STRENGTHENING MOTIVATIONAL ANALYSIS UNDER THE ESTABLISHMENT CLAUSE: PROPOSING A BURDEN-SHIFTING STANDARD

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INTRODUCTION

Biblically, there is a time for every purpose under heaven,[1] but courts have struggled in defining what purposes should be constitutional under the Establishment Clause.[2] Motivational[3] analysis under the Establishment Clause is necessary to preserve the values it was adopted to protect,[4] but the current state of purpose analysis provides no clear standard and allows the courts to invoke motivational analysis in an inconsistent manner.[5]

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1. *See* Ecclesiastes 3:1 (King James). "To every thing there is a season, and a time to every purpose under the heaven." *Id.*

2. *See* U.S. CONST. amend. I. The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The first part of this amendment concerning religion is commonly referred to as the "Establishment Clause."

3. It should be mentioned that for the purposes of this Note, the term "motivational" is synonymous with the purpose prong established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This standard is discussed further *infra* notes 6, 12, 13 and accompanying text. The courts do not always use the terms synonymously. In *United States v. O'Brien*, 391 U.S. 367 (1968), and other free speech cases, as well as in other cases and treatises that interpret legislation, the two terms have very different meanings. However, for the purposes of this Note, "purpose" and "motivation" both describe the underlying reason why the state action occurred. It is the reason and motive behind the action, and the way the courts have evaluated and should evaluate them. In essence, they are both terms that address the question of "why" something happened, and the Establishment Clause is concerned with whether the answer is unconstitutional.

4. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (citing Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

5. *See* Freiler v. Tangipahoa Parish Bd. of Educ., 975 F. Supp. 819, 825 n.4 (E.D. La. 1997) (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)), *aff'd*, 185 F.3d 337 (5th Cir. 1999). Justice Scalia, discussing the majority opinion, states:

> Like some ghoul in a late-night horror movie . . . *Lemon* stalks our Establishment Clause jurisprudence once again . . . . It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it.

Since 1971, when the Court articulated the motivational analysis standard in *Lemon v. Kurtzman*,[6] which made state action unconstitutional under the Establishment Clause if it does not have a secular purpose,[7] courts have struggled in defining how much of the purpose must be secular, who has the burden of showing whether the purpose is unconstitutional, and whether the state's proffered purpose is sufficient and legitimate. Due to the large volume of cases and the myriad of facts presented, stare decisis is a poor tool of interpretation because of its inherent inflexibility and the constant presentation of new facts.[8] Burden-shifting provides a flexible yet constant standard that alleviates this concern.

This Note proposes adopting a burden-shifting method in order to strengthen and clarify Establishment Clause motivational analysis. Under this standard, the plaintiff is required to make a prima facie case of clear religious motivation, after which the burden shifts to the defendant. The defendant will then have the burden of showing that the state action has a secular purpose that, if evaluated independently of the religious one, would be a sufficient purpose or motivation for the state action and would be narrowly tailored to meet that purpose.

Religious freedom, as protected by the Establishment Clause, is one of the cornerstones of America,[9] and the Supreme Court's effort to uphold that freedom has become a passionate source of conversation and commentary.[10] The

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Id. at 398-99 (Scalia, J., concurring) (citation omitted). Justice Scalia's harsh words did not prevent him from relying on *Lemon* when he joined the majority four years later in *Agostini v. Felton*, 521 U.S. 203 (1997). *See Freiler*, 975 F. Supp. at 825-26.

6. 403 U.S. 602 (1971).

7. *See id.* at 612.

8. For an interesting comparison, note the majority and dissent of *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir.), *petition for cert. filed*, 70 U.S.L.W. 3444 (U.S. 2001). Both evaluate the secular purpose, but use different standards and achieve different results.

9. *See* W. SEWARD SALISBURY, RELIGION IN AMERICAN CULTURE 26-31 (1964). Religious freedom was an important reason for many immigrants coming to the New World. *Id.* at 26. It motivated the Pilgrims, Puritans, Quakers, Catholics, Lutherans, Anglicans, Jews, and Presbyterians. *Id.*

10. *See, e.g.*, Leo Pfeffer, *A Case for Separation*, *in* JOHN COGLEY, RELIGION IN AMERICA: ORIGINAL ESSAYS ON RELIGION IN A FREE SOCIETY 52 (John Cogley ed., 1958). Noted jurist David Dudley Field once stated:

> The greatest achievement ever made in the course of human progress is the total and final separation of church and state. If we had nothing else to boast of, we could lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man[, woman,] and [their] Maker were a private concern, into which other [people] have no right to intrude. To measure the stride thus made for the emancipation of the race, we have only to look over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion that have filled the world.

Id. at 58 (quoting *American Progress*, *in* JURISPRUDENCE 6 (1893)); *cf.* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 & n.1 (2000) (describing why plaintiffs filed anonymously to protect

Establishment Clause states that Congress shall make no law establishing a religion. That liberty, enforced upon individual states by the Fourteenth Amendment, is the sentry that stands watch over the wall of separation between church and state.[11] The Establishment Clause is proactive, for as well as providing a remedy for improper conduct, it requires the Court to "keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded.'"[12] Establishment Clause jurisprudence not only corrects improper state action, but is also proactive in its vigilance.

This notion is furthered by the purpose prong of the most widely used test for Establishment Clause jurisprudence, the three-part test articulated in *Lemon v. Kurtzman*. Under *Lemon*, a statute is unconstitutional if it does not have a secular purpose, if it has the effect of advancing or inhibiting religion, or if it causes excessive entanglement between the church and the state.[13] State action need only violate one of these three prongs to be held invalid.

The purpose prong of *Lemon* is unique because a state action need not have an impermissible effect if its underlying rationale is unconstitutional. This analysis presents the courts with a difficult, but proactive method to evaluate a state action's constitutionality. The purpose of this Note is to articulate how the evaluation of the purpose of state action can be done more effectively, taking advantage of the Supreme Court's recognition that the values of the Establishment Clause are important and need to be upheld independently of the effect.[14] This Note advocates a method by which these values can be upheld while also allowing the state an opportunity to act if the secular purpose behind the state action is legitimate and the action is narrowly tailored to uphold a valid and valuable secular state interest.

By using a burden-shifting standard instead of the current standard, where any secular purpose is allowed, the courts will be able to strengthen motivational analysis of the Establishment Clause and preserve Establishment Clause values. Making the standard more difficult for the defendant to overcome, clarifying the standard to more clearly guide state action and define individual rights, helping to eliminate the perception that the purpose test is used as a fall back provision when the courts want to have a reason to invalidate state action, and not overturning otherwise valid state action because the legislative record reveals improper motivation, will allow the Establishment Clause to continue to be one

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themselves from intimidation and harassment).

11. *See infra* note 43 and accompanying text. Thomas Jefferson first proffered this notion of separation in his letter to the Danbury Baptist Congregation. It has subsequently become one of the more popular phrases to describe church state relationships in this country.

12. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (citing Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

13. *See* 403 U.S. 602, 612-13 (1971).

14. *Cf. Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314. "Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose." *Id.*

of the greatest achievements of our Constitution.[15] A burden-shifting analysis will also serve the needs of those who believe that the Establishment Clause is being interpreted in a manner detrimental to religious freedom.[16]

This Note is intended to be a start, not an end, to the discussion of how the purpose behind a state's action should be used to uphold our right to religious freedom under the Establishment Clause, while allowing the state sufficient opportunity to prove the constitutional and secular merits of its actions. This Note begins this discussion in Part I by developing a common foundation upon which to build the discussion. Part II discusses the role of motivational analysis in Establishment Clause jurisprudence. Part III makes a case for changing the current standard. Finally, Part IV discusses how a burden-shifting standard would be applied.

I. FINDING A COMMON DEFINITIONAL STANDARD FOR ESTABLISHMENT CLAUSE DISCUSSION

A. The Establishment Clause

1. A Brief History of the Establishment Clause.—Before the American Revolution, most states had an established religion.[17] These established religions discriminated against Jews, Roman Catholics, and other Protestant denominations.[18] For example, Virginia established the Church of England as its state religion and made it illegal to "[p]reach[] in unlicensed houses [or] . . . without Episcopal ordination. . . ."[19] This persecution inflamed James Madison,[20] whose anger may have caused him to include among his proposals for amendments to the Constitution, a proposal that read, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[21] This proposal is reflected in the First Amendment to the Constitution.[22]

The religion clauses of the Constitution have created special problems when

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15. *See supra* note 10.

16. *See, e.g.*, William F. Cox, Jr., *The Original Meaning of the Establishment Clause and Its Application to Education,* 13 REGENT U. L. REV. 111, 111 (2000) (stating that the Supreme Court "has wrongly interpreted the [First] Amendment").

17. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 1 (1994).

18. *Id.*

19. *Id.* at 1, 3.

20. *Id.* at 3-4 (quoting 1 THE PAPERS OF JAMES MADISON 106 (William T. Hutchinson et al. eds., 1962). In 1774, Madison wrote, "That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever." *Id.*

21. *Id.* at 94-95 (quoting 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 448-59 (Joseph Gales & W.W. Seaton eds., 1834)).

22. *See* U.S. CONST. amend. I.

looking to history as a guide to their interpretation.[23] This is exacerbated because there is no concrete notion of the Framers' intent.[24] Yet history is still often invoked in Establishment Clause opinions in support of various positions.[25] Additionally, the problem is compounded by enormous changes in our society since the Constitution was ratified.[26]

Clearly, the Establishment Clause is a limitation on national government, but it has been found to limit state government due to incorporation by the Fourteenth Amendment.[27] Therefore, though the literal text of the Establishment Clause only limits actions by Congress, it has been interpreted to apply to actions by all the branches of government at both the state and federal levels.

2. The Use of History as Support in Establishment Clause Opinions.— Compounding the problem of historical interpretation of the Establishment Clause is that there is more religious diversity today,[28] and public schools—a large source for Establishment Clause jurisprudence—did not exist when the Bill of Rights was ratified.[29] Additionally, by merely being observant of this nation's traditions and habits, individuals or citizens are made aware of this country's religious heritage, for money is engraved "In God We Trust," and elected officials begin their terms in office by swearing on a Bible.[30] But while this history should be celebrated, it should not dictate a path toward infringing on one of the nation's most sacred traditions: religious liberty.

Using a burden-shifting approach would help to alleviate some of the problems history has played in Establishment Clause jurisprudence. As stated previously, history is currently invoked as a source for both sides of the Establishment Clause argument. If a burden-shifting model were used, then the question would not be one of interpretation of the Framers' intent regarding the Establishment Clause, but whether there was a legitimate secular purpose that

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23. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 969 (1997).

24. Beyond the purely logistical question, namely who exactly were the Framers, courts have struggled because the debate raged even then, providing ample fodder for both sides. *See id.* (quoting Sch. Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring)). Justice Brennan stated: "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . . [as] the historical record is at best ambiguous, and statements can readily be found to support either side. . . ." *Schempp*, 374 U.S. at 237 (Brennan, J., concurring).

25. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting). Justice Rehnquist stated, "The true meaning of the Establishment Clause can only be seen in its history." *Id.*

26. *See* CHEMERINSKY, *supra* note 23, at 970.

27. LEVY, *supra* note 17, at 224-26 (arguing that to not have the Establishment Clause incorporated would "turn back the clock" and "is so unrealistic as not to warrant consideration").

28. CHEMERINSKY, *supra* note 23, at 970.

29. *See id.*

30. For a good discussion of relevant cases, see *Books v. City of Elkhart*, 235 F.3d 292, 322-25 (7th Cir. 2000) (Manion, J., concurring in part and dissenting in part), *mandate stayed by* 239 F.3d 826 (7th Cir.), *and cert. denied*, 121 S. Ct. 2209 (2001).

would enable the law to pass judicial scrutiny. Granted, this assumes a fundamental belief that a law without a legitimate and overriding secular purpose is invalid, but this argument also takes the historical interpretation, which cannot be clearly ascertained on either side, partially (if not wholly) out of the equation and allows for a clearer, more easily applicable standard.

3. Justifications for an Establishment Clause.—In order to evaluate a purpose behind a state's action under the umbrella of the Establishment Clause, one must understand both the rationale that underlies the adoption of the Establishment Clause and the purpose the Establishment Clause serves today. It should be noted that the Establishment Clause developed from a group of colonies, the majority of which had state-sponsored religion.[31] Perhaps its development can be directly related to the fact that England had a clearly state-sponsored religion.[32] It is also possible that as a stronger federal government was created, the Framers wished to secure liberties that this stronger government would not be able to take away.[33] However, it seems clear that the Framers did not see the full range of repercussions of this amendment,[34] and it is unclear whether the Framers would have approved or disapproved of this reach.[35]

The Establishment Clause flares passions in many people.[36] Some people view it as a tool being utilized by people who dislike organized religion to stamp out the very roots that strengthen this country, both historically and morally.[37] Others view it as a last firewall of protection against fundamentalist religious groups who would otherwise force their agendas upon all citizens.[38] Regardless, this preservation of liberty is uniquely American and deserves close scrutiny of not only the actual effect that the state action does have, but also of the potential effects that government action could have on this liberty. By using a standard that values the purpose behind the state action, we safeguard our liberty before it has been infringed.

4. The Tension Between the Establishment Clause and the Free Exercise Clause.—It is important to note the tension between the Establishment Clause and the Free Exercise Clause, also found in the First Amendment.[39] There is a

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31. *See* LEVY, *supra* note 17, at 1.

32. *See id.* It is even called "the Church of England."

33. *See id.* at 84.

34. *See, e.g.*, Cox, *supra* note 16, at 128-29. Many of the events the Framers took for granted, such as the congressional chaplain system, invocations, religious holidays, displays, etc., would later be challenged under Establishment Clause jurisprudence.

35. *See supra* Part I.A.2 (discussing the role of history in Establishment Clause opinions).

36. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 & n.1 (2000) (describing why plaintiffs filed anonymously to protect themselves from intimidation and harassment).

37. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE, at xiv (1982) (stating that the "Supreme Court has erred in its interpretation of the First Amendment").

38. *See* LEVY, *supra* note 17, at 188-95 (discussing, as an example, the "antiscientific" theory of creationism and the manner by which the Establishment Clause prevents it from being taught in public schools).

39. *See* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise

natural antagonism that exists between the two clauses, for one prohibits the state from establishing a religion, while the other prevents a state from inhibiting its practice.[40] Each clause serves as a sort of check and balance on the other. The issue then arises whether strengthening the Establishment Clause, as a burden-shifting motivational standard would do, would tip the scales too far in one direction.

Strengthening motivational analysis by using a burden-shifting standard would help, not hinder, the free exercise of religion because it would ensure that the foundation of that right, to practice the religion one chooses, is not being eroded. By prohibiting state interference with an individual freedom, more space exists for that freedom to manifest itself. Additionally, it would seem that one would be in favor of state-sponsored religion only if the state is establishing *his or her* religion. By preserving the antimajoritarian values of both the Constitution and religious freedom, as a burden-shifting standard would do, religious freedom is preserved for all.

B. Perspectives on the Establishment Clause: Separationist, Nonpreferential, and Neutral Treatment of the Establishment Clause

There are three conflicting ways to interpret the Establishment Clause: the separationist, nonpreferential, and neutrality approaches.[41] The first and broader approach, that of the separationist,[42] finds its genesis in a letter from Thomas Jefferson to the Baptist Association of Danbury, Connecticut, in which Jefferson describes a "wall of separation between church and state."[43] This doctrine has as its foundation that government may not aid religion, even if the aid is impartial, equitably administered, and given to all religious groups.[44] The separationist approach was made the predominant standard in *Everson v. Board of Education*,[45] when the majority and dissent—though arriving at different conclusions as to whether the wall had been breached—agreed that the standard was separation of church and state.[46]

The second and narrower approach "is that of nonpreferentialism or

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[of religion].").

40. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1307 (6th ed. 2000).

41. *See generally* LEVY, *supra* note 17, at 149-52.

42. For a more detailed discussion of the separationist approach, see *id.* at 149-51; *see also* CORD, *supra* note 37.

43. LEVY, *supra* note 17, at 246. The pertinent portion of the letter reads, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." *Id.* (quoting 16 THE WRITINGS OF THOMAS JEFFERSON 25 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903-04)).

44. *See id.* at 150.

45. 330 U.S. 1 (1947).

46. *See* MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 275 (1996).

accommodation of religion."[47] This interpretation holds that the First Amendment prohibits the government from establishing a state church that would be preferred over other churches.[48] While many of the current Supreme Court Justices prefer this approach,[49] it is a "fundamentally defective interpretation of the [E]stablishment [C]lause."[50] The fundamental flaw lies in the fact that the First Amendment "was framed to deny power," not create it.[51] Nonpreferential interpretation results in the government's ability to aid religion as long as it does so without discriminating, a vesting of power that the First Amendment did not prescribe.[52]

A third position is the neutrality approach, where the Establishment Clause, as well as the other religion clauses, are interpreted to mean that government may neither establish a benefit nor impose a burden upon religion.[53] This is the theory behind the endorsement test as articulated by Justice O'Connor.[54] But this theory evokes the same problems, such as indirect aid to religion and the creation of power, that arise when determining how to interpret whether a law is preferential.[55] Additionally, the endorsement test has traditionally been used to evaluate only the effect of the state action, not the purposes behind it, and has often been coupled with the purpose prong of the *Lemon* test.[56]

A full discussion of these approaches is outside the scope of this Note, but it is important to know that this Note assumes, along with the prevailing and dominant wisdom of the courts, that the separationist approach is the proper approach to follow.[57] This is important because the nonpreferentialist approach

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47. LEVY, *supra* note 17, at 151.

48. *Id.*

49. *See id.* (mentioning Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas).

50. *Id.* at 112.

51. *Id.* at 115.

52. *See id.* For further discussion on the nonpreferential versus separationist approach, see generally *id.* at 112-45.

53. *See* CHEMERINSKY, *supra* note 23, at 977-78.

54. *See* Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (stating that "[E]very government practice must be judged . . . to determine whether it constitutes an endorsement or disapproval of religion.").

55. *See* CHEMERINSKY, *supra* note 23, at 979.

56. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (stating that the Court assesses the constitutionality of state action "by reference to the three factors first articulated in *Lemon v. Kurtzman*" (citation omitted)); *see also* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d. 337, 344 (5th Cir. 1999) (stating the *Lemon* test is "occasionally ignored"); Books v. City of Elkhart, 79 F. Supp. 2d 979, 998 (N.D. Ind. 1999) (stating the endorsement test "is a refinement of the *Lemon* test"), *rev'd*, 235 F.3d 292 (7th Cir. 2000), *mandate stayed by* 239 F.3d 826 (7th Cir.), and *cert. denied*, 121 S. Ct. 2209 (2001).

57. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (using the *Lemon* test, a test commonly associated with the separationist approach). This separation should not be so strict that it overshadows freedom, for something religious in nature need not have an illegitimate religious purpose. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS

makes the purpose behind the law irrelevant: it is only concerned with whether the law has the effect of preferring one religion over another.[58] The neutrality approach, as strictly construed, also makes the purpose irrelevant, because it deals only with the question of whether a law establishes a benefit or burden, a question that deals with effect, not purpose.[59] While one could argue that the purpose behind the law would still be relevant to this particular analysis, that argument is beyond the scope of this Note. Also, as discussed *infra*, the neutrality approach is frequently coupled with motivational analysis.

C. The Endorsement and Coercion Standards

It is important to note that while the *Lemon* test has been reaffirmed as the dominant Establishment Clause standard, the Court has also articulated other standards since the adoption of *Lemon*.[60] In *Lynch v. Donnelly*,[61] Justice O'Connor, in a concurring opinion, articulated what has become known as the "endorsement test."[62] She stated that endorsement was the proper standard because "more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[63] The endorsement test has not overruled the *Lemon* test, but has instead evolved into a component of the *Lemon* standard, often measured in one of the prongs of *Lemon*.[64] Nonetheless, clearly the endorsement standard is important in modern Establishment Clause analysis.[65]

Another alternative standard, known as the "coercion" test, was proffered by the first Bush administration as amicus curiae in *Lee v. Weisman*,[66] and urged that the plaintiff would have to show government coercion to establish

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LIBERTY 37 (1990). The separation concept serves the need of a greater goal than just separation: to achieve the ideal of religious liberty in a free society. *See id. But see* CORD, *supra* note 37, at xiv (stating that the "Supreme Court has erred in its interpretation of the First Amendment" and criticizing the current separationist approach).

58. *See* LEVY, *supra* note 17, at 151.

59. *See* CHEMERINSKY, *supra* note 23, at 979.

60. *Books*, 79 F. Supp. 2d at 989-1006 (giving an overview of the historical precedent test, the *Lemon* test, the endorsement test, the coercion test, and the test for religious speech in a public forum).

61. 465 U.S. 668 (1984).

62. *See id.* at 689 (O'Connor, J., concurring).

63. *Id.* at 688.

64. *See Books*, 79 F. Supp. 2d at 998 (stating the endorsement test "is a refinement of the *Lemon* test"). There has been much discussion that the endorsement test has supplanted *Lemon*. However, the most recent Supreme Court decision concerned itself with purpose, an area traditionally found in the *Lemon* test, but not in the endorsement standard. Sante Fe Sch. Dist. v. Doe, 530 U.S. 290 (2000).

65. *See Books*, 79 F. Supp. 2d at 998.

66. 505 U.S. 577 (1992).

unconstitutionality.[67] *Lee*, involving prayers at high school commencements, held that such prayers were in violation of the Establishment Clause in part because the school principal "directed and controlled the content of the prayers."[68] Justice Kennedy, the author of the opinion, emphasized the coercive nature of the activities in ruling them unconstitutional.[69]

Regardless of the exact resting place of these standards in Establishment Clause analysis, the purpose behind the state's action will be relevant. It is important to divorce purpose from effect, because, in Establishment Clause analysis, courts are dealing with the establishment of religion, not the effect of religion; courts are determining if the values of the Establishment Clause are being eroded, not solely if the effect of that erosion exists. One need not have a liberty usurped to know it is being threatened. Therefore, this clause of the Constitution is uniquely preventative and proactive in guarding our liberties.

The burden-shifting model works in evaluating motivational analysis under either the *Lemon* or the endorsement approach to the analysis of the purpose of state action. These approaches dominate the current state of Establishment Clause jurisprudence and have represented the prevailing standard for decades as they were used even before the articulation in *Lemon*.[70] Burden-shifting works in the *Lemon* approach because separation is the rationale behind the *Lemon* test. Burden-shifting works under the endorsement model because the Court has substituted the endorsement standard only for the second and third prongs of *Lemon*, leaving the first prong intact.[71]

II. THE ROLE OF MOTIVATIONAL ANALYSIS IN ESTABLISHMENT CLAUSE JURISPRUDENCE

The Court's motivational analysis under the Establishment Clause, by attempting to discover the purpose behind a state's action, is unique because an illegitimate purpose alone can cause state action to be held unconstitutional regardless of its effect.[72] In early Establishment Clause cases, such as *Everson v. Board of Education*,[73] the Court evaluated larger doctrinal questions such as

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67. LEVY, *supra* note 17, at 200-01.

68. *Lee*, 505 U.S. at 588.

69. LEVY, *supra* note 17, at 202.

70. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (using the *Lemon* test and decided twenty-nine years after the *Lemon* decision).

71. *See* Agostini v. Felton, 521 U.S. 203, 232-33 (1997) (stating that *Lemon*'s entanglement test only deals with a statute's effect); *see also* Books v. City of Elkhart, 79 F. Supp. 2d 979, 998 (N.D. Ind. 1999) (stating the endorsement test "is a refinement of the *Lemon* test"), *rev'd*, 235 F.3d 292 (7th Cir. 2000), *mandate stayed by* 239 F.3d 826 (7th Cir.), *and cert. denied*, 121 S. Ct. 2209 (2001).

72. Hal Culbertson, *Religion in the Political Process: A Critique of* Lemon's *Purpose Test*, 1990 U. ILL. L. REV. 915, 917.

73. 330 U.S. 1 (1947).

separation of church and state.[74] When the Court first began evaluating the purpose behind state action, the Court clearly, but not explicitly, looked to the purposes behind the statutes.[75] However, the analysis of the purpose was not independent and included not only the legislative purpose, but also "general public rhetoric."[76]

Evaluation of a statute's purpose in determining whether state action violates the Establishment Clause was cemented in *Lemon v. Kurtzman*,[77] when the Court established the *Lemon* test.[78] The *Lemon* test is a three-prong test, in which a violation of any prong causes state action to be unconstitutional.[79] In order for a law to be constitutional, it must have a legitimate secular purpose, its primary effect cannot advance or inhibit religion, and government and religion must not be excessively entangled.[80]

A. Past Application of Motivational Analysis

The Court first inquired into the purpose of state action with regard to Establishment Clause jurisprudence in *McGowan v. Maryland*,[81] a case involving Sunday "blue laws." In *McGowan*, the Court determined that although these laws had been passed to promote religion, the purpose had evolved into a secular one, providing for "a uniform day of rest"; therefore, the laws were upheld.[82] In *McGowan*, the Court did not consider the purpose behind the statute independently from its effect,[83] but nonetheless clearly delved into the laws.

In *School District v. Schempp*,[84] decided two years later, the court considered a situation in which the Bible was read, without comment, but with a recitation of the Lord's Prayer, in schools. Again, the Court did not consider the purpose independently from the effect, but it clearly accorded a high value to the purpose of the school board as it struck the policy down.[85] The purpose test in *Schempp* was solely used in *Epperson v. Arkansas*,[86] where the Court declared invalid a statute that prohibited the teaching of evolution in public schools.[87] In declaring the statute invalid, the Court looked at public rhetoric and the history of the

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74. Culbertson, *supra* note 72, at 926.

75. *Id.* at 927. These cases included *McGowan v. Maryland*, 366 U.S. 420 (1961), and *Epperson v. Arkansas*, 393 U.S. 97 (1968). Culbertson, *supra* note 72, at 927-28.

76. Culbertson, *supra* note 72, at 927.

77. 403 U.S. 602 (1971).

78. Culbertson, *supra* note 72, at 930.

79. *Id.*

80. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

81. 366 U.S. 420 (1961).

82. *Id.* at 444-46, 451.

83. *See* Culbertson, *supra* note 72, at 928.

84. 374 U.S. 203 (1963).

85. *See id.* at 222-24.

86. 393 U.S. 97 (1968).

87. *Id.* at 107, 109.

statute.[88]

The purpose prong was solidified in its current basic form in *Lemon v. Kurtzman*.[89] At issue in *Lemon* were Pennsylvania and Rhode Island statutes that compensated private school teachers for nonreligious activities.[90] The Court invalidated both of these aid provisions, but accepted the legislatures' proposed secular purpose of promoting the education of young children.[91] In *Stone v. Graham*,[92] decided nine years later, the Court invalidated a statute in Kentucky requiring the posting of the Ten Commandments in the classroom on the grounds that the statute could have no secular purpose,[93] further securing motivational analysis.

The purpose prong of *Lemon* laid dormant in the Court for several years, but reemerged in *Wallace v. Jaffree*,[94] where the Court used it to examine a statute authorizing a moment of silence.[95] The Court determined the purpose was religious by looking at commentary by the legislative sponsor and by comparing the original and amended statute.[96] In 1987, the Court invalidated a statute dealing with the teaching of evolution because the stated secular purpose was "a sham."[97] As evidence that the statute was a sham, the Court looked at legislative hearings,[98] statements made by the sponsor,[99] and expert statements describing creation science as religious.[100]

As Supreme Court jurisprudence evolved and *Lemon's* purpose prong became the prevailing motivational standard, the Court used pure motivational analysis in its decisions. Pure motivation analysis requires the court to evaluate the purpose of an action independently from the effect of the action.[101] This is pure motivational analysis because the purpose test alone is sufficient to make an act unconstitutional;[102] that is, if the purpose is violative the court does not even need to discuss the effect of the statute,[103] but instead the court can evaluate

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88. *See id.* at 108 & n.16, 109. The statute was passed shortly after the Tennessee *Scopes* decision. *Id.* at 98.

89. 403 U.S. 602 (1971).

90. *See id.* at 606-10.

91. *Id.* at 607, 613.

92. 449 U.S. 39 (1980) (per curiam).

93. *Id.* at 39-41.

94. 472 U.S. 38 (1985).

95. *Id.* at 40, 55-56.

96. *Id.* at 56-58.

97. Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987).

98. *Id.* at 587.

99. *Id.* at 592.

100. *Id.* at 591.

101. *See* Culbertson, *supra* note 72, at 920.

102. *Id.*

103. *Id.* at 920; *see also* Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 250 (2000) (holding a prayer before football games unconstitutional in large part because the state had no legitimate secular purpose); *Edwards*, 482 U.S. at 585 (excluding discussion of the entanglement tests);

facts solely on the basis of their motivation.[104]

One problem that has plagued the courts has been defining the standard for an actual secular purpose.[105] In *Lemon*, the Court stated that the law must have some secular purpose.[106] However, the Court has sacrificed clarity by stating at different times that "a secular purpose" is sufficient,[107] that the law must be *clearly* secular to be valid,[108] and that it would be invalid if its *primary purpose* was a religious one.[109]

B. Policy Justifications for Establishment Clause Motivational Analysis

A rationale for the purpose test of *Lemon* is that the essence of the Establishment Clause is to prevent government from advancing religion.[110] If one can stop the unconstitutional effect from occurring, then an injury under the Establishment Clause is avoided. The Establishment Clause is unique in that an unconstitutional injury can be avoided before the effect has occurred.[111] This is true because the values supporting the Establishment Clause can be upheld when the values themselves are infringed, as opposed to after religious liberty is abridged.

Additionally, a purpose of the Establishment Clause is to remove the debate over the "preservation and transmission of religious beliefs" from government supervision or control.[112] The purpose test represents a "check on religious influences in the political process."[113] The government should not decide what is appropriate religious doctrine to be imparted to society, for that privilege is bestowed on the people by the Free Exercise Clause.[114] By allowing a state action to be unconstitutional before its unconstitutional effect has occurred, the debate—which itself can be injurious to those who fervently argue their

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Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (stating that the relevant statute lacked a secular purpose).

104. *See* Culbertson, *supra* note 72, at 919-20.

105. *See generally* Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 3-7 (1991).

106. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

107. Lynch v. Donnelly, 465 U.S. 668, 681 & n.6 (1984).

108. Harris v. McRae, 448 U.S. 297, 319-20 (1980).

109. Edwards v. Aguillard, 482 U.S. 578, 593 (1987).

110. CHEMERINSKY, *supra* note 23, at 988.

111. *See infra* Part IV.E; *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313-14 (2000) (discussing how Establishment Clause values must be protected).

112. *Santa Fe Ind. School Dist.*, 530 U.S. at 310 (quoting Lee v. Weisman, 505 U.S. 577, 589 (1992)).

113. Culbertson, *supra* note 72, at 926.

114. *See, e.g.*, Misti Weeks, *Establishment Clause Meets Free Exercise Clause in Friday Night Football: With Supreme Court Misguidance, Fifth Circuit Drops the First Amendment Ball on the 1-Yard Line*, 31 TEX. TECH L. REV. 1083, 1094 (2000); *see also* U.S. CONST. amend. I.

sides[115]—is removed from the legislative branch of government and is done so, potentially, before the injurious effect has occurred.

C. Modern Trend in Motivational Analysis

In June 2000, the Court handed down the most recent decision invalidating a statute because of its purpose in *Santa Fe Independent School District v. Doe*.[116] Stating that the Constitution required the Court to be mindful of the myriad and subtle ways that Establishment Clause values could be eroded,[117] including erosion by a policy that has the purpose of government establishment of religion,[118] the Court held a school district policy of allowing students to hold elections to determine if invocations should occur before football games, and then to determine who should deliver them, unconstitutional.[119] The policy was held invalid in part because it "unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at . . . school events."[120]

The policy at issue was a facially neutral one authorizing two student elections—the first to determine whether invocations should be held before football games, and the second to determine the spokesperson.[121] The policy also automatically limited the invocation to one that would be "nonsectarian and nonproselytising," but only if the original policy was enjoined.[122] The final draft of the policy omitted the word "prayer" and referred to "messages," "statements," and "invocations,"[123] and the school district argued that the policy was constitutional because it was content-neutral.[124]

In declaring the policy invalid, the Court looked at the language of the policy that stated that the purpose and requirements were "to solemnize the event," "promote good citizenship," and "establish the appropriate environment for competition."[125] After review of this language, the Court determined the purpose of the policy was "the selection of a religious message, and that is precisely how the students understand the policy."[126] The Court then determined that the

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115. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 315 (stating "one of the purposes served the Establishment Clause is to remove debate over this issue from government supervision . . . .").

116. *Id.* at 317.

117. *Id.* at 314 (quoting Lynch v. Donnelly, 465 U.S. 668, 694 (1984)).

118. *Id.*

119. *Id.* at 297-98, 317.

120. *Id.* at 317.

121. *Id.* at 297-98.

122. *Id.* at 297.

123. *Id.* at 298.

124. *Id.* at 315.

125. *Id.* at 306. The Court noted that these are permissible types of messages, and that a solemn, nonreligious message on United States foreign policy would not be allowed by the school policy. *Id.*

126. *Id.* at 307.

purpose of the policy was clearly religious.[127] In making its determination, the Court looked at the text of the policy,[128] a long established tradition of prayer at football games,[129] and the fact that the policy imposed a "majoritarian election on the issue of prayer."[130] The Court also looked at the "history and context of the community and forum."[131]

Santa Fe illustrates several problems with the current purpose-prong analysis that a burden-shifting model would help cure. First of all, while tradition may be an indicator of the purpose behind the policy, it creates some problems for both sides of the argument. For the plaintiff, tradition only works if there is past violative history. Therefore, if the school in *Santa Fe* had never before held an invocation before football games, the policy would have had a better chance of being held constitutional, because tradition was clearly integral to the Court's decision. For the defendants, if their current purpose was to correct past Establishment Clause violations, they are prevented by their past history from doing so because that same tradition would invalidate current action. As we have seen with Christmas and some public displays during that season, what starts off as a wholly religious holiday can have great and legitimate secular meaning.[132] With a burden-shifting approach, history would still be available to the plaintiffs to show a pattern of behavior or possible motivation. However, it would not make a purpose invalid per se, because the defendant would have the ability to stay within constitutional limits if it could show that the secular purpose was sufficient to uphold the government action.

Another problem in the current purpose analysis under the Establishment Clause is illustrated in *Freiler v. Tangipahoa Parish Board of Education*.[133] Here, the Fifth Circuit Court of Appeals disagreed with the district court's finding that no secular purpose existed for a school board policy creating a disclaimer to be used whenever evolution was taught.[134] While holding that the school board had still violated the Establishment Clause because it endorsed

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127. *Id.* at 309. The Court stated, "The District . . . asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer." *Id.* at 315.

128. *Id.* at 314-15. The Court looked at the "plain language," "the preferred message" of the "invocation," and "the selective access of the policy," which made it a "limited public forum for the expression of free speech." *Id.*

129. *Id.* at 315.

130. *Id.* at 316.

131. *Id.* at 317 (citation omitted).

132. *See* County of Allegheny v. ACLU, 492 U.S. 573, 617-18 (1989) (stating that Christmas and Chanukah displays had secular as well as religious meaning).

133. 185 F.3d 337 (5th Cir. 1999).

134. *Id.* at 341-42, 345. The district court ruled that no secular purpose existed because the school board's assertion that the disclaimer would encourage critical thinking was a sham. That court came to this conclusion because the state's proffered purpose was not mentioned in the debates concerning the policy's adoption, and because the school board already encouraged critical thinking. *Id.* at 342.

religion, the court noted that the only thing necessary to pass the purpose prong was "a sincere secular purpose[,] . . . even if that secular purpose is but one in a sea of religious purposes."[135] The court then treated the school board's proffered secular purposes with deference, while trying to determine if they were a sham by determining if the purpose was furthered by the state action.[136] The court then held that two of the three proffered purposes were not a sham[137] and therefore that the statute survived scrutiny under motivational analysis.

By evaluating a secular purpose in this manner, it is possible to have a legitimate secular purpose that is motivating the action, but this purpose may be secondary to the religious purposes behind the action. Currently, this would still be constitutional. Having a burden-shifting model helps correct this inequity by not allowing the action to pass scrutiny unless the secular purpose is sufficiently important to stand independent of the religious purpose(s) behind the state action and is narrowly tailored to serve the state's secular interest. In other words, by advancing a proposal that requires a clearly religious purpose to shift the burden to the defendant to show that the secular purpose, if evaluated independently of the religious purpose(s), is sufficient to justify state action, the burden-shifting model helps cure this issue.[138]

When one uses the purpose of state action to hold the action unconstitutional, the obvious difficulty is determining the purpose. This is compounded in Establishment Clause jurisprudence because the effect of the state's action is not considered when evaluating the purpose behind it.[139] Interpretation of the purpose behind the state action often involves an inquiry similar in some respects to that of statutory interpretation.[140] Courts use things such as "committee reports, floor debates, legislative hearings," and the circumstances behind a bill's passage.[141] Courts also consider "statements in the statute itself, former versions of the same statute," legislator's statements during debates, statements made at legislative hearings, comments by voters, and public official testimony.[142] Sometimes the court will even analyze the purpose as though it were a statute.[143] This analysis limits the values of the Establishment Clause, as well as the political process, because it allows the courts to determine the role of an underlying policy by trying to discern the role of an illicit policy.[144] This necessarily follows when courts use actual purpose analysis instead of possible

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135. *Id.* at 344, 348 (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

136. *Id.* at 344.

137. *Id.* at 345.

138. Therefore, it is important to clearly define such integral terms as "purpose," "religious," and "secular purpose." *See infra* Part IV.B.

139. *See supra* note 101 and accompanying text.

140. *See* Culbertson, *supra* note 72, at 921.

141. *Id.* at 921-22.

142. *Id.* at 922 (footnote omitted).

143. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 586-89 (1987) (trying to determine if a secular purpose is a sham, the Court goes through a statutory-type analysis).

144. *See* Culbertson, *supra* note 72, at 923.

purpose analysis. The potentially large amount of legislative evidence compounds this by allowing comments to extend past the context in which they were mentioned and by using an often inadequate and deceptive record.[145]

Burden-shifting analysis alleviates many of these concerns. Because burden-shifting is concerned with possible purposes, it can extend its inquiry past the record and into the arguments advanced by, and the evidence submitted by, counsel.[146] It will allow intrinsic evidence by the plaintiff to show that the state had a religious purpose in violation of the Establishment Clause. If this threshold is met, then the state would have the burden of showing that the action had an adequate independent purpose, which alone would have been sufficient to allow the law to pass, and that the action is narrowly tailored to serve that purpose. This satisfies those who want stricter separation of church and state because it gives the purpose prong of *Lemon* more power. It also appeases some of the concerns of those who dislike the current state of motivational analysis because it allows comments that were made in a different context,[147] such as in a time when religious motivation did not invalidate state action unless it was a gross violation of the Establishment Clause, to be compared with current state interests. Burden-shifting does not bind the state to the record if its interests have evolved since the record was created.

III. A CASE FOR A CHANGE: WHY A BURDEN-SHIFTING ANALYSIS SHOULD BE THE STANDARD

In order to ensure the liberties that the Establishment Clause exists to protect, state action should not pass Establishment Clause scrutiny unless it works to achieve an independent and sufficient secular purpose. The Establishment Clause exists to ensure our religious freedom, something that is unique and personal. To allow state action with a legitimate secular purpose, but with an overriding and prevalent religious purpose, to survive scrutiny places those freedoms in jeopardy. For example, a state could pass a law that would have the majority of its purpose, either explicit or implicit, to help further or establish one religion, and this law would pass scrutiny as long as some manifestation of a legitimate secular purpose existed.

A. Current Weight of Motivational Analysis

As previously discussed, Establishment Clause analysis is unique in that purpose alone can constitute a violation even if completely divorced from effect.[148] Seemingly in light of this, the Court has consistently held that any secular purpose, if legitimate, precludes a violation based solely on the purpose

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145. *Id.* at 917.

146. *See infra* Part IV.A (describing actual and possible purpose analysis).

147. *See, e.g.*, Metzl v. Leininger, 57 F.3d 618, 619, 621, 623 (7th Cir. 1995) (using a governor's comments, made at a time when such comments were not illegal, as evidence in invalidating a Good Friday holiday).

148. Culbertson, *supra* note 72, at 917.

behind the action.[149] The Court has also held that the purpose of the state action must be legitimate.[150] However, courts are reluctant to find that the state has violated the Establishment Clause on purpose analysis alone, and courts generally defer to a state's articulation of a purpose if it is sincere and legitimate, even if it is not the preponderant purpose behind the action.[151]

It is conceivable to have a jurisdiction where a law has no adverse effect on the people (all people are of a certain religion and favor a religious holiday to be recognized by the state, for example), where the statute has been enacted in a way that its effect in establishing a religion is delayed, or where the potential for an unconstitutional adverse effect is real, though in actuality it has not yet occurred. Because the courts allow a plaintiff to bring an action, even if Establishment Clause values are offended, it is in line with this policy of considering values to take into account the possible religious purpose, if it can be clearly shown, and therefore the potential effect(s) of the state action. Because this analysis necessarily goes beyond legislative interpretation, the standard should be raised from having to prove any legitimate secular purpose to one where the purpose of the state action should be independently secular in nature and narrowly tailored to serve the secular purpose.

While courts generally accept whatever secular purpose the government, whether federal, state, or local, proffers,[152] there are exceptions. Under *Stone v. Graham*,[153] the Court held that the proffered purpose was not legitimate and the actual purpose was invalid.[154] In *Stone*, the Court found that the posting of the Ten Commandments violated the purpose prong of *Lemon* because:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.[155]

In *Stone*, the Court found that the item at issue, namely the Ten Commandments,

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149. LEVY, *supra* note 17, at 157.

150. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (deciding whether the purpose of a statute was a sham); Wallace v. Jaffree, 472 U.S. 38, 57 (1985) (examining the legitimacy of the purpose behind school prayer).

151. *See* Metzl v. Leininger, 850 F. Supp. 740, 746 (N.D. Ill. 1994), *aff'd*, 57 F.3d 618 (7th Cir. 1995).

152. *See* LEVY, *supra* note 17, at 157.

153. 449 U.S. 39 (1980) (per curiam).

154. *Id.* at 41-42.

155. *Id.* (footnote and citations omitted).

were of such a religious nature that they overshadowed the proffered secular purpose.[156]

A similar evaluation took place in *Wallace v. Jaffree*,[157] where the statute was found to have the actual purpose of advancing religion.[158] In *Wallace*, the Court held that, because the purpose behind a statute that required a moment of silence for prayer or contemplation was in violation of the Establishment Clause, because it advanced religion, the statute was unconstitutional.[159]

In *Epperson v. Arkansas*,[160] decided before *Lemon*, the Court held invalid a statute that made it illegal to teach evolution in public schools.[161] The statute was held unconstitutional under a standard that independently evaluated purpose and effect, and the Court held that if either advanced or inhibited religion the statute was unconstitutional.[162]

In *Metzl v. Leininger*, a case involving an Illinois Good Friday school holiday, the Seventh Circuit found that because the purpose behind the statute's original enactment was religious, and that because the state had not offered any concrete evidence to show that purpose was superseded, it was unconstitutional.[163] In the *Metzl* case, the court noted that the allocation of the burden of production was critical and, though not citing authority, rested that burden on the state.[164]

However, while these cases illustrate the importance of a secular purpose in evaluating Establishment Clause jurisprudence and reveal the court's opinion that the purpose is clearly relevant, the majority of opinions hold that any proffered secular purpose, as long as it is legitimate, will suffice.[165] But this use of purpose raises some interesting and as of yet unclear questions. First of all, how much of the purpose must be secular? Secondly, who has the burden of showing that there was a legitimate secular purpose?

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156. *See id.* The proffered secular purposes were, "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Id.* at 41 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

157. 472 U.S. 38 (1985).

158. *Id.* at 56.

159. *See id.* at 40, 60-61.

160. 393 U.S. 97 (1968).

161. *Id.* at 107, 109.

162. *Id.* at 107. Quoting from *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), the Court stated: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson*, 393 U.S. at 107 (alteration by Court).

163. 57 F.3d 618, 619, 621, 623 (7th Cir. 1995) (using a governor's comments, made at a time when such comments were not illegal as evidence in invalidating a Good Friday holiday).

164. *Id.* at 622.

165. *See, e.g.*, Bridenbaugh v. O'Bannon, 185 F.3d 796, 800-01 (7th Cir. 1999) (noting that the secular purpose need not be exclusive, and that the court is generally deferential to the state's articulation of a secular purpose).

B. Why Have a Burden-Shifting Standard?

Motivational analysis is necessary to preserve the values of the Establishment Clause as a guardian of our religious freedom. If all courts evaluate the actual purpose behind the state action, the analysis is tainted because it is mired in the history of its passage and is subject to all of the problems of statutory interpretation.[166] Many statutes were passed at a time when celebrating their religious significance was not in violation of the Establishment Clause.[167] Also, now that legislatures know that their statutes may come under Establishment Clause scrutiny, the legislatures enact statutes leaving a record that will enable them to pass this scrutiny.[168]

A standard that allows the plaintiff to show clearly the illegitimate purpose behind the state's action, thereby forcing the government to defend its action against that possibility, assures that both those laws that may have been struck down but now are legitimate, as well as those laws otherwise unconstitutional but that have concealed their illegitimacy, are justly adjudicated. In other words, a burden-shifting analysis allows those laws that may have been unconstitutional, as judged by present standards, when they were enacted many years ago but that have evolved into constitutional and effective state action to be held constitutional. A burden-shifting standard also invalidates state actions that hide behind a stated secular purpose that was articulated in the anticipation that the action would be challenged.

C. Policy Justifications for Using a Burden-Shifting Model

A burden-shifting model puts the burden on the people who are in the best position to know what they are trying to prove. Initially, the burden is on plaintiffs to show that they have been harmed. Those who allege an injury are in the best position to know if they have in fact been injured. After this initial threshold burden is met, the burden shifts to the government to justify the purpose behind its actions. The government is in the best position to know what its justifications are.

Because this is a hard standard for the government to meet, it encourages full disclosure by the state. Additionally, the court must find that the action was narrowly tailored to serve the legitimate purpose, thereby ensuring a safeguard against the infringement of our religious liberty. If the government cannot show that this action does not violate the Establishment Clause, the action will fail.

Additionally, a burden-shifting model does not accept just any proffered secular purpose by the state or possible religious infringement claimed by the plaintiff. The state must show that the secular purpose is independently

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166. *See supra* notes 139-45 and accompanying text.

167. *See Metzl*, 57 F.3d at 624 (Manion, J., dissenting).

168. For example, Indiana recently passed a law allowing the posting of the Ten Commandments because of their historical significance. *See* IND. CODE §§ 4-20.5-21-2, 36-1-16-2 (Supp. 2001).

sufficient to justify the action. The plaintiff must show that the purpose is clearly religious, putting the onus on the plaintiff to understand and describe the liberty that is allegedly being abridged.

D. Distilling the Religious from the Secular Purposes

While any secular purpose is currently enough to satisfy the purpose prong under *Lemon*,[169] under a burden-shifting analysis this would no longer be the case. Because the secular purpose would need to be sufficient enough to stand alone, independent of the religious purposes, issues will arise when the secular purpose is related to religion.[170]

State action combined with some religious motivation should not be unconstitutional on that basis alone. Churches and religious organizations have assumed powerful roles in our communities and in ways that do not advance their doctrinal beliefs. As federal and state governments seek to diminish their role in providing entitlements, religious organizations have increased their programs to provide much-needed aid. Often these same religious organizations receive funding to help with specific programs or benefits. A burden-shifting standard does not disqualify religious organizations from receiving such funding or other support so long as the secular justifications are independently sufficient and the solution is narrowly tailored to serve those legitimate interests.

E. The Narrowly Tailored Requirement of Burden-Shifting Analysis

Governments should be required to show that their action is narrowly tailored to serve the secular interest because of the fundamental right of religious freedom and in order to ensure that government does not have the ability to erode Establishment Clause values merely because it has evoked a legitimate secular purpose. That the First Amendment Establishment Clause states there shall be "no law" regarding an establishment of religion sets a high standard for the state to overcome in enacting laws dealing with religion. The best method by which to apply such a standard is to ensure that the state action, though affecting or even involving religion, serves a clear and independently sufficient secular purpose.

To allow state action to serve a clear and independent secular purpose, but not be narrowly tailored to serve that purpose, would enable government to act in any way related to that purpose. Therefore, the component of the burden-shifting standard that requires the state action to be narrowly tailored to serve the secular purpose ensures that the state action is in fact related to that purpose and is necessary to ensure that the action does not expand beyond its constitutional

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169. *See, e.g.*, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999) (holding any secular purpose is sufficient, even if it is "in a sea of religious purposes").

170. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (stating that the secular purpose need not be unrelated to religion.); Lynch v. Donnelly 465 U.S. 668, 673 (1984) (noting that the Constitution also requires accommodation of religion).

scope.[171]

F. Who Currently Has the Burden of Showing There Is a Legitimate Secular Purpose?

Courts have struggled with whether the plaintiff or the defendant has the burden of production as to whether a legitimate purpose exists. In *Metzl v. Leininger*, the Seventh Circuit reasoned that the burden of production should be on the state.[172] The court determined that because a justification of a statute that honors an unambiguously sectarian holiday "is in the nature of a defense," and because the normal burden of producing evidence of a defense is on a defendant, the state should be required to show that the statute has a legitimate purpose.[173] The court further noted that where the government asserted a secular justification for a law, it then bore the burden to produce evidence to support that justification.[174]

At issue in *Metzl* was a statute that created a Good Friday holiday for schools. When the statute was enacted, the governor of Illinois offered a statement that clearly revealed that the statute was enacted so Christians could properly commemorate that sacred holiday.[175] The same issue again came before the Seventh Circuit four years later in *Bridenbaugh v. O'Bannon*,[176] and the court held that the state had met its burden by showing that, for purposes of a holiday for state employees, no schools or businesses have a higher percentage of people celebrating "a spring holiday on any other Friday."[177] The court held that the state merely had a burden to show some sort of "secular justification for choosing Good Friday" as a holiday.[178] By showing no other Friday in spring was better, this burden was held to have been met.[179]

As can be illustrated from the above example, even courts in the same circuit struggle with how exactly the burden to show a legitimate secular purpose should be apportioned. Because the courts seem willing to accept any proffered secular purpose as long as it is reinforced by evidence,[180] it seems that if the legislature

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171. It is not farfetched to consider what would happen without the "narrowly tailored" requirement. The state could have a legitimate purpose and the action would be constitutional in a manner similar to the federal government's use of the Commerce Clause, namely saying all action is related to the proffered purpose, thereby expanding the scope of the Establishment Clause to things otherwise unconstitutional. Of course, there would still be some sort of effect analysis that the action must pass, but motivational analysis would be effectively dismantled.

172. 57 F.3d at 622.

173. *Id.*

174. *Id.*

175. *Id.* at 619.

176. 185 F.3d 796 (7th Cir. 1999).

177. *Id.* at 799 & n.4.

178. *Id.* at 799 n.4.

179. *Id.* at 799 & n.4.

180. *See* Cammack v. Waihee, 932 F.2d 765, 777 (9th Cir. 1991) (finding a legitimate secular

is willing to call an apple an orange and find some extrinsic evidence to support its statement, the purpose is accepted as legitimate and secular. This current analysis puts the very basic tenets of the Establishment Clause in danger; therefore, the courts should adopt a different way to apportion the burden that is in line with the potential purpose analysis previously discussed.

IV. HOW A BURDEN-SHIFTING STANDARD WOULD APPLY

A. How to Determine if the Purpose Is Clearly Religious

In order for plaintiffs to make a prima facie case under the burden-shifting method, they must show that the purpose of a statute is clearly religious. When discussing the purpose behind state action, in essence one is discussing what the motivation is behind the state action. This becomes difficult in Establishment Clause analysis because the purpose may change over time.[181] There are two traditional ways to ascertain the purpose of the statute: possible purpose analysis and actual purpose analysis.[182]

Possible purpose analysis "considers the language of the statute" and counsel's arguments concerning the purpose behind it.[183] "[T]he possibility of a legitimate purpose is [generally] all that is required to satisfy this prong.[184] The court in this type of analysis is concerned with whether there is any government interest to justify this action.[185] Actual purpose analysis differs because instead of relying on counsel to articulate the purpose, the court looks only to the legislature.[186] In actual purpose analysis, the court looks to the stated considerations by the decision-making body to see if they were illegitimate or legal.[187] Because of this, actual purpose analysis can be difficult to overcome because the legitimate purpose must have been clearly and honestly stated by the decision-making body.[188]

One problem with possible purpose and actual purpose analyses, as they relate to a burden-shifting approach to the Establishment Clause, is that in the burden-shifting model, the court is not concerned with whether an actual legitimate purpose exists to validate a statute, but whether an impermissible and clearly religious purpose exists to shift the burden to the defendant. Because of the nature of this burden-shifting and the fact that it is concerned with current

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purpose to be enjoying a holiday on Good Friday).

181. *Cf.* Metzl v. Leininger, 57 F.3d 618, 619, 621, 623 (7th Cir. 1995) (using a governor's comments, made at a time when such comments were not illegal, as evidence in invalidating a Good Friday holiday).

182. Culbertson, *supra* note 72, at 917-18.

183. *Id.* at 918.

184. *Id.* "An example . . . is found in equal protection cases where no suspect criteria are involved." *Id.*

185. *Id.*

186. *Id.* at 919.

187. *Id.*

188. *See id.*

motivation for the action, not past motivation, the proposed model utilizes a possible purpose analysis to show that state action has a clearly religious purpose.[189]

B. Defining "Religious"

In order to ascertain whether a clearly religious purpose exists, one must couple the possible purpose analysis discussed above with whether something is religious. The Court has avoided attempting to define "religion" and "religious."[190] Defining the term "religious," especially at the fringes of its meanings, is an almost Sisyphean task.[191] At the center is the well-accepted, traditional meaning that the belief in a deity, at least partially characterized by "spiritual" and "otherworldly" concerns, including those involving the will of God, is religious.[192] There is no single characteristic or set of characteristics that defines "religion" or "religious."[193] To add to the confusion, the religion clauses seek incongruent definitions, for the Free Exercise Clause demands a broad definition, while the Establishment Clause seeks a narrower one.[194] These definitions are incompatible so as to maximize individual liberty, protect individual religious conduct, and limit the constraints on government.[195] This has caused some to clamor for separate definitions under the different clauses.[196]

The Court has worked most diligently toward a definition of religion in regards to the Selective Service Act.[197] While these cases involved statutory construction and not constitutional interpretation, the Court agreed with the statutory definition necessitating the involvement of a "Supreme Being"[198] and only talked about the definition of "religious" in a plurality opinion.[199] That opinion later defined "religious" as one whose notions or morality and ethics stem from a "Supreme Being" and whose beliefs, in particular the beliefs that impose a duty to act or abstain from action, occupy "a place parallel to . . . God" in the life of that person.[200]

The Court has also struggled with a definition in situations manifesting a

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189. When this Note refers to "possible purpose," it does so pursuant to the notion that it is looking for the state's possible impermissible purpose.

190. *See* CHEMERINSKY, *supra* note 23, at 972.

191. *See* Conkle, *supra* note 105, at 5. For further discussion, see also Jesse Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 285-86 (1989).

192. Conkle, *supra* note 105, at 5.

193. CHEMERINSKY, *supra* note 23, at 972.

194. *Id.*

195. *Id.*

196. *Id.* at 973.

197. *Id.*

198. *Id.* (citing United States v. Seeger, 380 U.S. 163, 164-65 (1965)).

199. *See id.* at 974 (citing Welsh v. United States, 398 U.S. 333, 337 (1970)).

200. *Welsh*, 398 U.S. at 340.

sincerely held belief.[201] If one claims that he is exempt from a law or is adversely affected by the Establishment Clause because of a sincerely held belief, then the Court must decide whether to accept that belief as valid.[202] The Court has held that the standard is not one of truth, but whether the beliefs are sincerely held.[203] The problem here is that there cannot be an objective test for sincerity.[204]

The most adequate way to assess whether something is religious is to associate the activity with prevailing doctrines of a particular religion.[205] However, because religion is essentially a personal experience and one may have individual beliefs outside the canon of a particular religion, this is problematic.[206] This is more problematic when evaluating individual religious freedoms than when evaluating whether state action has a clearly religious purpose. Because state action necessarily involves more than one person, and often many people, it logically follows that the religious component, if it exists, must also manifest its existence in the creed of those acting on behalf of the state. Therefore, for Establishment Clause purposes, the inquiry to determine if a doctrine is clearly religious should stem from reference to prevailing religious doctrines.

This last model works best with a burden-shifting method because the onus falls on the plaintiff to prove whether the act was religious. Obviously the easiest way to do so is to compare the action with doctrinal beliefs of a particular religious sect or denomination and determine whether the state action was in furtherance of those beliefs. Because generally state action in the area of religion will occur in a majoritarian concept, meaning that the state will not act unless there is a perception that many, if not most, of the affected citizens will agree with the action, often the divergent and difficult issues of whether something is or is not religious will dissolve.

C. Why a Burden-Shifting Approach Helps Solve These Problems

Many of these semantic pitfalls would be overcome with a burden-shifting model. If the plaintiff had the burden to show that a purpose behind the statute was clearly religious, the issue then becomes not how much of a secular purpose versus a religious purpose must exist, but whether an actual religious purpose exists at all. Proving this would then shift the burden to the state to justify the

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201. *See* CHEMERINSKY, *supra* note 23, at 975.

202. *See id.* There are some intriguing cases in this area, including a woman who claimed to be priestess of a church where the sacrament was sex for money; she was arrested for prostitution. *Id.* There was also a group who used marijuana as a "sacrament" and declared their sacred motto to be "Victory over Horseshit." *Id.* (citing United States v. Kuch, 288 F. Supp 429, 445 (D.D.C. 1968)).

203. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944).

204. *See id.* at 93 (Jackson, J., dissenting). "If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer." *Id.*

205. CHEMERINSKY, *supra* note 23, at 976.

206. *Id.* The Court has held that dominant views of a religion are insufficient to determine if a particular belief is religious. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

secular purpose as motivation for the state action. This shift would dissolve an argument as to whether the secular purpose existed at all or whether it was clear. This would shift the focus to whether the secular purpose or the state's secular motivation for the action is sufficient reason for the state action.

For the plaintiff the pivotal question in the burden-shifting model is not how much of a secular purpose exists, but whether a clearly religious one exists. By then shifting the burden and forcing the state to prove its case on its own merits, it theoretically diffuses much of the "he said, she said" bickering to decide what the true motivation is. While whether the secular purpose is independent and sufficient is still a fact-based analysis, it is an analysis where the state must prove its case against a standard—not an adversary. This forces the state not to impeach or attack the plaintiff's argument, but rather to persuasively present its own thesis. By not forcing the court to decide which side had the better case, but rather whether each side met its respective standard, the values of the First Amendment are further upheld, not merely made to settle for the victor in an adversarial court battle.

D. Other Burden-Shifting Solutions: The Disparate Impact Model

The burden-shifting method of assessing who has the burden and what evidence arises to show the burden has been met can be found in Establishment Clause jurisprudence. For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[207] the Court held that once a plaintiff had shown that a decision was motivated in part by an impermissible purpose, the burden shifts to the defendant to show that the same decision would have been made even if the impermissible purpose had not been included.[208] This allows the party in the best position to know the purpose behind an action to defend it, while assuring that the party claiming to be injured was in fact injured by the governmental action.

This transfers to the Good Friday cases previously cited, for example, because under the burden-shifting standard the plaintiff must initially show that enacting a holiday has, or has the potential to have, as its purpose the establishment of religion, which is unconstitutional.[209] The state would then have the burden to show two things. First, regardless of the solemnity of the holiday, the particular day would be celebrated anyway (the narrowly tailored aspect). Second, the reason that Good Friday was celebrated was adequate and independent of the religious purpose.

While on its surface that standard may seem insurmountable, it is not. What it does is force the state, in a situation like Good Friday, to discover and articulate the secular reasons for its actions. The state would have to show economic evidence, for example, that it would be more cost effective to have a

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207. 429 U.S. 252 (1977).

208. *Id.* at 270 n.21.

209. Indeed, the court in *Metzl* would have held that this initial threshold would have been met in the pleadings since Good Friday is a totally non-secular holiday that is celebrated by only one family of religions. Metzl v. Leininger, 57 F.3d 618, 620 (7th Cir. 1995).

holiday on that particular day.

Additionally, it would allow into evidence things that the court had not previously considered. For example, the government would be forced to consider why celebrating a holiday that changes dates every year, that is not a big travel day, that is determined by consulting a religious calendar, and that may not be as convenient as the day after Easter should be celebrated by the state.[210]

E. Justiciability of Motivational Analysis

Because this Note advocates a test to evaluate a state purpose, the problem of justiciability, particularly by ripeness, arises because it could be asserted that the injury has not yet occurred. This argument can be met by either one of two ways. First of all, the purpose prong is not a stand-alone test and can be paired with the effect prong. Because the effect can be a potential violation, the claim is ripe if potential for adverse effect exists. This notion is reinforced by the second method, which is to look at whether the purpose erodes the values of the Establishment Clause. The Court, in *Santa Fe Independent School District v. Doe*,[211] has held that if Establishment Clause values are eroded, there is a cause of action.[212] Because values are eroded with the potential of a violation, the case is therefore ripe.[213]

CONCLUSION

Burden-shifting motivational analysis of state action should be adopted for four reasons. First, it makes the standard more difficult for the defendant to overcome. This is the surest way to preserve the values of the Establishment Clause and will force states to have sound and constitutional reasons to act in the personal and sensitive area of religious liberty.

Second, it will provide a clearer standard to guide state action and define individual rights. Currently the courts interpret motivational analysis under the Establishment Clause in a manner that varies by jurisdiction and that seems to reinforce whatever result a court wishes to reach—a result that is often inconsistent and largely unforseeable.[214] By developing a clearer standard, the understanding and protection of individual religious rights, as well as the limits of state action with regards to religious freedom, will be bolstered.

Third, a burden-shifting standard protects religion. By allowing those religious programs and activities that have a clearly viable secular purpose, such as substance abuse treatment, to receive state funds and pass constitutional scrutiny protects these activities in the future. It gives a much clearer line as to

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210. For discussion of the Good Friday holiday, see *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 797 (7th Cir. 1999); *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995); and *Cammack v. Waihee*, 944 F.2d 466, 467 (9th Cir. 1991).

211. 530 U.S. 290 (2000).

212. *Id.* at 313-16.

213. *See id.*

214. *See supra* note 5 and accompanying text.

what motivation and purposes will be allowed to benefit from state action and what will not, instead of the current standard that requires states and religious groups to work in concert until costly litigation validates or invalidates their actions.

Finally, a burden-shifting standard will more clearly define a state's current motivation. By using a possible purpose analysis to see whether the action violates the Constitution, not whether it passes scrutiny, and then shifting the burden to the state, the state is able to overcome the trappings of history that may hold an action unconstitutional. For example, if eighty years ago a state decided to act in a way that was supportive of a particular religion, and the record reflects such motivation in a manner that—by the record alone—is unconstitutional, by giving the state a chance to explain the secular purposes relevant today and to show that the action is narrowly tailored to serve the interest, the state action will be preserved.

It is time the courts began an honest and open discussion about what is motivating state action in the area of religion. It is time we had a standard under Establishment Clause motivational analysis that encourages such discussion. Many great ideas involve some element of religious significance, and by enabling both sides of the argument to discuss with force and honesty the feared violations and actual motivations of their actions, the Establishment Clause will continue to be one of the greatest achievements of our Constitution.