighbors. Or one might receive financial gain when a neighbor agrees to baby-sit

\textsuperscript{51} Coleman, *supra* note 16, at (“An actor choosing to keep trust or not (or choosing whether to devote resources to an attempt to keep trust) is doing so on the basis of costs and benefits he himself will experience.”); McAdams, *supra* note 20, at 2246 (“A rational group member will violate a norm when the expected benefit exceeds the expected cost.”); Portes & Sensenbrenner, *supra* note 21, at 1332 (“The predictability in the behavior of members of a group is in direct proportion to its sanctioning capacity.”).

\textsuperscript{52} See McAdams, *supra* note 20, at 2246. As is discussed later, the second variable depends on the likelihood that the community will detect deviant behavior as well as the likelihood that the community can bring a sanction to bear on detected deviance. *See infra* notes 70-82.

\textsuperscript{53} For a commercial example, consider the diamond trade in New York, where the benefits of membership would be the present value of the future forgone profits if one is excluded from membership. *See* Bernstein, *Diamond, supra* note 35.
your children or watch your house while on vacation. Or one might receive greater financial gain when a neighbor offers her professional services, such as landscaping or legal advice, for little or no pecuniary compensation. If one is caught stealing a neighbor’s newspaper, then one may be excluded from membership in the neighborhood community and its corresponding benefits.\textsuperscript{54}

Clearly, whether exclusion from the community poses a significant sanction depends on how much one values the benefits of membership. If one is anti-social, has neighbors with few valuable skills, and never goes on vacation, membership may be of little value. Conversely, a gregarious jet-setter who lives among highly-skilled neighbors will have more to lose. To measure the size of the sanction, one must tally the benefits of community membership.

This sanction will be mitigated to the extent that the benefits associated with membership are available outside the community.\textsuperscript{55} For example, members of a new immigrant group may

\textsuperscript{54} In the extreme case of a co-op, your (potential) neighbors might be able to vote to exclude you, either initially or after you have taken up residence. See Janny Scott, \textit{Pushing Co-ops to Explain Why You Can’t Buy}, N.Y. TIMES, Apr. 21, 2007, at A1 (“In certain circles, the co-op-application-process horror story is as much a dinner-party cliché as the renovation-nightmare saga, the nursery-school-rejection narrative and indignation over excess packaging of food from Fresh Direct.”).

\textsuperscript{55} Portes & Sensenbrenner, \textit{supra} note 21, at 1336 (group’s ability to deter deviant behavior “is conditioned by the extent to which the community is the sole or principal source of certain rewards.”). Of course, even with discrimination, the group will not be able to enforce norms unless the rewards are high enough. \textit{Id.} (“[A] resource-poor immigrant community will have
face discrimination that excludes them from benefits in society at large, such as access to jobs and affordable credit. 56 Research shows that close-knit ethnic communities can provide these benefits to their members. 57 Indeed, because of ethnic discrimination, the community may initially be the sole source of such benefits, giving the community a powerful sanction to enforce its norms. But as the immigrant group assimilates into society, and discrimination ebbs, members can attain the same economic benefits outside of the community. 58 Society becomes a substitute for the community, reducing the community’s ability to sanction its members. 59

Second, the community could impose harms or costs unrelated to the benefits of membership. Such additional harms include verbal or physical harassment, embarrassment, or trouble enforcing normative patterns even if its members continue to face severe outside discrimination.”).

56 Id.
57 Id.
58 The rotating credit associations in certain immigrant communities are a good example of this phenomenon. See Timothy Besley, Stephen Coate, & Glenn Loury, The Economics of Rotating Savings and Credit Associations, 83 AM.ECON.REV. 792 (1993).
59 This tracks the economic analysis of religion, which holds that greater government-sponsored religious practice erodes the incentive to join private religious groups because some people can satisfy the same preference for religion through the government. See Richard A. Posner & Michael McConnell, An Economic Approach to Issues of Religious Freedom, 56 U. CHI. L. REV. 1, 12-14 (1989). This tracks Adam Smith’s original analysis of competition between government and religion. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).
destruction of property. The history books and case reports are full of examples. During the struggle over civil rights, those supporting equal rights for African-Americans were subjected to abuse and harassment for their beliefs. And as discussed later, those with religious beliefs contrary to their community, such as those who object to or abstain from school prayer, can be victimized.

Whether loss of membership or some other harm, the sanction can be multiplied if the violator belongs to overlapping communities. Overlapping relations exist when “persons are linked in more than one context (neighbor, fellow worker, fellow parent, coreligionist, etc.) . . .” Such relationships allow communities to bridge “structural holes” in their social networks.


See infra notes – and accompanying text. For example, in the recent Supreme Court case addressing the Pledge of Allegiance, the litigant opposing the Pledge recounted incidents of harassment and abuse suffered due to his principled stand against the Pledge. See Respondent’s Brief on the Merits at 24-29, Elk Grove Unified Sch. Dist. v. Newdow, 524 U.S. 1 (2004) (No. 02-1624), 2004 WL 314156.

Coleman, supra note 16, at S109; Eric A. Posner, The Legal Regulation of Religious Groups, 2 Leg. Theory 33, 36 (1996) [hereinafter Posner, Religious Groups] (“Isolation matters, because a nonlegal sanction, such as ostracism, is most effective when a hostile environment provides few of the goods members obtain from the group.”).

Each community has its own stock of social capital, in terms of the information and other benefits available to its members. If there is no overlap among communities, the social capital of each community remains separate.

Bridging the structural holes among communities can strengthen enforceable trust by increasing each community’s ability to monitor and punish violations of its norms.64 A norm violation committed in one community can be communicated to members of a second community,65 permitting the second community to sanction the violation. For example, consider a person who belongs to two communities — the neighborhood where she lives, as well as the church where she worships. If this person persistently steals the newspaper from a neighbor’s driveway, she has violated a norm of her church (thou shall not steal), but that violation occurs

64 Given that links among groups confer benefits, group members who serve as the link possess greater power within each group. See Burt, supra note 63, at 34 (“[H]oles in the social structure . . . create a competitive advantage for an individual whose relationships span the holes.”). Those people do so by serving as information “brokers”:

Holes are like buffers, like an insulator in an electric circuit. People on either side of a structural hole circulate in different flows of information. Structural holes are thus an opportunity to broker the flow of information between people, and control the projects that bring together people from opposite sides of the hole.

Id. at 35.

65 The link can do so in two ways. First, by communicating information that would otherwise not reach the group. Second, by lowering the cost of obtaining that information.
outside the church context and thus makes detection and sanction unlikely. If one of her neighbors is also a member of the church, however, that neighbor could bridge the structural hole between the neighborhood and church communities by communicating the violation to the church members.66 The co-religionists may then impose a sanction (e.g., ostracism or denial of salvation) for a norm violation that occurred outside their community. The more of such overlaps among communities (and thus the more bridges across structural holes), the greater likelihood of sanction due to a norm violation in any of the linked communities.67

The flip side is that overlapping relationships can significantly increase the benefits of community membership by making available benefits from other communities. For example, church members may also belong to certain workplace communities or hold positions in local government. If so, membership in a religious community can yield benefits such as job referrals or receipt of government benefits. The greater those other benefits, the more a person has to lose from violating the norms of any single community. Being a poor neighbor may cut oneself off from a panoply of benefits available in other communities.

66 Gossip is a main channel for passing along such information, making it a potent facilitator of social capital. See McAdams, supra note 20, at 2256 & n.56; see also Coleman, supra note 16, at S106. Also, members of a community with links outside the community hold great potential power. For example, if one of your neighbors is also a co-worker, their ability to poison the well at work gives them greater power to sanction violations of neighborhood norms. See RONALD S. BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION (1992).

67 Coleman, supra note 16, at S109 (“The central property of a multiplex relationship is that it allows the resources of one relationship to be appropriated for use in the others.”).
To summarize, Table 1 lists factors that affect the magnitude of the sanction, identifying which factors increase or decrease the sanction.

### Table 1

**Magnitude of Sanction**

<table>
<thead>
<tr>
<th>Factor</th>
<th>Effect on Magnitude of Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefits of membership in community</td>
<td>Directly related(^{68})</td>
</tr>
<tr>
<td>Substitute communities</td>
<td>Inversely related</td>
</tr>
<tr>
<td>Other punishment (harassment, physical or property damage)</td>
<td>Directly related</td>
</tr>
<tr>
<td>Overlapping relationships</td>
<td>Directly related (multiplier effect)(^ {69})</td>
</tr>
</tbody>
</table>

2. **Likelihood of Sanction**\(^ {70}\) — Having identified the main sanctions, we now turn to factors affecting the likelihood that a norm violator will be sanctioned. The likelihood of sanction will depend on the community’s ability to (1) detect norm violations, and (2) implement a sanction. Consider each in turn.

\(^{68}\) The larger the benefits of community membership, the greater the potential sanction if the community withholds those benefits. *See supra* notes 53–59 and accompanying text.

\(^{69}\) Overlapping relationships have a double effect on the size of the sanction. First, by increasing the benefits of membership, they increase the sanction when benefits are withheld. Second, they allow sanctions to be imposed outside of the community. *See supra* notes 62–67 and accompanying text.

\(^{70}\) Portes & Sensenbrenner, *supra* note 21, at 1337 (“[T]he effectiveness of collective sanctions through which enforceable trust is built depends on the group’s ability to monitor the behavior of its members and its ability to publicize the identity of deviants.”).
First, detecting norm violations is a problem of monitoring, and effective monitoring depends on the characteristics of the community. The larger and more geographically dispersed the relevant community, the greater the cost of monitoring.\textsuperscript{71} This is because a large, dispersed community lacks the frequent interaction among members necessary for easy monitoring. Instead, members must take additional, costly measures, such as auditing member compliance, to detect norm violations.\textsuperscript{72} So, a handful of neighbors living in a small apartment complex or

\textsuperscript{71} Posner, \textit{Religious Groups, supra} note 62, at 36 ("Size matters, because in smaller groups members can observe each other and exchange information more effectively than in large groups.").

\textsuperscript{72} The United States Sentencing Guidelines for sentencing organizations recognize the interplay between group size and monitoring costs. \textit{U. S. SENTENCING GUIDELINES MANUAL} § 8B2.1 cmt. n. 2(A)(ii) (”A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization”). The Guidelines mandate leniency for business organizations that have effective procedures for detecting wrongdoing by its employees and agents. \textit{Id.} § 8B2.1(b)(1) (“The organization shall establish standards and procedures to prevent and detect criminal conduct.”). While the Guidelines apply to both a multi-billion dollar corporation and a small company with fifty employees, successful monitoring might look quite different in different size organizations:

[A] small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems. Examples of the informality and use
dormitory can monitor neighborhood norms less costly than can members of a large religious congregation spread throughout a metropolitan area.

As discussed in section B.1., monitoring costs will be lower when overlapping relationships exist across communities. Overlapping relationships allow detection of norm violations that occur outside of the community’s normal reach. For example, if trustworthiness is an important neighborhood norm, a person might like to know whether their neighbors cheat at work or in recreational softball. Ordinarily, this information is not available, unless one is willing to take the costly steps of popping in on neighbors at work or attending their softball games. But if neighbors are also co-workers or members of the same softball league, monitoring is less costly. Norm violations observed at work or on the ball field can be inexpensively brought to bear back in the neighborhood.

Second, once a community detects a violation of its norms, it must communicate the violation to the member of the community best able to impose a sanction. For example, if a person violates a neighborhood norm against stealing a neighbor’s newspaper, that person’s next

of fewer resources with which a small organization may meet the requirements of this guideline include . . . monitoring through regular ‘walk-arounds’ or continuous observation while managing the organization . . . .

Id. § 8B2.1 cmt. n. 2(A)(iii).

See supra, notes 64–67 and accompanying text; see also Coleman, supra note 16, at §109 (describing the informational benefits derived from multiplexity).

door neighbors (who have baby-sat their kids or watched their house during vacations) might be best situated to impose a sanction by withholding the benefits of neighborliness. If the person stole the newspaper from someone who lived six houses down the block, the victim must communicate the norm violation to the violator’s next-door neighbors, or else the violation may go unpunished.\(^\text{75}\)

A community’s ability to communicate norm violations will (once again) depend on the community’s size and overlapping relationships. In small communities, gossip may efficiently communicate wrongdoing from victim to sanctioner.\(^\text{76}\) In larger groups, more costly measures, such as social organizations, newsletters, or attention in the local media may be necessary.\(^\text{77}\) For example, local parent teacher associations, churches, or recreational sports leagues can serve as informal depots for accumulation and dissemination of norm violations. Or a state bar association might publish the details of lawyer discipline decisions, including the lawyer’s name and nature of the violation.\(^\text{78}\) Or consider the case of a Colombian-born Miami police officer accused of improperly shooting two private citizens. “As the legal bills mounted, the unemployed [officer] found that he had no recourse but to go to the local Spanish-language radio

\(^\text{75}\) Of course, the victim may withhold normal common courtesies, such polite conversation and other considerations due one’s neighbors. But that cost may be quite low compared to the benefit of an occasional free newspaper.

\(^\text{76}\) Max Gluckman, *Gossip and Scandal*, 4 CURR. ANTHROPOLOGY 307, 308 (1963);

\(^\text{77}\) McAdams, *supra* note 20, at 2244-45.

\(^\text{78}\) Portes & Sensenbrenner, *supra* note 21, at 1337.

stations to plead for help from his fellow Colombians and other Latins."79 The accused police officer was communicating a message that he was being scapegoated because of his race.80 In each case, a relatively large community had to undertake relatively costly measures to overcome barriers to communication.

The preceding examples also illustrate how overlapping communities reduce the cost of communication. By bringing a varied population into more frequent contact, churches, PTA organizations, and recreational sports leagues multiply the opportunities for communication, increasingly the likelihood that a norm violation will be more widely disseminated. While one might think nothing of making an obscene gesture to a motorist while on vacation far from home, one will likely think twice doing so close to home, when accounts of the episode might be repeated to co-workers, fellow parishioners, other parents, and teammates.

Sociologists refer to the communicative function of overlapping relationships as “closure” of the social network.81 Closure is greater when communities are connected so that information flows easily to those who need to take action. For our purposes, the person aggrieved by a norm violation (or the person who detects the violation) must be connected to a person who can best mete out a sanction. Otherwise, it will be up to the victim alone to sanction, and this will not occur unless the victim is “sufficiently harmed and sufficiently powerful . . . to sanction alone.”82

79 Portes & Sensenbrenner, supra note 21, at 1327.
80 Id.
81 See Coleman, supra note 16, at S105-S106; Sobel, supra note 18, at 150-51.
82 Id. at S106. This could be a problem because social capital is a public good within the group. The harm to any one person will be smaller than the harm to the group overall. So, while
3. **Sidenote: Social Capital as a Public Good.**—In some cases, social capital may be a public good, meaning that it is non-rivalrous and non-excludable. Non-rivalrous means that “consumption . . . by one person does not leave less for any other consumer”; non-excludable means that “the costs of excluding nonpaying beneficiaries who consume the good are so high that no private profit-maximizing firm is willing to supply the good.” National defense is the classic example of a public good. First, national defense is non-rivalrous because my benefit from protection by the Department of Homeland Security and the United States Armed Forces (among others) does not limit my neighbor’s ability to similarly benefit. (Conversely, a hamburger is rivalrous because once I eat the hamburger, there is nothing left for my neighbor to enjoy.) Second, national defense is non-excludable because it would be prohibitively costly to confer its benefits only on taxpayers. (Again, the hamburger is different, as commercial law allows the seller to allocate hamburgers only to those who pay for them, and property and criminal law protect the buyer’s possession and enjoyment of the burger.)

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83 COOTER & ULEN, supra note 25, at 46.

84 See id. at 46-47; VARIAN, supra note 34, at 618.

85 Indeed, it is hard to imagine how government could do so — steering enemy attacks to property owned by tax cheats?

Because the market would provide too little (if any) national defense, the United States government must do so, providing all citizens the same level of that service regardless of their personal preferences. 87

In some circumstances, the enforceable trust version of social capital can act as a social good. Some of the benefits associated with enforceable trust are non-rivalrous, such as neighborliness. One person’s enjoyment of a neighbor’s pleasant demeanor may not diminish another person’s ability to enjoy the same. Conversely, other aspects are rivalrous, as when I loan my lawn mower to one neighbor, making it temporarily unavailable to other neighbors. The same applies to non-excludability. In a large community where membership is not easily discernible (such as the community of “native New Yorkers”), it may be too costly to exclude non-members from member benefits. But in a small neighborhood, exclusion is easier. For present purposes, the point is that social capital will be under-produced in contexts where it is a public good, and will be greater when it is rivalrous and excludable.

To summarize sections 2 and 3, Table 2 lists factors that affect monitoring and implementing the sanction, identifying which factors support and work against creation and maintenance of social capital.

**Table 2**

<table>
<thead>
<tr>
<th>Factor</th>
<th>Effect on Likelihood of Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size of Community</td>
<td>Inversely related</td>
</tr>
</tbody>
</table>

87 See Varian, *supra* note 34, at 618 (describing the allocational inefficiency involved with public goods).
Geographical Dispersion | Inversely related
---|---
Closure of Social Network | Directly related
Overlapping relationships | Directly related
Public good | Inversely related\(^{88}\)

C. **Social Capital and Transaction Costs**

As mentioned above, social capital can reduce transaction costs. This section explains precisely how social capital does so. Specifically, I return to our example of the family that will be taking a vacation and so needs someone to pick up the mail, take in the newspaper, mow the lawn, keep watch for suspicious activities on the property, and take other basic steps to keep the property in good order. Consider how social capital might reduce the transaction costs discussed in part I.A.\(^{89}\)

First, consider search costs. Absent social capital, the family must find someone in the marketplace who is willing to watch their home. They can search the yellow pages, check references, and do background checks (e.g., check with the local Better Business Bureau). All these steps are costly, and they yield imperfect information of the agent’s trustworthiness. If social capital exists among neighbors, however, the family can avoid many of these costs either

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\(^{88}\) The more some aspect of social capital is like a public good, the less likely that social capital will exist. *See supra* notes 83–87 and accompanying text.

\(^{89}\) *See supra* notes 23–47 and accompanying text.
by asking a neighbor to either watch the property\textsuperscript{90} or refer a house-sitting service that the neighbor trusts.

Second, recall that the family will face negotiation costs. Once they find a service, they must negotiate price and level of service (e.g., mow the lawn every week or every other week, edge the lawn, \textit{etc.}). Also, the family must specify precisely how they wish the service to be provided (lawn clippings to be bagged or not, height of the lawn). Again, these costly steps can be avoided by drawing on social capital with one’s neighbors. A neighbor may know what lawn care is expected in the neighborhood and may have observed the family’s specific lawn care practices.

Third, our family once again faces agency costs. Suppose the family is leaving for a month and pays a service to mow their lawn once a week. The lawn service has an incentive to shirk, such as by performing every other week. If shirking is hard to detect,\textsuperscript{91} the family will not know they have been cheated unless they take steps to monitor the lawn service. Perhaps the family could hire someone to check up on the lawn service, but that would only create another agency problem.\textsuperscript{92} Social capital could solve this problem. The family could ask a neighbor to either perform the requested lawn care service or keep track of when a lawn service performs

\textsuperscript{90}The neighbor could provide the service for free or for a small fee, as when someone pays a neighbor’s child to mow the lawn.

\textsuperscript{91}For example, caring for the lawn less often than agreed may leave no visible effects on the lawn.

\textsuperscript{92}For example, the monitoring service could reach an agreement with the lawn service to split the profits of shirking.
lawn care. Another possibility would be for the neighbor to agree to monitor the work of the lawn service.

Fourth, the family’s enforcement is similarly aided by social capital. If the family learns that the lawn service has shirked, they have relatively limited remedies. Litigation is unlikely given the high cost and small potential recovery. The family could report the lawn service to the local Better Business Bureau, but that would be time consuming without any assurance of satisfaction. Or the family could threaten to tell all of the lawn service’s clients about the shirking, but that would be quite costly (find the clients and then inform them all), as well as expose the family to possible liability. With social capital, enforcement is much more straightforward. If a neighbor shirks in performing the requested lawn care, gossip can communicate the violation, and the remainder of the neighborhood can impose a sanction.

Fifth, the odds of opportunistic behavior are reduced when social capital exists. For example, the manager of a lawn service might show up the day you leave for vacation and

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95 Bernstein, Diamond, supra note 35, at 133-34 (“In the typical diamond transaction, litigation costs would be high relative to the amount that could be recovered, and the promise would almost always be undercompensated under standard damage remedies.”).
demand twice as much money.\textsuperscript{97} Having no time to find a replacement service, the family may accede. The lawn service expects that the family will not be able to effectively communicate its opportunistic behavior to its existing and potential clients. Conversely, when social capital exists, a neighbor is less likely to behave opportunistically, given the easy ability to detect and punish such behavior.

In sum, social capital can reduce or eliminate each type of transaction cost. As the next section explains, however, social capital also has its costs.

\textbf{D. The Costs of Social Capital: Reciprocity and Forgone Preferences}

Social capital has two main costs. First, if social capital generates benefits for community members, the community likely enforces a norm of reciprocity: Members who receive benefits from the community must stand ready to provide similar benefits to other members of the community. In the example of our vacationing family, this means that a family who calls upon neighbors while on vacation will be expected to reciprocate when their neighbors

\textsuperscript{97} Examples of this type of behavior exist in the moving industry, where some disreputable firms demand an extra payment before making final delivery of a person’s belongings. \textit{See, e.g.}, Andy Newman, \textit{Movers Go on Trial in an Extortion Case}, N.Y. TIMES, Mar. 27, 2003, at D3 (“It seemed like a fair price to Streeter Nelson, a financial adviser from Pittsburgh: $2,900 to move half a houseful of her possessions to Rhode Island. After the truck was loaded, however, Ms. Nelson testified yesterday, the driver for On-Time Van Lines, a company based in Brooklyn, demanded nearly $10,000 to complete the move.”). As long as the payment demanded is less costly than either replacing the belongings or obtaining legal recourse, the person will pay the demand.
go on vacation. If the family refuses, they will violate a community norm and trigger corresponding sanctions. By drawing on social capital, the family is aware of the reciprocity norm and believes that the aggregate benefits outweigh the costs of reciprocity.

Second, inherent in the notion of social capital, and enforceable trust, is the potential to thwart people’s preferences and desires. Recall that enforceable trust ensures adherence to community norms. Those norms, in turn, may forbid or require behavior that some community members prefer or dread. Community members will then forgo or take actions because of the expected sanction. For example, “the norm in a community that says that a boy who is a good athlete should go out for football . . . direct[s] energy away from other activities,” such as non-

98 Cf. THE GODFATHER (Paramount Pictures 1972) (upon agreeing to perform a favor requested on his daughter’s wedding day, Vito Corleone responds, “Some day, and that day may never come, I’ll call upon you to do a service for me.”).

99 Indeed, merely asking a neighbor to watch one’s house can further strengthen social capital by signaling one’s heightened trust in one’s neighbor.

100 Coleman, supra note 16, at S105 (“Effective norms in an area can reduce innovativeness in an area, not only deviant actions that harm others but also deviant actions that can benefit everyone.”).

101 Id. (“A community with strong and effective norms about young persons’ behavior can keep them from ‘having a good time.’”); see Portes & Sensenbrenner, supra note 21, at 1322 (“social structures can advance as well as constrain individual goal seeking”).

102 See Posner, supra note 10, at 1699-1701.

103 Id.
athletic pursuits that the boy might prefer. Or during the Jim Crow era, white business owners who abhorred racism might nonetheless have adhered to (or not opposed) segregation out of fear that they would be cut off from the benefits of social capital. And in the example of our vacationing family, the neighborhood might enforce norms regarding political affiliation or religious belief. If so, a person with deviant beliefs must renounce or hide those beliefs to maintain their social capital. In all these examples, a price of social capital is the sacrifice of behavior that one values or prefers.

E. Coda

Before returning to constitutional law, let us take stock of what we know about social capital. Like other forms of capital, social capital helps or hinders human action. Social capital does so by creating certainty and predictability through enforceable trust: Community members behave consistent with community norms (trust) because failure to do so will result in sanction (enforceable). So when social capital exists, you can predict a person’s behavior if you know first, that the person is a member of a specific community, and second, the community’s norms. It is adherence to community norms that reduces transaction costs, making certain activities possible and others less costly.

104 Cf. BILL CLINTON, MY LIFE 40 (2004) (“Band camp . . . was the only place where being a ‘band boy’ instead of a football player wasn’t a political liability.”).

105 See Steven N. Durlauf, The Case “Against” Social Capital, 20 FOCUS 1, 2 (1999); Cass Sunstein, On the Expressive Function of Law, 144 U. PENN. L. REV. 2021, 2043-44 (1996) (arguing that one salutary function of civil rights laws was to protect non-racist white business owners from retaliation for their refusal to discriminate).
We also have some idea about when social capital will exist. Social capital will be strongest when both the potential sanctions for norm violations and the likelihood of sanction are high. Table 1 above summarized the factors that bear on the magnitude of sanctions, and Table 2 above did the same for the likelihood of sanction.

The remainder of this Article explores what light social capital can shed on cases where the government and private actors join to cause harm. Social capital suggests that certain human behavior is predictable. Consequently, when government regulates in an area with strong social capital, the government action might have predictable effects. The question is whether government should be held responsible, under the Constitution, for these predictable effects.

Part II reviews Supreme Court doctrine where the Court has adopted such a theory — the affect of mandatory disclosure laws on unpopular groups. Part III extends that analysis to an area where the Court has only half assimilated the lessons of social capital — private prayer at public occasions. Part IV proposes a legal test to fill this gap in the Establishment Clause case law.

The Article then concludes by suggesting how social capital can inform analysis of other constitutional law doctrines.

II. Social Capital and Minor Political Parties

Mandatory disclosure laws are a good starting point to consider the interaction of social capital and state action. The cases typically involve unpopular groups or organizations; in social capital terms, the groups’ beliefs run counter to community norms. For example, one case involves the Ohio Socialist party, whose political beliefs contradict those of an overwhelming majority of Americans. And another case involves the NAACP, whose work for racial equality violated the segregationist norms of some communities. In each case, detection of group
membership — and the violation of community norms signaled by membership — triggered sanctions.

The disclosure cases also involve two levels of action — the government mandating disclosure, followed by private actors imposing a sanction. The question is whether this public-private partnership places the harm within the Constitution’s reach. We address this question in two steps. Section A analyzes the cases on their own terms, identifying the Court’s rationale and resulting doctrine. Section B then explains the cases in terms of social capital, drawing some preliminary conclusions about how social capital can inform the analysis.

A. The Mandatory Disclosure Cases

The Court first addressed private retaliation for government-mandated disclosure in *NAACP v. Alabama*.\(^\text{106}\) That case began when the Alabama Attorney General brought suit to oust the NAACP from the state for failing to register to do business. During discovery, the Attorney General requested a list of all NAACP members, regardless of whether the members were doing business within Alabama. The NAACP refused to produce the list, but offered to qualify to do business in the state. The Attorney General refused the offer, and the district court ordered disclosure. The NAACP then appealed to the Supreme Court.

The NAACP argued that the disclosure order abridged its members’ First Amendment right of association. The Court has long recognized that association with those of similar views, for the purpose of discussion and expression of common points of view, is an essential corollary of the First Amendment’s guarantee of free speech.\(^\text{107}\) Laws that directly interfere with

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\(^{106}\) 357 U.S. 449 (1958).

association, such as banning certain types of association\textsuperscript{108} or forcing associations to accept unwanted members,\textsuperscript{109} clearly implicate this constitutional right. In \textit{NAACP v. Alabama}, the Court explained that public disclosure of an association’s members could also infringe that right:

\begin{quote}

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective a restraint on freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations . . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.\textsuperscript{110}
\end{quote}

Whether a challenged law impermissibly interferes with the right of association depends on whether there is a “likelihood of a substantial restraint upon the exercise by . . . members of their right to freedom of association.”\textsuperscript{111}

This test was satisfied when the NAACP showed that disclosure of its members had previously led to harassment: “[The group had] made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to

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\textsuperscript{108} CHEMERINSKY, \textit{supra} note 7, § 11.5.2, at 1156-58. \\
\textsuperscript{110} \textit{NAACP v. Alabama}, 357 U.S. at 462. \\
\textsuperscript{111} \textit{Id}.
\end{flushright}
economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”112 And the government did not have a sufficient interest to justify this intrusion on free association. The list of rank-and-file members was not relevant to the issue of whether NAACP was doing business in the state. Further, the NAACP had offered to register to do business in the state, mooting the entire proceeding.

*NAACP v. Alabama* teaches three important lessons. First, the government did not have to intend to abridge speech.113 “The governmental action challenged may appear to be totally unrelated to protected liberties.”114 The constitutional violation may arise solely from the effect of government’s action. Here, the forbidden effect was discouraging membership in the association by exposing members to harassment and retaliation.

Second, it did not matter that private action was the immediate cause of the forbidden effect. “The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.”115 So, the final act in the chain of causation might be private intimidation, but the government is nonetheless constitutionally responsible for the resulting infringement.

Third, the party asserting its associational rights bears the burden of proving the government’s action is likely to result in private infringement of associational rights. The

112 *Id.*
113 *Id.* at 461 (“In the domain of these indispensable liberties, whether speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.”).
114 *Id.*
115 *Id.* at 463.
NAACP was able to do so with evidence that past disclosures had led to harassment and intimidation of its members and thereby chilled membership. We now turn to two later cases, both reviewing campaign finance laws, that elaborate on this burden of proof.

First, in *Buckley v. Valeo*[^116^], the Supreme Court reviewed a federal campaign finance law that required (among other things) disclosures regarding donors:

> Each political committee [must] keep detailed records of both contributions and expenditures [that] include the name and address of everyone making a contribution in excess of $10, along with the date and amount of the contribution. If a person's contributions aggregate more than $100, his occupation and principal place of business are also to be included. These files are subject to periodic audits and field investigations by the [Federal Election] Commission.

> Each committee and each candidate also is required to file quarterly reports [that] contain detailed financial information, including the full name, mailing address, occupation, and principal place of business of each person who has contributed over $100 in a calendar year, as well as the amount and date of the contributions. They are to be made available by the Commission “for public inspection and copying.” . . .

> Every individual or group, other than a political committee or candidate, who makes “contributions” or “expenditures” of over $100 in a calendar year “other than by contribution to a political committee or candidate” is required to file a statement with the Commission.[^117^]


[^117^]: *Id.* at 63-64.
The challengers argued that such disclosure could subject contributors to unpopular political parties to substantial harassment, which might discourage potential donors from supporting the party. And donors are no less important to an association than its members, as the right to association must include the “right to pool money through contributions, for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective.’”

_Buckley_ established the evidentiary showing required for a government-mandated disclosure to violate the First Amendment right of association: “The evidence offered need show only a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” Further, the Court will consider a wide variety of evidence in deciding such claims:

The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

If the challenger makes this showing, the disclosure law is unconstitutional. Because _Buckley_ was a facial challenge, the litigants had not offered any evidence on how the law’s disclosure

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118 _Id._ at 65-66.

119 _Id._ at 74 (emphasis added).

120 _Id._ at 74.

121 _Id._ at 69-74.
provisions would affect identified minor parties.\textsuperscript{122} Thus, the Court upheld the disclosure law on its face, leaving minor parties free to challenge the law as it applied to their activities.\textsuperscript{123}

The second campaign finance case, \textit{Brown v. Socialist Workers `74 Campaign Committee},\textsuperscript{124} mounted just such an attack. There, an Ohio law required candidates to file a report that identified all contributors and recipients of campaign funds. Because the law included all recipients of campaign funds, the report would identify not only those compensated for working on the campaign, but also all businesses who simply sold goods or services to the campaign. Once filed, the list would remain open for public inspection for six years. The Ohio Socialist Party challenged the law as applied to its candidates. The Court held that the Party had shown a reasonable probability that disclosure would lead to threats, harassment, or reprisals by

\textsuperscript{122} \textit{Id.} at 71 (“no appellant in this case has tendered record evidence of the sort proffered in \textit{NAACP v. Alabama.”}.

\textsuperscript{123} \textit{Id.} at 74 (“Where it exists the type of chill and harassment identified in \textit{NAACP v. Alabama} can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases.”). The Supreme Court most recently applied this test to the Bi-Partisan Campaign Reform Act of 2002. \textit{McConnell v. Federal Election Comm’n}, 540 U.S. 93, 198-201 (2003) (“In this litigation the District Court applied \textit{Buckley’s} evidentiary standard and found . . . that the evidence did not establish the requisite ‘reasonable probability’ of harm to any plaintiff group or its members.”). Again, the Court rejected a facial challenge on those grounds, leaving minor parties to challenge specific applications of the Act’s disclosure provisions. \textit{Id.} (“[O]ur rejection of plaintiffs’ facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement.”).

\textsuperscript{124} 459 U.S. 87 (1982).
its proof of “threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members’ property, police harassment of a party candidate, and the firing of shots at an SWP office.”\textsuperscript{125} Two parts of the Court’s analysis are worth noting.

First, the government argued that because the party’s campaign workers were already visible to the public, the disclosure law posed little (if any) additional threat of harm.\textsuperscript{126} The Court rejected this argument for two reasons. First, for Party members generally, the disclosure law “result[ed] in a dramatic increase in public exposure.”\textsuperscript{127} Second, even if a subset of Party members was less threatened, the disclosure law would still be constitutionally troublesome as long as it “increase[d] the potential for harassment \textit{above and beyond} the risk that an individual faces simply as a result of having worked for an unpopular party at one time.”\textsuperscript{128}

In a second noteworthy part of its opinion, the Court indicated that overlapping relationships helped preserve social capital. Recall that the Ohio disclosure law applied to vendors who received campaign funds “for ‘merely’ commercial transactions,”\textsuperscript{129} regardless of whether they supported the party’s political views. The Court concluded that the mere willingness to conduct business with an unpopular group could subject a vendor to “public enmity,”\textsuperscript{130} thereby deterring vendors from doing further business with the unpopular party. This is the overlapping relationships concept discussed above: Commercial ties enforce political

\textsuperscript{125} \textit{Id.} at 99.

\textsuperscript{126} \textit{Id.} at 97 n.14.

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} (emphasis added).

\textsuperscript{129} \textit{Id.} at 98.

\textsuperscript{130} \textit{Id.} at 98.
social capital. And other overlapping relationships harmed the Socialist party members themselves. In the twelve months before trial, twenty-two of the party’s members (and four of the sixty Ohio members) “were fired because of their party membership.” This time sanctions in the overlapping employment relationship enforced political social capital.

B. The Social Capital Analysis

The mandatory disclosure cases fit the social capital model quite well. In each case, the challenged government action had the predictable effect of enforcing a community’s norms and thereby strengthening the community’s social capital. Consider each case separately.

In *NAACP v. Alabama*, one community followed a norm of racial segregation. To maintain enforceable trust, the community had to punish those who violated the racial segregation norm, which required imposition of sanctions. Clearly, the community had little trouble doing so — harassment and retaliation against desegregationists were fairly common. Further, sanctions were multiplied because several overlapping communities — including work, school, and most social activities — shared the segregation norm. And defenders of the segregation norm were not shy about imposing additional sanctions, such as physical harm and property damage.

Detecting those who held deviant, desegregationist beliefs, however, posed some difficulties. With no way to read minds, a person’s words and actions must serve as proof of their beliefs, and in 1960’s Alabama, NAACP membership served as proof of desegregationist beliefs. So, one strategy for the segregationist community to detect norm violators was to

131 Id. at 99.

132 See generally BELKNAP, supra note 60.

133 Id.
identify NAACP members. Doing so, however, would not be easy. One could wait outside meetings or try to observe other activity that indicated membership. But such methods were costly and incomplete. Forcing the NAACP to produce a membership list, however, would provide cheap, accurate information about norm violators. By ordering disclosure of the list, the court reduced the cost and increased the accuracy of detecting norm violations, and thus helped enforce one community’s segregationist norms and the social capital associated with those norms.

The flip side of mandatory disclosure is that it eroded the social capital of NAACP membership. When membership remained a private matter, a person could join the NAACP without substantial fear of losing social capital in contexts that held segregationist norms, such as the workplace or social circles. Further, the threat of physical harm, mental intimidation, or property damage would be low. When membership is disclosed, however, the risk of harm increases dramatically, increasing the cost of membership. When the cost of joining the NAACP increases, we should expect a corresponding decrease in membership. And with fewer members, the NAACP itself possessed less social capital.

The Ohio disclosure law in Brown operated in a similar way. One community held a norm that socialist political beliefs were repugnant. That community had enforced the norm by imposing sanctions, such as loss of work and harassment, on those who violated the norm. But as in NAACP v. Alabama, it was difficult to detect norm violations. The campaign disclosure laws, however, made detection both inexpensive and accurate. Once again, social capital of one group is re-enforced while that of another is eroded.

The lesson of the freedom of association cases is that government commits a constitutional harm when two things can be said: first, the government action helps a private
community create or maintain social capital, or destroy the social capital of a rival community, and second, the creation, maintenance, or destruction of social capital directly contravenes an established constitutional principle. Importantly, the government need not intend any of this. Rather, the effect on social capital must be a reasonably probable consequence of the challenged government action. In both *NAACP v. Alabama* and *Brown*, the direct, likely effect of the disclosure laws was to enforce norms in a manner that burdened the right of free association.

### III. Social Capital and Public Prayer

This Part III applies the social capital framework to a subset of Establishment Clause cases. Section A discusses religious displays on public property, which the Court has held to violate the Establishment Clause when they give the appearance that government endorses religion, even if the display was erected by a private group and the government intended no endorsement.\(^\text{134}\) Section B then turns to religious prayer on public property. Here, the Court suggests, and the lower court cases have held, that such prayer does *not* violate the Establishment Clause if it is *purely private*.\(^\text{135}\) This is because purely private prayer neither sends a message of government endorsement nor coerces people to pray, even when conducted on government property.

On the surface, the display and prayer cases appear consistent. Government does not offend the Establishment Clause as long as it does not appear to endorse religion. But the social capital analysis reveals that private prayer on public grounds poses an additional danger the endorsement test misses. Many private prayer cases arise when the government invites the public to an otherwise secular occasion. Once present, a person is confronted with a prayer to

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\(^{134}\) *See infra* notes 136–161 and accompanying text.

\(^{135}\) *See infra* notes 171–186 and accompanying text.
which she might object. Even if the prayer is purely private, and the government shows no hint of endorsement, the objector may still need to take some action to avoid participation. If the necessary action is visible to others in attendance, the objector will be identified as such. And if the community has a strong norm of religious belief and behavior, the objector may be labeled as a norm-violator and suffer sanctions, such as harassment or loss of social capital. The religious objector, then, finds herself in a similar position to the member of an unpopular political party.

Part III concludes that the Court ought to adapt its freedom of association test to protect religious objectors from the harm of private prayer on public property.

A. Religious Use of Public Property

This section reviews two aspects of the public religious display cases. Section one reviews the underlying doctrine, and section two analyzes the social capital implications of such displays.

1. The Religious Display Cases.— In religious display cases, the controlling analysis is what has come to be known as the endorsement test: A religious display on public property violates the Establishment Clause if a “reasonable, informed observer” would perceive that the religious use communicates government endorsement of religion.136 This “reasonable,

136 See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O’Connor, J., concurring in part and concurring in the judgment). Justice O’Connor is the architect and main proponent of the endorsement test. See CHEMERINSKY, supra note 7, § 12.2.1, at 1193-96. While Justice O’Connor has retired from the Court, leaving only three avowed adherents of the endorsement test on the current Court (Justices Stevens, Souter, and Breyer), it is the controlling test in these cases because it represents the narrowest grounds on which these decisions rest. Also, the Court has assimilated the endorsement test into the once-dominant
informed observer” is not a mere casual passerby, but instead “a hypothetical observer who is presumed to” be “aware of the history or context of the community and the forum in which the

Lemon test. The Lemon test is named after the case Lemon v. Kurtzman, 403 U.S. 602 (1971), where the Court framed a three-part test for determining whether challenged government action is constitutional:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion.”

Id. at 612-13. A recent majority opinion authored by Justice O’Connor sets forth the current formulation of the Lemon test, which requires the government to show that (1) the challenged action has “a secular legislative purpose,” and (2) the “principal or primary effect” of the challenged action “neither advances nor inhibits religion.” Agostini v. Felton, 521 U.S. 203, 218 (1997). In determining the primary effect of the challenged government action, the Court has considered whether a “reasonable observer” with knowledge of the “history and context” of the challenged government action, would perceive the government as endorsing religion. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). As part of this endorsement inquiry, the Court also considers whether the challenged government action entails excessive entanglement between government and religion. Agostini, 561 U.S. at 233.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring in part and concurring in the judgment). Justice John Paul Stevens has taken the view that either the casual passerby or the reasonable religious dissenter should be the relevant observer. Id. at 807-08 (Stevens, J., dissenting).
religious display appears.”138 Indeed, “reasonable observers have reasonable memories, and . . . precedent[] sensibly forbid[s] an observer ‘to turn a blind eye to the context in which [the] policy arose.”139

Applying the endorsement test, the Court has reached a mixed bag of results. In Allegheny County v. ACLU,140 the Supreme Court upheld a seasonal display that included a menorah adjacent to a Christmas tree, but struck down a crèche displayed on the steps of the town hall.141 Pairing the religious menorah with a secular Christmas tree sent a secular message of seasonal celebration,142 while the freestanding crèche was entirely religious, sending a message of religious endorsement.143 In McCreary County v. ACLU,144 the Court struck down

138 Id. at 780 (O’Connor, J., concurring in part and concurring in the judgment).
139 McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005).
141 Id. at 620-21 (menorah); id. at 601-02 (crèche). Again, while a majority of the Court did not apply the endorsement test, that test was the narrowest grounds that supported all of the Court’s holdings.
142 Id. at 613-21.
143 Id. at 598-602. In another context, however, the endorsement test upheld a crèche display on public property. See Lynch v. Donnelly, 465 U.S. 668, 685 (1984) (the display consisted of “display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads “SEASONS GREETINGS,” and the crèche at issue here.”).
two Ten Commandments displays at state courthouses because the displays had an unmistakable religious theme. And *Van Orden v. Perry*[^145] upheld a Ten Commandments display on the grounds of the Texas Capitol building because the display was part of an arrangement including “17 monuments and 21 historical markers commemorating the ‘people, ideals, and events that compose Texan identity.’”[^146] As these cases suggest, the endorsement test is highly contextual, requiring judges to imaginatively reconstruct the history and context of a religious display, and then view that imaginary world through the equally imaginary eyes of the reasonable observer. Not surprisingly, then, display of the same religious item — for example, the text of the Ten Commandments — was permissible when planted in one context but unconstitutional when transplanted to another.

[^144]: 545 U.S. 844 (2005)


[^146]: *Id.* at 698 (Breyer, J., concurring in the judgment). While Chief Justice Rehnquist wrote a plurality opinion (joined by three justices) upholding the display, Justice Breyer’s opinion concurring in the judgment is the relevant opinion for three reasons: first, his opinion stated the narrowest grounds for the decision; second, he applied the prevailing non-endorsement version of the *Lemon* test; and third, he provided the necessary fifth vote for the decision. The four dissenting justices applied the same non-endorsement test and reached the opposite conclusion. *See id.* at 737-47 (O’Connor, J., dissenting).
The endorsement test also applies to cases where religious groups seek access to public property. These cases typically involve a local government that, fearing a lawsuit on Establishment Clause grounds, bars religious groups from using public buildings. Under the First Amendment, denying access based on a group's viewpoint is unconstitutional unless the government can show a compelling reason to do so. The government typically claims that it is trying to avoid violating the Establishment Clause, arguing that granting access to religious groups would send a message endorsing religion.

The government's argument ultimately fails because allowing religious groups nondiscriminatory access to public property does not necessarily violate the Establishment Clause. In terms of the endorsement test, the reasonable, informed observer will not necessarily perceive government endorsement of religion from a policy that grants all groups — secular and religious

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148 See Good News Club, 533 U.S. at 102-06 (school district allowed community use of school facilities after school hours, but did not allow such use for religious worship); Mergens, 496 U.S. at 230-32 (school district allowed secular clubs to use school premises during non-instructional time, but not student Christian club); Widmar, 454 U.S. at 265-58 (university excluded religious student groups from use of facilities open to all other student groups).

149 Good News Club, 533 U.S. at 106-07.

150 Id.
— non-discriminatory access to public property.\textsuperscript{151} Rather, the message is that government supports a wide array of private association, \textit{regardless} of viewpoint.

\textit{Capital Square Review and Advisory Board v. Pinette}\textsuperscript{152} addressed the question of when allowing religious groups non-discriminatory access to public property might create an appearance of government endorsement. There, the Klu Klux Klan sought to place a Latin Cross on a public plaza adjacent to the state capitol building. Historically, the plaza had “been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious.”\textsuperscript{153} The state was concerned that placement of a religious symbol next to the statehouse would send an unconstitutional message of endorsement. Once again, Justices applying the endorsement test controlled the outcome.\textsuperscript{154} Justice O’Connor explained that the reasonable, informed observer would not perceive government endorsement from the mere proximity of the Klan’s cross to the statehouse. Knowing the plaza’s over one-hundred-year history of accommodating all manner and viewpoint of speech, the reasonable observer would instead perceive a message of tolerance and openness. In a different context, however, proximity

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} 515 U.S. 753 (1995).

\textsuperscript{153} \textit{Id.} at 757.

\textsuperscript{154} Writing for a plurality, Justice Antonin Scalia concluded that private religious speech on public property does not violate the Establishment Clause if all speakers, regardless of viewpoint, are given non-discriminatory access to the forum. \textit{Id.} at 763-65 (Scalia, J., announcing the judgment of the Court). The Justices applying the endorsement test provided the controlling rationale because they applied the narrowest rationale for striking down the state’s decision.
of a private religious display to the statehouse might send a message of endorsement, even if the forum were open on a non-discriminatory basis.\textsuperscript{155} In reaching this conclusion, Justice O’Connor made three important points.

First, purely private religious activity may violate the Establishment Clause. In \textit{Pinette}, the religious component of the challenged action — placement of a religious symbol — was carried out by purely private actors. Yet, the endorsement test still applied “where private religious conduct has intersected with a neutral government policy providing some benefit in a manner that parallels the instant case.”\textsuperscript{156} So, merely admitting private religion to public property triggers constitutional scrutiny.

Second, under the endorsement test, the mere fact that the government “neither intends nor actively encourages” the perception of endorsement does not end the analysis.\textsuperscript{157} Regardless of the government’s intent or disinterested behavior, “the State’s own actions in operating the forum in a particular manner and permitting the religious expression to take place therein, and their relationship to the private speech at issue, actually convey a message of endorsement.”\textsuperscript{158}

Justice O’Connor explained how the government may unwittingly and unwillingly endorse religion:

\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 774 (“I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism.”) (O’Connor, J., concurring in part and concurring in the judgment).
\item \textsuperscript{156} \textit{Id.} at 774 (O’Connor, J., concurring in part and concurring in the judgment).
\item \textsuperscript{157} \textit{Id.} at 777 (O’Connor, J., concurring in part and concurring in the judgment).
\item \textsuperscript{158} \textit{Id.} (O’Connor, J., concurring in part and concurring in the judgment).
\end{itemize}
At some point, . . . a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval. Other circumstances may produce the same effect — whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others. Our Establishment Clause jurisprudence should remain flexible enough to handle such situations as they arise. 159

Third, when a neutral government policy has led to perceived endorsement of religion, government has an affirmative duty "to take steps to avoid being perceived as supporting or endorsing a private religious message." 160 Government may not “remain studiously oblivious to the effects of its actions.” 161 So, if a policy of non-discriminatory access leads to religious activity that dominates a public forum, the government must take affirmative steps to avoid the forbidden result: the reasonable perception of endorsement. For example, the government might publicly disclaim any association with or endorsement of the religious activity.

2. The Social Capital Critique.—Undoubtedly, private religious use of public property assists the creation and maintenance of the social capital of religious communities. 162 For present purposes, a religious community is a group with “beliefs about

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159 Id. at 777-78 (O’Connor, J., concurring in part and concurring in the judgment).
160 Id. at 777 (O’Connor, J., concurring in part and concurring in the judgment).
161 Id. (O’Connor, J., concurring in part and concurring in the judgment).
morality, which have a nonhuman, otherworldly basis.” In addition to beliefs, the community will have corresponding norms of behavior, such as participation in group religious exercises (whether conducted in private or public) and actions consistent with moral teachings (such as marital fidelity and truthfulness). For the community to possess social capital, its norms must be supported by enforceable trust: Community members must be able to trust that co-religionists will behave consistent with applicable norms, and that trust must be enforced through sanctions for violating the norms. And norm enforcement depends on the magnitude and likelihood of sanction. Both religious displays and access to public property can help a religious community create or maintain its social capital.

First, access to public facilities can reduce the cost of a religious community’s activities. For example, instead of purchasing or leasing a space to hold its meetings, a religious community has access to a public facility at a below market rate, due to public support. With lower costs, a religious community can devote more resources to providing benefits to its members, thereby increasing the value of community membership. Or the community can lower the cost of membership and attract additional members, which may increase the benefits of membership, as each member has more members upon whom to draw. And if membership

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Religious Groups, supra note 62. Creation and maintenance of social capital in religious groups is discussed in more detail infra notes – and accompanying text.

163 Posner, Religious Groups, supra note 62, at 35; see also Laurence R. Iannaccone, Introduction to the Economics of Religion, 36 J. ECON. LIT. 1465, 1466 (1998) (“Insofar as an explicit definition of religion proves necessary (for example, to exclude political ideologies and secular philosophies), it suffices to define a religion as any shared set of beliefs, activities, and institutions premised upon faith in supernatural forces.”).
benefits increase, the community has also increased the sanction due to ostracism. Further, community meetings themselves provide an opportunity to communicate norm violations, decreasing the cost of monitoring and thereby increasing the likelihood of sanction. Thus, religious use of public facilities can increase the social capital of religious communities.

Current Establishment Clause doctrine prevents religious communities from using government property to improperly bolster their social capital. Under the non-endorsement approach, the government must grant access on a viewpoint neutral basis, meaning that religious groups receive no relative cost advantage over secular groups. The Constitution does not forbid all public support of religious groups, only favoritism or endorsement. Indeed, barring religious groups from public property would put those groups at a relative disadvantage, increasing the costs of membership relative to secular groups. Neutrality requires a non-discriminatory policy — access for everyone or no one — which is what current First Amendment doctrine prescribes. Thus, current constitutional doctrine protects against preferential support for religious social capital through private use of public property.

164 Posner, *Collective Action*, supra note 162, at 139-40; Posner, *Religious Groups*, supra note 62, at 35, 42-43 (religious groups “coordinate behavior through nonlegal sanctions, such as exhortation, criticism, threat, and ostracism.”).

165 The converse is also true, as the Court forbids disfavor of religion or religious groups. *See* Chemerinsky, *supra* note 7, § 12.2.1, at 1193-96.

Second, consider how religious displays on public property might increase a religious community’s social capital.\textsuperscript{167} Such displays may convince some citizens that government supports the religious community and its norms of belief and behavior. Citizens may construe this support of religious norms to mean that government will help the religious community sanction violations of those norms.\textsuperscript{168} Sanctions could include discriminatory denial of government services, selective enforcement of local laws, or outright harassment. By increasing the perceived sanction for violating the religious community’s norms, the display increases the enforceable trust supporting those norms.

Current doctrine on religious displays protects against improper aid to religious social capital. Such support only results if the government is perceived as endorsing religion and religious groups,\textsuperscript{169} and current doctrine forbids precisely such endorsement.\textsuperscript{170}

\textsuperscript{167} Public religious displays can also serve to weaken religious social capital. If people perceive that government (or other private associations) may serve some of their religious needs, government can serve as a low-cost substitute for church membership, reducing religious membership. \textit{See} Posner, \textit{Religious Groups, supra} note 62, at 50. This tracks the economic analysis of religion, which holds that greater government-sponsored religious practice erodes the incentive to join private religious groups because some people can satisfy the same preference for religion through the government. \textit{See} Posner & McConnell, \textit{supra} note 59, at 12-13. This tracks Adam Smith’s original analysis of competition between government and religion. \textit{See} Smith, \textit{supra} note 59.


\textsuperscript{169} A subsidiary issue is whose perception should count. By choosing an objective standard — the reasonable, informed observer — the endorsement test will allow displays that reinforces
In sum, both religious displays and access to public property can create or maintain the social capital of religious communities. But the Court’s current Establishment Clause jurisprudence is equal to the challenge, ensuring that religious social capital receives no preferential support. Conversely, as the next section discusses, prayer at public occasions is a blind spot in the Court’s current doctrine.

B. Religious Exercise at Secular Public Occasions

Over the last fifteen years, the Court has twice struck down prayer conducted at secular public functions — a high school graduation and a high school football game. Like the religious display and facility use cases, the prayer cases apply a version of the endorsement test. Unlike those cases, however, the endorsement test is not enough to protect against all constitutional harm. Section 1 explains the Court’s reasoning in both cases, and section 2 explains how social capital exposes the gap in constitutional protection.

1. The Public Prayer Cases.—In *Lee v. Weisman*,171 a Rhode Island middle school asked a rabbi to give a nonsectarian invocation and benediction at its graduation

170 See supra notes 136–139 and accompanying text.

ceremony. The middle school advised the rabbi that his remarks should reflect “inclusiveness and sensitivity,” which he followed by referencing only “God” and “lord,” without invoking a specific religious creed.\(^{172}\) Students were asked to stand silently during the rabbi’s remarks.

The Court framed the issue as whether the government had compelled the graduating students into religious exercise.\(^{173}\) In holding that the school district had done so, the Court made several findings.\(^{174}\)

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\(^{172}\) Of course, mere reference to “God” and Lord” is not entirely inclusive. \(\text{Id.}\)

\(^{173}\) \(\text{Id. at 587 (“It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’ The State’s involvement in the school prayers challenged today violates these central principles.”}).\)

\(^{174}\) The Court summarized the main facts that underlay its opinion:

These dominant facts mark and control the confines of our decision: \(\text{State officials direct the performance of a formal religious exercise} \) at promotional and graduation ceremonies for \(\text{secondary schools}.\) Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

\(\text{Id. at 586.}\)
(1) The challenged conduct occurred at a public secondary school graduation and promotion ceremony;

(2) The ceremony included a “formal religious exercise” — a prayer;

(3) State officials “directed” the prayer;

(4) Secondary school students were effectively (though not legally) compelled to attend the ceremonies;

(5) Several students in attendance objected to the prayer; and

(6) Because secondary school students could not effectively object to the prayer during the ceremony, they were effectively compelled to either participate in the prayer or appear to do so.

Note that these six factors give school officials much ammunition for designing graduation prayers that do not fit the precise rationale in *Weisman*. For example, a school district could include a prayer that is created and led by private actors, does not include secondary school students, or does not coerce participation or its appearance. So, the question going forward was which of the six listed facts was essential to the Court’s holding in *Weisman*?

In *Santa Fe Independent School District v. Doe*, the Court applied and clarified its *Weisman* holding. There, the school district had a policy that allowed students to decide, through two votes, whether to have prayer at the high school football games. The first vote decided whether to include an invocation, benediction, message, or statement before the game, and the second vote selected a student, from a slate of volunteers, to make the presentation. The school district instructed the student speaker that her message must be consistent with “the purpose of

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solemnizing” the football game.\footnote{Id. at 296-97.} Foreseeing a legal challenge to its policy, the school district also adopted a fallback policy that required any invocation, benediction, message, or statement be “nonsectarian, nonproselytizing.”\footnote{Id. at 300.} Two families challenged the law, one Catholic and one Mormon.

As in \textit{Weisman}, the Court focused on both government endorsement of the religious exercise and potential coercion of objectors. Though not conducted at a graduation or promotion ceremony, the prayer was:

\begin{enumerate}
\item Conducted at a secondary school occasion open to students and their families;
\item Government directed or endorsed;\footnote{\textit{Id.} at 300.}
\end{enumerate}

The Court described the scene at the football games:

Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school’s public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school’s name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the
(3) A formal religious exercise;
(4) Objectionable to several students and adults in attendance; and
(5) Such that some students in attendance were effectively compelled to either participate in the prayer or appear to do so.\textsuperscript{179}

school name. It is in a setting such as this that “[t]he board has chosen to permit” the elected student to rise and give the “statement or invocation.”

\textit{Id.} at 307-08. This perception was confirmed by the history of the invocation policy:

Most striking to us is the evolution of the current policy from the long-sanctioned office of “Student Chaplain” to the candidly titled “Prayer at Football Games” regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed [its current] policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school’s history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular “state-sponsored religious practice.”

\textit{Id.} at 309.

\textsuperscript{179} Some students were required to attend the games due to school commitments:
There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in Lee, “[l]aw reaches past formalism.” To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.”

*Id.* at 311 (citation omitted). Others were simply compelled to attend by social pressures:

For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”

*Id.* at 312 (citation omitted). In the end, however, the Court explained that the voluntariness of attendance at football games was not a factor in its decision: “Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are
The prayer coerced students through “‘social pressure’” that forced “‘the nonbeliever or dissenter’” into government endorsed religious exercise. Conversely, the Establishment Clause would not bar “any public school student from voluntarily praying at any time before, during, or after the schoolday.”

So, Weisman and Santa Fe leave us with several givens and unknowns regarding prayer at public occasions. First, the givens, which are hallmarks of constitutionally offensive conduct:

- Formal religious exercise.
- State directed or endorsed.
- Coercion of attendees into unwilling participation or its appearance, which need not be the direct result of government action, but may be due to private behavior (e.g., social pressure).

nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.” Id. at 312. All that is required is that those in attendance (whether voluntarily or effectively compelled to do so) be compelled to actually or apparently participate in the religious exercise.

180 Id. (quoting Lee, 505 U.S. at 594).
181 Id. (quoting Lee, 505 U.S. at 592).
182 Id. at 313.
183 Id. at 302 (“‘there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.’”).
The implication is that if any of these three factors is missing, the religious conduct will not run afoul of the Establishment Clause. The unknowns are open questions, the answers to which will further determine the scope of the Court’s holdings:

- Can adults be coerced through social pressure?  

- Are public occasions outside secondary school events covered?

- When is religious exercise at a public occasion state directed or endorsed?

If the few lower court opinions are any indication, states will likely have much leeway in dealing with these unknowns. For example, three courts of appeals have held that the coercion rationale does not apply to proceedings attended by adults. And another court of appeals found prayer to be purely private when the school district invited a parent to speak at a high school graduation

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184 Lee, 505 U.S. at 593 (“We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.”).

185 Bunting v. Mellen, 541 U.S. 1019 (2004) (Opinion of Stevens, J., respecting denial of certiorari) (“The Courts of Appeals for the Sixth and Seventh Circuits have rejected constitutional challenges to state universities’ inclusion of a nondenominational prayer or religious invocation in their graduation ceremonies, reasoning that college-age students are not particularly “susceptible to pressure from their peers towards conformity” . . . . The Fourth Circuit endorsed that principle in theory”), citing Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003); Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997);
with no official guidance on the subject matter.\footnote{See Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001); see also Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000); Doe v. School Dist. of the City of Norfolk, 340 F.3d 605 (8th Cir. 2003), \textit{rehearing and rehearing en banc denied} (Oct. 16, 2003) (in school district with past, informal practice of allowing school board members to speak when their child was in the graduating class, parent’s prayer at high school graduation was private speech that did not violate the Establishment Clause); Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897 (W.D. Mich. 2000).} As discussed next, these cases are not hopeful signs for those who take the social capital critique seriously.

2. **The Social Capital Critique.**—The Court’s holdings in \textit{Weisman} and \textit{Santa Fe} leave serious gaps in Establishment Clause protection. This section uses social capital to analyze three of the most serious gaps. First, the cases require that the prayer be government endorsed or directed. Second, the Court requires that the prayer coerce some in attendance to either participate or acquiesce in the prayer (or appear to do so). This assumes that students who can object to or abstain from the prayer suffer no constitutional harm. Third, adults likely receive no protection, on the assumption that they can more easily resist any coercion due to social pressure. Under the social capital analysis, there is no good reason to require any of the above elements for a constitutional violation.

Before turning to the specific requirements under \textit{Weisman} and \textit{Santa Fe}, it is important to highlight a significant shift in focus worked by the social capital analysis. The Court’s current doctrine focuses on the position of the dissenter at the public occasion: Can the person avoid participating in an unwanted religious exercise? Conversely, the social capital analysis shifts the focus to the benefit to the religious group, which includes ripple effects from the prayer (and the
dissenter’s actions during the prayer) that extend beyond the public occasion. The religious activity plays a role in maintaining the social capital of a religious community. This is the violation, and it has nothing to do with the three doctrinal requirements of Weisman and Santa Fe discussed above. The next section explains how religious communities build and maintain social capital, and the following section uses this analysis to expose the gaps in the Court’s current Establishment Clause case law.

a. Social Capital in Religious Communities

When analyzing social capital, we must first identify the relevant community. Here, the community can be loosely defined as co-religionists. This definition is purposefully vague because the actual community may vary from one context to the next. For example, in one locality social capital may exist among different denominations that share religious norms. In another community, several narrow communities may exist within a single religious denomination, as where a community has French, Irish, and Italian Catholic Churches. Or there may be several overlapping or interconnected religious communities, as where each denomination maintains its own social capital, but inter-faith activities also build social capital

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188 These norms could be theological tenets (e.g., inerrancy of the Bible, divinity of Jesus Christ), moral beliefs (opposition to abortion or same-sex marriage), or certain behavior (e.g., regular church attendance or public expressions of religious faith).

189 Peter Quinn, New York’s Catholic Century, N.Y. Times § 14 (June 4, 2006); see infra note 204.
among denominations. The bounds of any community of co-religionists depends on how far the group can extend its norms through enforceable trust.

To understand the role of public prayer in building and maintaining social capital, it is first important to understand how religious groups build and maintain social capital. Recall that social capital is a function of enforceable trust, and that there are two components to enforceable trust: first, the magnitude of the sanction tied to violating community norms, and second, the likelihood that a violation will be detected and punished. Consider how each component applies to religious communities.

Religious communities offer their members many benefits, and loss of these benefits would be a sanction for violating the community’s norms. Benefits include “spiritual and

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190 Here, sociologists would say that social capital exists within each denomination, but that structural holes exist between the various denominations. Individuals or organizations can arise to fill these structural holes, which then allows social capital to flow from one community to the other. A group that fills a structural hole has power as it serves as the gatekeeper for increased social capital.


192 See supra notes 48–88 and accompanying text.

193 See supra notes 53–67 and accompanying text.

194 See supra notes 70–82 and accompanying text.

195 See Iannaccone, supra note 163, at 1491 (“religions employ a vast arsenal of weapons in the war to shape souls: childhood education, parental reinforcement, selective membership, rites
communal benefits” as well as “various kinds of material goods” and “mutual aid.” For example, religious communities might provide goods or services that would be costly to obtain in the marketplace (e.g., child care and food in times of sickness), as well as goods not otherwise available in the private market (e.g., private assurance for loss of income, as when a church provides support for a member who has lost their job). And membership may confer commercial advantages, such as employment or business opportunities, as members of a religious community might prefer to hire or do business with co-religionists.

Membership in a religious group might also reduce the transaction costs of doing business. For example, connections among group members can reduce search costs, as when an employer obtains a credible job reference from a co-religionist. Membership can also reduce

197 Id. at 38-39; Iannaccone, supra note 163, at 1480-81.
198 Gary M. Anderson, Mr. Smith and the Preachers: The Economics of Religion in the Wealth of Nations, 96 J. POL. ECON. 1066, 1071 (1988) (“To the extent that moral duties are perceived in the market as relevant to assessing the riskiness of potential transactions, and individual’s moral reputation has a capital value; in an efficient human capital market the social cost of immoral behavior that is judged economically relevant will be fully reflected in reduced capital value of the individual’s reputation”). Economists would simply say that such people have a preference for such behavior because they derive utility from associating with co-religionists. See FRIEDMAN, supra note 23, at 100-04.
agency costs and “the risk of commercial opportunism.”

If an employer hires a co-religionist as an employee, the employer can rely on the enforceable trust of the religious community to keep the employee from taking advantage of the employer. And enforcement costs are lower as the enforceable trust of the religious community will be a powerful remedy.

The potential sanctions may be multiplied by the religious community’s overlapping relationships with other communities. For example, people who attend the same church might also participate in the same parent-teacher organization at their children’s school, work in the same industry, or hold public office in the local government. When this is true, breach of the religious community’s norms can result in sanctions in these other contexts.

The religious community’s power to sanction will be reduced to the extent that outside groups can provide benefits that are otherwise available through the religious community. For example, other private organizations could supply benefits such as child care or mitigate transactions costs such as by providing credible job references. Similarly, the benefits decrease to the extent that non-members cannot be excluded from enjoying them. (This is the public good problem noted above in Part I.B.3.) When non-members share in the group’s benefits, we have a free-rider problem: People outside the religious group can share in the benefits without bearing the cost (through enforceable trust) of creating and maintaining the group. The more free-riding, the more that the benefits of membership are diluted. For example, the more people who use child care provided by the religious group, the more that such care will cost to provide, or the less desirable that care will be. This will lead to less social capital for the religious community.

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200 For a general discussion of the problem of free-riding, see Cooter & Ulen, supra note 25, at 26-27.
Last, in addition to withholding the benefits of membership, religious groups can impose other sanctions. The religious community can impose “nonlegal sanctions, such as exhortation, criticism, threat, and ostracism.”\textsuperscript{201} And co-religionists can also inflict verbal and physical harassment as well as property damage as additional sanctions.

Next, we must consider the likelihood that the religious community will detect a norm violation and effectively impose a sanction. As discussed above, one factor will be the group’s size.\textsuperscript{202} Smaller groups allow easier detection and communication of deviant behavior, so a small congregation, or a single church, will make monitoring easier.

Also, overlapping relationships, such as when co-religionists work for the same employer, make monitoring easier by allowing community members to observe one another’s behavior outside of religious activities. As discussed above, such relationships allow groups to bridge structural holes in their social networks, increasing the available information and thus community’s ability to monitor norm violations.

Another structural hole might exist among different religious groups that share behavioral norms but worship separately.\textsuperscript{203} People within a denomination might have strong ties to one another but weak ties to people in other denominations. For example, a town could have three

\begin{footnotesize}
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\item \textsuperscript{201} See Iannaccone, \textit{supra} note 163, at 1483 (“Insofar as churches function like standard economic clubs, one also expects to find more free riding in larger congregations”); Posner, \textit{Religious Groups, supra}, note 62, at 35.
\item \textsuperscript{202} See \textit{supra} notes 71–72 and accompanying text; see also Iannaccone, \textit{supra} note 163, at 1483 (“Because monitoring costs increase with group size, sects cannot exploit economies of scale as fully as can larger congregations of mainline churches.”).
\item \textsuperscript{203} \textit{BURT, supra} note 66; \textit{Burt, supra} note 64, at 31.
\end{itemize}
\end{footnotesize}
churches, each for a different denomination, and each church might hold multiple worship services. These denominations might share a number of religious norms — such as norms of good behavior, core religious belief, or sexual morality — that they are interested in maintaining through enforceable trust. This requires each church to discover and sanction norm violations, which poses challenges both within and among churches. Within the church, the question is how large the congregation is and how often its members interact. A large church

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204 Some small towns might even have several churches within a denomination, each of which serves a different ethnic group. For example, the Town of Adams Massachusetts, where the author’s marriage ceremony was celebrated, has a population of only about 5,700, but has three Roman Catholic Churches (and six churches in all), each originally serving a different ethnic group within the Town. See Adams Massachusetts: Churches, http://adamsma.virtualtownhall.net/Public_Documents/AdamsMA_Guide/churches.

205 For example, many Christian denominations share religious norms (the divinity of Jesus), norms of behavior (opposition to abortion), and norms of sexual morality (disapproval of sex outside heterosexual, monogamous marriage). Of course, denominations might disagree both within and among themselves as to their commitment to these norms and their willingness to sanction violations. For example, on his recent trip to Brazil, Pope Benedict re-entered the debate in the Roman Catholic Church whether a legislator who votes in favor of legalizing abortion may receive the sacrament of Holy Communion. See Ian Fisher & Larry Rohter, Pope Opens Brazil Trip With Remarks Against Abortion, N.Y. TIMES, May 10, 2007, at A3 (statement approved by Pope Benedict XVI: “‘Legislative action in favor of abortion is incompatible with participation in the Eucharist,’ the statement said, ‘and politicians who vote that way should "exclude themselves from communion."’”).
with multiple services in separate locations will have a more difficult time monitoring its members than will a small church with one weekly service. The difficulty is even greater among denominations, where the question is whether links bridge the structural holes between religious communities. Enforceable trust increases to the extent that religious communities bridge the information and communication gaps both within and among their communities.

Last, public institutions, such as local public schools, can help bridge the gaps among religious communities. In an article critiquing the case for school vouchers, Professor William Fischel has written that public schools create social capital among adults by effectively bridging the social gaps among local citizens. Interaction among parents in a public school system creates social capital by building the trust, relationships, and communication that help overcome collective action problems. Consistent with the above discussion, Professor Fischel explains that social capital is greater in smaller school districts, which he identifies as districts


207 Fischel, Social Capital, supra note 206, at 113. Local public schools also build community social capital training citizens for public and private leadership positions through service on local school boards and other public school bodies. Id. at 113; see also Pildes, supra note 22, at 2065.

208 See supra notes 71–72 and accompanying text.
with less than 20,000 students. In such districts, children are more likely to remain in the same school and keep the same classmates every year. And by keeping the students together, the local schools increase the likelihood and duration of contact among the parents, which builds and strengthens the parental relationships that increase social capital. Other factors that increased the social capital of local public schools were the number of large families (greater involvement with greater number of children) and the overall number of families; and districts where public school children are a larger percentage of population.\(^{209}\) And of importance for the present analysis, the social capital in public schools often has a multiplier effect.\(^{210}\) Parental ties created through involvement in local public schools carry over into other areas, whether social, political, recreational, or professional.\(^{211}\)

\(^{209}\) Fischel, *Social Capital*, supra note 206, at 113 (“[T]he percent of public school children in the population . . . has a significant, positive effect on social capital”). The national per-state average is 16% (with Utah as the outlier at 21.6%).

\(^{210}\) *Id.* at 118-21.

Community contacts obtained through public schools have a local multiplier effect. The school-based network of adult acquaintances makes it easier to get other people to join a local organization or volunteer on a community project or attend a neighborhood picnic. Positive experiences from such activities create mutual bonds that increase people’s sense of trust in others. Being recognized as members of the community ("the parents of Isabelle and Eloise") makes adults more inclined participate in public life. Even people without children who live in such communities find it easier to do all those things, since getting to know a few people in the network facilitates getting to know the others who are already plugged in. 212

Professor Fischel specifically discusses athletics as an example of the social capital function of public schools. He explains:

212 Fischel, Social Capital, supra note 206, at 121.
There is no educational reason to connect spectator-sport competitions with schools. [Rather,] school-based spectator sports add to the social capital of the community, including people who have no children in school. [H]aving the sports organized along community lines is a way of building social capital that is useful within that community. People without children can connect with parents at sporting events (or at other school-based activities such as concerts) and thereby increase their own and the rest of the community’s social capital.\textsuperscript{213}

So, public school extra-curricular activities not only create and sustain social capital among parents, but also extend the social network to adults without school children. And to the extent that adults involved in the local public schools are also members of a local religious community, social capital in the local public schools can be leveraged to build and maintain the religious community’s social capital. For example, members of the religious community could either monitor violations of religious norms committed at public school events, or could withhold social capital in the public school setting as a sanction for violating a religious norm.

\textbf{b. Gaps in the Establishment Clause Doctrine}

With an understanding of how religious groups create and maintain social capital, we can now return to the Establishment Clause treatment of prayer at public occasions. Specifically, let us examine the three aspects of \textit{Weisman} and \textit{Santa Fe} noted above: the prayer must be government endorsed or directed, the prayer must coerce some in attendance to either participate or acquiesce (or appear to do so), and adults likely receive no protection. Consider each in turn.

\textsuperscript{213} \textit{Id.} at 21.
First, under the social capital approach, government endorsement or direction of the prayer, while sufficient for a violation, ought not be a necessary condition. As discussed above, endorsement improperly bolsters the social capital of religious communities by increasing the magnitude of the sanction, sending the message that the government supports the religious community and its norms. But the government can still bolster religious social capital when no endorsement is perceived. Consider the case of purely private prayer at an otherwise secular public occasion. Those who object to the prayer may be moved to take action to either signal their objection or at least avoid the appearance of acquiescence. Doing so, however, identifies the person as someone who does not hold certain beliefs about either religion or public prayer. If this view violates the norms of local religious communities, the public prayer has effectively aided the monitoring of that norm, and in doing so, identified a norm violator who may now be sanctioned. Further, as public occasions typically have many attendees, the norm violation is communicated widely within the community.

The dilemma of the religious dissenter parallels that of unpopular groups subjected to mandatory disclosure laws. Disclosure of campaign contributions is meant to prevent actual or apparent corruption of politicians. There was no suggestion that the laws were intended to either endorse the views of majority parties or punish the members of unpopular minority parties. But mandatory disclosure nonetheless violated the First Amendment when it had the effect of exposing minority political party members to private retaliation. So, a neutral government

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214 In dicta, the Court gave an example of government action that would be unconstitutional because of its predictable effect on private conduct: “A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.” American Commc’ns Ass’n v. Douds, 339 U.S. 328, 402 (1950).
purpose did not immunize the law from constitutional challenge. The same should be true for prayer at public occasions, where harm occurs regardless of the government’s actual or perceived endorsement of religion.

The preceding discussion shows why the second and third elements from Weisman and Santa Fe — that some attendees be coerced to pray, and that adults are not covered — leaves many unprotected. The very ability to object to or abstain from public prayer that demonstrates lack of coercion also singles out a person to be sanctioned for violating the religious community’s norms. And this occurs regardless of whether the person objecting or abstaining is an adult or a minor. By inviting the public to a secular occasion and then allowing prayer, the government may substantially aid the religious community in creating enforceable trust.

In sum, the Weisman and Santa Fe doctrinal framework has a significant blind spot: It allows the use of public occasions for religious exercises that preferentially aid the creation or maintenance of religious social capital. Religious communities can do so by using public prayer to monitor adherence to the community’s norms of belief and behavior. The public prayer becomes a religious test, with those who object or abstain receiving a failing grade. And since religious exercise receives preferential treatment, as the religious community is the only group allowed to use the public occasion to aid its social capital, it fails the constitutional requirement of neutrality. Part IV proposes a constitutional test to close this gap in the Establishment Clause doctrine.

IV. Social Capital and Religious Exercise at Public Occasions: A Proposed Test

The preceding sections argue that religious communities possess potent social capital, and that religious communities can use public institutions, such as public schools, to help strengthen their social capital. This observation, however, is a long way from a judicially
enforceable doctrine that identifies and proscribes unconstitutional instances of public institutions aiding religious social capital. Indeed, determining whether a religious community possesses social capital, and whether that social capital is aided by public institutions, are highly contextual inquiries that offer judges little guidance. Social capital, standing alone, is not a useable judicial doctrine.

The challenge, then, is to craft a judicial doctrine that captures the essential constitutional harm, but also provides judges with a manageable test. Section A proposes such a test, and section B demonstrates how the test works by applying it to the facts of the *Santa Fe* case.

**A. Borrowing Constitutional Doctrine: A Proposed Test**

The proposed doctrine must take account of why religious exercise at public occasions is constitutionally troublesome. First, the doctrine must recognize that private religious exercise at a public occasion can cause a backlash against dissenters, whether religious minorities, religious dissenters, or non-believers. Second, because private conduct at a public occasion poses a constitutional threat, the doctrine must recognize — as did *Pinette* when faced with a Latin Cross on public property — that government can have an affirmative duty to prevent private religious exercise from having a constitutionally proscribed effect. Third, a religious community can use a public occasion to enforce trust and thereby create or maintain social capital, regardless of whether the government intended that result. So, the government’s purpose should not be an element of the constitutional test. And fourth, neither government endorsement nor coercion should be required. Regardless of how strenuously and clearly government may distance itself

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216 *See supra* notes 152–161 and accompanying text.
from private religious exercise, or how free attendees feel to object or abstain, religious exercise may have the forbidden *effect* of building or maintaining religious social capital.

The Court’s test in the mandatory disclosure cases — *NAACP v. Alabama* and *Brown* — captures quite well the main concerns regarding religious social capital. The mandatory disclosure laws caused a private backlash against members of unpopular groups. And by identifying people who violated certain community norms, the mandatory disclosure laws helped create or maintain social capital, regardless of whether the government intended that result. Consequently, whether a mandatory disclosure law violates the First Amendment right of association rests solely on the law’s affect, regardless of whether the government intends or endorses the results.

The following proposed test is adapted from the Court’s First Amendment test for mandatory disclosure laws:

1. A religious exercise is conducted at a government-sponsored secular event.
2. The “reasonable dissenter in this milieu could believe” that she must take some action to avoid perception of “her own participation or approval of” the exercise.\(^{217}\)
3. The reasonable dissenter’s actions pose a reasonably probability that she will be the subject of retaliation, threats, or harassment by government or private actors.

As with the mandatory disclosure test, the likely effect of the law must be proven by specific evidence. Recall *Buckley*’s holding that “[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to

threats, harassment, or reprisals from either Government officials or private parties." 218 And courts may consider a wide array of evidence on this element:

The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views. 219

If all three elements are satisfied, the challenged religious exercise is unconstitutional unless the government can prove that allowing the exercise is necessary to avoid a Free Exercise Clause violation. If the government cannot carry this burden, it has an affirmative duty to either exclude the private religious exercise from the public occasion, or to takes steps to eliminate the threat to reasonable dissenters.

This test would supplement, not replace, existing Establishment Clause doctrines. So, a government act that survived scrutiny under Weisman and Santa Fe could be struck down under this test. As Justice Stephen Breyer has explained, Establishment Clause cases necessarily employ a variety of constitutional tests that police different parts of the government-religion landscape. 220 Further, the proposed test is just that — a proposal for further discussion and

219 Id. at 74.
220 Van Orden v. Perry, 545 U.S. 677, 699 (Breyer, J., concurring in the judgment) (“as Justices Goldberg and Harlan pointed out, the Court has found no single mechanical formula that can accurately draw the constitutional line in every case.”).
debate. In that spirit, the remainder of this section offers suggested factors to consider in analyzing the test’s three requirements. Not surprisingly, I suggest factors tied to the creation and maintenance of a religious community’s social capital: the community’s ability to monitor violations of religious norms, communicate information about violations, and punish those violations. Consider each in turn.

First, does the public occasion make it easier to monitor violations of religious norms? For example, a religious dissenter may stand out at a parent-teacher organization meeting with a dozen attendees, but not at a public university graduation with thousands in attendance. Also, monitoring should be greater if the groups invited to the public occasion overlap with religious communities. And based on the work of Professor William Fischel, discussed above,221 one might be more suspicious of religious exercises that take place at public schools, as those institutions are a locus for building social capital among adults. Even then, social capital is likely to be stronger in small school districts with larger families.

Second, does the public occasion facilitate communication of the violation? Again, significant overlap with the religious community will be important. If the public occasion is attended by many co-religionists, then any norm violation will be communicated quickly to a large portion of the religious community. And the closure of social networks — how closely different communities are connected with overlapping relationships — will make it easier to communicate the violation more widely. Also, if the incident is reported in local media, the violation will be further communicated.

Third, does the public occasion facilitate punishment of the violation? As in the mandatory disclosure context, proof of past retaliation or harassment of religious dissenters will

221 See supra notes 206–213 and accompanying text.
be the best evidence. For example, have religious dissenters been subjected to verbal or physical harassment, theft, or loss of property? And overlapping relationships among communities will increase the power to punish. Has the violation of religious norms been punished by loss of work, denial of government benefits, or ostracism?

Of course, these suggestions are incomplete. The precise facts of a case will dictate what evidence is most probative of the three elements. In that spirit, the next section reviews the facts of *Santa Fe* to illustrate how that analysis might work.

**B. *Santa Fe* as Test Case**

This section applies the three elements of the proposed test to the facts in *Santa Fe*. Of course, *Santa Fe* held that the students were coerced to pray, and cases covered by this Article’s proposed test would not involve coercion. That difference, however, does not keep *Santa Fe* from serving as a good test case. The proposed test’s third element — whether there is a reasonable probability of retaliation — will usually be the most contentious one, and *Santa Fe* offers a rich factual setting to illustrate the analysis.

1. **Religious Exercise at a Government-Sponsored Secular Event.** — In *Santa Fe*, this element would not be contested. As Santa Fe High School was a public school, the football game was a government sponsored event. Further, this event was secular: Though some commentators (tongue firmly in cheek) have written that Texas high school football takes on the cast of religion, the public was invited to watch a sporting event, not a prayer service. And last, there was concededly a religious exercise — a prayer — at the government-sponsored event. The first element is satisfied.

222 *See* Pamela Colloff, *They Haven’t Got a Prayer*, TEX. MON. (Nov. 2000).
2. **Reasonable Dissenter Believes that She Must Act.**—The *Santa Fe*

opinion supports this element: “[W]e are . . . persuaded that the delivery of a pregame prayer has
the improper effect of coercing those present to participate in an act of religious worship.” 223

This implies that some in attendance preferred to not participate and so would have objected or abstained if not for the coercion. The second element is satisfied.

3. **Reasonable Probability of Retaliation Against Dissenters.**—To start,

consider that the Santa Fe Independent School District (SFISD) was well situated to aid private
social capital. First, SFISD was a small school district: Professor Fischel’s research indicated
that a small district was one with less than twenty thousand students, and SFISD had four
thousand students. Second, SFISD covered a “small community in south Texas [with] two
primary schools, one intermediate school, one junior high school, and one high school.” 224 The
small number of schools fosters stronger social capital as children are likely to have the same
classmates over longer periods of time, thereby bringing the parents into more frequent,
sustained interaction. Third, SFISD had a higher percentage of its overall population enrolled in
public schools: about 20%, which is above the national average of 16%. Because a higher
percentage of the citizens were involved in the schools, SFISD could better serve as a contact
point for adults within the community. And last, the high school football games were a locus of
community social activity, which would bring adults without children into contact with others in
the community. As the District Court found, “high school football, which is ten or twelve games
at most a season for these kids, is the apex of their social function. It is a very big deal to the

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223 *Santa Fe*, 530 U.S. at 312.

224 *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 809 (5th Cir. 1999).
community. The entire community turns out for these things." In short, the SFISD seemed ripe to aid a religious community in enforcing its social capital.

The specific facts of the *Santa Fe* case support the view that a local religious community was using the SFISD to enforce its social capital. First, consider that the plaintiffs filed their

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225 Brief for Respondents at 6, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (No. 99-62), 2000 WL 140928 ("Texas high school football, especially in small towns, is an event of remarkable importance. Each football game is ‘a major community-wide social event, complete with the kind of attendance that is reserved for other special or ‘rite of passage’ occurrences.’ Brief of Texas Ass’n of School Boards Legal Assistance Fund at 6.").

226 Recall that in the mandatory disclosure cases, the Court stated that it may consider harassment of other groups that would be probative of any threat against the unpopular group in the litigation. While the text above focuses on religious intimidation, there was also evidence of racial harassment in the City of Santa Fe. In the early 1980’s, Santa Fe was home to a Klu Klux Klan movement aimed at intimidating and harassing Vietnamese shrimpers. Vietnamese Fisherman’s Ass’n v. Knights of the Klu Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981). The Klan held a rally that included cross burning and instructions on how to burn shrimp boats, both directed at the so called problem of Vietnamese shrimpers. At the rally, there were cries of “blood, blood, blood” and “fight, fight, fight.” The Klan also held a boat trip with hooded Klansmen and a cannon to intimidate Vietnamese shrimpers. And threats of violence were also directed towards dock owners who dealt with Vietnamese shrimpers. During that time, three Vietnamese shrimp boats were intentionally burned, but the perpetrators were unknown. Vietnamese shrimpers testified that they feared for their lives if they continued their business. In a lawsuit over the conduct, the federal district court concluded: “The uncontroverted statements
lawsuit anonymously because members of local religious communities had sanctioned those who violated religious norms:

The court closed the trial for the testimony of the minor plaintiffs, because of “the possibility of social ostracization and violence due to militant religious attitudes.” There was uncontradicted evidence of verbal harassment of students who declined to accept Bibles or objected to prayers and religious observances in school. One witness — not a plaintiff — began home-schooling her youngest daughter to avoid persistent verbal harassment, with pushing and shoving, over issues of religion in the public school.\textsuperscript{227}

Violating the local religious norms could lead to both withholding social capital — as when families are ostracized — or imposition of harms — as when families suffer verbal or physical harassment.

During the litigation, some community members aggressively sought to uncover the plaintiffs’ identity. Here, the school district’s small size, as well as assistance from school officials, aided religious communities in monitoring violations of religious norms. These efforts led the district court “to threaten ‘the harshest possible contempt sanctions’ if school employees continued their efforts ‘to ferret out the identities of the Plaintiffs.’”\textsuperscript{228} These extensive efforts included “[a]ttempts by [school district] administrators, teachers, and other employees ‘overtly of the defendants have created an atmosphere that would predictably result in intimidation and acts of violence.’” \textit{Id.} at 1016.


\textsuperscript{228} \textit{Id.}
or covertly to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright snooping.”

And while the case was pending before the Supreme Court, three students at Santa Fe High School allegedly threatened to lynch the only Jewish student in the entire district. The following account appeared in a local newspaper:

In their lawsuit, the Nevelows said their son had been threatened since Dec. 4, 1998, when three students shouted ‘Hitler missed one,’ ‘No more Jews’ and ‘Heil Hitler’ at him. He was 11 at the time.

School officials informed the Nevelows about the incident, but the three students were not reprimanded or provided counseling, according to the lawsuit.

In October 1999, the parents said, a student drew a swastika on Nevelow’s book cover. School officials allegedly turned a blind eye to these problems: “In that same month, according to the lawsuit, a teacher gave Nevelow an ‘F’ after he wrote about anti-Semitism and hatred that he said was occurring at his school.” These incidents spurred yet another lawsuit against SFISD, which later settled for an undisclosed amount.

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229 Doe v. SFISD, 168 F.3d at 809 n.1.
231 Id.
232 Id.
233 Id.
Additional facts recited in the Court’s opinion show how willing SFISD was to allow religious groups to use the public school to promote religious social capital. For example, the school district allowed the Gideons to pass out Bibles on school property — a form of proselytizing. While the school board had a policy against such activity, the district’s superintendent approved the activity because he believed “that the continuation of the distribution policy would be less controversial than to stop the practice.” 234 The fact that stopping the practice would be “controversial” suggests that such activity was consistent with the norms of a local religious community, and that violating those norms (by enforcing the policy) would provoke a sanction from the religious community. And this was not an isolated incident:

The district court found a history of distinctively Christian prayer at graduation, prayer before every football and baseball game, school selection of the clergyman to conduct a subsidized baccalaureate service, and on-campus distribution of Bibles by the Gideons. The court further found that Santa Fe had encouraged and preferred religion clubs over other clubs and that multiple teachers had promoted their own religious views in the classroom. 235

The district court found that “these incidents occurred amidst the School District’s repeated tolerance of similar activities and oftentimes with the awareness and explicit approval of the School District . . . .” 236

236 Doe v. SFISD, 168 F.3d at 809.
Again, religious communities used the public schools to enforce their norms.

The religious community also used SFISD to reduce its monitoring costs. Teachers could confront students with religious messages, effectively smoking out non-believers by identifying the dissenters and non-participants. Consider the example of one SFISD teacher:

“[I]n April 1993, while plaintiff Jane Doe II was attending her seventh grade Texas History class, her teacher . . . handed out fliers advertising a Baptist religious revival. Jane Doe II asked if non-Baptists were invited to attend, prompting [the teacher] to inquire about her religious affiliation. On hearing that [a student in his class] was an adherent of the Church of Jesus Christ of Latter Day Saints (Mormon), [the teacher] launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils. [The teacher’s] comments inspired further discussion among Jane Doe II’s classmates, some of whom reportedly noted that ‘[h]e sure does make it sound evil,’ and ‘[g]ee, . . . it’s kind of like the KKK, isn’t it?’”

Monitoring was quick and cheap.

Also, there seems to have been few other social organizations in Santa Fe that competed to provide the social capital citizens found available from religious groups. Indeed, some local citizens appeared to feel under siege from the outside world, leaving the local religious and other social groups as the only source of social capital. For example, an amicus brief filed on behalf of 159 students and parents in the SFISD stated that “Amici do not understand why the federal courts have become anti-God, anti-religion, and anti-prayer, and why the State is forcing

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237 Id. at 810
viewpoint discrimination upon them."^{238} The brief later continues: "The Fifth Circuit has sent a powerful message — that the government disapproves of Amici and that Amici are outsiders."^{239} As outsiders, the community cannot get what it needs from the secular world; social capital is available only within the religious group itself.^{240}

And after the Court handed down its decision in *Santa Fe*, religious activities at football games intensified:

On the first Friday night of football season, Santa Fe High School’s bleachers were packed with straw-haired girls and sunburned boys in baseball caps and parents in T-shirts that said “Fix Your Eyes on God.” Beneath them, a spectacle was unfolding that seemed far grander than anything a Santa Fe Indians — Hitchcock Bulldogs game would normally merit. TV trucks and camera crews were descending from all directions on this small-town stadium, having come not for the sport, but for the symbolism: This was the first game since the U.S. Supreme Court had handed down a devastating decision against the Santa Fe school district, striking down its longstanding tradition of school-sponsored prayer at football games. The ruling had touched a wellspring of emotion in Santa Fe, and as game-time neared, it was clear that the town’s indignation ran deep. Two men

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^{239} *Id.*

^{240} This excerpt also provides hints of another form of social capital: bounded solidarity. *See* Portes & Sensenbrenner, *supra* note 21, at 1327-32 (“bounded solidarity . . . is limited to members of a particular group who find themselves affected by common events in a particular place and time.”).
bearing large pine crosses across their backs stood in silent protest at the stadium gates, while a dark-eyed teenager walked among the crowd singing hymns and weeping, his Bible held aloft, as if he were seeking divine intercession. Defiance mixed with piety:

On the crowd’s fringes, a towheaded boy carried a sign high above his head proclaiming “We ought to obey God rather than men, Acts 5:29.”

. . . . When the last notes of the National Anthem faded and the Fighting Indians ran onto the field, several hundred people in the stands bowed their heads and raised their hands skyward, their voices straining to be heard over cheers and air horns and scattered applause. Our father which art in heaven, hallowed be thy name. Thy kingdom come.

Thy will be done in earth, as it is in heaven. . . .

Despite a ruling from the United States Supreme Court, the norm of public prayer still flourished.

*Santa Fe* holds much evidence that religious dissenters would experience retaliation. Many in the community, and in the SFISD schools, were willing to take the time and effort to identify religious dissenters. The community then stood ready to withhold social capital — whether at school or the elsewhere in the city — from those who violated community norms. Further, some in the community were willing to verbally and physically harass norm violators. And in some cases, the punishment was visited on people who were merely suspected (incorrectly) of violating group norms. This is a strong case that *Santa Fe* would satisfy the third element of the proposed test.

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241 Colloff, *supra* note 222.

242 *Id.*
4. *Necessary to Avoid a Free Exercise Clause Violation.*—SFISD would have no argument that allowing a student-led prayer at football games was necessary to avoid a Free Exercise Clause violation. The public address system used for pre-and in-game announcements was not a public forum open to all speakers, so excluding the public prayer would not be a discriminatory denial of access. Thus, SFISD has no justification for permitting a public prayer that likely subjects dissenters to private retaliation.

**Conclusion**

This Article has argued that the concept of social capital can inform analysis of constitutional law doctrines. Specifically, we examined how mandatory disclosure laws can help enforce private social capital, and then applied the same analysis to religious exercises at public occasions. In each case, the analysis helped explain why joint government-private action was constitutionally problematic: The government impermissibly aided the creation or maintenance of private social capital in a way that violated a constitutional principle. Mandatory disclosure laws violate the principle of freedom of association, and prayer at public occasions violates the principle of neutrality towards religion. The Court’s current doctrine adequately addresses the harm posed by mandatory disclosure laws, but not that posed by private religious exercise at public occasions. This Article proposes a test that bridges this gap.

The main subject for future analysis is whether social capital holds insights for other areas of constitutional law. Consider three possibilities. First, Professor Fischel’s work on social capital in public schools suggests a new wrinkle to the issue of affirmative action in elementary and secondary schools. If local public schools are a source of adult social capital, attempts to assign students to distant schools will interfere with that social capital. On the one hand...

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243 *Santa Fe,* 530 U.S. at 302-03.
hand, this could be an argument against race conscious student assignment, as parents (and their 
social capital) are additional victims of such plans. On the other hand, this could be an argument 
for race conscious assignment: Racially segregated public schools exclude minorities from the 
social capital networks available to parents in other school districts.

Second, social capital may be at work in cases such as Lawrence v. Texas,244 where Texas 
had criminalized same sex sodomy. Certain communities surely hold a norm that same sex 
sexual activity is immoral. That norm can be better enforced if overlapping communities — 
such as employment — can be used to sanction violations. One way to do that is to criminalize 
the underlying conduct. Under Texas law, people convicted of certain crimes — including same 
sex sodomy — could be denied certain jobs or required to register as a sex offender. This greatly 
increased the available sanction for violating the community’s norm. Indeed, the Petitioners in 
Lawrence specifically noted this aspect of Texas law:

Moreover, “[t]he Texas courts have held that the crime of homosexual conduct ... is a 
crime involving moral turpitude.” Petitioners’ convictions may therefore be used in 
Texas court proceedings to impeach their character and credibility. The convictions 
could also enhance a prison sentence if a subsequent federal conviction occurred. They 
disqualify or restrict Lawrence and Garner from practicing dozens of professions in 
Texas, from physician to athletic trainer to bus driver. In four states, Lawrence and 
Garner are considered sex offenders and would have to register with law enforcement as 
such.245

244 539 U.S. 558 (2003).

245 Petition for Writ of Certiorari at 12-13, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-
102); see also Lawrence, 539 U.S. at 575.
This raises two questions for consideration: Does this leveraging of government action to promote social capital violate a constitutional principle? And if so, is the same problem at work when same sex couples are denied the right to marry or adopt a child?

Third, action by the federal government may harm social capital in a manner that disrupts the functioning of state and local governments. In addition to building social capital, participation in local associations helps train community members to later take leadership roles in local and state government. Federal action that interrupts this local participation thereby interferes with the generation of local and state leaders.246 For example, if the federal government required recipients of federal education funds to adopt school choice programs, the consequent movement of school children out of local schools may diminish the social capital of the parents.247 When (if ever) would such an impact on federalism values go too far?248

In the end, then, this Article is a first stop in a longer journey. My immediate destination was shoring up current Establishment Clause doctrine using insights from social capital. In doing so, this Article also charted the course for future work that takes those insights further into constitutional law.

246 See supra notes 206-213 and accompanying text.

247 See Fischel, Social Capital, supra note 206.