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PUBLIC EXPRESSION OF RELIGION ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

H.R. 2679

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PUBLIC EXPRESSION OF RELIGION ACT OF 2005

THURSDAY, JUNE 22, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:03 a.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

This is the Judiciary Committee's Subcommittee on the Constitution. I am Steve Chabot, the Chairman. I want to thank everyone for being here this morning.

The House Constitution Subcommittee convenes today to consider H.R. 2679, the Public Expression of Religion Act, commonly known as PERA, which was introduced by the distinguished gentleman from Indiana, Congressman John Hostettler, who is with us here this morning.

PERA amends 42 U.S.C. Sections 1983 and 1988 to prevent the use of the legal system in a manner that extorts money from State and local governments and inhibits their constitutional actions.

Federal statute 42 U.S.C. 1983 is the statute that allows people to sue State and local governments for alleged constitutional violations of their individual rights. Federal statute 42 U.S.C. 1988 is the Federal fee-shifting statute that allows prevailing plaintiffs in lawsuits filed under 1983 to be awarded attorney's fees from the defendant. And the defendant in that case would generally be a governmental entity.

Consequently, under 42 U.S.C. 1983, parties can sue State and local governments claiming their individual rights were violated and demand attorney's fees in the case under 42 U.S.C. 1988 if they prevail at any stage of judicial review.

Because of these laws, the threat of litigation against State and local officials alleging that they have violated the Establishment Clause often forces States and localities to cave to demands to remove even the smallest religious references on public property. Most localities do not have the money to pay for not only their own, but also the plaintiff's, attorney's fees if they receive an adverse judgment. And Establishment Clause case law is oftentimes so confusing and the outcome in these cases so unpredictable that it is virtually impossible for a locality to foresee the outcome in any given case.

PERA addresses this problem by amending 42 U.S.C. 1983 to permit only injunctive relief in cases alleging violations of the Establishment Clause. PERA also amends 42 U.S.C. 1988 to disallow the award of attorney's fees to prevailing parties in cases alleging violations of the Establishment Clause.

PERA will level the playing field against groups such as the ACLU who have won millions of dollars in attorney's fees while extorting State and local governments into suppressing the religious speech and free exercise of religion of private individuals, for example, tearing down veterans' memorials that happen to have religious symbols on them, removing the Ten Commandments from public buildings, booting the Boy Scouts off public property, or blotting out crosses from official county seals. This happened in California.

Again, I would like to thank our witnesses for being here today. And we will get to you very soon.

And that is the balance of my statement. I would now yield to the gentleman from New York, Mr. Nadler, for the purpose of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, I want to join you in welcoming our witnesses today.

I think we can agree that the topic of today's hearing is of monumental importance, albeit for differing reasons. The good news is that this legislation is not yet another attempt at stripping the Federal courts of the jurisdiction to hear cases if some in Congress think they won't like the answer the Federal courts might give.

The bad news is that today for the first time since the enactment of Section 1983 in 1871 we are considering legislation that would single out a particular group of individuals whose first amendment rights have been violated by the Federal Government or by the government and deny them remedies available to everyone else under Section 1983. These are people whose rights have been violated by the Government or by someone acting under color of law and who have been able to prove that in a court of law. By denying them the normal relief of monetary damages and the ability to petition for attorney's fees we are not just denying them their day in court, we are telling Government officials everywhere that Congress thinks it is okay if they violate people's religious liberty.

Because remember, anyone who loses a case—when the Government loses a case here, the court will have found that they violated someone's religious liberty. It is especially galling after we have just completed most of the work on the reauthorization of the Voting Rights Act, although I must say it seems that some of the majority party aren't too happy with that, in which we enhanced the attorney's fees, enhanced the attorney's fees provision in that bill that this Committee reported by adding a right to be awarded the cost of expert witnesses.

As this Committee stated in its report, "The Committee received substantial testimony indicating that much of the burden associated with either proving or defending a Section 2 vote dilution claim is established by information that only an expert can prepare. In harmonizing the Voting Rights Act of 1965 with other Federal civil rights laws, the Committee also seeks to ensure that

those minority voters who have been victimized by continued acts of discrimination are made whole."

I would warn my colleagues that starting down this path of denying proven victims of discrimination by the Government—that is what we are talking about, Section 1983 where someone acting under color of law, a Government official, violated someone's constitutional rights, in this case, someone's constitutional rights under the first amendment liberty provisions—starting down this path will only lead to depriving other unpopular groups of their civil rights remedies.

It wasn't so long ago that attacks on unelected judges and ACLU lawyers stirring up trouble was the common language of the militant segregationists, those who said that if it weren't for those unelected judges and those ACLU lawyers and those carpetbaggers coming down here, no one would be questioning our Jim Crow practices that our local Black people are so happy with.

It is distressing and sadly ironic that today the same language is being used to gut the nation's oldest and most durable civil rights law. It is all reminiscent of Governor Wallace's infamous 1963 inaugural speech in which he said, "From this day, from this hour, from this minute we give the word of a race of honor that we will tolerate their boot in our face no longer. And let those certain judges put that in their opium pipes of power and smoke it for what it is worth." I think the governor would feel right at home on this Committee today, as would some of the majority witnesses.

Or the notorious southern manifesto signed by Members of both houses of this Congress in defiance of the Supreme Court's school desegregation decisions: "We regard the decisions of the Supreme Court in the school case as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate in derogation of the authority of Congress and to encroach upon the reserved rights of the States and of the people."

Does this sound familiar? This is the rhetoric we are hearing on this bill. It is the rhetoric we are hearing on the other court-stripping legislation.

I raise this not to suggest that any Members of this house are segregationists. Far from it. I do recall the overheated rhetoric of a half-century ago to urge caution. Unpopular minorities—and those are the people in these cases, people defending the religious liberty of unpopular minorities and decisions defending the rights of unpopular minorities against the will of the majority have always inflamed passions. People have always questioned our system of checks and balances and especially the role of the independent judiciary.

Recourse to an independent judiciary is the bulwark of our liberties. We recognize—and remember, if you look at the 1936 Stalinist Constitution of the Soviet Union, it looked wonderful, right to free expression, right to freedom of speech, freedom of the press, freedom of religious and anti-religious propaganda, as they quaintly put it. The only problem was there was no real recourse. There was no way to enforce those rights.

If you sought to enforce the rights, you got shot. In this country, you go to court until now. If this bill passes or the other court-

stripping bills, we limit the right of people to go to court to defend their rights.

We recognize people's liberties. We recognize that the independent judiciary is the bulwark of our liberties by allowing people to go to court and force the Government to respect their rights.

We recognize this by allowing them to receive damages where the Government has done them. We recognize this by ensuring just as we have done with the Voting Rights Act that people who can prove their rights have been violated can get attorney's fees paid so that people with valid claims will be able to go to court and not be damaged—will be able to go to court, number one and number two, not be damaged by huge attorney's fees.

I would remind my friends—and let me say the Chairman talks about localities being hurt by attorney's fees. They are only getting hurt by attorney's fees if they are judged wrong by the courts, if they damaged individual rights of somebody. And it is better that the Government be damaged by attorney's fees when the Government has violated someone's rights than that the victim of the deprivation of those rights, the victim of unconstitutional practices be damaged.

I would remind my friends that this legislation is not limited to religious symbols in public places. This legislation applies to any violation of the Establishment Clause. This would include forced prayer, not a voluntary prayer, but forced prayer. And if Government forcing your child to say a prayer of another faith is not the establishment of religion then the phrase has no meaning.

It is an election year. The months leading up to elections have long been known as the silly season. We all understand that. But get an earmark for a bridge or something. Leave the first amendment and our civil rights laws out of it.

Thank you. I yield back.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Indiana, Mr. Hostettler, the chief proponent of the bill, is recognized for the purpose of making an opening statement.

Mr. HOSTETTLER. I thank the Chairman. And I want to thank you for calling this important hearing today as the legislature acts in our constitutionally independent capacity.

I first introduced the Public Expression of Religion Act in the 105th Congress a few years before this election year after I realized that the imposition of attorney's fees in these kinds of cases were jeopardizing our constituents' constitutional rights. An example of this was in 1993 when the Indiana Civil Liberties Union, which is affiliated with the American Civil Liberties Union, mailed a letter to all the public educators in Indiana. And I think we have some excerpts from that. And I will read.

First of all, the heading is from the Indiana Civil Liberties Union. And the footing states that the Indiana Civil Liberties Union is an affiliate of the American Civil Liberties Union. The letter states, in part, this: "Dear Educator, the Indiana Civil Liberties Union has received several calls recently from school boards throughout the State concerning prayer at graduation. The Supreme Court has held clearly and explicitly that prayer at gradua-

tion is 'forbidden by the Establishment Clause of the first amendment.' And there are no exceptions or loopholes."

"No member of the school board, no teacher, no principal, no invited clergy and student speaker may take the podium and invite the audience to pray. If you decide to hold graduation prayer anyway as a matter of principle, four things will probably happen. One, we will sue both the school corporation and any individuals who approved or authorized graduation prayers. Two, we will win. The Supreme Court has already decided the issue.

"Three, you will pay your own and our attorney's fees, an amount that could run as high as a quarter of a million dollars. Your insurance will not cover it because it is a deliberate violation of law. So the money will come directly from property taxes." The letter ends this way, ironically enough. "The ICLU does not enjoy litigation. We and you have better things to do with our time. You have better things to do with your money."

These threats to teachers who are highly unlikely to be able to pay their own attorney's fees, let alone the exorbitant attorney's fees of the ICLU, make it very likely that educators would capitulate to the ICLU before even checking to make sure the ICLU has their facts right, which in one particular case they didn't. What makes this even more difficult for States and localities is that the jurisprudence in Establishment Clause cases is about as clear as mud. Different districts and even the Supreme Court itself flip-flops on issues.

For instance, last year the Supreme Court handed down two Ten Commandments decisions on the same day with a different decision in each. In the *Van Orden* case, the court applied the *Marsh* test of historical perspective to determine that the Ten Commandments in a public venue was constitutional. While the *McCrary* case used the *Lemon* test to determine that the Ten Commandments in a public venue was unconstitutional, clear as mud.

Our constituents who are being threatened with these lawsuits know that even if they are right they will have to pay their own attorney's fees to take the gamble that the court will muddle through one more time the jurisprudential mess of the Establishment Clause and come out on their side. If a court chooses to use the *Marsh* test, they might win. If the court chooses to use the *Lemon* test, they might lose. It is a toss-up.

Unfortunately, many of our constituents do not have the means or time to set aside a small fortune every year to defend their constitutional rights against these liberal organizations. Nor do they look kindly on the fact that their constitutional rights have become subject to the whims, literally, of unelected judges. But that issue is for another hearing.

Regardless, many do not wish to roll the dice to have their day in court. So they capitulate to these organizations and their often questionable pronouncement of what is or is not constitutional. The majority of the cases the ACLU and its affiliates represent are facilitated by staff attorneys or through pro bono work. So any attorney's fees awarded to them is icing on the cake. It is a win-win situation for them right now.

On the other hand, cities and States have to consider where the attorney's fees would come from if they lose their case and have to

pay the ACLU. Where would the money come from, from the taxpayers? States and localities have limited resources with which to fight court battles. Thus, another reason that they are capitulating before they even go to court.

This was the case recently with the Los Angeles County seal. The ACLU threatened to sue Los Angeles County if they did not remove the small cross from the county seal. The previous seal is available along with the new seal.

The county was forced to choose between paying to change the seal or paying to go to court and possibly pay exorbitant attorney's fees to the ACLU. In the end, the L.A. county commissioners in a three to two vote decided to ignore the will of the people of Los Angeles County and pay to change the seal instead of paying to go to court. They had been advised by their attorneys that if they lost in court they would not only have to change the seal, but they would additionally have to pay attorney's fees.

Mr. Chairman, opposition to PERA is based in no small part on the reality of the Establishment Clause jurisprudence as it has come today. I mentioned the two cases earlier, and I point out that as that case was without—Mr. Chairman, I ask for an additional minute.

Mr. CHABOT. Without objection, the gentleman is granted an additional minute.

Mr. HOSTETTLER. —that as that case was decided before the most recent changes to the Supreme Court, namely the addition of Chief Justice Roberts and Justice Alito that, in fact, in one particular case the majority found that the public display of the Ten Commandments was constitutional. Whereas in the other case, Justice Breyer changed his vote, so to speak, and, therefore, as a result of one person's vote, the case in McCrary County was found to be unconstitutional.

But given the fact that Justice Alito has taken Sandra Day O'Connor's place, whose position in both cases, in my humble opinion, was on the wrong side, the simple fact of the matter is we will not need Stephen Breyer's opinion in the future.

Mr. Chairman, I believe it is time to bring this extortion to an end. The Public Expression of Religion Act would make sure that these cases are tried on their merits and are not merely used to extort money either via settlements or attorney's fees. I yield back the balance of my time.

Mr. CHABOT. I would ask unanimous consent that the gentleman be given an additional minute and the gentleman would yield to me for a moment.

Mr. HOSTETTLER. Yes, I will yield to the gentleman.

Mr. CHABOT. Could we have that pulled up again, what we had there before that showed the seal of California? If I am not mistaken, Mr. Hostettler, the one on the left there was the old version. And it is pretty hard to see the cross on there, but there is a statue of, I believe, a pagan goddess there in the middle.

Mr. HOSTETTLER. Yes.

Mr. CHABOT. About at her arm level there, the cross to the right there, that is the cross, I believe. It is pretty hard to see on there.

Mr. HOSTETTLER. Yes, sir.

Mr. CHABOT. About, I think I understand it is maybe one-sixth the size of the cow there at the bottom. The cross is removed there on the right. But the pagan goddess on there, that was okay, but the cross was removed?

Mr. HOSTETTLER. It is my understanding that the pagan goddess was not the subject of the ACLU's concern, that the cross was the subject of the concern. L.A. County changed the goddess in hopes of fending off a future potential lawsuit.

Mr. CHABOT. Okay.

Mr. HOSTETTLER. That is my understanding.

Mr. CHABOT. Very good. Well, thank you very much, Mr. Hostettler. The gentleman's time has expired.

The gentleman from Virginia is recognized for the purpose of making an opening—if he would like to make an opening statement, or not, either way.

Mr. SCOTT. Sure. Thank you, Mr. Chairman.

Mr. Chairman, it is just nice to see the representative of the American Legion here because the last few years we have seen our budget deteriorate about $9 trillion, and they have been leaving veterans behind. As a matter of fact, just recently we have slashed $6 billion from what is needed to meet current veterans' health-care needs over the next 5 years.

We have prevented 1 million new veterans from enrolling in V.A. medical care. We have doubled and tripled health-care fees for 4 million military retirees under 65. More than 30,000 new veterans are waiting for their first appointment at the V.A., double the number from a year ago. We have doubled the co-pays for prescriptive drugs. We have opposed ending the tax on military families pensions and concurrent receipts for disabled veterans.

As a matter of fact, Mr. Chairman, when we talk about what we are doing with our budget, this chart shows that all our money is going to interest on the national debt with a little bit going to education, a little bit going to homeland security. And what falls off the truck, the veterans get.

But the veterans who happen to be multi-millionaires, however, Mr. Chairman, we are going to help this afternoon because those with States over $1 million we are going to eliminate most of the estate tax on those multi-million dollar estates. So when they die with millions of dollars—if they die with millions of dollars, we will be right there to help them out.

So, Mr. Chairman, I would hope that if we are going to be patriotic that we would fulfill our responsibilities to our veterans, not have a three-quarters of a trillion dollar tax cut going only to dead multi-millionaires. And I say dead multi-millionaires because there is no tax for the first $1 million of the estate under the former law. And now it is up to about $2 million per person. That is $4 million per couple tax-free. But we are going to make sure those with even more than that get tax relief to the tune of about three-quarters of a trillion dollars and fully phased in over 10 years.

Mr. Chairman, this particular bill—it is interesting if you violate the Establishment Clause, no disincentive. But if you violate the free speech part, free exercise part of the same amendment, then I guess you can get attorney's fees. This is a picking and choosing which constitutional rights we are going to actually enforce. It is

a real bad precedent. And I would hope we would defeat the bill if it ever comes up.

I yield back.

Mr. CHABOT. The gentleman yields back.

The Chair would just note that the purpose of this hearing is on PERA, not necessarily veterans' benefits. But since the gentleman from Virginia has mentioned the national debt, for example, I would note that I came here in 1994. And prior to that when the gentleman's party was in control for 40 years we didn't have a balanced budget. And that is when much of the debt was run up.

And at least for 4 or 5 of the years we had a balanced budget since the current majority party is in control now. I very much would like to get back to a balanced budget.

And let me just conclude with saying that when the gentleman talks about the Federal inheritance tax or the death tax, I would just say that philosophically I believe that when the Government can take away 55 percent of what a person has when they die I think that is confiscatory and immoral.

And I think that we ought not tax people when they die. And this is money that they paid taxes on throughout their life. But that is not the purpose of this hearing. But the gentleman brings it up, so there are two sides to many things.

And I will—well, the gentleman from New York, unless the gentleman from——

Mr. NADLER. I will just point out—I don't want to get into an overlong discussion of economics at the moment, although it does implicate the question of why this question is a veterans issue when there are so many other issues that really affect veterans as opposed to this nonsense.

But I would simply point out given what the Chairman said that when Ronald Reagan took office, the national debt of the United States accumulated from George Washington through Jimmy Carter was $794 billion. Twelve years later when George Bush the first left office, the national debt was $4.3 trillion. There is almost quintupled. It started declining when Clinton was in office. It is now greatly accelerating again.

And one other thing, the stuff I hear when our party was in control of Congress, et cetera, et cetera, don't forget that during that period that Republican presidents for most of the time, not to mention a Republican Senate. This is fortunately or unfortunately not a parliamentary system with a unicameral legislature. So you can't just look at the House, as much as I wish maybe we should.

I yield back.

Mr. CHABOT. We could carry on this all day.

But the gentleman, Mr. Lloyd here, who I think is a veteran, obviously will, I am sure, in his testimony discuss why, in fact, there are veterans who care about this particular issue.

I would like to introduce our witness panel at this, at this time, if we could.

Our first witness today is Rees Lloyd. Mr. Lloyd is a long-time civil and workers' rights attorney in California and a Vietnam-era veteran of the U.S. Army who currently serves as commander-elect of district 21 of the American Legion Department of California,

which embraces some 23 posts and over 6,000 members in Riverside, California.

Mr. Lloyd was once a staff attorney with the ACLU of Southern California, which recognized him for "pioneering efforts in the area of workers' rights," and a pro bono attorney for the late Cezar Chavez, founder and president of the United Farm Workers of America.

Mr. Lloyd currently serves as special counsel for civil rights to California department commander Wayne Parrish and as Director of the Defense of Veterans Memorials project of the Department of California.

Excuse me.

He was named American Legionnaire of the Year 2004–2005 for the 40,000-member fifth area of the Department of California. Mr. Lloyd has served as a principle spokesman for the American Legion regarding Establishment Clause litigation and the Public Expression of Religion Act.

And we welcome you here, Mr. Lloyd. And I am going to introduce the rest of the panel here before we get to you.

Our second witness is Mathew Staver.

I am pronouncing that right, I assume?

Mr. Staver serves as the Interim Dean of Liberty University School of Law and is the founder and chairman of Liberty Council, a national non-profit litigation, education and policy organization. He has written 10 books, most of which focus on constitutional law and has published hundreds of articles on constitutional law. He has presented many continuing legal education credit courses to attorneys, law professors and judges regarding the 42 U.S.C Sections 1983 and 1988.

Mr. Staver has argued in numerous State and Federal courts across the country and has more than 110 published legal court opinions. Mr. Staver has written numerous briefs before the United States Supreme Court and has argued twice before the high court as lead counsel.

We welcome you here, Mr. Staver.

Our third witness is Marc Stern, Assistant Executive Director of the American Jewish Congress and co-director of its commission on law and social action. Mr. Stern was consulted widely by numerous Jewish and non-Jewish organizations interested in maintaining the separation of church and State and is interviewed often by the broadcast and print media.

Mr. Stern has been named one of the 40 to 50 most influential leaders of the American-Jewish community. Mr. Stern has taken the lead role in coalitions assembled by the American-Jewish Congress, which have produced guidelines utilized by the Clinton administration to clarify contentious church-State issues in American society today. These guidelines include Religion in the Public Schools, Religion in the Federal Workplace and Public Schools and Religious Communities, a first amendment Guide. Mr. Stern has written numerous briefs, monographs, legislative testimony and articles on a variety of civil rights and civil liberties issues.

And we welcome you here, Mr. Stern.

Our fourth and final witness will be Professor Patrick Garry. Professor Garry is an associate professor of law at the University of South Dakota School of Law and a visiting professor at George

Washington School of Law. Patrick Garry has a J.D. with honors and Ph.D. in constitutional history from the University of Minnesota.

Before joining the faculty at the University of South Dakota School of Law, Professor Garry was awarded a research fellowship at the Freedom Forum Media Studies Center and was a visiting scholar at Columbia University Law School. He also served as an adjunct professor at St. John's University and a research project adviser at the Center for Media Law and Ethics in the University of Minnesota.

Patrick Garry is a contributor to the Oxford Champion to the United States Supreme Court and has published seven books. His first book was included in the distinguished studies in American legal and constitutional history. Professor Garry's study of Justice Oliver Wendell Holmes appears in Great Justices of the U.S. Supreme Court, and his scholarly articles have been published in a variety of journals.

We very much welcome our entire panel here this morning. Obviously we have a very distinguished panel.

And it is the practice of the Committee to swear in all witnesses appearing before it. So if you would, if you would all please stand and raise your right hand.

Do you swear that in the testimony you are about to give you will tell the truth, the whole truth and nothing but the truth, so help you, God?

All witnesses have indicated in the affirmative.

And, without objection, all Members will have 5 legislative days within which to submit additional materials for the record.

[The prepared statement of Mr. Conyers is located in the Appendix.]

Mr. CHABOT. And before we get started, you are probably familiar with the 5-minute rule. But each of you will have 5 minutes to testify. We actually have a lighting system which when you begin there will be a green light. That will be on for 4 minutes. The yellow light will be on for 1 minute, letting you know it is time to kind of wrap up. And the red light will come on, at which time we hope you will be finished. If not, we will give you a little bit of leeway. But we hope to not have to gavel anybody down.

We also apply the 5-minute rule to ourselves here. So we are pretty careful about that to be fair.

So if there are no questions, Mr. Lloyd, you are recognized for 5 minutes.

TESTIMONY OF REES LLOYD, COMMANDER, DISTRICT 21, THE AMERICAN LEGION

Mr. LLOYD. Thank you very much——

Mr. CHABOT. If you could turn the light on. You just push the—or turn the mike on. Yes, I am sorry. And if you will pull the box kind of toward you there. We will begin your time here at that time.

Mr. LLOYD. Thank you very much, Mr. Chairman and Members of the Committee. And it is indeed a great honor for me to be able to address you today on this important legislation on behalf of the American Legion, the largest wartime veterans organization in the

world, with 2.7 million members, and indeed on behalf of the entire Legion family of Legion, auxiliary and sons of the American Legion, with some 4 million members.

I can assure you that we regard this as an extremely serious matter. Our veterans memorials all over the nation are threatened by lawsuits. And we are being precluded from effectively exercising our rights to petition before the courts and before our elected bodies at the local level because of the threat of attorney fees being imposed, including on us if we have the audacity to intervene in such cases and fight the ACLU and others in protection of our veterans memorials because we run the risk then of having those fees shifted to us. And I would ask that that be considered carefully by the Congress when it considers civil rights.

I was very, very interested in the comments of Mr. Nadler, and I thank him for referencing the civil rights legislation, civil rights of our country. I have been involved as a civil rights attorney my entire professional life. It was my honor, among other things, to represent Cezar Chavez and the farm workers movement for almost 20 years until the day of that great man's death. And in that time, I would say, Mr. Nadler, we fought those battles because they needed to be fought——

Mr. NADLER. Nadler.

Mr. LLOYD. Nadler—not because we were getting paid. Because when I worked for him, I got all the frijoles and tortillas I could eat, and that was it. We fought them because they needed to be fought, and they were right.

And today we are told that the ACLU and others will not fight the battles for what they believe to be the civil rights under the Establishment Clause unless they are enriched at taxpayer expense. And I object to that notion.

Mr. NADLER. I ask that that be stricken from the record.

Mr. CHABOT. Let us let the——

Mr. NADLER. It is an unfair aspersion about the ACLU.

Mr. CHABOT. The witness is entitled to his opinion. And if it is his opinion, it is his opinion.

Mr. NADLER. The fact that the ACLU has said it will not fight unless it gets paid. It is not true.

Mr. LLOYD. It is true that the opponents of this bill have stated that if you remove the attorney fee provision these suits will not be brought. In fact, it is in the testimony that is written here today. So it is true.

And I don't believe the ACLU has ever intended, or anybody in it ever believed, that that was the basis. Certainly, when I was an ACLU attorney we never did that. As a civil rights attorney, as a member, former attorney for the ACLU and for Cezar, I am appalled that this is what would happen to the civil rights movement, the civil rights effort, to have to depend on attorney fees.

We are trying to defend our veterans memorials in California where we had the precedent of the Mojave Desert Veterans Memorial across a rock outcrop built in 1934 by vets to honor vets. When it was incorporated into the Mojave Desert Preserve, a lawsuit is filed. It is 11 miles off the highway. It is in the middle of the desert. You have to drive to it to be offended by it. A judge says tear it down and gave the ACLU $63,000.

In the Mount Soledad case that many people in the country are aware of at this time—that cross was there since 1913. Fifty years ago they established the memorial. Today a Federal judge has ordered it be destroyed by August 1 or we will fine you $5,000 a day. We can't enter that case as parties and intervene because the Legion will then risk having to pay the ACLU's attorney fees. And that shouldn't be.

It is not a one-way—it is a two—it is not a two-way street. It is one-way. If the ACLU prevails, it gets its funds. If it loses, it doesn't have to pay them because there is a different standard. And the different standard is you have to show that it was frivolous. It is not at all the prevailing party gets their attorney fees.

And with reference to the remarks of Representative Scott, which we appreciate very much, we are dealing with those issues and other legislative matters. But I will say there is an easy way to find the money to pay the veterans benefits that are due. Stop the judges from giving millions to the ACLU and others to sue our veterans memorials and give us the ability to fight back on a level playing field where we don't risk having those fees imposed on us and where we can appeal to local elected bodies who will listen to us who today don't because their minds are made up. They say we have no choice, including in Los Angeles, including at Redlands where they are drilling holes through the crosses on the badges because they can't afford to make the changes that are due.

Gentlemen, I don't think Congress ever intended the 1976—not the 1871 Civil Rights Act, but the 1976 Civil Rights Attorney Fees Act, 42 U.S.C. 1988 to be used in this way. The country got along under the Civil Rights Act since 1871 until 1976 without an attorney fee provision, and we can if we eliminate it today.

And I thank you. I am out of time.

[The prepared statement of Mr. Lloyd follows:]

PREPARED STATEMENT OF REES LLOYD

Mr. Chairman and Honorable Members of the Subcommittee on the Constitution:

It is my great honor to appear before you today to offer testimony in support of the passage of the Public Expression of Religion Act, HR. 2679, PERA, on behalf of The American Legion, the largest wartime veterans' organization in the world with 2.7 million members. It is also poignant that I should appear before you on June 22, the anniversary of Congress' recognition of the Pledge of Allegiance in 1942, and the day on which in 1944 what has been described as the greatest social legislation of the 20th Century, the GI Bill, was signed into law.

In testifying before you, I preface my remarks by stating that I do not appear before you as an inveterate hater of the American Civil Liberties Union (ACLU) or related organizations bringing Establishment Clause litigation and seeking and receiving taxpayer-paid attorney fees therefore, although I believe that PERA must be passed to stop the exploitation of the law for attorney fee profits in such cases.

I have been a civil rights attorney for some twenty-five years. I was an ACLU of Southern California staff attorney for approximately two years immediately after graduating from law school and passing the California Bar, and had been on a fellowship with the ACLU while in law school. I have devoted my professional career to the defense of civil and workers rights. Among other things, I was for some twenty years, and until the day of his death and beyond, a volunteer attorney for the late Cesar Chavez, the founder and president of the United Farm Workers of America, AFL-CIO, whom we honor in California today for his great contributions to civil rights. Cesar Chavez was, indeed, a great American, he mentored me when I was an independent trucker engaged in a nationwide strike during the so-called Arab Oil Embargo, and it was Cesar Chavez who urged me to go to law school and his recommendation that secured my admission. It is a little known fact that Cesar Chavez was also a veteran, serving four years in the U.S. Navy when his country

called. He was, in his humility and self-sacrifice, the greatest man I ever knew, or will know, and I will always walk in his shadow.

I state this not for self-aggrandizement, but, rather, to indicate to you that I speak to you from the heart, and based on a lifelong commitment to the defense of civil rights, from participation in Resurrection City in the Poor People's Campaign of Dr. Martin Luther King in 1968, to the present moment, in which I am privileged to participate in a great cause, the cause of veterans, the cause of the defense of American values by The American Legion Family of Legion, Auxiliary, and Sons of the American Legion, altogether involving some 4 million members.

Neither The American Legion, nor I as its representative in these proceedings, believe that passage of PERA is a partisan issue, a conservative or liberal issue, a Republican or Democrat issue, or an ideological one. The American Legion believes it is an American issue, a civil rights issue that transcends all partisan, party, or ideological allegiances.

PERA is narrowly drawn to impact only on Establishment Clause cases, and no other civil rights claims. Arguments have been raised that this, somehow, creates an Equal Protection violation. It is respectfully suggested that this is an argument without merit; the law makes distinctions in myriad instances, including as to what kind of civil wrongs can result in attorney fee transfers by court orders. Further, Establishment Clause cases are the only claims of which I am aware that are allowed to proceed without any showing that the plaintiff has suffered any economic, physical, or mental damage, or been deprived of the exercise of any right, but is merely offended at the sight of a symbol which has a religious aspect. In all other categories of claims of which I am aware, mere "taking offense" is not even cognizable for a claim or cause or action. Thus, the distinction made in PERA is a rational one, and preserves attorney fee transfers in cases in which an actual economic, physical, or mental injury, or deprivation of right, other than mere offense, is suffered.

Concisely stated: The American Legion believes that passage of the Public Expression of Religion Act is essential for the protection of civil rights, for all Americans and not limited to special interests, and for the preservation of the purpose and integrity of the attorney fee provisions of the Civil Rights Act, 42 U.S.Code Section 1988, the Equal Access to Justice Act (EAJA), and all other federal statutes which were benevolently intended to benefit the poor and advance civil rights, and are now resulting in the opposite; are resulting in unintended financial enrichment; and are trammeling and throttling the exercise of First Amendment rights to freedom of speech, to petition for redress of grievances to the judicial and legislative branches,

In particular, but without limitation, The American Legion believes this reform legislation is absolutely necessary if we are to be able to preserve and protect our veterans memorials, and, indeed, all public displays of symbols of our American heritage which have a religious aspect, from litigative attacks under the Establishment of Religion Clause of the First Amendment by special interests, epitomized by, but not limited to, the ACLU, the primary source of such Establishment Clause litigation, and the primary recipient of literally millions of dollars of attorney fees from such litigatio—even though the ACLU in fact has no actual attorney fees.

As a former ACLU attorney, I know to a certainty that the ACLU's litigation is carried out by staff attorneys, or by pro bono attorneys who are in fact precluded from receiving fees under the ACLU's own policies. Notwithstanding, the ACLU regularly seeks, and receives, attorney fees in Establishment Clause cases at market rate, usually $350 an hour in California. Although the courts know that ACLU clients in fact incur no attorney fee obligation, and that ACLU incurs no fee obligation to volunteer cooperating attorneys, as far as known, no judge has simply said "no" to ACLU attorney fee requests, even though there is no evidence that any attorney fees were incurred. Thus, benevolently intended fee provisions are being used as a bludgeon against public entities to surrender to ACLU's demands, and to obtain profits in the millions. (See, examples cited below, and in American Legion Magazine reports submitted as Attachments hereto.)

Further, it must be emphasized that there is nothing in the law today to bar declared enemies of America, including without limitation terrorists who we are warned are in fact in our midst, from following the precedents being set by the ACLU and others to bring lawsuits to destroy or desecrate our veterans memorials, or other public displays of symbols of our American history and heritage if they contain a religious aspect, and then to exploit federal law, including the Civil Rights Attorney Fees Act, 42 U.S. Code Section 1988, and related acts, including the Equal Access to Justice Act (EAJA), which also should be reformed, to demand that the courts award them taxpayer-paid attorney fees for such Establishment Clause litigation attacks.

Frankly stated, if PERA is not passed, if EAJA and all other federal statutes which may provide attorney fees in Establishment Clause cases are not also reformed, there is nothing in the law to prevent such an abuse and exploitation by terrorists or their sympathizers.

The American Legion urges this reality to be considered in acting on PERA.

The threat of imposition of such fees is having other, and very real, consequences: Benevolently intended attorney fee statutes designed to advance First Amendment rights, including the right to petition for redress, are now being exploited for financial profit in Establishment Clause litigation, to effectively prevent The American Legion and others from meaningful participation in such Establishment Clause litigation in the exercise of the right to petition. Simply stated, as an attorney, acting under the Code of Professional Responsibility, I must advise The American Legion and others I represent based on what the law is, not what I would like it to be. Without PERA, I necessarily have to advise The American Legion that if the organization does seek to intervene in lawsuits against veterans memorials as a party, it risks having a court order it to pay the attorney fees of the ACLU.

Thus, the very threat of imposition of attorney fees is having a chilling affect on the exercise of fundamental First Amendment rights.

Further, the threat of imposition of attorney fees in Establishment Clause controversies is effectively depriving Americans of the right of speech and to petition elected bodies for redress because those elected bodies at the local level cannot in fact consider contrary views and deliberate because they so fear imposition of attorney fees in such matters by the courts that they believe they have no deliberative choice as they must protect taxpayer funds which are needed for essential local services. In short, their minds are made up before the first objection of a citizen is heard, nullifying effective exercise of the freedom of speech and to petition for redress before local elected bodies.

Thus, the citizen's right to be heard, and the very deliberative process of our representative democracy, are being distorted and denied by the threat of, and actual imposition of, attorney fees on taxpayers in Establishment Clause litigation.

The threat of imposition of attorney fees is very real, and it manifestly is being used as a bludgeon by the ACLU and others to compel surrender to their demands to in effect secularly cleanse the public sphere, including at veterans memorials.

Although most Americans remain unaware of it—and are outraged when they learn of it—Courts are awarding taxpayer-paid attorney fees to the ACLU and others literally in the millions of dollars annually, against towns, school boards, cities, counties, states, and the potential of imposition of such fees on The American Legion or others who would desire to intervene in such cases to participate fully in those judicial proceedings, as parties, to apprise the judiciary of their views on the importance of protecting our veterans memorials or other public display of symbols of our American heritage.

Passage of PERA is essential as the very threat of imposition of attorney fee awards in Establishment Clause cases, including those at veterans memorials, has intimidated elected bodies into surrender to the demands of the ACLU and others to remove or destroy symbols of our American heritage if they have a religious aspect, rather than run the risk of imposition of often massive attorney fees on taxpayers, or upon intervening private parties, like The American Legion in defense of veterans memorials.

All across the nation, lawsuits are being brought under the Establishment Clause to remove or destroy symbols of our American heritage from the public sphere if they have a religious aspect, principally the Christian Cross, but also the Star of David, both of which are present in the hundreds of thousands in our twenty-two National Cemeteries, from Arlington in the East to Riverside National Cemetery in California, and across the sea at American cemeteries in Europe, including Normandy Beach, where there are more than 9,000 raised Crosses and Stars of David.

There are countless veterans memorials which have stood for years, decades, even longer, erected by grateful Americans in small towns, cities, counties, states, and considered by most Americans as sacred places as their manifest purpose is to honor, and call to the remembrance of succeeding generations, those Americans who served and sacrificed in defense of our American freedom.

Today, all of these veterans' memorials are threatened by dangerous precedents being set in Establishment Clause lawsuits brought by individuals and special interest organizations, epitomized by the ACLU, who are offended by veterans memorials because they contain a Cross or other religious symbol, or a prayer, as in the Mojave Desert Veterans Memorial case *(Buono vs. Norton),* and the Mt. Soledad National War Memorial litigation in San Diego, which has become a focus of national controversy in light of the fact that, on the one hand, a federal judge has ordered the City of San Diego to tear down the cross which has stood at the memorial for more

than half a century or he will fine the taxpayers $5,000 a day; and, on the other hand, a California Superior Court Judge overturned a special election in which 76% per cent of the voters voted to transfer the Mt. Soledad National War Memorial to the federal government. The attorney for the plaintiff in the case, reportedly backed by the ACLU, has collected thousands of taxpayer-paid dollars in attorney fee awards in that case.

In the Mojave Desert Case, the solitary cross, erected on a rock outcrop eleven miles off the road in the desert by veterans in 1934 to honor World War I veterans, has been declared to be an unconstitutional violation of the Establishment Clause because in 1994 it was incorporated into the Mojave Desert Preserve. Although Congress passed legislation sponsored by Rep. Jerry Lewis, my Representative in California, to transfer the one-acre Mojave Desert Veterans Memorial to private parties, veterans, in exchange for five acres of private land, the federal judge, on motion of the ACLU, nullified the act of Congress, finding its action violates the Establishment Clause, and ordered the Executive Branch to tear down the Cross. That case is on appeal. So far, the ACLU has reaped $63,000 in attorney fees to destroy that veterans' memorial.

These veterans' memorials deserve to be defended, and The American Legion is ready and able to do so. But the threat of imposition of attorney fees creates a bar to intervention in these case with full party status not only against the public entities which cannot risk imposition of attorney fees, but private non-profit organizations like The American Legion which have fiduciary obligations to their members and cannot effectively exercise the right to petition for redress in Establishment Clause cases because of the risk that devastating attorney fees may be imposed.

The enormity of the threat of imposition of fees by courts should not be discounted. For but a few examples:

- In its Establishment Clause lawsuit against San Diego to drive the Boy Scouts out of Balboa Park, the ACLU received some $950,000 in attorney fees when the City settled rather than risk even more attorney fees being awarded in the litigation.
- In the Ten Commandments Case in Alabama, the ACLU and sister organizations received $500,000 in attorney fees.
- In Washington State, the ACLU received $108,000 from the Portland School board in a case brought for an atheist to prevent the Boy Scouts from recruiting in the schools on non-class time.
- In Illinois, the ACLU brought suit against the Chicago Schools to drive out the Boy Scouts out of the schools, and the Department of Defense to drive the Boy Scouts off military bases as sponsored troops. The Chicago schools quickly kicked out the Boy Scouts and settled $90,000 on the ACLU to avoid even larger court-awarded fees. The DoD entered a partial settlement, and the case continued, resulting in a federal judge finding that the DoD aid to the Boy Scout Jamboree, supported by every U.S. President since its inception, is in fact a violation of the Establishment of Religion Clause. ACLU is seeking attorney fees under the Equal Access to Justice Act in that case.
- In Nebraska, a federal judge overturned a referendum in which 70% of the voters voted to define marriage as a union of a human male and female, and imposed attorney fees of some $156,000.
- In Los Angeles County, the Board of Supervisors voted 3-to-2 to remove a tiny cross from the County Seal when the ACLU threatened to sue over it (but not over the Roman Goddess Pomona whose figure dominated the Seal). The County will spend approximately $1 million to remove the cross from all flags, seals, badges, etc. The rationale for the three who voted to surrender to the ACLU: The threat of an even greater amount ordered in attorney fees to the ACLU if the County fought and lost.
- The City Council of Redlands voted, unwillingly, to remove the cross from its City Seal when the ACLU threatened lawsuit. The sole reason given for the vote: The fear of a court-awarded attorney fees to the ACLU being imposed on limited taxpayer-funds needed for city services. Redlands cannot afford to change all of the seals as L.A. County is doing. Therefore, among other things, Redlands is calling in all employees who have badges, police, fire, emergency services, et al., and drilling a hole through the Cross on the badges to comply with ACLU's demands.
- In the Mojave Desert WWI Veterans Memorials case, the ACLU pleaded for fees under both the Civil Rights Act, 42 U.S.C. Section 1988, and EAJA, and ultimately received some $63,000 in attorney fees under the EAJA.

A recent case exemplifies, I believe, the abuse and exploitation of the Civil Rights Act attorney fee provisions for pure profit by the ACLU, and the ACLU's use of the Civil Rights Act to terrorize local elected bodies.

That case is the now famous "Dover Design Theory Case." There, the ACLU sued the Dover school board after it voted to include teaching of the "design theory" along with Darwinian theory in science classes. The ACLU was represented by a cooperating, pro bono law firm.

Whatever one thinks of the "design theory" or the merits of the case, the attorney fee outcome should be carefully considered. The judge ruled that the teaching of "design theory" violates the Establishment Clause. The court then awarded the ACLU $2 million in attorney fees to be paid by the school board from taxpayer-funds needed for the schools.

The court imposed this massive attorney fee award on the taxpayers and schools even though the pro bono law firm representing the ACLU declared that in fact it waived all attorney fees. Thus, the $2 million is pure profit for the ACLU.

The ACLU added to this set of facts the following: The ACLU announced to the media after its victory over the school board that it was only going to demand that the school board pay it $1 million instead of $2 million. The ACLU stated it was doing so because the school board members who had voted for the teaching of "design theory" had been removed from the school board in elections and replaced by school board members who agreed with the ACLU's position.

Thus, the ACLU announced it would not "punish" the school board by demanding the full $2 million.

However, it publicly warned that it would not be so benevolent in the future if any other school board did not comply with ACLU's demands.

I respectfully suggest there could not be better evidence of the need for PERA, nor better evidence that the ACLU is exploiting the Civil Rights Act for profit and using its attorney fee provisions as a club to "punish," in ACLU's own words, elected local agencies, than the very public statements of the ACLU in the Dover Design Case.

As one who was active in what was once called the Civil Rights Movement, and one who in that movement supported and fought for the attorney fee provisions of the Civil Rights Act and EAJA, and as a former ACLU attorney, I am personally appalled and ashamed at the ACLU's disgraceful abuse of the Civil Rights Act for its own political and economic gain. People fought, and some died, in the civil rights movement for these laws to benefit the poor and make real the promise of our American freedoms. What is happening is shameful.

Congress should end this abuse.

The American Legion is strongly in support of passage of PERA, and similar reform of the EAJA and all federal fee-shifting statutes in Establishment Clause cases, as an absolutely necessary reform of the law to preserve and protect our civil and constitutional rights, and to protect the integrity of the Civil Rights Act, EAJA, and related acts.

At the American Legion National Convention in 2004, more than 4,000 delegates voted unanimously for Resolution 326, Preservation of Mojave Desert Memorial, which I wrote and which calls on Congress to amend the Civil Rights Act, 42 USC Section 1988 to eliminate the authority of judges to award attorney fees to the ACLU, or anyone else, in Establishment Clause cases. (See, Attachment.) At that time, Past National Commander Thomas P. Cadmus of Michigan called on "all Legionnaires, and all Americans, to stand up to the ACLU and defend our American values."

At the American Legion National Convention in 2005, delegates unanimously voted to adopt Resolution 139, to amend the EAJA in the same way as the Civil Rights Act to eliminate the courts' power to impose attorney fees in Establishment Clause cases when the federal entities are the defendants, as in the Boy Scouts Jamboree case. (See, Attachments.)

American Legion National Commander Thomas Bock, the primary spokesman for The American Legion in all matters, including PERA, vowed upon his election at the 2005 National Convention that The American Legion would stand and fight to defend our veterans memorials, our American values generally, and to support passage of PERA against the terrorizing litigation attacks of the ACLU and others.

In 2006, under National Commander Bock's leadership, The American Legion published "In the Footsteps of the Founders," explaining why PERA is needed. It was sent to all 15,000 American Legion Posts along with additional material on DVD.

In his recent call for defense of the Mt. Soledad National War Memorial, Commander Bock stated:

"What is next? Will the ACLU target the 9,387 crosses and Stars of David honoring World War II heroes killed during the invasion of Normandy? The Public Expression of Religion Act, H.R. 2679, may be the only way to stop this assault."

The American Legion does mean to stand and fight to defend our veterans' memorials against Establishment Clause litigation assaults. But we need a level playing field—and that means the end to one-sided risks of attorney fee awards to the ACLU, or others, but not against the ACLU or others, because, under decisional law, the fees do not go to the "prevailing party" because, when the ACLU loses, it is shielded from fee transfer unless it can be shown the suit was legally frivolous because the filing of a lawsuit against a governmental entity is itself a First Amendment right.

With regard to Commander Bock's reference to the American Cemetery at Normandy Beach, may I close with a personal observation which, I believe, reflects what is really at stake, and how much defense of veterans memorials means to us.

I am proud to be a member of Memorial Honor Detail, Team 12, Riverside Post 79, at Riverside National Cemetery, the home of the U.S. National Medal of Honor Memorial, and the U.S. National POW/MIA Memorial, the centerpiece of which is a dramatic sculpture of a prisoner of war by artist and Legionnaire Lewis Lee Millett, Jr., a veteran who waived the entire $100,000 artist's commission so the funds could be used to complete the memorial surrounding the sculpture.

We fear that that sculpture in the National POW/MIA Memorial may become a target of an Establishment Clause lawsuit, because artist, veteran, Legionaire Lee Millett, Jr., engraved the POW's Prayer at the base: "I look not to the ground, for I have no shame. I look not to the horizon, for they never came. I look to God, I look to God . . ."

There are more than 80,000 gravesites at Riverside National Cemetery now, almost all with a Cross or Star of David or other religious symbol. We fear for them, too. The ACLU has said it would not sue the grave markers because that is a matter of "family choice." That, constitutionally, is utterly specious: If the religious symbol is unconstitutional under the Establishment Clause because it is on federal ground, as the ACLU otherwise insists, no person can "choose" to commit an unconstitutional act. Further, who would have dreamed the ACLU would file a lawsuit against the solitary cross honoring WWI veterans in the middle of the desert to which one has to drive to be offended.

MHD Team 12, Riverside Post 79, is the first volunteer team to perform more than 1,200 military honors services for our fallen comrades.

The Captain and founder of Team 12 is Robert Castillo, who is a Native American who has served in many Legion offices in California and has led practically all 1,200 MHD Team 12 services at RNC, carrying the American Flag to lead the processions.

Robert Castillo, as a teenager, participated as a member of the United States Navy in the D-Day landing at Normandy Beach on June 6, 1944. He fought on both Omaha and Utah beaches. His ship was sunk. He was terribly wounded, and received a Purple Heart among other medals.

On the anniversary of D-Day, June 6, 2006, Robert Castillo, who is affectionately known as "Uncle Bobby" by Legionnaires throughout California, led MHD Team 12 through six military honors services, in heat that reached 100 degrees. He never wavered in those services; he has never wavered in service to America as a teenager on D-Day, nor any day since, as he continues to serve America in The American Legion.

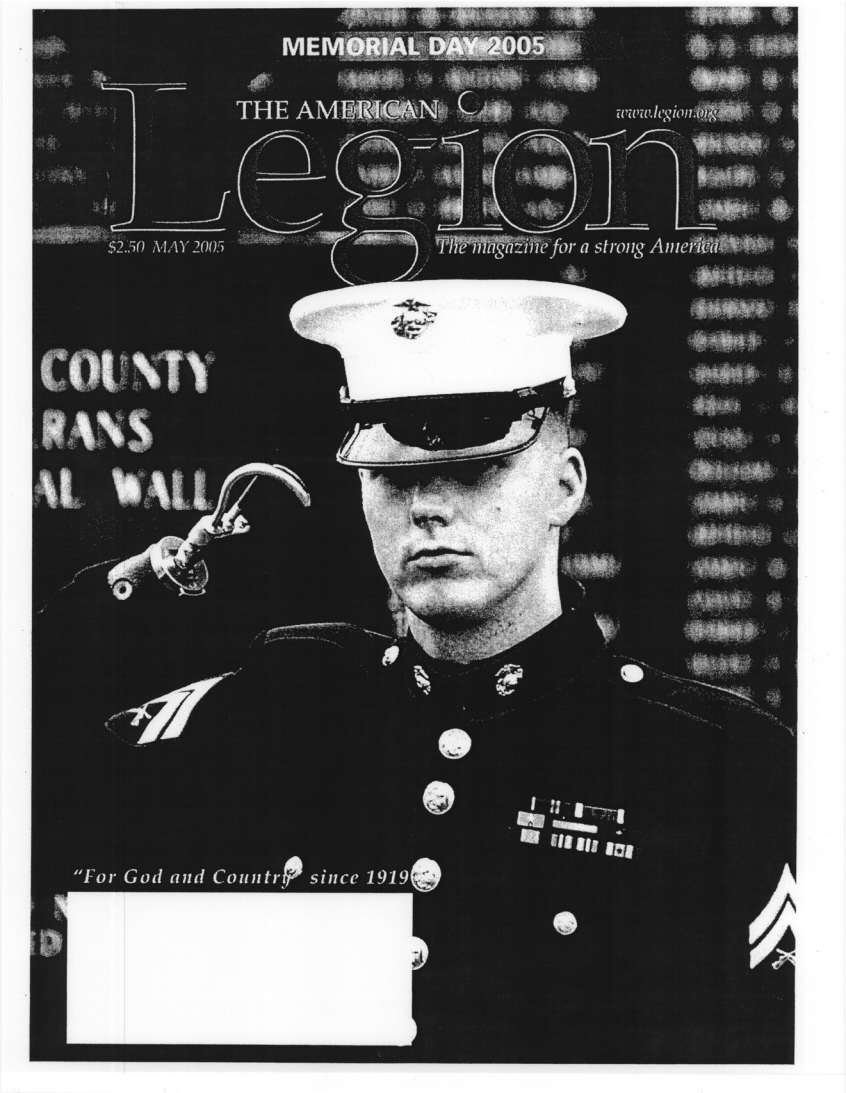
He asked me to convey to this Committee, and this Congress, his support for PERA, and his common-sense view which I believe reflects the view of almost all the 2.7 million members of The American Legion:

"How can they give our tax money to the ACLU to sue our veterans memorials? I don't understand it. It's wrong. They shouldn't be allowed to do this. Are they going to sue our cemetery at Normandy Beach, and then take our money for doing it? We can't let them do that. *My buddies are buried there.*"

If you heed no other voice, I would appeal to you to hear the voice of Legionnaire Robert Castillo, and reform the law by passing PERA, and comparable reform of EAJA and all other federal fee statutes in Establishment Clause cases. Do not allow the law to be exploited for profit in attacks under the Establishment Clause against our veterans' memorials and cemeteries. Give us the level playing field needed to allow us to defend the memorials, and gravesites, of our fallen American heroes.

I thank you for allowing me to testify on behalf of The American Legion.

ATTACHMENT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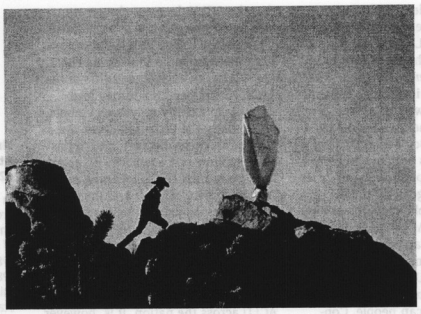


A cross to honor fallen World War I veterans is covered up in the Mojave National Preserve after legal pressure from the ACLU.
Christine Wetzel

The Law Against Values

Attorney Rees Lloyd argues the ACLU should not collect profits from taxpayer-funded fees.

In a remote area of the Mojave Desert, atop a rock outcrop, stands a lone cross. Just two pipes tied together, it was erected by a private citizen in 1934 to honor the service of World War I veterans. But when President Clinton issued an order incorporating the site into the Mojave National Preserve, the American Civil Liberties Union saw a golden opportunity. In 2000, the organization filed a federal suit on behalf of retired Forest Service employee Frank Buono of Oregon, who claims to suffer a civil-rights violation every time he drives back to California and sees the cross. A district court ruled for the ACLU and ordered the cross removed.

So far, due to Civil Rights Act, 42 U.S. Code Section 1988, the ACLU has made $63,000 in attorney fees off the case. Although Rep. Jerry Lewis, R-Calif., succeeded in passing legislation swapping land with a private owner and placing the cross on private land, to be cared for by veterans, the ACLU is back in court trying to nullify the deal as a First Amendment violation.

Los Angeles Daily Journal

Rees Lloyd

Longtime civil-rights attorney Rees Lloyd believes Congress never intended such abuse of the law. A past commander of San Gorgonio Post 428 in Banning, Calif., he authored American Legion Resolution 326, which calls on Congress to amend 42 U.S.C. Section 1988 and end judges' authority to award attorney fees in cases brought to remove or destroy religious symbols. In a recent interview, Lloyd explained the purpose of the law and how the ACLU exploits it to impose a secular agenda.

The American Legion Magazine: *What is 42 U.S.C. Section 1988, and how does the ACLU profit from it?*

Rees Lloyd: The Civil Rights Attorney Fee Act was intended to provide an incentive to attorneys to take on representation of victims of civil-rights violations who could not afford legal counsel and thereby to fulfill the promise of the Civil Rights Act and

certain specified federal statutes. Instead, its good intentions have been exploited by the ACLU to reap enormous profits through what I believe is manifestly *in terrorem* – terrorizing – litigation to enforce its secular political, cultural and social will on elected officials and the American people by lawsuits attacking Boy Scouts and every symbol of America's religious history and heritage in the public square.

While the language of 42 U.S.C. Section 1988 is simple, it has been used and abused by the ACLU, as construed by other unelected lawyers, i.e., judges, who hand out enormous hourly attorney fees to the ACLU in such a way as to defeat the intent of elected representatives of the American people, Congress, and to terrorize elected officials at local levels to cower and surrender.

Q. *How much has the ACLU received through taxpayer-funded attorney's fees?*
A: The ACLU, posturing to the public that it acts on principle and pro bono, in the public interest and without fee, in fact has raked in enormous profits in lawsuits brought under the "establishment clause."

These lawsuits are nationwide, coast to coast, and run literally into millions of dollars in the pockets of the ACLU in "attorney fee awards" – although in fact neither the ACLU nor its mascot plaintiffs have incurred any actual attorney fees.

As a onetime ACLU staff attorney, I know that the ACLU recruits attorneys to take on its cases without fee, and that the ACLU does not charge attorney fees to the persons it uses as plaintiffs.

Large firms often provide attorneys from their pro bono units at no cost to the ACLU; the mascot plaintiffs of the ACLU in fact pay no attorney fees; lawsuits to destroy religious symbols, particularly the Christian cross, are as easy as shooting ducks in a barrel as judges follow precedent, in "judge-made law" pertaining to the meaning of the "establishment clause"; and the ACLU achieves its secular political aims, laughing all the way to the bank.

As to the total amount reaped by the ACLU, I do not know of any definitive study that has gathered up all the attorney-fee awards granted to the ACLU across the nation. It is, however, in the millions.

Q: *Why won't judges deny these fees to the ACLU?*
A: Congress did not require judges to award attorney fees under 42 U.S.C. Section 1988. Congress made attorney-fee awards purely discretionary. Judges have interpreted that to mean that a prevailing party is to receive "reasonable" attorney fees, even if there are in fact no actual attorney fees. "Market rate" is used. In large cities, that can be a starting point of about $350 an hour.

So, in practice, what is a "reasonable" attorney fee? Whatever one lawyer, i.e., a judge, wants to give to another lawyer, taxpayers be damned.

As far as is known, not one single judge has ever simply dared to say "no" to the ACLU. Why should they? They are

The Civil Rights Attorney Fee Act, 42 U.S.C. 1988

"In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title ... [other statutes omitted] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Eighty-five years of the ACLU

1920 – Socialist Roger Baldwin (right) founds the American Civil Liberties Union as a nonpartisan organization devoted to the defense of civil liberties guaranteed in the U.S. Constitution.

1925 – The ACLU represents plaintiff John T. Scopes in a trial challenging a Tennessee law prohibiting teachers from giving lessons on evolution in state-supported schools and universities.

1940 – Because so many ACLU members have communist affiliations, the organization is criticized as a communist front. It bars from leadership positions anyone supporting totalitarianism.

1943 – In *West Virginia State Board of Education v. Barnette*, the U.S. Supreme Court declares the board's resolution ordering students and teachers to salute the flag as unconstitutional.

1954 – The ACLU files an amicus brief in *Brown v. Board of Education*, in which the Court rules that school segregation denies equal protection of the law to black students and is unconstitutional.

1963 – In *Abington School District v. Schempp*, the Court rules that the "establishment clause" forbids

lawyers handing taxpayer funds to other lawyers; the fox is in the chicken coop.

Congress should take back the authority it gave to award such fees and forbid them in cases under the "establishment clause." If such cases must be brought by the ACLU, it should have at least the decency to pay its own way.

"The ACLU is the advance guard of secular totalitarianism in America. I am thankful that The American Legion is finally exposing the ACLU. Their hordes of lawyers have bullied everyday, hardworking Americans far too long."

– Retired U.S. Army Maj. Gen. Patrick Brady, recipient of the Medal of Honor and board chairman of the Citizens Flag Alliance, Inc.

Q: *Hasn't the ACLU done some good in the past? When did it cross the line?*

A: I am not an inveterate ACLU-hater. I believe that the ACLU, in the past, did much good, and still can, in defending freedom of speech, which I believe was its primary mission. Many of the early free-speech cases, especially in the area of labor when unions were forming, were won by ordinary working people defended by the ACLU. That I respect and admire.

While I respect that early work of the ACLU, I believe whatever good it did in the past has been vitiated by the harm it has done in the present by its fanatical secularism and apparent abandonment of common sense.

I was admitted to the bar in November 1979 and worked at the ACLU for approximately two years. At that time, there was not a "church-state project" and if there was a focus of "separation of church and state," I was not aware of it, perhaps because of my concentration on rights in the workplace.

But then Hollywood money came in to fund church-state litigation at the ACLU of Southern California. Norman Lear and other millionaires poured money into the ACLU. That influx of Hollywood money, I believe, marked what I now perceive as a crossing of the line into fanatical secular attacks on every symbol of America's religious history and heritage in the public square.

Q: *Many charge the ACLU with being "anti-Christian." Is this true?*

A: The ACLU is much too politically correct to ever be expressly or rhetorically anti-Christian. It would react with horror to the suggestion that it is impure. But it is objectively anti-Christian. It is indicted by what it does, not by what it says.

The ACLU is quintessentially secular. I totally disassociate myself from attacks on the ACLU that say it is a Jewish organization with an anti-Christian bias. The ACLU's faith is not in Judaism, it is in secularism.

It has to be recognized that the ACLU's mission is political. It is an organization of elitists convinced of their sincerity, goodness, intelligence and right to social-engineer American culture and government without ever having to be elected by the people they would govern, and to accomplish their purpose through people like themselves: equally elitist lawyers sitting as judges over mere mortals.

What common sense would dictate a lawsuit against that lone cross in the Mojave Desert honoring World War I veterans? And persecuting the Boy Scouts? The philosopher George Santyana once said, "Fanaticism is the doubling of passion, while halving reason." There you have modern ACLU fanaticism.

---

state-mandated reading of the Bible or recitation of prayer in public schools.

1966 – In *Miranda v. Arizona*, the ACLU argues that suspects in custody have a right to a lawyer and the right not to incriminate themselves.

1973 – The ACLU places a full-page ad in *The New York Times* calling for President Nixon's impeachment. The ad invites readers to join, and more than 25,000 new members sign up.

1978 – In *Village of Skokie v. National Socialist Party*, the U.S. Supreme Court rules that the Nazi Party cannot be prohibited from marching peacefully simply because of the content of its message.

1983 – In *City of Akron v. Akron Center for Reproductive Health*, the ACLU's Reproductive Freedom Project challenges a state ordinance restricting access to abortions.

1985 – Alabama's statute allowing time for "voluntary prayer" is ruled an unconstitutional endorsement of religion by a state.

1987 – In *Edwards v. Aguillard*, the ACLU challenges a Louisiana law allowing the teaching of "creation science." The Court declares the law unconstitutional, holding that the law's original purpose was

Res. 326 (National Convention, 2004)

Urges Congress to amend 42 U.S.C. Section 1988, to expressly preclude the courts from awarding attorney fees under that statute, in lawsuits brought to remove or destroy religious symbols.

The Boy Scouts are not the enemy of America. Veterans and memorials that mark their service to the nation are not the enemies of America. Symbols of our American religious history and heritage in the public square are not threats to our American freedom. Those symbols which the ACLU now so fanatically attacks are but reminders of our American roots, our American heritage, the foundation from which this magnificent edifice of American freedom arose.

Q: *Can 42 U.S. Code 1988 be changed?*
A: Congress must take the lead to clarify 42 U.S.C. 1988 to exclude lawsuits related to acknowledgement of God. Besides The American Legion, many organizations desire to see the statute modified, such as CourtZero.org, Alliance Defense Fund, Thomas More Law Center, American Center for Law and Justice, The Rutherford Institute and Stop the ACLU Coalition.

In the 108th Congress, on Nov. 21, 2003, U.S. Rep. John Hostettler, R-Ind., introduced a bill, H.R. 3609, titled "Public Expression of Religion Act of 2003" that would restrict remedies under 42 U.S.C. 1988 in establishment clause litigation to injunctive relief. The congressman intends to reintroduce the bill in the 109th Congress.

Q: *American Legion Res. 326 calls for Congress to reform 42 U.S. Code 1988. What can Legionnaires do to help?*
A: American Legion Resolution 326, Preservation of the Mojave Desert World War I Memorial, is a concrete measure with which we can stand up to the ACLU and not merely complain. It calls on Congress to amend 42 U.S.C. 1988 to rescind the authority to award attorney fees it gave to judges in cases under the "establishment clause" to "remove or destroy religious symbols."

All Legionnaires, all veterans, all Americans, should unite behind this simple measure, across party and ideological lines, to demand reform and to end this abuse by which the ACLU has waged war against the Boy Scouts, all symbols of our American religious heritage, and now even veterans memorials.

No one should doubt the threat that the ACLU's lawsuit against the Mojave Desert veterans memorial represents: it is the first time in history that private parties have been allowed to sue a veterans memorial to remove a religious symbol. The same legal principles the court followed under the "establishment clause" to order that solitary cross in the desert removed are applicable to all the crosses and Stars of David in our national cemeteries, and the 9,000 at Normandy Beach.

Communicate with your post, district, area, department and National Commander Thomas P. Cadmus. Communicate your support to amend this law to your elected officials. Demand to know where they stand on the issue.

Interview: Matt Grills

Article design: Doug Rollison

"clearly to advance the religious viewpoint."

1989 – In *Texas v. Johnson*, the Court rules that burning the U.S. Flag is symbolic speech protected by the First Amendment.

In *Allegheny County v. Greater Pittsburgh ACLU*, the Court rules that nativity scenes alone cannot be displayed on courthouse steps.

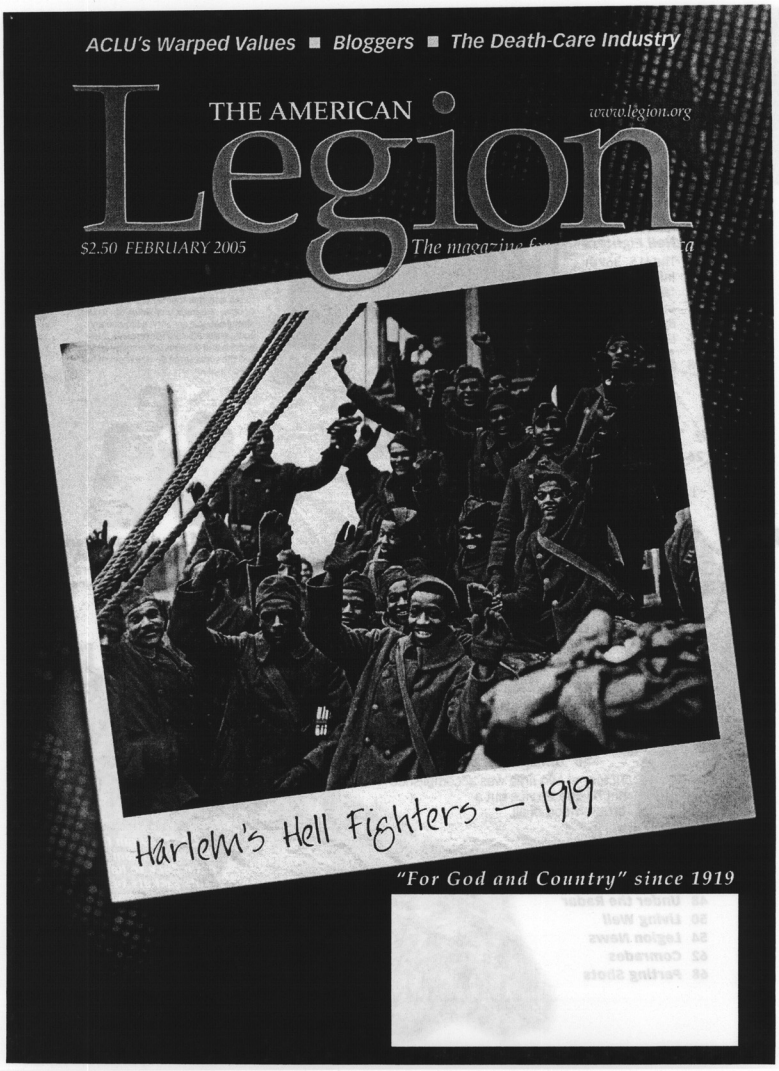
1992 – In *Lee v. Weisman*, the Court rules that clergy-led prayer as part of an official public-school graduation ceremony violates the "establishment clause."

1996 – In *United States v. Virginia*, the Court rules that Virginia Military Institute's exclusion of women denies equal protection under the law.

1999 – In just 20 years, the ACLU's income grows from $3.9 million to a record $45 million. Its endowment fund grows from $780,000 to $41 million.

2000 – In *Santa Fe Independent School District v. Doe*, the Court rules that student-initiated prayer on state-run school ground at football games violates the "establishment clause."

Sources: Lectlaw.com; ACLUprocon.org; others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Harlem's Hell Fighters — 1919
"For God and Country" since 1919

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The American Legion Magazine, a leader among national general-interest publications, is published monthly by The American Legion for its 2.7 million members. These wartime veterans, working through 15,000 community-level posts, dedicate themselves to God and Country and traditional American values; strong national security; adequate and compassionate care for veterans, their widows and orphans; community service; and the wholesome development of our nation's youth.

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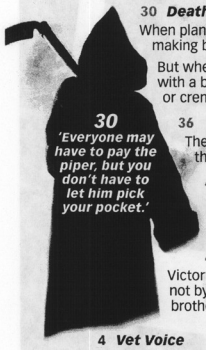
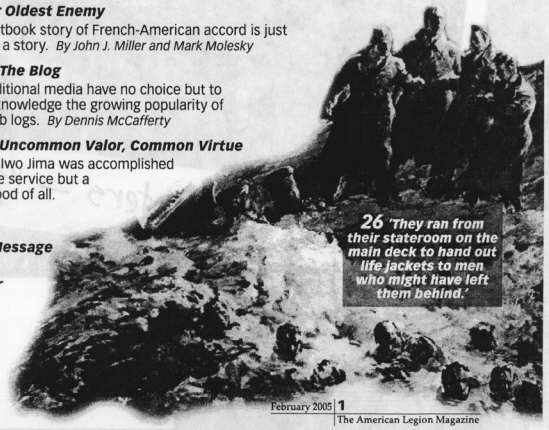
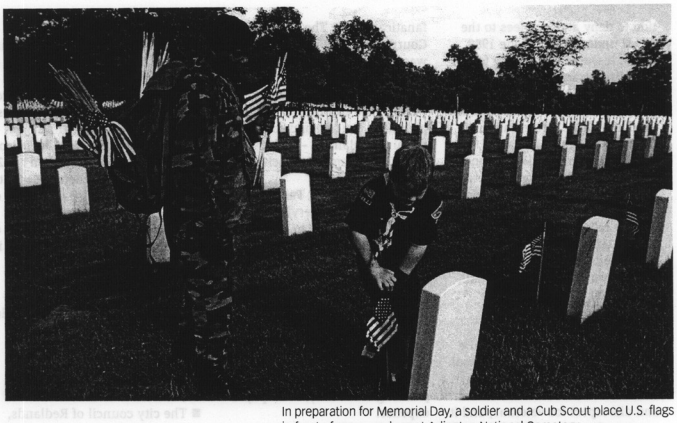


30 ***'Everyone may have to pay the piper, but you don't have to let him pick your pocket.'***



26 ***'They ran from their stateroom on the main deck to hand out life jackets to men who might have left them behind.'***



In preparation for Memorial Day, a soldier and a Cub Scout place U.S. flags in front of grave markers at Arlington National Cemetery. ZUMA Press

Legion stands up for Scouts after ACLU-DoD settlement

BY REES LLOYD

American Legion National Commander Thomas Cadmus recently called on government officials to "stand up to the ACLU," fueling a firestorm of protest against fanatical *in terrorem* litigation by the American Civil Liberties Union against the Boy Scouts, the Mojave Desert Veterans Memorial and every public expression of America's religious history and heritage.

The call from the Legion's top official came in a blistering public denunciation of the Defense Department announcement that it would order military units worldwide not to sponsor Boy Scout troops, a partial surrender to an ACLU lawsuit filed in Illinois in 1999. Cadmus asked publicly, "What are the courts doing? ... Where is the outrage?"

The public generally does not know the ACLU is profiting in such cases by millions of dollars in taxpayer-paid "attorney fee awards" authorized under the Civil Rights Act, 42 U.S. Code Sec. 1988.

While the law was paved with good intentions – to ensure legitimate victims of civil-rights violations could obtain representation – it has been exploited by the ACLU in First Amendment "establishment of religion clause" cases in which there are, in fact, no attorney fees incurred by the ACLU or its plaintiffs, who appear to be "mascot plaintiffs" with *de minimis* claims like "Oh my God, I saw a cross!"

Elected and appointed officials at the local, state and federal levels have been literally terrorized from standing up to the ACLU in fear of enormous attorney fees being imposed by unelected judges not answerable to the taxpayers. As far as is known, not a single American judge has had the courage to exercise discre-

tion to deny attorney fees to the ACLU under 42 U.S. Code 1988, which is the sole authority for awarding attorney fees.

Delegates at the National Convention 2004 unanimously adopted Resolution 326, "Preservation of the Mojave Desert Veterans Memorial," which calls on Congress to amend the law and end judges' authority to award attorney fees in cases brought "to remove or destroy religious symbols."

The Department of California sponsored Resolution 326 after a federal court in Riverside, Calif., for the first time allowed the ACLU to pursue a precedent-setting lawsuit to remove a solitary cross at what is now the Mojave Desert Veterans Memorial.

That case, *Buono v. Norton*, illustrates the ACLU's fanaticism and disrespect for veterans, and it exposes the threat of further legal attacks on veterans' memorials by the ACLU or others.

In 1934, a private citizen strapped two pipes together to form a cross and mounted it on a rock outcrop in a remote, privately owned area of the Mojave Desert. The purpose was to honor the service of World War I veterans. President Clinton, as one of his last acts, issued an executive order incorporating the area in the Mojave National Preserve. The ACLU seized on that fact to file a federal suit to remove the cross in 2000. A district court ruled for the ACLU and awarded it more than $40,000 in attorney fees.

Veterans protested, and Rep. Jerry Lewis, R-Calif., who represents the area, achieved legislation officially establishing the site as the Mojave Desert Veterans Memorial. The legislation authorized an exchange of the 1-acre site for five acres from a private owner, placing the memorial on private land.

However, that did not satisfy the fanatical ACLU. The Ninth Circuit Court of Appeals held the case was "not moot" because the land exchange, although legislatively authorized, was not complete. Further, the court found the lead plaintiff – the first and sole remaining plaintiff – had legal standing to complain of civil-rights injury.

The lead plaintiff, Fank Buono, is a retired Forest Service employee who later moved to Oregon, but claims civil-rights violation and injury because he sees the cross when driving back on visits. ACLU's attorney fee award for representing him was increased to $63,000.

Upon such *de minimis* dross as this is constitutional law being made by judges, and the ACLU is profiting financially, at taxpayer expense.

They're still at it. The ACLU filed a motion in District Court in December to declare the land exchange unconstitutional, claiming it doesn't comply with the spirit of the injunction.

Other examples of ACLU abuse are multiple, nationwide and glaring:

■ The ACLU reaped some $940,000 in settlement from the City of San Diego when it surrendered in ACLU's litigation to kick the Boy Scouts out of Balboa Park. The Boy Scouts are appealing. The American Legion has filed a friend-of-the-court brief supporting the Scouts.

■ The ACLU received some $500,000 to drive the Ten Commandments out of the courthouse of Alabama Judge Roy Moore, notwithstanding the fact that the same Ten Commandments are on the massive doors and the wall of the U.S. Supreme Court itself.

■ Portland Public Schools were ordered to pay the ACLU $108,000 in a case brought for an atheist who objected to the Boy Scouts being allowed to recruit during non-class time. At the time of this writing, Portland is considering a complete ban.

■ The Los Angeles County Board of Supervisors, over the vigorous objection of Supervisor Michael Antonovich, joined by Supervisor Don Knabe, surrendered on a 3-2 vote to the ACLU's demands that it change the county seal because of a tiny cross in one small panel representing the mission period of its history. The ACLU, exposing its hypocrisy as well as fanaticism, did not demand removal of the central religious figure dominating the seal – "Pomona," the Italo-Roman goddess of poma, i.e. fruits. A citizens' initiative petition is ongoing to place the issue on the ballot and overturn the surrender to the ACLU.

■ The city council of Redlands, Calif., reluctantly surrendered to the ACLU's demand that it change its city seal to remove a cross, for fear of court-ordered attorney fees to the ACLU.

Simply put, it is clear the ACLU has gone too far, exploiting the Civil Rights Act, 42 U.S. Code 1988, to enrich itself and carry out *in terrorem* litigation to compel surrender to its demands from elected and appointed officials who fear judge-awarded attorney fees.

Claims by ACLU defenders that the organization once did public good in defending free speech, are vitiated by its fanaticism in self-enriching terroristic litigation and self-appointed social engineering in the present.

American Legion National Resolution 326 calls for Congress to reform 42 U.S. Code Sec. 1988 to take the profit out of such terroristic litigation. This can be a powerful weapon in the effort to stop such abuses. It will take a united, determined effort by the American Legion family, other veterans, an aroused citizenry

and courageous elected officials.

The legal principles used by the ACLU to sue against the single cross at the Mojave Desert Veterans Memorial are applicable to the 9,000 crosses and Stars of David at Normandy, along with those in every national cemetery.

If Congress does not act, nothing in the law will prevent Islamist terrorists in the United States, or their sympathizers, from using the ACLU precedent to sue veterans' memorials or the Boy Scouts, or anyone else over expressions of America's religious history and heritage. And nothing stops the ACLU from collecting millions of taxpayer dollars as attorney-fee awards.

Commander Cadmus has sounded the tocsin. "We are determined to stand up to the ACLU and, as first step, to demand that Congress end the appalling practice of awarding attorney fees in the millions of dollars to the ACLU at taxpayer expense so they can use the courts to destroy American values."

Rees Lloyd, a longtime civil-rights attorney, is past commander of American Legion San Gorgonio Pass Post 428 in Banning, Calif., and the author of Resolution 326. He was an ACLU of Southern California staff attorney for two years after graduating from law school in 1979.

Article design: Doug Rollison

'Where is the outrage?'

DoD's settlement with ACLU launches Legion-led national debate, media barrage.

The American Legion, according to one headline, was "aghast," and the Department of Defense was "humbled," by the American Civil Liberties Union last November. DoD agreed to partially settle a five-year-old lawsuit brought by the ACLU to prohibit sponsorship of Boy Scout programs at U.S. military installations. The settlement, reportedly handled by subordinates of Defense Secretary Donald Rumsfeld, came two weeks after attention to values was widely attributed to President Bush's re-election. The agreement ignited a fiery national debate pitting the values of God and country against the constitutional interpretations of the ACLU, whose civil-rights activism was cast by some as a form of "legal terrorism."

In 1999, the ACLU of Illinois sued the DoD, the Department of Housing and Urban Development and the Chicago Board of Education for sponsoring Boy Scout programs because participation includes an oath that has the words, "On my honor, I will do my best to do my duty to God and my country…" The Chicago Board of Education soon ceased sponsorship of Scouting activities. DoD was less hasty. The U.S. military sponsors more than 400 Scout units worldwide and supports the national Boy Scouts Jamboree in Virginia to the tune of about $2 million from the Army every four years. The settlement did not address the Jamboree. But the ACLU regards the DoD decision as only "partial."

Swiftly following the announcement, talk-show TV and newspaper editorial pages brimmed with public debate over the DoD's concession. Bloggers soon joined the fray. Five days after the decision, the U.S. House of Representatives passed, 391-3, a non-binding resolution commending the Boy Scouts and condemning legal efforts to restrict government ties to them.

The following is a small sample of public expressions in the days after the decision:

"The idea that sponsorship of Scouting by American military units is 'unconstitutional' goes beyond the absurd, even well past the point of stupidity. How is it the government can fund chapels on military bases, and chaplains in the military, but not accommodate Scouting? How is it the Congress can sanction Scouting by issuing them a federal charter, but the courts can declare them 'outlaws'?

"Is there no one in Washington, D.C., at the highest levels of government that will stand up for Scouts, for Scouting and support this movement that has long been an institution of highest reputation in America? Where's the president? Where's his cabinet? Where's the Congress?What are the courts doing? Where is the outrage?"

– Letter from American Legion National Commander Thomas P. Cadmus to Defense Secretary Donald Rumsfeld, dated Nov. 16, 2004. As of late December, the secretary had not replied.

CONTINUED ON PAGE 24

'Lawyers abandoned the Boy Scouts'

"If our Constitution's promise of religious liberty is to be a reality, the government should not be administering religious oaths or discriminating based on religious beliefs."

– ACLU lawyer Adam Schwartz

"This highlights more than anything else how rabid the ACLU is about the Scouts. They want to attack the Boy Scouts of America and the Pentagon for supporting the Boy Scouts, and they want to support kids running around naked in the woods."

– Bob Bork, national spokesman for Boy Scouts of America, referring to an ACLU lawsuit filed last year in support of a proposed children's nudist camp in Virginia

"What's really happening here is, as we see it, we have young men and women ... all over the world, 120 countries, in Afghanistan and Iraq, fighting the global war on terrorism with courage and valor. And then we find out the Pentagon caves in to legal terrorism right here in our own United States."

– American Legion National Adjutant Robert W. Spanogle, interviewed Nov. 17 on Fox News' "The O'Reilly Factor"

"The new big threat to our civil liberties is a group of 10-year-olds with walking sticks."

– Columnist Collin Levey, The New York Post

"The voters of this nation, if it's a choice between expanding NAMBLA (the North American Man/Boy Love Association, which the ACLU defended in a wrongful death lawsuit brought by the parents of a 10-year-old killed by a member of the association) and preserving the Scouting movement, the voters of America want to defend the Scouting movement ... Without a shot being fired, Department of Defense lawyers apparently abandoned the Boy Scouts, threw up their hands and surrendered to the ACLU's latest radical attack on the cherished heritage and values of this nation."

– U.S. Rep. J.D. Hayworth, R-Ariz., a former Eagle Scout

"Is the Department of Defense now going to treat the Boy Scouts as some kind of a pariah organization, not worthy of any kind of support? Being a part of a group, wearing a uniform, accomplishing tasks ... all of these things are conducive to the kind of culture that is endemic in the military. And for a young man to go from Cub Scout to Boy Scout to Eagle Scout to the armed forces, that's a kind of lifetime progression ..."

– Elaine Donnelly, president of the Center for Military Preparedness

"Many of the men and women in the military who live on these bases have children who may want to be a member of the Boy Scouts. These devoted parents who serve this nation do not make much money as it is, and sadly they are sometimes asked to give their life in defense of freedom ... If a base commander decides that the base should sponsor a local chapter of the Boy Scouts for the children of these parents, why should they not be allowed to do so?"

– Rep. Walter Jones, R-N.C., in a letter to President Bush, asking for further investigation into DoD's settlement with the ACLU

"There is fresh evidence that the ACLU intends to end all federal support for the Boy Scouts of America. In their view, where there is government there cannot be faith."

– U.S. Senate Majority Leader Bill Frist, R-Tenn., after introducing his "Save Our Scouts" bill on Nov. 27 to continue federal support for Boy Scouts and Girl Scouts

"It is a national security issue. The Department of Defense has conceded to a false and atheistic notion about military conduct. A military that must avoid God upon hearing the wimpy threats of the ACLU is hardly suited to deal with those who would destroy us in the name of Allah."

– Former Eagle Scout and Web columnist Hans Zieger

EIGHTY-SIXTH NATIONAL CONVENTION
OF
THE AMERICAN LEGION
NASHVILLE, TENNESSEE
August 31, September 1, 2, 2004

Resolution No. 326: Preserve WWI Veterans Memorial In Mojave Desert
Origin: California
Submitted by: Convention Committee on Credentials and Other Internal Matters, Section II

WHEREAS, The motto of The American Legion has been "For God and Country" since its founding by veterans of World War I in 1919; and

WHEREAS, The American Legion Department of California, assembled in convention in Riverside County, California, in 2003, by vote of delegates did pass a resolution in support of legislation to officially designate as the Mojave Desert Veterans Memorial the site at which in 1934 a cross was erected in tribute to veterans; and

WHEREAS, The United States Congress passed legislation designating that site as an official veterans memorial and providing for its preservation by exchanging that one-acre site for a five acre site privately owned, thus placing the veterans memorial in private hands to be cared for by veterans organizations; and

WHEREAS, Notwithstanding that action by Congress, the United States Ninth Circuit Court of Appeals has recently ruled at the request of the American Civil Liberties Union (ACLU) that the cross at the Mojave Desert Veterans Memorial must be removed or destroyed; and

WHEREAS, The ACLU has sought and obtained hundreds of thousands of dollars in attorneys fees awarded by judges pursuant to the authority granted to the courts to award attorney fees in such cases pursuant to the Civil Rights Act, 42 United States Code, Section 1988; and

WHEREAS, The authority of judges to impose on taxpayers the burden of paying attorney fee awards to the ACLU for pursuing lawsuits to remove or destroy religious symbols derives exclusively from 42 U.S.C. Section 1988 established by Congress; now, therefore, be it

RESOLVED, By The American Legion in National Convention assembled in Nashville, Tennessee, August 31, September 1, 2, 2004, That Congress should amend 42 U.S.C. Section 1988, to expressly preclude the courts from awarding attorney fees under that statute, in lawsuits brought to remove or destroy religious symbols.

EIGHTY-SEVENTH NATIONAL CONVENTION
OF
THE AMERICAN LEGION
HONOLULU, HAWAII
August 23, 24, 25, 2005

Resolution No. 139: Amend The Equal Access To Justice Act
Origin: California
Submitted by: Convention Committee on Credentials and Other Internal Matters, Section II

WHEREAS, The American Legion assembled in National Convention 2004 at Nashville, Tennessee, by vote of delegates did adopt Resolution 326, Preservation of Mojave Desert Veterans Memorial, sponsored by the Department of California, calling on Congress to amend the Civil Rights Act of 1976 (42 USC 1988) to expressly preclude the courts from awarding attorney fees under that statute in lawsuits brought to remove or destroy religious symbols, including at Veterans memorials; and,

WHEREAS, The American Legion disapproved and sought to end the use of the Civil Rights Act as to monetary awards of attorney fees awarded in lawsuits brought under the Establishment Clause of the First Amendment to the U.S. Constitution against the Boy Scouts of America, and cities, counties, states and other taxpayer supported government entities, including school boards, for sponsoring Boy Scout Troops or for publicly displaying symbols of America's religious history and heritage; and

WHEREAS under the Establish Clause, the American Civil Liberties Union sued agencies, elected and appointed officials and employees of the Federal government of the United States, including without limitation the Department of Defense in wartime, for sponsoring the Boy Scouts of America or events connected with the Boy Scouts of America, or for publicly displaying symbols of America's religious history and heritage, including at Veterans memorials; and

WHEREAS the ACLU sought and received taxpayer-paid attorney fees by claims under the Equal Access to Justice Act (EAJA), 28 United States Code Section 2412, in said Establishment Clause lawsuits against Federal government defendants in cases involving the Boy Scouts, and including attorney fees for obtaining court orders to destroy religious symbols at military Veterans' memorials; now, therefore, be it

RESOLVED, By The American Legion in National Convention assembled in Honolulu, Hawaii, August 23, 24, 25, 2005, That Congress should amend the Equal Access to Justice Act, 28 USC2412, or any other federal statute in lawsuits brought under the Establishment Clause and to limit remedies thereunder to declaratory and injunctive relief only.

EIGHTY-SEVENTH NATIONAL CONVENTION
OF
THE AMERICAN LEGION
HONOLULU, HAWAII
August 23, 24, 25, 2005

Resolution No. 166: The Boy Scouts Of America And The Department Of Defense
Origin: Convention Committee on Americanism
Submitted by: Convention Committee on Americanism
(Consolidated with Resolution No. 72 (MT); Resolution No. 13 (WY); and Resolution No. 131 (NY))

WHEREAS, The Eighty-Second National Convention of The American Legion in Milwaukee, Wisconsin passed Resolution 334 titled "Support of Boy Scouts of America" which reiterated The American Legion's longstanding support of the Boy Scouts of America in its efforts to maintain and practice traditional family values with regard to their membership and their leadership standards; and

WHEREAS, The American Legion, as chartered by the United States Congress, pledges to "transmit to posterity the principles of justice, freedom and democracy"; and

WHEREAS, The American Legion endorses the concept that the perpetuation of these principles may best be initiated by an enlightened public achieved through the implementation of educational practices offered in the homes, in our schools and through public wide programs organized and developed for this purpose by organizations like the Boy Scouts of America; and

WHEREAS, The Supreme Court of the United States has upheld the constitutional right of the Boy Scouts of America to set their own standards and membership policies because an indispensable part of being free is the right of individuals to hold moral positions and to associate with others who share those positions; and

WHEREAS, Despite the Supreme Court having ruled in favor of the Boy Scouts' freedom to associate with those sharing their moral views and to not associate with those who do not share their moral views, the Boy Scouts have been subjected to a continual barrage of attacks by groups and individuals holding opposing views; and

WHEREAS, These opposition groups have been successful in eliminating the Scouting program from all branches and installations of the U.S. Armed Forces; and

WHEREAS, The American Legion believes that this unrelenting assault against the Boy Scouts is not a unique occurrence but a part of an orchestrated effort to denigrate, damage and systematically destroy traditional American values, as embodied in the Boy Scouts of America, The American Legion, the Flag of the United States, the Pledge of Allegiance, and numerous other embodiments of Americanism; now, therefore, be it

RESOLVED, By The American Legion in National Convention assembled in Honolulu, Hawaii, August 23, 24, 25, 2005, That The American Legion express its steadfast opposition to Department of Defense policies that prohibit the chartering of Boy Scout units by components of the Armed Forces of the United States and the use by the Boy Scouts of America of Department of Defense installations worldwide; and, be it finally

RESOLVED, That The American Legion use every executive, legislative and judicial avenue available to restore longstanding policies of cooperation between the Department of Defense and the Boy Scouts of America that will allow Boy Scout units the right to use DoD facilities and to authorize components of the active duty military, National Guard and reserve units to charter or sponsor Boy Scout units without fear of legal reprisal.

United States House of Representatives
Committee on the Judiciary
F. James Sensenbrenner, Jr., Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(4) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: H. R. 2679, The "Public Expression of Religion Act of 2005"

Date: June 22, 2006

1. Name: Rees Lloyd, Vice Commander

2. Entity(ies) you are representing: The American Legion

3. Business Address and Telephone Number:
The American Legion, District 21
300 S. Highland Springs Avenue, Suite 6C, PMB 137
Banning, CA 92220

4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?
☐ YES ☑ NO

5. Have any of the entities that you are representing received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?
☐ YES ☑ NO

6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. *(Please use additional sheets if necessary.)*

7. Signature: Date: 06/20/2006

judi-5/2003

Mr. CHABOT. Thank you very much, Mr. Lloyd.

Mr. Staver, you are recognized for 5 minutes.

TESTIMONY OF MATHEW STAVER, FOUNDER AND CHAIRMAN, LIBERTY COUNSEL, INTERIM DEAN, LIBERTY UNIVERSITY SCHOOL OF LAW

Mr. STAVER. Thank you, Mr. Chairman, Members of the Committee. Thank you for inviting me.

Sections 1983 and 1988 are in derogation of the American rule. The American rule essentially says that each party bears his own cost for the cost of the litigation. These sections are particularly ap-

ropos in the normal civil rights cases where plaintiffs are ill-financed and where the law has some relative predictability.

However, in the Establishment Clause cases, many if not most of the plaintiffs today, based on the rise of public interest law firms, will finance the case by the public interest law firm and, therefore, there will be no opposition for these individuals to come to court if this Committee passes this particular bill.

Moreover, Establishment Clause jurisprudence is the most unpredictable and conflicting area of law today. There have been and remain sharp disagreements among the justices of the United States Supreme Court over the meaning and the application of the Establishment Clause. In an area where the law is so conflicting and the court decisions are so confusing, supporting every conceivable position to the contrary, it makes little sense to award damages and attorney's fees to plaintiffs with diametrically opposed positions on the same issue.

Instead of encouraging ill-financed plaintiffs to vindicate their rights, these statutes have become a financial bonanza to attorneys on both sides of the Establishment Clause. While conflicting court opinions will inevitably occur in any area of law, it is particularly troubling when conflicting opinions are the rule rather than the exception.

In my written testimony, I discuss in detail absurd examples of court decisions that reached exactly opposite and irreconcilable results. One sad example involves New York City public school funding cases, which were litigated at an enormous expense. The same school district that paid huge attorney's fees after losing its case at the United States Supreme Court eventually won 10 years later coming back following a second challenge.

In the *Augustini* case, the court overruled its prior precedent involving the same New York City public school district. Scarce tax dollars, however, were used to divert through attorneys rather than to disadvantaged school children. By providing damages and a fee shifting statute in such a confused area of law, the complaining plaintiff often uses the threat of attorney's fees and costs and damages to force Government officials to a desired result, whether or not the result is the right one.

The confused and conflicted opinions of the Establishment Clause jurisprudence originate with the United States Supreme Court. The Court recently used several tests—or the court currently uses several tests, some of which conflict with one another. And sometimes the Court foregoes using any test at all.

The Court uses the oft-maligned three-pronged Lemon test. The court later modified these three prongs to two prongs. But in certain institutional funding cases, the Court resurrects the third prong. For several years, the Court added the so-called "political divisiveness prong" but then recently overruled itself and eliminated this prong.

The Court also uses a historical analysis or the Marsh test. In most cases, the Marsh test cannot be reconciled with the Lemon test. The plaintiff can win under one test and lose under the other. And we are left with little guidance to determine which test should be used.

The Court in *Lee v. Weisman* developed a so-called coercion test. But the justices are not in agreement when it should be used. Nor do they agree whether it is coercion with psychological only or whether it involves some kind of penalty or force.

Knowing the problem, Justice Sandra Day O'Connor, shortly before her retirement, proposed a brand-new test in the *Newdow* case that was designed to be used in limited circumstances. Justice Thomas has recently advocated that the Establishment Clause does not even apply to the States, nor does it bind the States. Then, of course, sometimes the Supreme Court uses no test at all and, even worse, provides no explanation as to why it used no test.

If the justices of the United States Supreme Court are conflicted over the meaning of the Establishment Clause—and they are—and if professors and judges in lower courts are conflicted—and they are—then it is particularly inappropriate to punish Government officials with the threat of damages and attorney's fees for a mere misstep in this constitutional minefield.

Another peculiarity with the Establishment Clause that makes sections 1983 and 1988 inappropriate is the exception to the normal rules regarding standing. In every other area of law, the plaintiff must experience a direct and concrete injury. But in the Establishment Clause context, Federal courts have relaxed these requirements and carved out significant exceptions.

In most lower Federal courts, a plaintiff can bring a challenge to the Establishment Clause simply because the litigant claims that he or she is offended by the imagery, the words or the alleged action. This exception to the general rule has opened up the floodgates of litigation.

It is because of these floodgates of litigation and it is because of the unique situation regarding the Establishment Clause that I believe, although these statutes, 1983 and 1988, may be applicable in other areas, even first amendment free speech or free exercise, they are wholly inapplicable in the Establishment Clause.

If you talk to any judge or any professor, the issue of the Establishment Clause is the most confusing area of constitutional law.

I argued one of the Ten Commandments cases last year. And I can tell you no one can make a determination as to what the rationale is between those two cases. In one case, they used a brand-new modified Lemon test, in the Kentucky case. And in the other case, they essentially used no test at all.

One court recently on December 20, 2005, says that the Supreme Court on the Establishment Clause have left the lower Federal court judges in first amendment purgatory. For these reasons, we shouldn't punish Government officials when our own justices of the Supreme Court are conflicted and confused over the meaning of the Establishment Clause.

Thank you very much.

[The prepared statement of Mr. Staver follows:]

PREPARED STATEMENT OF MATHEW D. STAVER

TESTIMONY OF

Attorney Mathew D. Staver
Founder and Chairman of Liberty Counsel
Interim Dean of Liberty University School of Law
Before House Judiciary Subcommittee on the Constitution
June 22, 2006

Mr. Chairman, members of the committee, thank you for inviting me. My name is Mathew Staver.[1] I am the Founder and Chairman of Liberty Counsel[2] and the Interim Dean of Liberty University School of Law.[3]

I have come today to address whether federal statutes 42 U.S.C. §§ 1983 and 1988 should be amended to exclude claims arising under the Establishment Clause of the First Amendment to the United States Constitution. Sections 1983 and 1988 are designed to encourage plaintiffs who suffer deprivation of their civil or constitutional rights to vindicate those rights in a court of law. Sections 1983 and 1988 are particularly suited

1 A detailed curriculum vitae is available upon request. In reference to the relevant issue before this Committee, my specialty is constitutional litigation. I have earned B.A., M.A. and J.D. degrees, an honorary LL.D. degree, am an AV rated attorney and Board certified by the Florida Bar in Appellate Practice. I have written ten books, most of which deal with constitutional law, including a recent 572 page book devoted exclusively to constitutional law. In reference to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, the sections under consideration before this Committee, I have conducted numerous continuing education credit courses for attorneys and law professors. I have also been called to testify in federal court regarding 42 U.S.C. § 1988, and have been recognized by federal courts as an expert on Section 1988 attorney's fees. I have written numerous briefs before the United States Supreme Court and presented oral argument before the High Court twice as lead counsel.

2 Liberty Counsel is a nonprofit litigation, education and policy organization founded in 1989. Liberty Counsel has offices in Florida and Virginia and has hundreds of affiliate attorneys in all 50 states. Liberty Counsel specializes in constitutional law.

3 Liberty University School of Law was founded in 2004 and received provisional accreditation by the American Bar Association on February 13, 2006.

for those cases in which the plaintiffs are ill-financed and where the law is relatively predictable. However, in Establishment Clause cases, many, if not most, of the plaintiffs are represented by public interest law firms which will finance the case whether or not a fee shifting statute exists.

Establishment Clause jurisprudence is the most unpredictable and confusing area of law. There have been and remain sharp disagreements between the Justices of the United States Supreme Court and lower court judges over the meaning and application of the Establishment Clause. In an area of law where there are conflicting court decisions for every conceivable proposition, it makes little sense to award attorney's fees and costs to plaintiffs with diametrically opposed positions. While conflicting court opinions will inevitably occur in any area of law, it is particularly troubling when conflicting opinions are the rule rather than the exception to the rule. By providing a fee shifting statute in such a confused area of law, the plaintiff often uses the threat of attorney fees to force government officials to a desired result, whether or not that result is the right one. It is my considered opinion that Establishment Clause claims should be excluded from Section 1988.

To better understand the problem, let me first begin by reviewing the background of 42 U.S.C. §§ 1983 and 1988 and then addressing the current state of Establishment Clause jurisprudence.

I. BACKGROUND OF RELEVANT FEE SHIFTING STATUTES.

A. 42 U.S.C. § 1983.

Originally called the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [4]

Section 1983 was enacted to "create a right of action in federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal

4 42 U.S.C. § 1983 (1996).

enforcement."[5] Representative Shellabarger, the Chairman of the House Select Committee, which drafted the Ku Klux Klan Act, said that the statute was "confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights."[6] The U.S. Supreme Court in *Monroe v. Pape*, held that Section 1983 served three purposes: (1) "to override certain kinds of state laws, (2) to provide a remedy where state law was inadequate, and (3) to afford a federal remedy where the state remedy, while adequate in theory, was not available in practice."[7] Section 1983 served as the vehicle of vindication for the deprivation of another's statutory or constitutional rights. [8]

The Members of the 96th Congress that enacted Section 1983 did not directly address the question of damages, but "the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871."[9] The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available

5 H.R. Rep. No. 96-548 (1979).

6 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 164 (1970).

7 *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

8 H.R. Rep. No. 96-548.

9 *Carey v. Piphus*, 435 U.S. 247, 255 (1978).

under that section for actions found to have been violative of constitutional rights and to have caused compensable injury.[10] Section 1983 has led to the derogation of the American Rule[11] for damages, by allowing the prevailing party to recover not only damages, but attorney's fees as well.

B. 42 U.S.C. § 1988.

One of the exceptions to the American Rule is 42 U.S.C. § 1988(b), which states:

> In any action or proceeding to enforce a provision of sections 1981[12], 1981a[13], 1982,[14] 1983, 1985[15], and 1986[16] of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §

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10 *Id.*

11 BLACK'S LAW DICTIONARY (8th ed. 2004). The American rule is the general policy that all litigants, even the prevailing one, must bear their own attorney's fees; *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-262 (1975) (holding that prevailing parties in federal litigation may not recover their attorney's fees unless Congress has expressly authorized a fee-shifting statute pertinent to the case at bar.).

12 Equal rights under the law: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

13 Provides damages in cases of intentional discrimination in employment.

14 Property rights of citizens:"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

15 Provides a cause of action for conspiracy to interfere with civil rights.

16 Provides a cause of action for neglect to prevent violations of 42 U.S.C § 1985.

> 2000d et seq.], or section 13981[[17]] of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. [8]1

Section 1988, known as "The Civil Rights Attorney's Fees Awards Act of 1976," made fee awards an essential remedy for private citizens who had the opportunity to assert their civil rights.[19] The remedy of attorney's fees is appropriate in the area of civil rights.[20] "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."[21] Whether Section 1988 is appropriate in the context of Establishment Clause claims is an entirely different question. I think it is not appropriate, as I will continue to explain.

C. Equal Access to Justice Act

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17 Provides that "All persons within the United States shall have the right to be free from crimes of violence motivated by gender…"

18 42 U.S.C § 1988(b) (2000).

19 S. Rep. No. 94-1011 (1976).

20 *Id.*

21 *Id.*

Before continuing further, I need to point out another exception to the American Rule is the Equal Access to Justice Act (EAJA).[22] Under the EAJA, "courts may award reasonable attorney's fees to parties that have successfully litigated against the federal government in an action in which the government's position was not substantially justified."[23] Even if Section 1988 was amended to eliminate the award of attorney's fees, which I believe it should be, the EAJA remains a viable loophole to such a revision. Thus, I would urge this Committee to also consider similarly amending the EAJA to exclude from its purview Establishment Clause claims.

II. THE ESTABLISHMENT CLAUSE EXCEPTION TO STANDING RULES.

Section 1983's focus on civil rights claims has been expanded to cover constitutional claims, including Establishment Clause cases under the First Amendment. These claims are typically brought by public interest organizations, already financed by public, charitable support. These public interest organizations will continue to take Establishment Clause cases

22 The Equal Access to Justice Act provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1994).

23 John W. Finley, III, *Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade, Associations*, 53 J. URB. & CONTEMP. L. 243, 245 (1998).

without regard to such fee-shifting provisions. In fact, a good argument can be made that some frivolous claims will be eliminated by removing the threat of attorney's fees.

Plaintiffs bringing claims pursuant to the Establishment Clause or other Constitutional provisions must meet all three prongs of the "standing" test in *Lujan v. Defenders of Wildlife*.[24] "First, the plaintiff must have suffered an injury in fact- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[25] Simply put, the plaintiff must suffer a (1) direct and concrete injury, (2) which injury can be traced to the complained of action, and (3) which injury will be redressed by the litigation. This three-prong test

24 *Ganulin v. United States*, 71 F. Supp. 2d 824 (S.D. Ohio 1999).

25 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

helps to protect Article III courts, by ensuring that they are not giving advisory opinions, but rather are hearing only cases and controversies.[26]

Despite the *Lujan* test, lower federal courts have relaxed the standing requirements in Establishment Clause cases and have carved out exceptions to the normal standing rules that apply in every other area of litigation. In ruling on standing, the Supreme Court has held that "it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[27] In *McGowan v. Maryland*, the Court held that the standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause.[28]

The Sixth Circuit Court of Appeals has noted that First Amendment Establishment Clause plaintiffs do not bear a heavy burden, and the standing inquiry in such cases can be tailored to reflect the type of injury Establishment Clause plaintiffs are likely to suffer.[29] In *Briggs*, the court

26 *Flast v. Cohen*, 392 U.S. 82, 96 (1968). The Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

27 *Id.* at 102.

28 *McGowan v. State of Maryland*, 366 U.S. 420, 429- 30 (1961).

29 *Briggs v. Ohio Elections Com'n*, 61 F.3d 487, 492 (6th Cir. 1995).

held that there is not a heavy burden to demonstrate "a claim of specific present objective harm or a threat of specific future harm."[30] "While it is clear that abstract injury is not enough to establish standing, it is equally clear that mere offense to individual values of an abstract or esoteric nature can provide the basis for standing."[31] In cases involving the Establishment Clause, the courts have lessened the standing requirements laid out in *Lujan* to seemingly fictitious injuries. In most lower federal courts, a plaintiff can bring an Establishment Clause challenge simply because the litigant claims that he or she is offended by the religious imagery or alleged religious action.[32] This exception to the general rules of standing has opened the floodgates of litigation. In no other area of law may a plaintiff bring a lawsuit based on mere offense.

III. CONFUSING AND CHANGING INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE.

In addition to the exception to the standing rules for Establishment Clause cases, there are confusing and changing interpretations of the Establishment Clause itself. The Supreme Court currently uses several tests, some of which actually conflict with one another, and sometimes the High

30 *Id.* at 492.

31 *Id.*

32 *See* Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 491-92 (1999) (noting that the "standing doctrine shifted" to allow plaintiffs much broader access to challenge governmental acts under the Establishment Clause).

Court forgoes using any test at all. Thus, litigants, government officials and judges are left to guess at the meaning of the Establishment Clause. If the Justices of the Supreme Court are conflicted over the meaning of the Establishment Clause, then it is particularly inappropriate to punish government officials with the threat of attorney's fees and costs for a mere misstep in this constitutional mine field.

A. Overview of the Supreme Court's Various Tests.

1. The Lemon Test.

The Court in *Lemon v. Kurtzman* applied a three-part test for deciding Establishment Clause cases.[33] "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."[34]

In *Lynch v. Donnelly*[35] and *County of Allegheny v. ACLU*,[36] the *Lemon* test was refined into an "endorsement" test and narrowed to the purpose and effects prongs. The purpose test focuses on the subjective intent of the government speaker and the effects on the objective meaning of the

33 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

34 *Id.* at 612-13.

35 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

36 *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

statement to a reasonable observer.[37] The purpose prong asks "whether government's actual purpose is to endorse or disapprove of religion," and the effects prong asks "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion.[38]

2. The Marsh Test.

In *Marsh v. Chambers*,[39] the Supreme Court did not use a specific test, but rather examined the Establishment Clause from an historical perspective. After chronicling history back to the debates on the Constitution and Bill of Rights, the Court held that legislative prayers were permissible since the same statesmen, on the same day they agreed on the language of the First Amendment, authorized Congress to pay a chaplain to open each session with prayer.[40] Contemporaneous actions taken by those who framed the First Amendment are "weighty evidence" of its intent.[41] "*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise

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

38 *Id.* The entanglement prong has been subsumed into the effects prong and is concerned with "institutional" entanglement. The "political divisiveness" inquiry only applied to school funding cases, but has been discarded by cases post *Aguilar v. Felton*, 473 U.S. 402 (1985). *See Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); *Mitchell v. Helms*, 530 U.S. 793, 825-26 (2000) (plurality).

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

40 *Id.* at 786-91.

41 *Id.* at 790.

broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."[42] In many cases the outcome of the litigation will be entirely different depending on whether the Court applies the *Marsh* test instead of the *Lemon* test. There is almost no guidance when one is applicable and the other is not.

3. The Lee or Coercion Test.

The Court in *Lee v. Weisman* used yet another approach for Establishment Clause cases - a coercion test.[43] The Court held that "government may not coerce anyone to support or participate in religion or its exercise" or to act in a way that establishes a state religion, or tends to do so. The Court found that public school officials compelled young students to participate in "an overt religious exercise."[44] Justices of this Court have indicated at various times that coercion is part of the Free Exercise Clause but not the Establishment Clause, have discussed coercion as though it is part of the Establishment

42 *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part, dissenting in part).

43 *Lee v. Weisman*, 505 U.S. 577 (1992).

44 *Id.* at 587-88.

Clause, or have stated that coercion alone is insufficient.[45] Even within one test, the United States Supreme Court is conflicted and confused as to its application.

4. A New Test and No Test.

Justice O'Connor proposed a new test for Establishment Clause cases in *Elk Grove Unified School District v. Newdow*.[46] Justice Thomas has written that the Establishment Clause does not apply to the states, and thus restricts only the federal, not state, government. [7]4

The final option for analysis of Establishment Clause cases is to use no test at all. This classic case was presented in 2005 with the two decisions by the High Court on the Ten Commandments. In the Kentucky case, the Supreme Court used a modified *Lemon* test, but in the Texas case, argued and decided the same day, the Court used no test at all.

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45 Not part of Establishment Clause: *Lee*, 505 U.S. at 604 (Blackmun, J., concurring); *Id.* at 619 (Souter, J., concurring); *County of Allegheny*, 492 U.S. at 597 n.47; *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963)(apparently rejecting coercion but then discussing "indirect coercion"); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (same); Discussing coercion: *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2320 (2004) (Rehnquist, C.J., concurring) (distinguishing between compulsion in *West Virginia Bd. of Ed* v. *Barnette*, 319 U.S. 624 (1943) and coercion in *Lee*); *Id.* at 2327 (O'Connor, J., concurring); *Id.* at 2328-31 (Thomas, J., concurring); *Good News* Club v. Milford Cent. Sch., 533 U.S. 98, 121 (2001) (Scalia, J., concurring); *Mitchell* v. *Helms*, 530 U.S. 793, 870-71 (2000) (Souter, J., dissenting); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 719 (1994)(O'Connor, J., concurring in part); *Bd. of Ed. of Westside of Cmty. Sch. v. Mergens by & through her next Friend, Mergens, et al.*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part); *County of Allegheny*, 492 U.S. at 657-63 (Kennedy, J., concurring in part, dissenting in part);*Wallace* v. *Jaffree*, 472 U.S. 38, 60 (1985); *Zorach v. Clauson*, 343 U.S. 306, 311-14 (1952); *Id.* at 321 (Frankfurter, J., dissenting); Coercion insufficient by itself: *County of Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring in part).

46 *Newdow*, 124 S. Ct. at 2322 (2004) (O'Connor, J., concurring).

47 *Id.* at 2328. (Thomas, J., concurring) ("The Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

IV. EXAMPLES OF CONFUSING AND CONFLICTING ESTABLISHMENT CLAUSE JURISPRUDENCE.

That the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused "hopeless confusion" is no surprise, as many members of the Supreme Court have voiced opposition to its continued use.[48] *Lemon* is not solely to blame for the infamous three-part test because it merely stated what the Court had previously done.[49] Nevertheless, the chaos caused by *Lemon* led Justice Kennedy to state: "Substantial revision of our Establishment Clause doctrine may be in order...."[50]

The Supreme Court acknowledged that there is no "rigid caliper" or "single test" and that *Lemon* was only meant as a "guideline."[51] Yet, the "guideline" continues to overshadow Establishment Clause jurisprudence. *Lemon* has fractured the Court and caused scholars and litigators to wonder

48 *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)("checkered history"); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000)(Scalia, J., dissenting from denial of certiorari)(would grant certiorari to "inter the *Lemon* test"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994)(Scalia, J., dissenting)("meaningless"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring)("stalks our Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985)(O'Connor, J., concurring)("should be reexamined and refined"); *Id.* at 91 (White, J., dissenting); *Id.* at 110-11 (Rehnquist, J., dissenting)(*Lemon* has spawned "unworkable plurality opinions," "consistent unpredictability" and "unprincipled results"); *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (Stevens, J., dissenting)(requires "sisyphean task" to apply the test).

49 The purpose and effects of a government activity were first mentioned in *McGowan v. Maryland*, 366 U.S. 420, 443, 445 (1961), *Schempp*, 374 U.S. at 222, and *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The entanglement prong was first announced in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

50 *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989)(Kennedy, J., concurring in part, dissenting in part).

51 *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting); *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting); *Wallace*, 472 U.S. at 86 (Burger, C.J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

if there is any hope for consistency. There are as many conflicting decisions on virtually identical fact patterns as there are judges to decide them.

For almost every federal district court opinion stating one proposition, one can find another federal district court holding exactly the opposite. Many of these cases have not been appealed through the appellate level, and most have not made their way to the United States Supreme Court. Consequently, many of the federal district court cases still remain and have never been clarified. Because the Supreme Court has developed such an unworkable test, it has opened the floodgates to Establishment Clause litigation. Courts have gone in all directions applying the *Lemon* test, and litigants have often been frustrated when they first enter the federal district court and are unable to take the case any higher to have it clarified or possibly overturned. To illustrate this point, I will overview a number of conflicting decisions considering the same issue. In most cases only the federal district court cases have been cited simply to illustrate the confusion among those courts. While the propositions stated below may not be the final ruling of the court, as the case may have been appealed to a higher judicial body, the cases are cited to illustrate the religious liberty quagmire.[52]

52 The cases cited between footnotes 52 and 113 are mostly citations to the federal district courts. These cases are not shepardized and may have been overruled by either a circuit court of appeals or the United States Supreme Court. The cases are listed only as examples of the confusion caused by the *Lemon* test and therefore may not represent the final holding or established law.

In the area of release time, courts have allowed students to go off school premises for religious instruction[53] so long as the instruction did not take place near the school building.[54] Some courts have ruled it is unconstitutional for students to hand carry attendance slips from the parochial instruction back to the public school.[55] Other courts have ruled that elective credit cannot be given for the parochial course.[56] Some courts have ruled that public school intercoms were permitted in seminary classrooms and public schools could maintain mailboxes for seminary instructors.[57] Schools have been forced to defend the recognition of religious observances[58] and the prohibition of school dances.[59]

A parochial school child can participate in a public school band course,[60] but cannot participate in an all-county band.[61] If a parochial school

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53 *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981); *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975); *State v. Thompson*, 225 N.W.2d 678 (Wis. 1975).

Doe v. Shenandoah County School Board, 737 F. Supp. 913 (W.D. Va. 1990).

Lanner, 662 F.2d at 1349; *Thompson*, 225 N.W.2d at 678.

Lanner, 662 F.2d 1349; *See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990).

Id.

58 *See Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980). *See also Student Members of Playcrafters v. Board of Education*, 424 A.2d 1192 (N.J. 1981) (School board forced to defend policy of prohibiting extracurricular activities on Friday, Saturday, and Sunday).

See Clayton v. Place, 884 F.2d 376 (8th Cir. 1989).

Snyder v. Charlotte Public School District, 365 N.W.2d 151 (1985).

Thomas v. Allegheny County Board of Education, 51 Md. App. 312, 443 A.2d 622 (1982).

child needs remedial services, the district may be allowed to fund services at the student's school,[62] but such provision may be void on its face,[63] or funds may be allowed only if services are performed at "neutral sites."[64]

Public funds may be used to lease classroom space from a church related school, but only if public school children are shielded from religious influence.[65] Public schools may[66] or may not[67] lease classroom space in parochial schools. Private school students or religious organizations may[68] or may not[69] be permitted to utilize public school facilities. Financial

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62 *See Walker v. San Francisco Unified School District*, 741 F. Supp. 1386 (N.D. Cal. 1990), *reh'g denied*, 62 F.3d 300 (9th Cir. 1995); *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

Wamble v. Bell, 598 F. Supp. 1356 (W.D. Mo. 1984); *Viss v. Pittenger*, 345 F. Supp. 1349 (E.D. Pa. 1972).

64 *Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984); *Pulido v. Cavasos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Filler v. Port Washington University Free School District*, 436 F. Supp. 1231 (E.D.N.Y. 1977); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

Thomas v. Schmidt, 397 F. Supp. 203 (D.R.I. 1975).

66 *Spacco v. Bridgewater School Department*, 722 F. Supp. 834 (D. Mass. 1989); *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Americans United for Separation of Church & State v. Paire*, 348 F. Supp. 506 (D.N.H. 1972); *Citizens to Advance Public Education v. Porter*, 237 N.W.2d 232 (Mich. 1976) (shared time secular education program).

67 *See Americans United for Separation of Church & State v. School District of Grand Rapids*, 546 F. Supp. 1071 (W.D. Mich 1982); *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp. 1059 (E.D. Ky. 1974).

68 *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990); *Parents Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986); *Country Hills Christian Church v. Unified School District*, 560 F. Supp. 1207 (D. Kan. 1983); *Resnick v. East Brunswick Township Board of Education*, 389 A.2d 944 (N.J. 1978); *cf. Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (University must allow recognized student organizations to use school facilities for religious purposes).

69 *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982); *Lamb's Chapel v. Center Moriches School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990); *Resnick v. East Brunswick Township Board of Education*, 343 A.2d 127 (N.J. 1975); *cf. Wallace v. Washoe County School Board*, 701 F. Supp. 187 (D. Nev. 1988); *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

assistance programs for needy students attending private schools have failed the *Lemon* test.[70] Some courts have disqualified private college students from receiving government tuition grants,[71] while other courts have allowed such grants.[72] Some plans have been upheld only when the use of the funds is restricted.[73] Students may receive grants to study philosophy or religion in public schools, but not theology in pervasively sectarian schools failing a 36-prong test.[74] However, Veteran's Administration, and some handicap tuition assistance programs, have generally been held valid for recipients attending sectarian schools.[75]

70 *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972); *People v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Weiss v. Bruno*, 509 P.2d 973 (1973), *contra Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973).

71 *See d'Errico v. Lesmeister*, 570 F. Supp. 158 (D.N.D. 1983); *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974); *Americans United for Separation of Church & State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974); *Opinion of the Justices*, 280 So. 2d 547 (Ala. 1973); *State v. Swanson*, 219 N.W.2d 727 (Neb. 1974). *But cf. Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972) (loans constitutional).

72 *See Americans United for Separation of Church & State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977); *Lendall v. Cook*, 432 F. Supp. 971 (D. Ark. 1977); *Americans United for Separation of Church & State v. Rogers*, 538 S.W.2d 711 (Mo. 1976); *Cecrle v. Illinois Educational Facilities Authority*, 288 N.E.2d 399 (Ill. 1972).

73 *See Walker*, 741 F. Supp. at 1386; *Lendall*, 432 F. Supp at 971; *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

74 *See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp 694 (D. Minn. 1990); *But cf. In Re Dickerson*, 474 A.2d 30 (N.J. 1983) (testamentary scholarships for ministry students at public institute constitutional).

75 *Witters v. Washington Department of Service of the Blind*, 474 U.S. 481 (1986); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974).

Some courts have ruled that the state may provide bus transportation to private school children,[76] but in Rhode Island, the enabling statute was stricken three times.[77] Public funds cannot be used to provide textbooks to private school students in some states,[78] but in others, it is acceptable for the state to reimburse parochial schools for textbook expenditures.[79] Decisions have limited the provision of educational materials to sectarian schools.[80] In some cases states may not reimburse a sectarian school for costs incurred performing state-mandated tasks, such as testing and record-keeping,[81] but in other cases it is permissible.[82]

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76 *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (provision valid but not severable); *Cromwell Property Owners Association v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979); *Board of Education v. Bakalis*, 299 N.E.2d 737 (1973); *State v. School District*, 320 N.W.2d 472 (Neb. 1982); *Springfield School District v. Department of Education*, 397 A.2d 1154 (Pa. 1979); *cf. Americans United for Separation of Church & State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975) (no cross-district transport).

77 *Members of Jamestown School Committee v. Schmidt*, 699 F.2d 1 (1st Cir. 1983); *Members of Jamestown School Committee v. Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981); *Members of Jamestown School Committee v. Schmidt*, 427 F. Supp. 1338 (D.R.I. 1977).

78 *California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *contra Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848 (8th Cir. 1983); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976); *Cunningham v. Lutjeharms*, 437 N.W.2d 806 (Neb. 1989).

79 *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Pennsylvania Department of Education v. The First School*, 348 A.2d 458 (Pa. 1975).

80 *Americans United for Separation of Church & State v. Oakey*, 339 F. Supp. 545 (D. Vt. 1972); *but see Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

Committee for Public Education & Religious Liberty v. Levitt, 342 F. Supp. 439 (S.D.N.Y. 1972).

82 *Committee for Public Education & Religious Liberty v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978); *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975).

State regulation of private schools regarding compulsory attendance,[83] teacher certification,[84] and curriculum[85] have been upheld. State employees may not teach or provide remedial services in private schools,[86] but may visit classrooms to observe both secular and religious teaching, suggest teacher replacements, and review accreditation.[87] However, student teachers may not receive credit for teaching at parochial schools.[88]

State inquiry into a religious organization's operating costs violates the Establishment Clause,[89] unless requested by the Internal Revenue Service.[90] The state may enforce compliance with minimum wage laws,[91] the

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83 *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Attorney General v. Bailey*, 436 N.E.2d 139 (Mass. 1982); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

84 *Fellowship Baptist Church*, 815 F.2d at 486; *but cf. Bangor Baptist Church v. State*, 549 F. Supp. 1208 (D. Me. 1982); *Johnson v. Charles City Community Schools Board of Education*, 368 N.W.2d 74 (1985); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W.2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981). *cf. State v. Anderson*, 427 N.W.2d 316 (N.D. 1988) (home schooling parents violated teacher certification requirements).

85 *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 952 (1st Cir. 1989); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W. 2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (Neb. 1981); *cf. New Jersey State Board of Higher Education v. Board of Directors*, 448 A.2d 988 (N.J. 1982) (prohibiting conferring of degree by unlicensed institution applied to a sectarian college whose religious doctrine precluded state licensure).

86 *Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Wamble*, 598 F. Supp 1356; *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp 1059 (E.D. Ky. 1974); *but see Walker*, 741 F. Supp. at 1386.

New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 952 (1st Cir. 1989).

Stark v. St. Cloud State University, 802 F.2d 1046 (8th Cir. 1986).

89 *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979); *Fernandez v. Lima*, 465 F. Supp. 493 (N.D. Tex. 1979). *See also Heritage Village Church & Missionary Fellowship v. State*, 263 A.2d 726 (N.C. 1980) (act requiring only certain religious groups to file information is unconstitutional).

90 *United States v. Freedom Church*, 613 F.2d 1316 (1st Cir. 1979); *Lutheran Social Service v. United States*, 583 F. Supp. 1298 (D. Minn. 1984); *cf. Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir. 1987); *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989) (state inquiry into church

Fair Labor Standards Act,[92] and force participation in FICA and FUTA,[93] despite an organization's religious beliefs to the contrary. The National Labor Relations Board may not be applicable to parochial schools,[94] but a state labor board may have jurisdiction.[95] Sectarian schools are prohibited from utilizing CETA workers.[96] Civil rights statutes have not been enforced against religious organizations,[97] but courts have split as to whether the

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records does not violate entanglement prong).

91 *Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola*, 628 F. Supp. 1173 (D.P.R. 1985); *Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320 (W.D. Va. 1983).

92 *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O St. Baptist Church v. E.E.O.C.*, 616 F. Supp. 1231 (W.D. Ky. 1985); *Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982).

93 *South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203 (6th Cir. 1990) (church included within workers' compensation system); *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987); *Young Life v. Division of Employment & Training*, 650 P.2d 515 (Colo. 1982) (religious organization subject to unemployment tax); *Baltimore Lutheran High School Association v. Employment Security Administration*, 490 A.2d 701 (Md. 1985) (school subject to unemployment tax); *Contra Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W. 767 (N.D. 1980) (church not subject to unemployment tax); *The Christian Jew Foundation v. State*, 353 S.W.2d 607 (Tex. 1983) (organization exempt from unemployment tax); *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) (school exempt from unemployment tax).

94 *Universidad v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985); *see also N.L.R.B. v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985); *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980); *Catholic Bishop v. N.L.R.B.*, 559 F.2d 1112 (2d Cir. 1977); *McCormick v. Hirsh*, 460 F. Supp. 1337 (M.D. Pa. 1978); *contra N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977).

95 *Goldsborough Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977); *cf. Catholic High School Association v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

96 *Decker v. O'Donnell*, 663 F.2d 598 (7th Cir. 1980) (CETA created entanglement); *see also Decker v. Department of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979).

97 *Dayton Christian Schools v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (N.D. Tex. 1980); *E.E.O.C. v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978); *contra Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980); *McLeod v. Providence Christian School*, 408 N.W.2d 146 (Mich. 1987); *but see E.E.O.C. v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).

"reasonable accommodation" requirement may be enforced against secular employees.[98] As a result, religious institutions have been forced to departmentalize between those employees who carry on the ministry and mission of the institution from other employees who perform routine tasks. Thus, while a religious institution may discriminate on the basis of religion in hiring and firing a school professor, it may not do the same to a secretary.

Two entanglement triangles arise in the provision of child care. First, the state may purchase child care services from religiously affiliated organizations[99] and may consider the religious preference of the parents for placement,[100] but the agency cannot impose its religious doctrine upon a child.[101] Second, religious child care facilities exempted from licensure may or may not be deemed to fail the *Lemon* test.[102] Church-run day care centers

98 *Protos v. Volkswagon of America, Inc.*, 797 F.2d 129 (3d Cir. 1986); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981); *E.E.O.C. v. Jefferson Smurfit Corp.*, 724 F. Supp. 881 (M.D. Fla. 1989); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979); *Michigan Department of Civil Rights v. General Motors*, 317 N.W. 16 (Mich. 1982); *American Motors Corp. v. Department of Industry, Labor, & Human Relations*, 286 N.W.2d 847 (Wis. 1978).

99 *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

100 *Id., cf. Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. 1982) (religious affiliation requirements in adoption proceeding constitutional); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (statute specifying religious needs of child upheld); *Zucco v. Garrett*, 501 N.E.2d 875 (Ill. 1986) (awarding custody based on religious practices is abuse of discretion).

101 *Arneth v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988).

102 *Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (4th Cir. 1984); *Forte v. Colder*, 725 F. Supp. 488 (M.D. Fla. 1989); *see The Corpus Christi Baptist Church, Inc. v. Texas Department of Human Resources*, 481 F. Supp. 1101 (S.D. Tex. 1979); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 578 (E.D. Cal. 1988); *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984); *State Department of Social Services v. Emmanuel Baptist Pre-School*, 455 N.W.2d 1 (Mich. 1990); *Pre-School Owner's Association v. Department of Children & Family Services*, 518 N.E.2d 1018 (Ill. 1988); *Arkansas Day Care Association v. Clinton*, 577 F. Supp. 388 (E.D. Ark. 1983). *cf.*

are subject to zoning restrictions,[103] but a city may not exempt them from requirements imposed upon commercial operators.[104]

Courts are divided over whether the state may[105] or may not[106] erect a cross as a war memorial. Where a state exercised eminent domain over a cemetery, a court prohibited the state from erecting crosses and a statue of Jesus, but allowed the state to provide and erect religious markers chosen by the descendants.[107] Crosses placed on government property have generally been prohibited,[108] but crosses and religious symbols on official seals may or may not be permissible.[109]

State v. McDonald, 787 P.2d 466 (Okla. 1989) (religious affiliated "boy's ranch" subject to state licensing requirements).

103 *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984).

104 *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *cf. Arkansas Day Care Association*, 577 F. Supp. 388 (statute disparately treated religious facilities).

105 *Eugene Sand & Gravel, Inc. v. Eugene*, 558 P.2d 338 (1976).

106 *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

107 *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

108 *Mendelsohn v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); *Hewitt v. Joyner*, 705 F. Supp. 1443 (C.D. Cal. 1989); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

109 *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Friedman v. Board of City Commissioners*, 781 F.2d 777 (10th Cir. 1985); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Johnson v. Board of County Commissioners*, 528 F. Supp. 919 (D.N.M. 1981); *Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990).

The Ten Commandments have been removed from schools,[110] but permitted to remain on other public property.[111] A legislature may designate a room for prayer and meditation, but religious decorations or use of the room may be prohibited.[112]

An order of then-Governor Ronald Reagan giving state employees a three hour paid holiday on Good Friday violated the Establishment Clause,[113] but a school district was permitted to designate Good Friday a paid holiday in conjunction with a Union Contract.[114]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[115] Justice Scalia noted in his concurrence the fact that the Court sometimes decides to use a test and sometimes it does not

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again by frightening little children and school attorneys . . . . Its most recent burial, only last Term [in

110 *Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.N.D. 1980).

111 *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1972).

112 *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

113 *Mandel v. Hodges*, 54 Cal. App. 3d 596 (1976).

114 *California School Employees Association v. Sequoia Union High School District*, 67 Cal. App. 3d 157 (1977); *cf. Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987) (state may declare Good Friday a legal holiday).

115 *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 397 (1993) (Scalia, J., concurring).

> *Lee v. Weisman*[116]] was, to be sure, not fully six-feet under . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinion, personally driven pencils through the creature's heart . . . .
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish to do so, but we can demand it to return to the tomb at will . . . . When we wish to strike down a practice it forbids, we evoke it . . . . Sometimes we take a middle ground of course, calling its three prongs "no more than helpful sign posts." Such a docile and useful monster is worth keeping around, at least in a somnolent state: one never knows when one might need him.[117]

The decisions in both *McCreary County, Kentucky v. ACLU of Kentucky*[118] and *Van Orden v. Perry* further show the conflicting and confusing interpretations of the Establishment Clause. Both of these cases involved the Ten Commandments and were argued and delivered on the exact same day; however, the Court's analysis was not consistent. In *McCreary*, the Court used a modified *Lemon* test, focusing primarily on the purpose prong.[119] In *Van Orden*, the Court did not use the *Lemon* test at

116 The Court did not use the Lemon test, but instead used a newly-created "coercion" test.

117 *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring in judgment)(citations omitted).

118 *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

119 *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (2005). The majority in that case certainly implies *Lemon's* continued vitality by conducting purpose analysis. The majority never explicitly reaffirms *Lemon* because the inquiry ended when the Court held the displays unconstitutional as having an impermissible purpose.

all.[120] On December 20, 2005, the Sixth Circuit Court of Appeals upheld the identical Ten Commandments display the Supreme Court had declared unconstitutional in the *McCreary County* case. In *ACLU of Kentucky v. Mercer County, Kentucky*, the federal court of appeals denoted that the different interpretations and applications of Establishment Clause have left lower court judges in "Establishment Clause purgatory."[121]

To add to the confusion, the Court has been inconsistent on when something is or is not a violation of the Establishment Clause. In *McCreary,* the Court held that the Ten Commandments display may be constitutional in one county, while unconstitutional in another.[122] The eyes that look to purpose belong to an " 'objective observer,' " one who takes account of the traditional external signs that show up in the " 'text, legislative history, and implementation of the statute,' " or comparable official act.[123] Therefore, the constitutionality of a Ten Commandments display would depend on a person's subjective understanding of its purpose, which could vary from county to county.

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120 *Id.* A plurality of the Court in *Van Orden* disregarded the Lemon test, noting that Lemon is not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. The plurality instead employed an analysis driven by both the nature of the monument and by our Nation's history.

121 Id.

122 *McCreary,* 125 S. Ct. at 2722.

123 *Id.* at 2734.

Similar to *McCreary* was *Van Orden*.[124] There, the constitutionality of a Ten Commandments display was dependent upon how long it had been present on the State Capitol grounds. "Acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[125]

Following suit, the circuit courts, like the Supreme Court, have bought into the confusing and changing interpretations of the Establishment Clause in the context of prayer at school board meetings. Prayers are frequently said at county, municipal and school board meetings, as well as other meetings of public officials. In many respects, these prayers are very similar to prayers preceding legislative sessions.

A federal court of appeals ruled that a resolution of the Board of St. Louis County in Minnesota which provided for an invocation at its public meetings was not a violation of the First Amendment Establishment Clause.[126] Under this policy, a board of commissioners invited local

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124 *Van Orden*, 125 S. Ct. at 2854.

125 *Id*. at 2862.

126 *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979).

clergymen to offer prayers prior to the commencement of each board meeting. The chairman of the board would generally announce the following: As is our practice, the Reverend John Doe will now give a prayer. The Court found that this practice was consistent with the First Amendment because the prayer had a "secular legislative purpose of setting a solemn tone for the transaction of governmental business" and assisted the maintenance of order and decorum.[127] The practice of opening these board meetings with prayers was not "an establishment of religion proscribed by the establishment clause of the First Amendment in any pragmatic, meaningful and realistic sense of that clause."[128] Similarly, the state Supreme Court of New Hampshire ruled that inviting local ministers to open town meetings with an invocation was not prohibited by the First Amendment Establishment Clause.[129]

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127 *Id.* at 1114-115.

128 *Id.* at 1115.

129 *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968). Other courts have similarly ruled that prayers offered at the outset of public assemblies are constitutional. *See, e.g., Marsa v. Wernik*, 430 A.2d 888 (N.J.), *app. dismissed and cert. denied*, 454 U.S. 958 (1981) (prayer at the outset of borough council meeting constitutional); *Lincoln v. Page*, 341 A.2d 799 (N.H. 1968) (invocation at town meeting constitutional); *Colo v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) (salaries for legislative chaplains constitutional); *Snyder v. Murray City Corp.*, 902 F. Supp. 1444 (D. Utah 1995) (statements by a minister at outset of council meeting constitutional).

In a 2-to-1 decision, one federal appeals court ruled that prayer offered at the opening of a school board meeting is unconstitutional.[130] The Cleveland school board traditionally opened its deliberative session with prayer. Historically, the school board invited representatives of the protestant, Roman Catholic, Jewish and Muslim faiths. The federal district court upheld the practice, but two of the three appeals court judges voted to reverse the decision.[131]

Similarly, the Fourth Circuit Court of Appeals struck down the practice of opening a town council meeting with prayer.[132] However, just one year later, the same federal appellate court held that a different county's practice of opening a county board meeting with prayer did not violate the Establishment Clause.[133]

A California federal court found that the Palo Verde Unified School District's practice of opening each meeting with prayer did not violate the Constitution.[134] In upholding the practice, the court relied on the Supreme

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130 *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999).

131 *Coles v. Cleveland Bd. of Educ.*, 950 F. Supp. 1337 (N.D. Ohio 1996) (reasoning that prayers at school board meetings are no different than prayers at legislative meetings, thus finding that the Supreme Court decision in *Marsh* controls the outcome).

132 *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004).

133 *Simpson v. Chesterfied Cty. Bd. Of Supervisors*, 404 F.3d 276 (4th Cir. 2005).

134 *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp.2d. 1192 (C.D. Cal. 1998).

Court's legislative prayer case in *Marsh*. The court noted that school board meetings, unlike classroom sessions, are composed primarily of adults. The "fact that at any given board meeting there may be children present in the audience, some of whom may participate in an awards session or address the board on a particular topic, does not change the nature or the function of the board meeting. A board meeting is a meeting of adults with official business and policymaking functions."[135]

If the opinions of this Court give jurists "blurred" vision to "dimly" perceive permissible Establishment Clause lines, then they certainly will affect elected officials' vision of constitutionality, entitling them to some grace in trying to negotiate the territory.[136] In the constitutional minefield established by *Lemon*, where the line bends and curves, ebbs and flows, generating numerous pluralities, surely courts must not punish government officials by assessing damages and attorney's fees and costs.

V. THE PUBLIC EXPRESSION OF RELIGION ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The stated purpose of H.R. 2679, the Public Expression of Religion Act ("Act"), is "to eliminate the chilling effect on the constitutionally protected expression of religion by State and local officials that results from

135 *Id.* at 1197.

136 *See, e.g., Mitchell*, 530 U.S. at 807; *Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 612.

the threat of damages and attorney's fees." This stated purpose is neutral and serves a secular purpose. The object is to limit the exposure of government entities in an area of law that is extremely unclear. The Act does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. The Act has a predominately secular purpose and does not have the primary effect of advancing or inhibiting religion.

The Supreme Court has held that a law must have a secular legislative purpose if it is to survive Establishment Clause review. *See Lemon v. Kurtzman*.[137] The government may not act "with the ostensible and predominant purpose of advancing religion."[138] This requirement "does not mean that the law's purpose must be unrelated to religion;" it means only that Congress may not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters."[139]

Although the Act addresses the subject of religion, its purpose is not to advance any particular religion, or to promote religion over nonreligion. Creating an environment that fosters lawful activity or speech, including

137 403 U.S. 602, 612 (1971).

138 *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 125 S.Ct. 2722, 2733 (2005).

139 *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

religious speech, is a legitimate secular purpose.[140] In *Widmar*, a religious student group challenged a state university policy that allowed only secular student organizations to use campus facilities. The university attempted to defend its policy on the grounds that an "open forum" policy would offend the Establishment Clause. The Supreme Court dismissed that argument and held that an equal access policy, having the secular purpose of providing a forum for religious as well as secular speech, would be constitutional.[141]

Several federal courts have applied the *Widmar* rationale in other settings. In *Chabad-Lubavitch of Ga. v. Miller*,[142] a religious group wanted to place a Chanukah menorah in the rotunda of the Georgia capitol. Although Georgia had allowed other groups to use the rotunda for expressive activities, it refused to permit the menorah display. When the religious group filed suit, claiming that the state had violated its right of free speech, Georgia stated in its defense that it had a compelling state interest in avoiding the Establishment Clause violation that would result from the display. Siting *en banc*, the Court of Appeals for the Eleventh Circuit held that neutral treatment of the menorah would "advance the secular purpose of providing an arena for its citizenry's exercise of the constitutional right to

140 *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

141 *Id.*

142 5 F.3d 1383 (11th Cir. 1993) (en banc).

free speech."[143] Other courts have similarly found that government policies permitting religious displays in public parks have a valid secular purpose.[144]

Although the above-cited opinions address the issue of equal access to government property for religious speech, those cases are relevant to the constitutionality of this Act because they stand for the principle that government accommodations of religious speech serve a secular purpose. The Act accomplishes that purpose by eliminating the chill on speech that results from the threat of Establishment Clause suits. That the Act mentions only religious expression presents no constitutional concerns because Establishment Clause actions, with their lax standing requirements coupled with the potential for damages and attorney's fees, create an exposure for government entities that does not exist in other types of cases.

Just as the Act has a predominantly secular purpose, it does not have as its primary effect the advancement or inhibition of religion. When deciding whether legislation runs afoul of the Establishment Clause, courts consider "whether an objective observer, acquainted with the text, legislative

143 *Id.* at 1389.

144 *McCreary v. Stone*, 739 F.2d 716, 726 (2d Cir. 1984); *Flamer v. City of White Plains, N.Y.*, 841 F.Supp. 1365, 1376-77 (S.D.N.Y. 1993).

history, and implementation of the statute, would perceive it as a state endorsement of [religion]."[145]

Because the Act is still in its formative stages, there currently is little legislative history and no implementation for a reasonable observer to consider. The plain meaning of the text does not suggest that it primarily benefits or burdens religion. The type of speech the Act seeks to protect consists only of constitutionally protected expressions of religion. An objective reading of the Act's language reveals that its intent and effect is merely to free government actors from the shadow of potential liability for damages and fees in an area where free speech has been significantly chilled by frivolous lawsuits. No reasonable observer could conclude that the Act conveys the message to any religious group "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."[146]

In sum, the Act passes constitutional muster because it has the predominately secular purpose of limiting government liability and fostering free speech, and because the Act does not have the primary effect of

145 *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985)) (O'Connor, J., concurring in judgment).

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

advancing or inhibiting religion. H.R. 2679 presents no Establishment Clause problems.

VI. SECTION 1983 DAMAGES AND SECTION 1988 ATTORNEY'S FEES AWARDS ARE NOT APPROPRIATE IN ESTABLISHMENT CLAUSE JURISPRUDENCE.

After examining both Section 1983 and Section 1988, it is clear that neither, in its current state, is in line with the original legislative intent. Section 1983 was intended to serve as a means of vindication for civil rights violations. Opening up the floodgate for Establishment Clause cases by relaxing the rules for standing, combined with awarding attorneys fees under Section 1988, has spawned frivolous litigation and often results in government officials changing a course of action because of the threat of attorney's fees. The fee shifting statute is used to intimidate local government officials into action oftentimes not warranted under the Establishment Clause. Facing the threat of attorney's fees, local officials will do whatever a particular party demands. "'Private attorney generals' should not be deterred from bringing good faith actions to vindicate the fundamental rights involved by the prospect of having to pay their opponent's counsel fees should they lose."[147] The purpose of Sections 1983 and 1988 is to provide access to the courts for those with civil rights claims.

147 S. Rep. No. 94-1011 (1976).

Because of the peculiar and unfortunate status of Establishment Clause jurisprudence, this Committee should amend Sections 1983 and 1988 to exclude damages and attorney's fee and cost awards in Establishment Clause claims.

Mr. CHABOT. Thank you.

Mr. Stern, you are recognized for 5 minutes.

TESTIMONY OF MARC STERN, GENERAL COUNSEL, AMERICAN JEWISH CONGRESS

Mr. STERN. Mr. Staver——

Mr. CHABOT. If you could turn the mike on.

Mr. STERN. Mr. Staver has given the lies to the charge that the ACLU would not litigate if there were not attorney's fees. The New York City case he talked about was finally litigated in *PEARL v. Nyquist* in 1973 3 years before the attorney's fees statute was brought. My predecessor was lead counsel. If there were attorney's fees, it was later in *Aguillard* when the other side won, but not when the original case, *PEARL v. Nyquist*, was brought.

Secondly, this bill has two components. We have heard not a word from its proponents about the limitations on remedy, which, as I read the bill, include even a ban on declaratory judgments, nominal damages, punitive damages, which we make available to prisoners even under the Prison Litigation Reform Act.

As to attorney's fees, this act leaves citizens worse off than inmates in prison. Inmates get capped attorney's fees. Here a proven violation of the Establishment Clause results in no attorney's fees.

Secondly, it is simply not true that the Establishment Clause is uniquely difficult. I defy anybody to explain when regulations become taking. I defy anybody to explain to me in great detail what the public forum doctrine amounts to.

There are any number of cases—I have advised school districts—a case called *Wigg v. Sioux Falls School District* where a teacher taught in her own classroom immediately after school in a Bible club. I believe, others believe that that is a substantial Establishment Clause reason for the school to say you can't teach a Bible club in the same classroom you teach during the day as a public school teacher. I think there is a Supreme Court case on point directly controlling.

I told the school board they ought to take an adverse decision of the Eighth Circuit to the Supreme Court. And what they said to us was we can't afford to. We will have to pay attorney's fees for the other side. It is entirely—the bill's ban on attorney's fees is entirely irrational.

If a teacher is disciplined for compelling students to bring—to pray, he or she can bring a first amendment free speech challenge, a free exercise challenge. And in the unlikely event that they prevail, they get attorney's fees. If by chance the student beats the teacher to the courthouse and brings an Establishment Clause claim on a clear, established violation of the Establishment Clause, they get no attorney's fees.

The issues before the court will be exactly the same. The school district will raise free speech claims or free exercise claims on behalf of the teacher, or the teacher will intervene and raise those claims. The Establishment Clause issues in the case, the free speech claims in the case—who gets attorney's fees depends simply on who was first to the courthouse door. I suggest to you there is no rational difference between those two cases that justify this restriction.

Finally, I would say the following. It is clear from the testimony of my colleagues on the panel that the chief beef here is not with the attorney's fees statute but with the substance of constitutional law. And that is plainly beyond this Committee's competence.

There is a problem in one category of cases where there are conflicting constitutional rights and you have an award of attorney's fees to one side, whoever happens to win when there are plausible arguments all along on both sides. But that would put Mr. Staver's group out of the attorney's fees business. That would put ACLJ out of the attorney's fees business. And they, equally with the ACLJ, the American Center for Law and Justice, equally with the ACLU finance their operation with attorney's fees.

The *Wigg* case, in which the teacher taught in her own classroom immediately after school, which the *Wall Street Journal* cited in my testimony, points out that kids feel attracted to the teacher they know, I think has substantial Establishment Clause problems. There is a conflict of rights there.

If you are interested in not having the attorney's fees statute prevent people from litigating cases where there are plausible constitutional claims on both sides, then do it even-handedly. Say, in cases in which the court finds that there is substantial constitutional arguments on both sides, constitutional argument, not merely policy argument, on both sides, you have the discretion to lower or cap fees. That would be fine. But I assure you it is not the ACLU that will be the chief victim of that, of that action. The action will come from the other side.

Finally, because I have many friends in the ACLU. It is true that you have Ken Falk's letter. It is all equally true that when that letter was written it was perfectly clear that the school couldn't run a school graduation because the Supreme Court had said so the year before.

A colleague of mine who was on the opposite side of the aisle in church-State cases used to make a living writing letters to school boards asking them to stop what he thought were constitutional violations. And I would call him up and I would say—I am not going to use his name—you know, "Joe, the other organization that is your competitor, first they file a lawsuit, and then they settle for attorney's fees. Why do you write the letter first?" He goes, "Well, that is just not an ethical way to proceed."

If you think this is a problem only of the ACLU, you are wrong. Attorney's fees can be abused. They also make it possible to vindicate constitutional rights that otherwise would go unvindicated. If you want to deal with abuse, then deal with abuse. This bill doesn't deal with abuse. It deals with one section, one type of rights that the Committee happens to disfavor. That is not a permissible basis for legislation.

[The prepared statement of Mr. Stern follows:]

PREPARED STATEMENT OF MARCH D. STERN

TESTIMONY

of the

AMERICAN JEWISH CONGRESS

before the

SUBCOMMITTEE ON THE CONSTITUTION

of the

HOUSE COMMITTEE ON THE JUDICIARY

concerning

H.R. 2679

THE PUBLIC EXPRESSION OF RELIGION ACT OF 2005

June 22, 2006

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TESTIMONY OF THE AMERICAN JEWISH CONGRESS
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION
OF THE HOUSE COMMITTEE ON THE JUDICIARY
CONCERNING H.R. 2679
THE PUBLIC EXPRESSION OF RELIGION ACT OF 2005
JUNE 22, 2006

On behalf of the American Jewish Congress, I want to thank you for providing it with an opportunity to submit its views on H.R. 2679, *The Public Expression of Religion Act of 2005*. We believe this bill to be exceedingly bad public policy. It is arguably unconstitutional as well, but this Committee need not reach that issue to determine that this bill should not pass. We urge you to give this bill the decent burial it deserves.

The bill has two sub-sections. The first bans all but injunctive relief in cases arising under the Establishment Clause of the First Amendment. The second carves out an exception from the general rule of 42 U.S.C. § 1988 providing for an award of attorney's fees in cases in which plaintiffs bring successful actions to vindicate constitutional rights under, *inter alia*, 42 U.S.C. § 1983.

I. The Limits On Relief

Remedies

H.R. 2679 casts a broad net. It simply bans any but injunctive relief in cases brought under the Establishment Clause. Thus, even if a state or locality were to formally establish a state church, prefer one religion over another, *Larson v. Valente*, 456 U.S. 1 (1982), or coerce participation in religious exercises—all of which are core violations of the Establishment Clause—a plaintiff would be entitled to nothing but injunctive relief, not nominal damages, not punitive damages and, most peculiarly, not even a declaratory judgment.

When the *Prison Litigation Reform Act*, 42 U.S.C. § 1997 (PLRA), was enacted, there was a substantial debate whether Congress has the power to limit the remedies available to the federal courts to cure constitutional violations. We need not enter the thicket. For present purposes, we acknowledge that Congress has substantial but not unlimited authority over remedies. Nevertheless, H.R. 2689 is indefensible both as policy and constitutional law.

Moreover, because H.R. 2679 does not address the universe of constitutional claims against local governments, it cannot be claimed that the bill addresses a generally applicable problem with regard to remedies available in § 1983 claims or with the award of attorney's fees in such cases. If H.R. 2679 is to be sustained, it must be because something unique to Establishment Clause claims justifies treating such claims less well than all other § 1983 claims.

Just how draconian these restrictions are may be judged by comparing the proposed *Public Expression of Religion Act* with the *Prison Litigation Reform Act*, 42 U.S.C. § 1997e(e), which denies damages to inmates in any civil action in which they allege a violation of rights, unless there is physical injury. On its face, this would seem to deny the possibility of relief in any prisoner case seeking to vindicate rights under either the Free Exercise or Establishment Clauses.

The courts have generally read this ban not to deny courts the power to issue declaratory judgments. See, *e.g.*, *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002). *Cf. Boxer v. Harris*, 437 F.3d 1107, 1111 (11th cir. 2006) (collecting cases; noting issue is open in the 11th Circuit). About half the circuits that have spoken on the subject award actual and punitive damages for violations of First Amendment rights, refusing to allow these fundamental constitutional rights to be rendered nugatory by PLRA, *Allah v al-Hafeez*, 226 F.3d 247 (3rd Cir. 2000); *Cannell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998); *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2005). *Contra Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001). The Second and Eighth Circuits allow for nominal and punitive damages as well as declaratory relief, but not compensatory damages, for First Amendment violations. *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002); *Royal v. Kavtzky*, 375 F.3d 720 (8th Cir. 2004)We are unable to conceive of any rationale, other than naked hostility toward

the Establishment Clause as interpreted by the federal courts, that would justify denying to law-abiding citizens at least the same access to the broad panoply of judicial relief afforded convicted felons in First Amendment cases.[1]

We note, too that the *Public Expression of Religion Act*'s preference for injunctive relief over declaratory relief inverts the ordinary preference for declaratory relief over injunctive relief. The cases are legion in which courts have refused to enjoin public officials after declaring that their actions violated the Federal Constitution because the very fact of a declaration of the obligation of public officials was thought sufficient to bring about compliance without the necessity for intrusive and demeaning injunctions. Courts properly assume that public officials will abide by declared constitutional rights and often presume future compliance.

Under H.R. 2679, in order to afford plaintiffs any relief, courts face a Hobson's choice. They may enjoin officials they would otherwise not subject to the indignity of an injunction under the equitable rules governing injunctions or they may leave a plaintiff who has proven an actual violation of the Constitution wholly without any remedy. The latter possibility is nothing less than an open

[1] Although the bill's title suggests a preoccupation with a subset of Establishment Clause claims—those involving "public religious expression"—the actual text of the bill is not so limited, but applies to all Establishment Clause claims. We proceed on the assumption that the text, not the title, is controlling.

invitation for local officials to ignore existing constitutional law on the chance that nothing will happen.

Consider what this would mean in the real world. A student is compelled by a teacher to participate in prayer. This is a one-time event. The teacher acts on her own. No school policy authorizes such action. Suit is brought by the student against the teacher. Without question, that action violates the Constitution as it is currently understood by the courts and as it would be understood on almost any view of the Clause.

By the time a court case is brought and is resolved, the school year will have ended. The student will no longer have the offending teacher. The likelihood of a further violation by this teacher directed at this student is so slight that it is doubtful that the student even has standing to seek an injunction against further violations. Cf. *Los Angeles v. Lyons*, 461 U.S. 95 (1983); see *O'Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005). Even if there were standing, as matter of discretion it is doubtful that most judges would issue an injunction. This is a case where the only practical remedy is damages. Yet by its terms, H.R. 2679 denies the courts the right to give the student any damage remedy, even nominal damages. By its terms, it denies the courts authority to issue declaratory relief, and provide even the psychic satisfaction of official vindication. (Of course,

by denying attorney's fees, the Act makes it likely that few suits would be brought even in cases where an injunction would be appropriate.)

A declaratory judgment offers more than just psychic satisfaction, Should officials repeat their violation of declared rights, a plaintiff could seek supplemental relief, 28 U.S.C. § 2202, including an injunction. And if that were violated, plaintiff could seek to hold the offending officials in contempt, with all the remedies that flow from such a finding. But if courts are stripped of the power to issue declaratory judgments, and perhaps supplemental relief, this path to the contempt power would also evaporate. We assume, but unfortunately cannot be certain, that the legislation is not designed to strip the courts of the power to remedy contempts of court with monetary damages. It can be read to do so.

And what possible justification can there be for denying damages in cases such as the one I posit? It is not to protect public officials in doubtful cases, because the law is clear that public officials are immune from damages except where the law was clearly settled at the time they violated it. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). So the repeal of damages in this bill is only about violations of clearly settled law. For example, the law is pellucidly clear that officially coerced prayers are unconstitutional. *Lee v. Weisman*, 505 U.S. 587, 636-39 (1992) (Scalia, J., dissenting). Violations of clearly settled constitutional rights generate a

presumptive right to at least nominal damages, *Carey v. Piphus*, 435 U.S. 247 (1978).

Moreover, coerced prayer cases do not exhaust the possibilities for damages in Establishment Clause cases. In *Larson*, *supra*, officially disfavored churches were subjected to onerous regulatory requirements with attendant expenses, while more favored churches were exempted. H.R. 2679 would bar recovery for the added, but illegally imposed, costs.

Again, other than raw hostility to the non-establishment of religion as mandated by the Constitution, we can conceive of no justification for the wholesale denial of monetary damages or declaratory relief. It is simply not true, as is the case with regard to prison inmate litigation addressed by the *Prison Litigation Reform Act*, that in Establishment Clause cases public officials operate under especially difficult circumstances that prison officials do day-by-day.

Damages are in any event not readily recovered in § 1983 claims. Where the law is not clearly established, the qualified immunity doctrine is a barrier to recovery. *Brosseau v. Haugen*, 543 U.S. 194 (2004). Municipal bodies, including school boards, are only liable in damages for the acts of their line employees when they act pursuant to an official policy set by high ranking public officials, again a

high hurdle. *Jett v. Dallas I.S.D.*, 491 U.S. 701 (1989). And, of course, actual damages must be shown and not presumed, *Carey v. Piphus*, *supra*.

In almost 30 years of practice in the field, I can recall no more than half-a-dozen Establishment Clause cases in which actual damages have been awarded—but these were all horrific cases, involving flagrant violations of the Clause. In at least two of those cases, the reaction to plaintiffs' having objected to traditional religious practices was so severe they had to leave the community. But where actual damages are shown, H.R. 2679 treats citizens worse than prison inmates. What possible justification can there be for that other than hostility to the law as declared by the courts?

That the interest advanced by the bill is hostility to existing Establishment Clause jurisprudence, not the preservation of the public fisc, is indicated by a comparison of two sets of cases, each presenting the same legal issues for consideration by the courts. In one, the full panoply of judicial remedies is available, as are attorney fees. In the other, only injunctive relief is possible.

Example 1. A private party seeks to erect a Latin cross on public property, invoking his free speech rights. The city responds that it is barred from granting the request by the Establishment Clause. The private party sues.

Example 2. A private party seeks to erect a Latin cross on public property on Good Friday, and the town acquiesces, believing it is obligated to do so by the Free Speech Clause. The town, in turn, is sued by other citizens claiming that the display violates their rights under the Establishment Clause.

Example 3. A teacher, invoking academic freedom, prays with her class. She is disciplined by the school district, on the ground that the teacher's actions violated the Establishment Clause. The teacher sues her employer, alleging the discipline violated her Free Speech and Free Exercise rights.

Example 4. A student sues a teacher because the teacher led a class in prayer and refused to excuse students unwilling to participate. The defendant teacher invokes the Free Speech Clause in his own defense.

Leaving aside the merits of these cases for the moment, it is apparent that the plaintiffs in cases 1 and 3 have available to them a full range of judicial remedies, and are eligible for an award of attorney fees. By contrast, plaintiffs in cases 2 and 4 are entitled only to injunctive relief, if they can meet the stringent requirements for an injunction. Each of these cases is of a type now routine. Each presents exactly the same legal issues, albeit only sometimes is the Establishment Clause injected into the case at the behest of the plaintiffs. Each of these litigations makes the same demands on the government, the courts and the public fisc. Each raises

exactly the same Establishment Clause issues. But only in some does H.R. 2679 have any effect

Plaintiffs in cases 2 and 4 have no greater incentive than plaintiffs in cases 1 and 3 to bring legally frivolous or marginal claims.

In upholding the restriction on recovery (and attorney's fees) in the *Prison Litigation Reform Act* ("PLRA"), the courts have insisted that there must exist a rational basis for distinguishing between prison claims and all other constitutional claims bought under Section 1983. See, *e.g.*, *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (*en banc*); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997).

In the PRLA context, the courts have found that prisoners had a unique set of incentives to engage in frivolous litigation and harass their keepers since they were largely immune from any penalties and costs imposed on other litigants, and that hence, such litigation posed a special risk to the public fisc and prison governance. *Zehner*, *supra*. As a result, Congress had a solid basis to create countervailing disincentives to discourage litigation of marginal value. As noted, that is not the case with the Establishment Clause. Whatever disputes there may be at the margins of that Clause, no one can doubt the importance of the principle embodied in that claim for the religious peace Americans have enjoyed, nor that the overwhelming majority of cases present issues of profound importance. Such

cases are not brought, in my experience, promiscuously or lightly. That is as true of cases such as 2 and 4 as it is of cases 1 and 3.

None of the factors involved in inmate litigation—or any other ones we can conceive—justify the exception created by H.R. 2679. No one has an incentive to engage in frivolous Establishment Clause litigation, especially given the notoriety attaching to such plaintiffs. See *Santa Fe I.S.D. v. Doe*, 530 U.S. 290 (2000) (noting efforts by school officials to expose and harass Establishment Clause plaintiffs). I am unaware of any Establishment Clause challenge, let alone one brought by the "separationist" groups which bring a majority of these cases (ACLU, AJCongress, Americans United, Freedom from Religion Foundation), ever having incurred Federal Rule 11 sanctions for bringing a frivolous action.[2]

Establishment Clause litigants are not inmates with unlimited time on their hands for whom litigation is a form of recreation, not hard work. They have no incentive to lie or retaliate, *Johnson v. Perry*, *supra*. They, or the organizations representing them, typically have to initially bear by themselves the not inconsiderable costs of litigation. The number of Establishment Clause cases (that is, for purposes of H.R. 2679, cases in which plaintiffs invoke the Establishment Clause), brought in the federal courts is a miniscule portion of the docket, unlike

[2] But see *Peloza v. Capistrano U.S.D.*, 37 F.3d 517 (9th Cir. 1994) (Establishment Clause challenges to ban on teaching evolution; parts of claim frivolous; no Rule 11 fees).

prisoner civil rights cases. The proposed statute cannot possibly be defended as necessary to spare the federal courts from a deluge of lawsuits.

It is true that some have contended that the Establishment Clause creates no individual rights, but is merely a federalism provision. *Elk Grove I.S.D. v. Newdow*, 547 U.S. 1, 49-50 (2004) (Thomas, J., dissenting). That is not, however, the law, because it is an argument that has failed to persuade anyone but Justice Thomas. Congress may not make it law for the Supreme Court by majority vote.

We know authoritatively that Congress may not invoke powers it undoubtedly possesses, such as the power to regulate remedies, to enlarge or contract the interpretation of the Constitution. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating *Religious Freedom Restoration Act* because it expands meaning of Constitution as interpreted by the Court).

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, … alterable when the legislature shall please to alter it. *Marbury v. Madison*, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. … Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

521 U.S. at 529 (some citations omitted).

If this is true of congressional efforts to expand constitutional rights, it is *a fortiori* true of congressional efforts to contract them.

In many places in this country, public officials routinely ignore Establishment Clause decisions of the Supreme Court and other federal courts. The political dynamic is simple enough. Popular politics or tradition supports some evident and blatant violations of the Establishment Clause, say school prayer or permanent religious displays. Public officials make a deliberate decision to ignore the law, and to appease public opinion, betting (often correctly) that dissenters would not risk community displeasure to file a court challenge. Often, like George Wallace in the schoolhouse door, their own popularity is enhanced by their defiance.

In the fall of 1989, I represented a Jewish high school football player who objected to school-sponsored prayers at every football game. We sought interim injunctive relief for my client to remedy that blatant Establishment Clause violation. It was denied. (The school board contended, *inter alia*, that if the court granted the injunction there would be disorder at the next game.)

We had made one important tactical error. We filed the lawsuit (*Berlin v. Okaloosa County*) while the school superintendent was running for reelection. He promptly drew a line in the sand, announcing that a vote for him was a vote to

resist to the end all efforts to ban prayer at football games. The end to the litigation came only after he was safely reelected and the local newspapers began to speculate on what the attorney's fees would be if the lawsuit was successful.

Here, the available of attorney's fees put an end to a calculated defiance of the Constitution for cheap political advantage. It is a good thing that the fee statute exists for it serves to provide a tangible disincentive for the manipulation of the Constitution for the short-term advantage of unprincipled public officials. Eliminate that disincentive—as H.R. 2679 would do—and the inevitable, perhaps the desired result, will be more open defiance of well-settled constitutional principle.

To repeat, the only justification for the line drawn by H.R. 2679 is unvarnished hostility toward one set of constitutional claims,[3] and a desire of its sponsors to encourage local government to defy existing restraints on endorsing and encouraging religion, particularly in ways not readily subject to injunctive relief such as one-time ceremonies or other temporary events. That is not a legitimate purpose; it may indeed be an impermissible sectarian purpose. See, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987). Congress should not be in the business of encouraging violations of the Nation's fundamental charter.

[3] This is not a case involving enhanced protection for only some claims, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), but reduced protection for a disfavored class of claims.

II. The Attorney Fee Section Is Likewise Unacceptable

H.R. 2679 excludes citizens whose rights under the Establishment Clause, including the rights not to be coerced to participate in religious practice and to be free of religiously discriminatory rules have been violated from an award of attorney's fees, generally available to § 1983 plaintiffs. Again, H.R. 2679 treats citizens' Establishment Clause claims less advantageously than it treats the constitutional claims of inmates.

The bill treats citizens vindicating core and often undisputed aspects of the Establishment Clause less well than it treats inmates suing their custodians. A successful inmate litigant is entitled to attorney's fees, like all other successful litigants under § 1983, except that fees for prisoners are capped by reference to the *Criminal Justice Act*, 18 U.S.C. § 3006A. (Presumably, if H.R. 2679 passes, inmates raising Establishment Clause claims will also be denied attorney's fees, unlike all other inmate litigants.) In upholding the constitutionality of the fee cap against claims that the cap interferes with access to courts, courts have emphasized that the statute does not deny all fees, *Johnson*, *supra*. H.R. 2679 does not even make a capped fee available to Establishment Clause litigants.

What possible reason could there be for treating citizen litigants substantially less well than prison litigants? Again, it must be nothing less than

naked hostility toward Establishment Clause claims itself. No rational reason justifies the crude line the bill draws. It therefore is doubtful that H.R. 2679 would withstand a constitutional challenge such as those brought unsuccessfully to challenge PLRA.

We recognize, of course, that the Constitution does not of its own force compel an award of attorney's fees. Congress could, if it thought it wise, repeal the attorney's fees statute, 42 U.S.C. § 1988, in its entirety and revert to the usual American rule on attorney's fees. What it may not, however, is pick and choose among favored constitutional rights without any acceptable rational basis for drawing a distinction.

It is true that on occasion, local government does not defend a practice because it fears incurring attorney's fees should it lose a legal challenge. But this too is a risk that cuts both ways. It is equally true that local government bodies have foregone litigating Establishment Clause defenses against claims of free exercise or religious free speech because of concern about attorney's fees. I have myself been involved in cases where substantial Establishment Clause defenses were not pursued because of a fear of paying attorney's fees to plaintiffs invoking the Free Speech Clause *See* D. Golden, *Saving Souls at School: Thanks To Court*

Rulings Some Teachers Are Leading Bible Clubs In Their Own Classrooms After the Bell, Wall Street Journal (May 20, 2006).

In passing the *Attorney Fees Act*, Congress recognized the importance of private litigation to enforce constitutional rights. In the ensuing decades attorney's fees have become an integral part of the mechanism for making real the rights guaranteed citizens by the Constitution. Our political institutions have adapted to that mechanism, both by considering it in setting their budgets, and more importantly, in taking constitutional law more seriously. Local government now treats constitutional law as relevant to local governments and the way they do business, and not just something, as a Montana state judge once memorably told a lawyer, only for the Supreme Court, *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979) ("you can give those [citations] to the Supreme Court"). The judge's reaction is, unfortunately, still common, although not nearly as common as it was before fees were mandated.

The attorney's fees statute embodies the view that the public weal is best served by ensuring official compliance with the Constitution. Given the imbalance of power and resources between the government and the citizen, and the costs of contemporary litigation, the *Attorney Fees Act* represents an important effort to recalibrate that balance. Its selective gutting would be a mistake of the first order.

If Congress is to begin to deny attorney's fees to unpopular cases, there will be no end to the loopholes it will be pressed to create. The attorney fee statute will soon be pock-marked with carve outs for controversial cases.

One does not need a particularly long memory to recall that desegregating the nation's schools was once a controversial subject. Indeed, as the Supreme Court's recent decision to review two school desegregation cases reveals, it remains a controversial subject. There were repeated efforts in the 1970's to restrict the remedial powers of the courts with respect to integration. An entire presidential campaign turned on that issue.

Any number of other civil liberties issues remain contentious: should Congress deny attorney's fees to those seeking to integrate schools; challenge reverse discrimination; ensure equal access to the ballot; invalidate English-only rules; exclude illegal aliens from government benefits; rectify abuse of the power of eminent domain; protect free speech for violent extremist groups; advance gay rights claims; resist ordinances protecting rights of gays and lesbians in cases affecting religious institutions?

Depending on the political winds of the moment, one or the other of these classes of claims will be politically controversial. To take but one set of current controversies: At some times and for some people, decisions expanding the rights

of gay and lesbian Americans, such as *Lawrence v. Texas*, 539 U.S. 558 (2003), will be controversial. At other times, and in other places in this country, decisions denying religious institutions the right to be excused from compliance with anti-discrimination laws will be controversial. See M. Stern, *Two-Way Street*, New York Sun (June 14, 2006). The only practical way to make sure that all these claims can be heard is to ensure that access to the courts is on an equal footing.

Conservatives may think that they do their causes no harm by restricting the access to the courts of "liberal" claims. Separating church and state, a cause dear to the Founders, is not a liberal preserve. But the major premise is mistaken. Once this Committee establishes exceptions to the *Attorney Fees Act* and the remedial powers of the federal courts in pursuit of one vision of church-state relations, it will set a precedent that will be invoked by others with very different visions, and no less convinced of the righteousness of their cause. They will point to H.R. 2679 as a controlling precedent.

H.R. 2679 represents a potentially catastrophic retreat from that view that we ought to encourage compliance with the Constitution, even where compliance is unpopular. It classifies some rights as preferred; others as discouraged or disfavored. There will be no end to the exceptions, with majorities using their political power to thwart enforcement of unpopular constitutional provisions—

provisions intended precisely to protect important principles against being swept away by the majority's passion of the moment.

* * *

I recognize that as we testify, political power temporarily rests with those who reject a sharp line dividing church and state. That dominance will not last forever. And when advocates of a sharp division between the two are politically ascendant, supporters of H.R. 2679 will be fighting to defeat exceptions of the sort they created but favoring their opponents' causes.

The bill you are considering today is a reflection of the mistaken view that Establishment Clause litigation is brought only by those who detest religion, and who seek a naked public square. That is a gross over-simplification, and in some cases, a lie.

Cases casting doubt on traditional civic religious practices are deeply unpopular among many Americans. Those decisions have been exploited by demagogues of all stripes to support their claim that there is a judicial declaration of war against religion and Christianity. If the subject today were the value of the separation of church and state as such, I would be pleased to defend most of those decisions. There certainly is no war on religion and Christianity. But I need not enter those lists today.

In recent years, conservatives have also successfully invoked the Establishment Clause to stop efforts to grant preferred status to "progressive" religious views on sexuality in the public schools. *Citizens for a Responsible Curriculum v. Montgomery County*, ___ F.Supp.2d ___ (D. Md. 2005); *Hansen v. Ann Arbor Public Schools*, 293 F.Supp.2d, 7780, 804-05 (E.D. Mich. 2003) Those were solid and welcome decisions, decision which should be hailed—and were hailed—by all who view the neutral and even-handed enforcement of the Establishment Clause as a guarantor of religious liberty, and not as a means of suppressing faiths with which one disagrees.

If H.R. 2679 were law, neither set of plaintiffs would have been entitled to attorney's fees, a real disincentive to litigation. The Michigan lawsuit involved a one-time event, long since complete by the time that case was adjudicated. Claims for injunctive relief were moot. H.R. 2679 would have denied all of us, including public school officials across the Nation, the sound guidance those decisions provide.

No one should think that the current balance of forces in religion and politics will prevail forever. One need not be much of a prophet to predict that in the coming years there will be a resurgence of political power to those holding "liberal" religious views, to say nothing of those hostile to public faith claims

altogether. Some of those persons are likely to attempt to use governmental authority to lord over their religious opponents. It is a sad fact of human nature that some of those who today protest official efforts to impose religion will, when they hold the reins of power, not hesitate to impose their secular views on others. When that happens, as it inevitably will, the sponsors of H.R. 2679 will rue the day that they supported this legislation.

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June 20, 2006

Mr. CHABOT. Thank you.

Professor Garry, you are recognized for 5 minutes.

TESTIMONY OF PATRICK GARRY, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF SOUTH DAKOTA SCHOOL OF LAW

Mr. GARRY. Thank you, Mr. Chairman, Members of the Committee.

It has already been discussed here the confusing and inconsistent status of the Establishment Clause jurisprudence. I would contend in disagreement with Mr. Stern that it is an unusually confusing and inconsistent area of the law. Teaching constitutional law, I make my living on making the students confused about doctrines in constitutional law. But it is particularly confusing when it comes to Establishment Clause doctrine.

And I think there is a link between the fear that local government officials have in dealing with this area about what, in fact, does constitute an impermissible establishment of religion. And the court, in fact, has recognized that in several cases I cited to this Committee, the *Lamb's Chapel* case, the *Rosenberger* case, the *Good News* cases in which local government officials are, in effect, selecting out and discriminating against religious expression because of the fear that somehow any connection between that local governmental entity and this religious expression might be seen as an unconstitutional establishment.

There have been—it has already been discussed—sort of the number of different tests that have been used to measure whether an establishment—impermissible Establishment Clause has occurred. And one can even see it sort of in comparing some of the cases that have taken place. For instance, government can pay for students to be bused to and from religious schools, but the government can't pay for busing trips during the school day for field trips for those students.

Some Christmas creches on public property are okay. Others are not. It is due largely to the individual facts and context of each case and how the judges are going to interpret those.

Prayers can be used to open legislative sessions, but they can't be used prior to Friday night football games.

There is also indications in which local government officials or school boards in particular have singled out religious expression only to be told later on that, in fact, the Establishment Clause did not require their particular activity. One school even prohibited a teacher's assistant from wearing a cross on a necklace during school hours. Elsewhere, afraid of violating the Establishment Clause, school officials refused to let a student read a religious story as part of a class exercise on inspirational stories.

Now, granted, Mr. Stern brings a good point. This Committee can't necessarily control or can't control really in any way what the Supreme Court does about the Establishment Clause. But that aside, it can do something about the costs and risks imposed by a Supreme Court that is very uncertain and inconsistent in this particular area.

I might also add in response to the—sort of the general subject area of Section 1983. Section 1983 is a civil rights statute and meant to provide relief for violation of individual civil rights. As

was brought up, it is used to vindicate when there are violations of a person's right to vote.

And, in fact, in the religious area if an individual is discriminated against or infringed on their religious liberty in some way, they have the opportunity to bring a free exercise clause—and that free exercise lawsuit. And under that, they can pursue this kind of remedy. And that is a real individual right remedy.

However, the Establishment Clause within the context of the Constitution is not necessarily an individual right provision, not at all in the sense that free speech is or an individual's right to vote or an individual's right to practice their religion. It is a—it is a structural kind of provision which deals with the relationship between religion and Government in society.

And with that, I will sum up and thank the Committee for inviting me here today.

[The prepared statement of Mr. Garry follows:]

PREPARED STATEMENT OF PATRICK M. GARRY

Testimony of Professor Patrick M. Garry
before the Subcommittee on the Constitution,
U.S. House of Representatives, Committee on the Judiciary,
in support of H.R. 2679
(Public Expression of Religion Act of 2005).

June 22, 2006

INTRODUCTION

The Public Expression of Religion Act of 2005, introduced into the U.S. House of Representatives as H.R. 2679, addresses the damages available in lawsuits brought under 42 U.S.C. §§1983 and 1988 claiming a violation of the First Amendment Establishment Clause.[1] Only for such actions does H.R. 2679 seek to limit the remedies available to litigants to injunctive relief, as well as to prohibit any award of attorney's fees. This limitation and prohibition is logical since Section 1983 claims generally relate to violations of individual rights, whereas the Establishment Clause is more of a structural provision of the Constitution than a substantive individual rights provision. More importantly, the Public Expression of Religion Act is necessary to prevent a governmental chilling of free speech and free exercise rights under the First Amendment. As has been revealed through numerous Supreme Court decisions, a governmental fear of incurring Establishment Clause litigation can often cause that government to enact policies that discriminate against religious speech or practice. Certainly, the constant threat of attorney's fees under 42 U.S.C. 1988 is sufficient to incite that fear and subsequently bring about that discrimination.

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[1] The Public Expression of Religion Act of 2005 seeks to amend 42 U.S.C. 1983, which authorizes civil actions by individuals claiming to have been deprived of their civil rights by state or local officials, to provide that "the remedies with respect to a claim under this section where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion shall be limited to injunctive relief." H.R. 2679. The Act also seeks to amend 42 U.S.C. 1988(b) to state that "no fees shall be awarded under this subsection with respect to a claim" described above.

The threat of an attorney's fee award is particularly chilling because of the highly uncertain and inconsistent status of current constitutional doctrines governing the Establishment Clause. Over the past several decades, the courts have not only used an array of different constitutional tests for determining Establishment Clause violations, but have applied those tests in confusing and inconsistent ways. In 2005, for instance, the Supreme Court issued rulings on the same day in two cases involving the public display of the Ten Commandments. Those rulings, however, contained opposite holdings. In *McCreary County v. ACLU*,[2] the Court found a framed copy of the Ten Commandments in a courthouse hallway to be an unconstitutional establishment of religion. But in *Van Orden v. Perry*, the Court upheld a Ten Commandments monument on the grounds of the Texas state capitol.[3]

Not only were the rulings different in the two cases, but different constitutional tests were used in each case. In *Van Orden*, the plurality opinion did not even mention what had, up to that time, become the most prominent test for judging public displays or expressions of religion – the endorsement test -- nor did *Van Orden* employ the infamous *Lemon* test.[4] Instead, the Court resorted to a somewhat infrequently used test articulated in *Marsh v. Chambers:*[5] a test looking at whether there has been an unbroken tradition of certain religious acknowledgments, such as

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[2] 125 S. Ct. 2722 (2005).

[3] 125 S. Ct. 2854 (2005).

[4] 125 S. Ct. at 2861 (calling the *Lemon* test inappropriate for "passive" religious expressions).

[5] 463 U.S. 783, 792 (1983)(upholding the Nebraska legislature's practice of opening sessions with a prayer by a state-employed clergy).

with the public display of the Ten Commandments.[6] Furthermore, the crucial fifth vote supplied by Justice Breyer in *Van Orden* appeared to rely on yet a brand new test – a "legal judgment" test that seems to call on justices to exercise their common sense in cases such as these.[7]

In *McCreary*, on the other hand, the Court used a variation of the *Lemon* test – a variation that focused on whether a predominantly secular purpose had been behind the Ten Commandments display.[8] However, this 'purpose' test seems to contradict the direction the Court has been moving in its development of the neutrality approach, employed in the Cleveland school voucher case and which downplays 'purpose' of governmental action in favor of 'effect' of governmental action. Further complicating any doctrinal comparison of *McCreary* with *Van Orden* is the fact that the monument upheld in the latter case, on which were inscribed the words "I am the Lord thy God," was of a more overtly religious nature than was the framed document struck down in *McCreary*.[9]

As some commentators have noted, the *Van Orden* and *McCreary* decisions "utterly failed to resolve an issue that had been boiling over in the lower courts for the past decade."[10] According to Professor Laycock, the split decisions "mean that we will be litigating these cases one at a time for a very long time."[11] This uncertainty, however, will inevitably lead

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[6] *Van Orden,* 125 S. Ct. at 2861-63.

[7] 125 S. Ct. at 2869 (Breyer, J., concurring).

[8] *McCreary,* 125 S. Ct. at 2736.

[9] *Van Orden,* 125 S. Ct. at 2893.

[10] Jay Sekulow & Francis Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion,* 14 Wm. & Mary Bill Rts. J. 33, 34 (2005).

[11] Douglas Laycock, *How to be Religiously Neutral,* Legal Times, July 4, 2005, at 42.

governmental units to discourage or even prohibit public expressions of religion, even if those expressions do not violate the Establishment Clause, simply out of fear of incurring a large attorney's fee award in a Section 1983 action.

Because the Public Expression of Religion Act of 2005 is necessary to prevent a chilling of free speech and free exercise rights, it should not be seen as some special privilege or accommodation to religion. However, even if it is an accommodation, it is a permissible accommodation. Indeed, the Court has long held that legislative bodies can confer accommodations that facilitate religious practice and belief, so long as those accommodations do not discriminate among different religious sects. An examination of the historical background of the First Amendment shows that governmental accommodation of religion, as long as it is nondiscriminatory, lies solidly within the framers' intent.

I. IT IS LOGICAL TO TREAT ESTABLISHMENT CLAUSE CASES DIFFERENTLY UNDER 42 U.S.C. §§ 1983 AND 1988

The Establishment Clause is not an Individual Rights Clause

Section 1983 claims, which allow for the awarding of attorney's fees in actions for the deprivation of civil rights by state or local governments, focus primarily on remedying individual rights violations. But the Establishment Clause does not represent or reflect individual rights. For this reason, the remedies awarded in most establishment cases are not money damages to individuals; instead, the remedies are most often an injunction against the offending governmental practice or an overturning of a particular law or ordinance.

Unlike the Free Exercise Clause of the First Amendment, which protects a substantive individual right, the Establishment Clause is a structural clause, governing the relationship

between "church and state." Its primary aim, to the framers, was to prevent in the United States a nationally established church like that of the Church of England. Thus, whereas the Free Exercise Clause focuses on the individual, the Establishment Clause focuses on the structural autonomy of religious institutions from state control, as well as of governmental institutions from the dictates of a chosen religious sect. As Justice Kennedy stated in *Lee v. Weisman*, the "Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions."[12]

II. THE PUBLIC EXPRESSION OF RELIGION ACT IS NECESSARY TO AVOID A CHILLING OF FIRST AMENDMENT RIGHTS

Not only do Establishment Clause violations not fit within the Section 1983 emphasis on individual rights violation, but the threat of attorney's fees in cases alleging Establishment Clause violations poses a chilling effect on the First Amendment freedoms of free speech and free exercise of religion.

The Supreme Court has specifically overturned governmental attempts to avoid Establishment Clause litigation when those attempts result in the chilling or infringement of free speech or religious exercise freedoms. In *Good News Club v. Milford Central School*,[13] for instance, the Court overturned a school board policy excluding religious groups from after-hours

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[12] *Lee v. Weisman*, 505 U.S. 577, 591-2 (1992).

[13] *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

use of school facilities.[14] Previously, in *Lamb's Chapel v. Center Moriches Union Free School District*,[15] the Court had overturned a school district policy that, because of a fear of incurring Establishment Clause litigation, permitted outside groups to use school facilities for everything but religious purposes. The Court ruled that the Establishment Clause could not be used to single out and exclude religious groups.[16] Likewise, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[17] the Court held that a public university's refusal to subsidize a religious periodical published by a recognized student organization constituted viewpoint discrimination, since the university provided subsidies to a wide variety of nonreligious student periodicals.

These opinions stand for the proposition that fears of incurring Establishment Clause lawsuits cannot justify viewpoint discrimination against religious speech or organizations. Yet the kind of infringement on First Amendment freedoms that occurred in *Lamb's Chapel, Good News,* and *Rosenberger,* all because of a fear of facing Establishment Clause lawsuits, is just the kind of infringement that can arise because of the chilling effect caused by a fear of being saddled with a Section 1988 award for attorney's fees

III. SECTIONS 1983 AND 1988, AS CURRENTLY STAND, CAUSE A CHILLING OF FIRST AMENDMENT RIGHTS BECAUSE OF THE CONFUSING AND UNCERTAIN ESTABLISHMENT CLAUSE JURISPRUDENCE

The Unpredictable and Inconsistent Establishment Clause Doctrines

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[14] For a discussion of this case, see Douglas Kmiec, "Good News for Religion," 21 *Cal. Law*. 25 (May, 2001).

[15] *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993).

[16] Ibid., 394.

[17] *Rosenberger*, 515 U.S. 819 (1995).

The chilling effect of Section 1983 attorney's fees results from the extremely unpredictable status of the Court's Establishment Clause doctrines. Because of the many different tests the Court applies in its different Establishment Clause cases, and because of the various and somewhat subjective ways in which those tests have been applied, it is reasonable to conclude that governmental units, fearing an award of attorney's fees against them, would simply play it safe and forbid any kind of religious expression that might somehow be subject to an Establishment Clause challenge.

This doctrinal inconsistency has led one court to describe Establishment Clause case law as suffering "from a sort of jurisprudential schizophrenia."[18] The various establishment tests that the Court has articulated have not only failed to provide a consistent guide to the relationships between government, public employees and the religious practices of society, but the tests have almost completely failed to bring about any kind of social harmony or agreement on the issue of religion in the public arena. As one legal scholar has observed, "we are moving less toward any type of consensus on this matter than toward a state of increased polarization and divisiveness."[19]

Over the past several decades, the courts have applied an array of tests to determine whether some governmental action constitutes an establishment of religion, with the first and

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[18] *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 717 (9th Cir. 1999).

[19] Daniel Conkle, "Toward a General Theory of the Establishment Clause," 82 Nw. L. Rev. 1113, 1160 (1988). Another commentator stated that "as a result of the multitude of tests and opinions stemming from Supreme Court Establishment Clause cases, there have been numerous inconsistencies among the lower courts, as well as a general sense of confusion within society." Roxanne Houtman, "ACLU v. McCreary County: Rebuilding the Wall Between Church and State," *Syracuse Law Review*, Vol. 55, at 395, pp. 403-04 (2005). Over the past thirty years, "the Supreme Court's Establishment Clause jurisprudence has become increasingly ambiguous." Ibid.

most prominent being the one outlined in *Lemon v. Kurtzman*.[20] However, the *Lemon* test and its progeny have failed to provide any consistent basis for evaluating Establishment Clause cases.[21] As one legal scholar puts it: "There is no underlying theory of religious freedom that has captured a majority of the Court," and every new case "presents the very real possibility that the Court might totally abandon its previous efforts and start over."[22] Another scholar notes that the establishment doctrines being applied by the courts are "in nearly total disarray."[23]

The inconsistent legacy of *Lemon* is apparent in many ways.[24] For instance, although the Court had previously held that states could lend textbooks to religious schools,[25] in *Lemon* the Court ruled that states could not supplement the salaries of religious school teachers who taught

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[20] *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

[21] Russell L. Weaver, "Like a Ghoul in a Late Night Horror Movie," 41 *Brandeis Law Journal* 587, 590 (2003). As Justice William Rehnquist explained in a dissenting opinion in *Wallace v. Jaffree*, the *Lemon* test "has simply not provided adequate standards for deciding Establishment Clause cases." *Wallace v. Jaffree*, 472 U.S. 38, 111 (1985) (Rehnquist, J., dissenting).

[22] William P. Marshall, "What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence," 75 *Indiana Law Journal* 193 (2000).

[23] Kent Greenawalt, "Quo Vadis: The Status and Prospects of 'Tests' Under the Religion Clauses," 1995 *Supreme Court Review* 323, 323 (1995). "The failure to adopt a single Establishment Clause test has resulted in the use of a multitude of tests by lower courts, which is causing a growing number of disputes among the circuits." Roxanne Houtman, "ACLU v. McCreary County: Rebuilding the Wall Between Church and State," 55 *Syracuse Law Review* 395, 419 (2005).

[24] Keith Werhan, "Navigating the New Neutrality: School Vouchers, The Pledge, and the Limits of a Purposive Establishment Clause," 41 *Brandeis Law Journal* 603, 610 (2003).

[25] *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968).

the same subjects offered in public schools.[26] Though it later allowed book loans from public to parochial schools, the Court prohibited states from providing to religious schools various instructional materials, such as maps and lab equipment.[27] In one case, the Court struck down a state's provision of remedial instruction and guidance counseling to parochial school students,[28] only to later uphold another state's provision of speech and hearing services to such students.[29] Whereas some cases have permitted states to furnish religious schools with standardized tests[30] and pay the costs incurred by religious schools to administer such exams, others have prohibited states from helping finance the administration of state-required exams that were prepared by religious school teachers.[31]

Establishment Clause doctrines became so unpredictable that the Court took the unprecedented step of overruling a decision it had reached under *Lemon*,[32] even though the Court still adhered to *Lemon* as providing the applicable law. This unpredictability stems from the fact that the second and third prongs of the *Lemon* test often call for distinctions that are too

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[26] *Lemon*, 403 U.S. 602, 617-21 (1971).

[27] *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362-66 (1975).

[28] *Meek*, 421 U.S. 349, 367-72 (1975).

[29] *Wolman*, 433 U.S. 229, 241-48 (1977).

[30] Ibid., 239-41.

[31] *Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980).

[32] *Aguilar v. Felton*, 473 U.S. 402, 410-14 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

ambiguous to support a consistent constitutional jurisprudence.[33] The Court has even recognized that the inconsistencies of *Lemon* would continue until it could find a different, less fact-sensitive test.[34] In fact, some members of the Court have issued sharp criticisms of *Lemon*.[35] Their criticisms revolve around the fact that the secular purpose prong of the *Lemon* test often created the assumption that any law motivated by a desire to promote religious freedom or to accommodate religious practice automatically constituted an establishment.[36]

As *Lemon* began falling into disrepute, the Court experimented with other Establishment Clause tests. In *County of Allegheny v. American Civil Liberties Union*, involving the constitutionality of holiday displays on public property, the Court employed the endorsement test.[37] Then in 1992, in a case involving a rabbi-led prayer at a public high school graduation ceremony, the Court tried out the coercion test.[38] Finally, in *Zelman v. Simmons-Harris*,[39] where

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[33] Werhan, "Negotiating the New Neutrality: School Vouchers, The Pledge, and the Limits of a Purposive Establishment Clause," 41 *Brandeis Law Journal* 603, 610 (2003).

[34] *Regan*, 444 U.S. 646, 662 (1980).

[35] *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655-6 (1989)(Kennedy, J., concurring in part and dissenting in part); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987)(Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985)(O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-12 (1985)(Rehnquist, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768-69 (1976)(White, J., concurring in the judgment).

[36] Michael Paulsen, "Lemon is Dead," 43 *Case Western Reserve Law Review*, 795, 801. The result was frequently a reading of the Establishment Clause that required functional hostility to religion "by treating the promotion of religious freedom – as distinguished from the promotion of religion – as an improper government motivation" (ibid.).

[37] *County of Alleghany*, 492 U.S. 573 (1989).

[38] *Lee v. Weismann*, 505 U.S. 577 (1992).

[39] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

the constitutionality of Cleveland's school voucher program was upheld, the Court embraced the neutrality approach.[40] But the test most generally used to determine when the public expression of religion violates the Establishment Clause is the endorsement test – a test fraught with uncertainty.

The Ambiguities of the Endorsement Test

In *Lynch v. Donnelly*,[41] the Court began using the endorsement test to decide Establishment Clause issues. Subsequently, this test has become the Supreme Court's preeminent means for analyzing the constitutionality of religious symbols and expression on public property.[42] The coercion test, used in *Lee v. Weisman*,[43] had a relatively short existence. Under that test, a religious activity is unconstitutionally coercive if the government directs it in such a way as to force objectors to participate. At issue in *Lee* was a prayer offered by a school-invited rabbi at a graduation ceremony. The Court held that because graduation exercises are

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[40] However, according to one legal scholar, none of these doctrinal approaches "appears up to the task of providing a satisfying analytical framework for addressing problems that arise under either the Establishment Clause or the Free Exercise Clause." Brett G. Scharffs, "The Autonomy of Church and State," 2004 *Brigham Young University Law Review* 1217, 1236-37 (2004).

[41] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[42] Alberto B. Lopez, "Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment," 55 *Baylor Law Review* 167, 195 (2003). Since *County of Allegheny*, which confirmed the endorsement test as the Court's preferred method of analysis, the Court has continued its reliance on the endorsement test for Establishment Clause cases. The Court recently applied the test in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 316 (2000).

[43] *Lee*, 505 U.S. 577, 586 (1992).

virtually obligatory, objectors to the prayer were unconstitutionally coerced into participating.[44] A problem with this approach, however, involves the Court's definition of participation. The Court said that "non-governmental social pressure occurring in a government-provided forum could constitute coercion forbidden by the establishment clause."[45] But this finding equates private social pressure occurring in a state-created forum with actual government compulsion.[46]

Since the unconstitutional coercion occurring in *Lee* was a result of peer pressure, the question arises as to whether a private prayer included in a state-sponsored activity taking place at an institution of higher education, where the participants would be older and hence less susceptible to peer pressure, would similarly violate the Establishment Clause. In *Tanford v. Brand*, however, the court ruled that a religious invocation as part of a graduation ceremony at a state university was not coercive.[47] Finding that students did not feel compelled to participate in the invocation, the court characterized it as "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[48]

The coercion test has lived a relatively brief life in Establishment Clause jurisprudence, having given way to the endorsement test as defined by Justice O'Connor.[49] Under this test, the

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[44] Ibid., 586.

[45] Paulsen, *"Lemon is Dead,"* 832.

[46] Moreover, the Court's ruling actually undermines First Amendment values, since social pressure usually occurs in the form of speech. Ibid., 834.

[47] *Tanford v. Brand,* 104 F.3d 982 (7th Cir. 1997).

[48] Ibid., 986.

[49] *Lynch*, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring); *Estate of Thornton*, 472 U.S. 703, 711 (1985)(O'Connor, J., concurring in the judgment); *Wallace*, 472 U.S. 38, 67 (1985)(O'Connor, J., concurring in part and concurring in the judgment).

government unconstitutionally endorses religion whenever it conveys the message that a religion or particular religious belief is favored by the state.[50] In *County of Allegheny v. ACLU*,[51] the Court struck down a city's practice of allowing a private religious group to place a creche on public property during the Christmas season.[52] In the very same case, however, the Court upheld another holiday display also located on public property – a display that combined a forty-five-foot Christmas tree and an eighteen-foot menorah.[53] Distinguishing the unacceptable creche in *Allegheny* from the permissible one in *Lynch*, the Court examined the setting and found that, unlike the elephants, clowns and reindeer that surrounded the creche in *Lynch*, nothing in the *Allegheny* display muted its religious message. The menorah, on the other hand, represented a holiday with both sectarian and secular aspects. Moreover, the placement of the menorah next to the Christmas tree (unlike the display with just the creche) symbolized two faith traditions – one Jewish and one Christian – conveying the message that the city recognized more than one manner of celebrating the holiday.[54] Thus, while the creche was considered an endorsement of the Christian faith, the tree and menorah were acceptable, insofar as together they did not give the impression that the state was endorsing any one religion.[55]

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[50] *County of Allegheny*, 492 U.S. 573, 593 (1989).

[51] *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

[52] Ibid., 579-81 (although the creche was owned by a Roman Catholic group, the city of Pittsburgh stored, placed and removed it).

[53] Ibid., 581-7.

[54] Ibid., 616-17 (noting that the Christmas tree was once a sectarian symbol but that it has lost its religious overtones).

[55] Ibid., 620-1. In *Allegheny*, the Court concluded that, as to the creche, "no viewer could reasonably think that it occupied this location without the support and approval of the

A problem with the endorsement test is its subjectivity regarding a court's conclusions as to what impressions viewers might have of some religious display or speech. Because the test calls for judges to speculate about the impressions that unknown people may have received from various religious speech or symbols, it is incapable of achieving certainty. [56] One judge has written that the endorsement test requires "scrutiny more commonly associated with interior decorators than with the judiciary."[57]

Justice Kennedy, a critic of the endorsement test, declared it to be "flawed in its fundamentals and unworkable in practice."[58] According to Justice Kennedy, the endorsement test results in a "jurisprudence of minutia" that requires courts to consider every little detail surrounding the religious speech, so as to determine whether an observer might read into the speech an endorsement by the government. In *Allegheny*, this meant that the Court had to examine "whether the city has included Santas, talking wishing wells, reindeer, or other symbols" to draw attention away from the religious symbol in the display.[59]

Under the endorsement test, courts have tended to view any religious expression by

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government." *County of Allegheny*, 492 U.S. 513, 599-600 (1989). The tree and menorah, on the other hand, did not present a "sufficiently likely" probability that observers would see them as endorsing a particular religion. Ibid., 620.

[56] Steven D. Smith, "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test," 86 *Michigan Law Review* 266, 301 (1987).

[57] *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987)(Easterbrook, J., dissenting).

[58] *County of Allegheny*, 492 U.S. 573, 669 (1989).

[59] Ibid., 674. The banning of the creche, in Kennedy's opinion, reflected "an unjustified hostility toward religion" and a "callous indifference toward religious faith that our cases and traditions do not require." Ibid., 655, 664.

public officials as an automatic equivalent of establishment, no matter how much that single religious expression may be surrounded by secular messages, and no matter the age or maturity of the audience. In one case, even though the students were adults and not children, endorsement occurred when a professor at a public university organized an after-class meeting on religious topics, which was attended by several of his students.[60] And when a high school biology teacher denied the theory of evolution and discussed his religious views with students during the school day, the court held that the government had improperly endorsed a religion.[61]

The 'context' of a religious message can also produce subjectivity in the endorsement test. The courts have given mixed signals regarding 'context:' namely, the issue of when a religious text or symbol has become sufficiently 'diluted' by surrounding secular texts and symbols so as to prevent it from becoming an endorsement of religion. In *Allegheny*, the Court held that a creche located on the steps of a county courthouse was prominent enough to constitute an endorsement.[62] On the other hand, the religious message conveyed by a publicly displayed menorah was sufficiently diluted by the presence of a Christmas tree to keep it from becoming a state endorsement.[63]

One year after *Allegheny* was decided, the Sixth Circuit in *Doe v. City of Clawson*[64]

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[60] *Bishop v. Aronov,* 926 F.2d 1066, 1068-9 (11th Cir. 1991). In *Bishop*, the professor prefaced his remarks by labeling them his "personal bias," thus denying any implication of institutional endorsement (ibid., 1066,1068).

[61] *Peloza v. Capistrano Unified School District*, 37 F.3d 517, 519-20 (9th Cir. 1994).

[62] 492 U.S. at 598-602.

[63] Ibid. 617, 635.

[64] 915 F.2d 244 (6th Cir. 1990).

found no Establishment Clause violation by the display of a creche in front of city hall. According to the court, the presence of other "holiday artifacts" and secular symbols had "diluted" the religious message of the creche.[65] A similar result occurred in *Jocham v. Tuscola County,*[66] where the court held that a creche located on a courthouse lawn was sufficiently diluted by secular objects like toy soldiers and decorative wreaths, as well as by a sign indicating that the display was privately-funded.[67] The presence of such a disclaimer proved to be controlling in *Americans United for Separation of Church and State v. City of Grand Rapids*,[68] in which the court upheld a private group's display of a 20-foot high steel menorah in a downtown public park. Although recognizing that the display sent a religious message and did not include secular symbols, the court gave great weight to the presence of two disclaimers indicating that the display was privately-sponsored and did not constitute an endorsement of religion.[69] The court found that these disclaimers allowed a reasonable observer to distinguish "between speech the government supports and speech that it allows."[70]

Under the endorsement test, no concrete boundary exists as to where establishment

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[65] Ibid., 247.

[66] 239 F.Supp.2d 714 (E.D. Mich. 2003).

[67] Ibid., 719, 743. But the issue of context and whether any religious message is sufficiently diluted is an almost unanswerable question. For example, what if the Ten Commandments were displayed along with three dozen other documents underlying the nation's history? Would the other documents sufficiently mute any religious message of the Ten Commandments? Or what if the Ten Commandments was the only non-United States document in the display, what message would that send?

[68] 980 F.2d 1538 (6th Cir. 1992).

[69] Ibid., 1544-46.

[70] Ibid., 1545.

begins or ends. There is nothing so minute that it cannot rise to the level of an official government endorsement of religion. Leaflets dropped in student mailboxes, announcing church social activities, have been ruled an unconstitutional establishment. This occurred in an Ohio school district, whose policy permitted non-profit community groups such as Little League, the Red Cross and the YMCA to distribute leaflets advertising their activities. Religious groups could also distribute their materials, but only after the principal scrutinized those leaflets, ensuring that they only advertised specific activities and did not engage in any proselytizing. Moreover, the leaflets were not even handed out personally to the children; they were placed in mailboxes from which students could retrieve them at the end of the school day. Yet despite all these precautions, the court held that "the practice of distributing religious material to students could be construed as an endorsement of religion by the school."[71]

In another case, the singing of "The Lord's Prayer" by a high school choir was found to violate the Establishment Clause.[72] According to the court, just the rehearsal of that song during choir practice was enough to constitute a violation. In a prime example of the jurisprudence of minutia, the court held that for a public school choir to sing just one religious-oriented song is to "advance the Christian religion."[73]

Although the endorsement test requires a constant judicial oversight of religious speech, it does not seem to allow for any remedial action. For instance, a city that erected a creche on the lawn of its civic center was not allowed to modify that display so as to comply with

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[71] *Rusk v. Crestview Local Schools*, 220 F.Supp.2d. 854, 858 (N.D. Ohio 2002).

[72] *Skarin v. Woodbine Community School District*, 204 F.Supp.2d 1195 (S.D. Iowa 2002).

[73] Ibid., 1197.

endorsement test mandates. After receiving complaints from the ACLU, the city added the following decorations to the creche scene displayed outside the civic center: several reindeer, a large Santa Claus with a sack of presents, three-foot-tall candy canes, a snowman flanked by gift boxes, and various animals including lambs and donkeys.[74] Despite these changes, however, the court concluded that they "did not rescue the display from impermissible endorsement."[75] According to the court, the "context" of the display included the time period during which the original creche stood -- hence, the secular figures later added did not negate the earlier message of endorsement. Consequently, the end result is: once an endorsement, always an endorsement. No matter what the city did, it could not remedy any constitutional defects.

As applied, the endorsement test renders nearly impossible any remedial efforts. No matter what subsequent steps are taken to disassociate the governmental unit from the particular religious speech or symbol, the courts can always point to whatever endorsement may have occurred prior to that disassociation. In *Mercier v. City of La Crosse*,[76] plaintiffs sued to force the removal from a public park of a monument bearing the Ten Commandments. The monument had been placed in the park forty years earlier by the Fraternal Order of the Eagles. In an attempt to avoid the lawsuit, the city sold back to the Eagles the 20 foot by 20 foot plot of land on which the monument stood. Subsequently, the Eagles installed a four foot tall iron fence around the perimeter of the parcel, with signs at each corner of the fence stating that the monument was the private property of the La Crosse Eagles. Six months later, the city erected a

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[74] *American Civil Liberties Union v. City of Florissant*, 17 F.Supp.2d 1068, 1071 (E.D. Mo. 1998).

[75] Ibid., 1075.

[76] *Mercier v. City of La Crosse*, 276 F.Supp.2d 961 (W.D. Wis., 2003).

second iron fence around the monument. This fence was gated, and hanging on it was a sign that read: "This property is not owned or maintained by the City of La Crosse, nor does the City endorse the religious expressions theron." Yet despite all these actions, the court held that the city had failed to cure the Establishment Clause violation and that a reasonable observer could still conclude that the city was sponsoring the monument.

The *Mercier* court acknowledged that the disclaimer sign might prevent a newcomer to La Crosse from perceiving any city endorsement of the religious message. The problem, however, lay with the long-time residents of the city. According to the court, those residents would know about the city's relationship with the monument, its desire to keep the monument on city property, and its efforts to resist removal of the monument. And yet, what the court did not recognize was that these same residents would know that a federal judge had ruled the original monument to be a violation of the Establishment Clause and that the city was prohibited from endorsing the monument's religious message. Presumably, this knowledge would significantly reduce the feelings of alienation suffered by the plaintiffs who did not believe in or agree with the religious ideas conveyed by the Ten Commandments.

The endorsement test has thrown First Amendment jurisprudence into a pit of ambiguity.[77] It tends to elevate human emotions to the level of constitutional trump cards. In

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[77] Even though a number of Justices "find irresistible the proposition that government should not make anyone feel like an outsider by endorsing religion," these same Justices seem uninclined to overturn free exercise exemptions for religious objectors, or the use of the national motto 'In God We Trust,' or even the opening of Supreme Court sessions with the plea "God save the United States of America and this Honorable Court." Steven Smith, "Nonestablishment Under God," 50 *Villanova Law Review* 1, 13-14 (2005). There is also the example posed by Justice Stevens: what about the observer who thinks the exhibition of an "exotic cow" in the national zoo conveys the government's endorsement of the Hindu religion? Ibid., 15-16.

Mercier, for example, a privately financed Ten Commandments monument was successfully challenged on the grounds that it "emotionally disturbed" a plaintiff who viewed it, that it caused another plaintiff to feel "marginalized," that it distracted a third plaintiff and caused her emotional distress, that it "so upset" still another plaintiff that she became "sick to her stomach," and that it caused another so much "stress and disturbance" that she lost sleep.[78]

The Causes of the Current Establishment Clause Confusion

The contorted, confusing, historically-contradictory course of modern establishment doctrine began with *Everson v. Board of Education,*[79] which marked the Court's entry into what would become a convoluted maze of Establishment Clause jurisprudence. In ruling on the constitutionality of a program allowing parents to be reimbursed for the costs of transporting their children to and from parochial schools, the *Everson* Court gave its view of the Establishment Clause:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'"[80]

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[78] 276 F.Supp.2d at 966-67.

[79] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[80] Ibid., 15-16.

The specific examples listed above by the Court – establishing an official church, aiding or giving preference to any one religion, forcing a person to profess a belief in any religion – seem straightforward enough and consistent with history. But it was the last sentence of this long quote that has proved to be the curse of Establishment Clause jurisprudence over the past half-century, for it is anything but indicative of the framers' intentions regarding the constitutional treatment of religion. As later discussed, not only did the framers not believe in a wall of separation between church and state, but they never even once used such a phrase during the debates on the First Amendment.

The "wall of separation" metaphor articulated in *Everson* continued to influence the course of constitutional law throughout the 1960s, as the number of Establishment Clause cases reaching the courts steadily increased.[81] Then, with the 1971 decision in *Lemon v. Kurtzman*,[82] the 'wall of separation' metaphor launched a new phase in Establishment Clause jurisprudence. In *Lemon*, the Court examined the constitutionality of two state statutes that provided public money to parochial schools.[83] In striking down the statutes, the Court articulated what would be known as the three-part *Lemon* test: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;

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[81] Alberto B. Lopez, "Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment," 55 *Baylor Law Review* 167, 183 (2003).

[82] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[83] Ibid., 606. The Pennsylvania statute provided money to nonpublic schools by reimbursing the schools for expenses associated with teachers' salaries and teaching materials, including textbooks. Under the Rhode Island statute, the state made a supplemental payment of 15% of a teacher's salary directly to teachers in nonpublic schools (ibid., 606-7).

finally, the statute must not foster an excessive government entanglement with religion."[84]

Throughout the next decade and a half, the *Lemon* test prevailed as the standard by which courts adjudged Establishment Clause issues. But the "net effect" of the decisions coming down from the Burger Court during the 1970s was to "raise the wall of separation to a height never before reached."[85] In *Lynch v. Donnelly,*[86] however, the Court began rethinking the separationist view that had been articulated in *Everson* and later incorporated into *Lemon*. In upholding the constitutionality of a Christmas display that included a creche and that was owned and maintained by the city of Pawtucket, Rhode Island, the *Lynch* Court stated that the wall of separation "is a useful figure of speech" but "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[87]

The separationist approach contradicts the intentions of the First Amendment framers, who never intended the notion of separation to justify discrimination against religion's role in the public sphere.[88] As recognized by the Fifth Circuit Court of Appeals, the First Amendment "does not demand that the state be blind to the pervasive presence of strongly held views about religion," nor that religion and government "be ruthlessly separated."[89] Likewise, Justice Goldberg has observed that:

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[84] Ibid., 613.

[85] Viteritti, *"Reading Zellman,"* 1116.

[86] *Lynch v. Donnelly,* 465 U.S. 668 (1984).

[87] Ibid., 673.

[88] Michael Stokes Paulsen, "Lemon is Dead," 43 *Case Western Reserve Law Review* 795, 810 (1993).

[89] *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2003)

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.[90]

Not only does the 'wall of separation' metaphor contradict the spirit of the First Amendment, but it provides a completely inappropriate constitutional doctrine. As Justice Reed pointed out, a rule of law should not be constructed from a figure of speech, lifted from a letter Thomas Jefferson wrote years after the First Amendment was ratified to the Danbury Baptists, who sought relief from discriminatory treatment by the Congregationalist establishment in Connecticut.[91] Furthermore, as historians have pointed out, the 'wall of separation' metaphor does not even reflect an accurate portrayal of Jefferson's beliefs.

Thomas Jefferson's influence in the area of law and religion has stemmed primarily from a single phrase (from among his more than sixty volumes of writings) recited by the Court in *Everson*: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[92] Subsequent to *Everson*, the Supreme Court has constructed three different establishment tests, all based on Jefferson's metaphor: the *Lemon* test; the Endorsement test,[93] and the Coercion test.[94] Indeed, the vast

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[90] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring).

[91] *McCollum* , 333 U.S. 203, 247 (1948)(Reed, J., dissenting).

[92] *Everson*, 330 U.S. 1, 16.

[93] *Lynch*, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring). Justice O'Connor's concurring opinion in *Lynch* was adopted by a majority of the Court in *County of Allegheny*, 492 U.S. 573 (1989).

[94] *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

majority of Establishment Clause cases have either cited or relied upon Jefferson's 'wall of separation' metaphor. And yet, according to numerous historical studies, the Court's reliance on Jefferson and his 'wall of separation' metaphor has been misplaced.

Daniel Dreisbach's *Thomas Jefferson and the Wall of Separation between Church and State* addresses the historical origins of the view that the First Amendment was designed to create a wall of separation between religion and government.[95] Dreisbach argues that Jefferson's wall of separation differs both in "function and location" from the "high and impregnable barrier erected in 1947" by Justice Hugo Black in *Everson v. Board of Education.*[96] As Dreisbach explains: "Whereas Jefferson's wall explicitly separated the institutions of church and state, Black's wall, more expansively, separates religion and all civil government."[97]

Casting doubt on Jefferson's own belief in a strict separation of state and religion, as interpreted by modern courts, are his actions as president. During Jefferson's presidency, for instance, Congress approved the use of the Capitol building as a church building for Christian

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[95] Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, (New York: New York University Press, 2002). For other works examining the historical origins of the wall of separation, Philip Hamburger, *Separation of Church and State*, (Cambridge, Mass: Harvard University Press, 2002); John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties,* (Boulder, Co.: Westview Press, 2000); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*, (New York: Oxford University Press, 1995); John C. Jeffries, Jr. & James E. Ryan, "A Political History of the Establishment Clause," 100 *Michigan Law Review* 279 (2001); J. Clifford Wallace, "The Framers' Establishment Clause: How High the Wall?," 2001 *Brigham Young University Law Review* 755 (2001).

[96] Ibid., 125.

[97] Ibid.

worship services,[98] which Jefferson attended on Sundays.[99] Jefferson even approved of paid government musicians assisting the worship at those church services.[100] He also supported similar worship services in his own Executive Branch, both at the Treasury Building and at the War Office.[101] Later, when Jefferson founded the University of Virginia, he designated space in its Rotunda for chapel services and indicated that he expected students to attend religious services there.

Some scholars argue that, even if *Everson's* use of the 'wall of separation' metaphor does reflect Jefferson's views, those views did not at all represent those of the individuals actually responsible for drafting and ratifying the First Amendment.[102] (Not only did Thomas Jefferson not participate in the debates on the First Amendment, he was not even in the country at the time.) The essential themes that run through the pre-enactment debates of the Religion Clauses were limited to the preservation of individual liberty and the preservation of religious

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[98] 10 Annals of Cong. 797 (1800).

[99] James Hutson, *Religion and the Founding of the American Republic*, (Washington, D.C.: Library of Congress, 1998), 89.

[100] Ibid., 84.

[101] Ibid., 89.

[102] Hamburger, *Separation*, 109, 162 (contending that at the time Jefferson expressed such views, they were not "widely published or even noticed"). Steven Smith argues that the Establishment Clause was designed to protect the established state religions from federal interference; and as such, "the religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom." Smith, *Foreordained*, 30. Paulsen, *"Religion, Equality, and the Constitution,"* 317 ("The original intention behind the establishment clause...seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion.").

institutional autonomy.[103] The historical record demonstrates that, in the years leading up to adoption of the First Amendment, the colonies, states, and Continental Congress frequently enacted legislative accommodations to religions and religious practices. There is "no substantial evidence that anyone at the time of the Framing viewed such accommodations as illegitimate, in principle."[104] Furthermore, during the debates over the First Amendment, not one of the ninety framers ever mentioned the phrase "separation of Church and State."[105] Yet it seems logical that if this had been their objective, at least one would have mentioned the phrase that, through the *Everson* decision, would later come to shape the constitutional relationship between church and state.

Constitutional Confusion Intensifies the Threat and Costs of Litigation, Which in Turn Causes a Chilling of First Amendment Freedoms

Prior to the 1970s, there had existed a sweeping recognition by the courts of the religious presence in American public life. In 1931, the Supreme Court declared that Americans were a religious people,[106] and in 1963 the Court held that the First Amendment prohibited judicial

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[103] Chester J. Antieau et al., *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses,* (Milwaukee: Bruce Pub. Co., 1964), 42 (demonstrating that the Religion Clauses of the First Amendment were designed to prohibit the use of religion as an instrument of national policy by forbidding exclusive privileges to any one sect).

[104] Michael McConnell, "Accommodation of Religion: An Update and a Response to the Critics," 60 *George Washington Law Review* 685, 693 (1992).

[105] *The Congressional Records* from June 8 to September 24, 1789 chronicle the months of discussions and debates of the ninety Framers of the First Amendment. 1 Annals of Cong. 440-948 (1789).

[106] *United States v. MacIntosh*, 283 U.S. 605, 625 (1931). Harold Berman, "Religion and Law: The First Amendment in Historical Perspective," 35 *Emory Law Journal* 777, 779 (1986) (suggesting that prior to mid-twentieth century, the United States thought of itself as a Christian

"hostility" toward religion.[107] But with *Lemon v. Kurtzman,* the courts turned sharply separationist in their opinions regarding public accommodation of religion, and they have used the Establishment Clause to enforce "a strict separation of church and state at all levels of American government."[108] As Justice Arthur Goldberg once wrote, the strict separationist approach carries an attitude of "a brooding, and pervasive devotion to the secular and a passive, or even active, hostility, to the religious."[109]

Throughout the post-*Lemon* era, conflicts over the public expression or presence of religion have become virtually institutionalized. In Dickson, Tennessee, public school officials refused to let a student submit a paper on the life of Jesus Christ for a ninth-grade English class.[110] Elsewhere, school officials removed a kindergartner's drawing of Jesus Christ from a display of student posters depicting things for which they were grateful.[111] A court ruled that coaches could not participate in their student-player prayers.[112] School authorities refused to allow the distribution of brochures advertising a summer Bible camp.[113] And in Florida, one county even banned Christmas trees from being displayed on public property, after its county

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county).

[107] *School District v. Schempp*, 374 U.S. 203, 225 (1963).

[108] Conkle, "Toward a General Theory of the Establishment Clause," p. 1117.

[109] *School Dist. v. Schempp,* 374 U.S. 203, 306 (1963)(Goldberg, J., concurring).

[110] *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995).

[111] *C.H. v. Oliva*, 990 F. Supp. 341, 353-54 (D.N.J. 1997).

[112] *Doe v. Duncanville Indep. Sch. Dist.,* 70 F.3d 402, 406-7 (5th Cir. 1995).

[113] *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003).

attorney decided that they qualified as religious symbols.[114]

The courts' uncertain interpretation of 'establishment' has encouraged litigation over just about every occurrence of public-associated religious expression. Exemplifying this trend, a lawsuit was filed after a Chicago park district refused to allow a family to inscribe a religious message on a brick they had purchased as part of a fundraising effort for a new playground. The bricks, used for paving the center of the playground, could be inscribed with whatever message the purchaser wanted, as long as it did not have any religious content.[115] In another brick-fundraiser case, a New York public school ended up removing from a front walkway all bricks containing religious messages.[116] Elsewhere, a brick inscribed with the message "For All the Unborn Children" was removed from a city park, as were bricks inscribed with a student's name and a cross from a flagpole plaza.[117] The basis of these removals was the fear that a few privately-composed religious messages, included among many more non-religious messages, were enough to connote an official government establishment of religion.

IV. *THE PUBLIC EXPRESSION OF RELIGION ACT* IS A PERMISSIBLE ACCOMMODATION OF RELIGION

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[114] "County Bans Xmas Tress in Public Buildings," *FoxNews*, December 17, 2004, at www.foxnews.com/printer_friendly_story/0,3566,141805,00.html.

[115] The Associated Press, "Couple Claims City Unfairly Barred Jesus Brick from Playground," The First Amendment Center Online, 24 July 2003, http://www.fac.org/news.aspx?id=11741.

[116] The Associated Press, "Ministers Sue N.Y. School District Over Religious Bricks," The First Amendment Center Online, 11 September 2000, http://www.fac.org/news.aspx?id=5788.

[117] The Associated Press, "School District Sued After Walkway Crosses Removed," The First Amendment Center Online, 28 March 2003, http://www.fac.org/news.aspx?id=6569.

The Establishment Clause has been interpreted to permit accommodations of religion, as long as those accommodations do not discriminate among different religious sects.[118] Accommodations do not amount to permanent alliances between government and selected religious denominations. With accommodation, the individual decides for herself how or what to practice, and then the government simply facilitates.[119] As Professor Conkle notes, "there is nothing approaching a consensus, historical or contemporary, for the proposition that government should be precluded from favoring religion generally, as against irreligion."[120] In fact, inherent in the very text of the First Amendment is a constitutional favoritism of religion.

The intent of the Establishment Clause was to free religious institutions from ecclesiastical coercion by the government, not to prevent the state from accommodating religion

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[118] Rodney K. Smith, "Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?" 43 *Case Western Reserve Law Review* 917, 920 (1993). As one scholar has noted, it can "hardly be argued that the government establishes religion by the simple act of making public funding available on a formally neutral basis to all organizations, religious and non-religious, willing to provide an identifiably secular service." Paul E. Salamanca, "Quo Vadis: The Continuing Metamorphosis of the Establishment Clause Toward Realistic Substantive Neutrality," 41 *Brandeis Law Journal* 575, 579 (2003). If the case were otherwise, religious organizations would then become essentially second-class citizens regarding their right to participate in governmental programs.

[119] Such facilitation occurred in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), where the Court ruled that a religious school was exempt from paying the unemployment compensation tax required by federal law. But the Court has also allowed public funds to go to religious institutions to help them operate. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court consented to federal construction funds flowing to church-affiliated colleges for buildings used for secular educational purposes. The Court also upheld in *Hunt v. McNair*, 413 U.S. 734 (1973), a state-funded bonding program that allowed religious colleges to obtain construction loans at low interest. In addition, the Court allowed a blind student to receive public vocational rehabilitation aid that paid the student's tuition at a religious college. *Witters v. Wa. Dept. of Servs.*, 474 U.S. 481 (1986).

[120] Conkle, "Toward a General Theory of the Establishment Clause," 1157.

and taking advantage of the unique social contributions of religion.[121] To the framers, "government noninvolvement in the province of the church did not mean total government separation from general religious ideas and affirmations relevant to civic life."[122]

Short of the state's imposition of a national religion, the Establishment Clause should not prevent a democratic government from being responsive to the beliefs and values of its citizens. And in a society in which over ninety percent of the citizens claim to be religious, to say that government should not be responsive to religion is to say that government should not be responsive to the opinion of the people.[123] Indeed, perhaps there is no clearer example of governmental accommodation of religion than in the special accommodations made by the military, which employs more than 1400 ministers of 86 different religious denominations and operates some 500 chapels.[124]

Constitutional accommodations have arisen in a number of circumstances. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v.*

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[121] Esbeck, "Dissent and Disestablishment," 1396.

[122] Thomas Berg, "The Voluntary Principle and Church Autonomy, Then and Now," 2004 *Brigham Young University Law Review*, 1593, 1597 (2004). The eighteenth century notion of separation designed "primarily to protect the vitality and independence of religious groups" stood in "marked contrast to a separationism founded on a suspicion of religion." Ibid.

[123] Richard John Neuhaus, "A New Order of Religious Freedom," 60 *George Washington Law Review* 620, 629 (1992). As Professor Smith argues, "a principle that forbids governmental invocation of religion may have the effect of rendering us tongue-tied when it comes to explaining our most basic political commitments," and this muffling on "the most basic matters is not a promising foundation for enduring political community," Steven Smith, "Nonestablishment Under God?" 50 *Villanova Law Review* 1, 11 (2005).

[124] John T. Noonan, *The Lustre of Our Country: the American Experience of Religous Freedom,* (Berkeley: University of California Press, 1998), 220.

Amos,[125] religious organizations were given exemptions from the antidiscrimination requirements of Title VII, thereby allowing them to favor members of their own faith when hiring for ministerial positions. A similar need for accommodation was highlighted in a case holding that enforcement of laws requiring property owners to rent to unmarried couples violated the religious freedom of owners who were devout Christians.[126] In *Zobrest v. Catalina Foothills School District*,[127] the Court upheld the provision of a publicly funded sign-language interpreter for a deaf student at a religious school, noting that "governmental programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" do not violate the Establishment Clause.[128]

Municipalities frequently adopt ordinances that accommodate religious organizations.[129] In these ordinances, certain types of establishments, such as theaters, fire stations and bars are often excluded within a certain distance from religious houses of worship.[130] The presumption is that religious exercise is a valuable activity to protect, and minimizing the types of businesses that might be "demoralizing or annoying" to churchgoers is one way of doing so.[131]

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[125] *Amos*, 483 U.S. 327 (1987).

[126] *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 717 (9th Cir. 1999).

[127] *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

[128] Ibid., 8.

[129] James E. Curry, *Public Regulation of the Religious Use of Land*, (Charlottesville Va.: Michie 1964), 3.

[130] Anson Phelps Stokes, *Church and State in the United States*, (New York: Harper, 1950), 369.

[131] Ibid., 419, 369.

Furthermore, America's "unbroken" history of giving tax exemptions for religious property – a history reaching back to colonial times – reflects a longstanding tradition of government accommodation of religion.[132]

Accommodation tries to understand the special needs of religious exercise and support governmental efforts to facilitate that exercise. In *Zorach v. Clauson,* Justice Douglas articulated the constitutional basis for accommodating religion and the religious needs of citizens:

> We are a religious people whose institutions presuppose a Supreme Being. . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[133]

Courts have thus long accepted the notion of governmental accommodation of religion, and inherent within any accommodation is a preferential treatment given to religion. In *Arver v. United States*, the Court upheld certain religious exemptions contained in the Selective Service Act. This spirit of accommodation continued in *Zorach v. Clauson*, where the Court upheld a public school program allowing students release time to attend religious classes off the school's premises. In *Walz v. Tax Commission*, the Court sustained a state tax exemption of church property, ruling that it did not constitute an establishment of religion. *Transworld Airlines v. Hardison* upheld Title VII provisions that required employers to make reasonable accommodations to their employees' religious needs.

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[132] *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675 (1970).

[133] *Zorach v. Clauson* , 343 U.S. 306, 313-14 (1952).

In *Stark v. Independent School District*, the court held that a school district's arrangement with a small religious group, whereby the religious parents were allowed to send their children to a public school containing one multi-age classroom that conformed to the group's religious tenets opposing the use of computers, did not amount to an unconstitutional establishment.[134] The religious group provided the building to be used as a public school, open to anyone who would want to attend, on the condition that the state provide the books and a teacher. The accommodation made by the state, and approved by the court, involved the state's agreement to operate the school in accordance with the group's religious objection to the use of technological devices such as computers and televisions.

There are two types of accommodation. The first type involves seemingly mandatory accommodations that are required by the Free Exercise Clause.[135] In this respect, any accommodation provided by the Public Expression of Religion Act could well amount to a mandatory accommodation, since it is necessary to avoid any chilling of First Amendment freedoms caused by the current remedy provisions of 42 U.S.C. Sections 1983 and 1988.

A second type of accommodation, however, involves the permissive kind -- ones that are not required by the Free Exercise Clause, but also not prohibited by the Establishment Clause. For example, regarding tax exemptions of religious property, the Court has generally concluded

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[134] *Stark v. Independent School District, No. 640,* 123 F.3d 1068 (8th Cir. 1997).

[135] In *Brown v. Gilmore*, the court outlined mandatory accommodation: "Not only is the government permitted to accommodate religion without violating the Establishment Clause, at times it is *required* to do so." 258 F.3d 265, 274 (4th Cir. 2001). In *Brown*, the Fourth Circuit held that Virginia's moment of silence statute, requiring that each school establish the daily observance of one minute of silence in each classroom, was constitutional as a minor and nonintrusive accommodation of religion. Ibid., 271, 278.

that while they are neither proscribed by the Establishment Clause nor prescribed by the Exercise Clause, they are nonetheless constitutionally permissible.[136]

Another way to look at this issue is to consider the costs of not accommodating. A government committed to religious pluralism must be able to recognize and accommodate religious needs. Many times, it may be impossible to know if in fact the Free Exercise Clause demands a particular accommodation. Or perhaps it is impossible to know just how much a nonmandatory accommodation may actually expand free exercise rights. But the First Amendment mandates that religion be given every benefit of the doubt; it suggests that the costs of not accommodating religion may be too high to even risk.

V. THE CONSTITUTIONAL HISTORY IN SUPPORT OF GOVERNMENTAL ACCOMMODATION OF RELIGION

The constitutional history of the First Amendment shows that the kind of accommodation and recognition posed by the Public Expression of Religion Act clearly falls within constitutional bounds.

In eighteenth century America, religion was as publicly practiced as politics, with civil laws often reflecting religious values.[137] Public accommodations of religion were frequent, and few people believed that they constituted any kind of establishment of religion.[138] Indeed, the

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[136] Witte, *Religion and the American Constitutional Experiment*, 188.

[137] Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment*, (New York: Oxford University Press, 1986), 22, 51 (1986).

[138] Michael McConnell, "Accommodation of Religion: An Update and a Response to the Critics," 60 *George Washington Law Review* 685, 714 (1992). Generally, whenever conflicts

religious inspiration of the earliest colonies can be seen in their charters. The First Charter of Virginia, for instance, described the colony as serving "the Glory of his Divine Majesty."[139]

The Supreme Court has said that the religion clauses of the First Amendment are heavily grounded in the history surrounding their adoption.[140] It is a full and rich history, since religion provided the first political blueprints for many of the new colonies. And yet, throughout much of the modern Establishment Clause jurisprudence, the courts have largely ignored this history. Instead, they have focused almost single-mindedly on only one historical figure -- Thomas Jefferson -- and only one concept -- the 'wall of separation.'[141]

The framers never stated in a clear and unanimous voice their precise intention behind the general, broad language of the First Amendment. Perhaps that was because they considered the language clear and their intentions obvious. At any rate, the constitutional debates surrounding the drafting of the First Amendment are relatively sparse and somewhat meandering. But even though the literature may be ambiguous on the framers' views of religion and democracy, the historical record certainly is not. Abundant data exists on how eighteenth century Americans actually structured and maintained the relationship between democratic government and religion. Presumably, since it has never been seen as a constitutional provision of radical change, the First Amendment was intended to preserve this relationship that had

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occurred between civil law and religious belief, the latter was accommodated; and these accommodations were never seen as amounting to impermissible establishments, (ibid., 715).

[139] Michael McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 *William and Mary Law Review* 2105, 2186.

[140] *Engel v. Vitale,* 370 U.S. 421, 429-30 (1962); *McGowan v. Maryland,* 366 U.S. 420, 437-40 (1961).

[141] Michael W. McConnell, *"Establishment and Disestablishment,"* 2108 (2003).

evolved over nearly a century and a half. Thus, through a historical survey of the time, it is possible to illustrate consistent patterns and trends that existed throughout all the colonies and states of eighteenth century America.

Eighteenth Century Views on the Democratic Need for Religion

More than any other single concept, the 'wall of separation' metaphor has shaped the direction of Establishment Clause doctrines in the modern era. However, not only does the metaphor have almost no historical basis, it actually contradicts the relationship between religion and government that existed in eighteenth century America.

To Americans of the constitutional period, religion was an indispensable ingredient to self-government.[142] Political writers and theorists emphasized the need for a virtuous citizenry to sustain the democratic process.[143] John Adams believed there was "no government armed with power capable of contending with human passions unbridled by morality and religion."[144] He wrote that "religion and virtue are the only foundations not only of republicanism and of all free

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[142] Tocqueville likewise observed that the early Americans considered religion "necessary to the maintenance of republican institutions." Alexis de Tocqueville, *Democracy in America,* J.P. Mayer ed., (Garden City, N.Y.: Anchor Books, 1969), 293. He came to agree with this position, arguing that religion was desperately needed in a democratic republic (ibid., 294). Jefferson, in his *Notes on Virginia*, expressed the sentiment that belief in divine justice was essential to the liberties of the nation: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" Thomas Jefferson, *The Life and Selected Writings of Thomas Jefferson,* Adrienne Koch & William Peden, ed., (New York: Random House, 1944), 278-279.

[143] For a discussion on the influence of republican thought on the writing of the Constitution, Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke*, (Chicago: University of Chicago Press, 1988).

[144] *The Works of John Adams*, C.F. Adams, ed. (Boston: Little, Brown and Company,1850-1856) 9:229.

government but of social felicity under all governments and in all the combinations of human society."[145]

The constitutional framers "saw clearly that religion would be a great aid in maintaining civil government on a high plane," and hence would be "a great moral asset to the nation."[146] A 1788 New Hampshire pamphleteer expressed the prevailing view: "Civil governments can't well be supported without the assistance of religion."[147] This was why George Washington urged his fellow Virginians to appropriate public funds for the teaching of religion.[148] His objective was not to establish a religion, but to maintain a democratic government.

According to Washington, religion was inseparable from good government, and "no true patriot" would attempt to weaken the political influence of religion and morality.[149] As a general

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[145] *The Spur of Fame: Dialogues of John Adams and Benjamin Rush*, John A. Schutz and Douglass Adair, eds. (San Marino, Ca.: Huntington Library, 1966), 192. According to Benjamin Rush: "The only foundation for a useful education in a republic is to be laid in religion. Without it there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments." Brian Anderson, "Secular Europe, Religious America," *The Public Interest* (April 1, 2004) 143.

[146] Anson Phelps Stokes, *Church and State in the United States*, (New York: Harper, 1950),515.

[147] *The Complete Anti-Federalist*, Herbert J. Storing, ed.(Chicago: University of Chicago Press, 1981) 4:242.

[148] Joseph Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society*, (Washington, DC: Brookings Institute Press,1999). According to the framers, only within a religious congregation would people develop the civic virtue necessary for self-government. Ibid.

[149] David Barton, "The Image and the Reality: Thomas Jefferson and the First Amendment," 17 *Notre Dame Journal of Law, Ethics and Public Policy* 399, 428 (2003). George Washington saw religion as an incubator for the kind of civic virtue on which democratic government had to rely. Viteritti, "Choosing Equality," 127.

in the revolutionary army, he required church attendance by his soldiers.[150] At his urging in 1777, Congress approved the purchase of twenty thousand Bibles for the troops.[151] And in his Farewell Address to the nation at the end of his presidency, he warned that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."[152]

Late eighteenth century Americans generally agreed that the only solid ground for the kind of morality needed to build a virtuous citizenry lay with religious observance.[153] In early America, churches were the primary institutions for the formation of democratic character and the transmission of community values.[154] As Professors Richard Vetterli and Gary C. Bryner have explained:

There was a general consensus that Christian values provided the basis for civil

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[150] Viteritti, "Choosing Equality," 127.

[151] A. James Reichley, *Religion in American Public Life,* (Washington, DC: Brookings Institution, 1985), 99.

[152] *A Compilation of the Messages and Papers of the Presidents*, James D. Richardson, ed. (New York: Bureau of National Literature, 1897), 212. The framers believed, as for instance did George Washington, that religion and morality were the "indispensable supports" for democratic government. President George Washington, "Washington's Farewell Address, (Sept. 17, 1796)" in 1 *Documents of American History* 169, Henry S. Commager ed., (New York : Appleton-Century-Crofts, 1973), 169, 173.

[153] J. William Frost, "Pennsylvania Institutes Religious Liberty," in *All Imaginable Liberty: The Religious Liberty Clauses of the First Amendment,* Francis Graham Lee, ed. (Lanham, Md: University Press of America, 1995), 45.

[154] Michael McConnell, "Why is Religious Liberty the 'First Freedom'?" 212 *Cardozo Law Review* 1243, 1253 (2000). John G. West, *The Politics of Revelation and Reason: Religion and Civic Life in the New Nation,* (Lawrence: University of Kansas, 1996), 11-78. Through the middle of the 19th century, it was common practice for religious schools to be supported by state-generated revenue. Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society*, (New York: Hill and Wang, 1983), 166-67.

> society. Religious leaders had contributed to the political discourse of the Revolution, and the Bible was the most widely read and cited text. Religion, the Founders believed, fostered republicanism and was therefore central to the life of the new nation.[155]

The notion that the First Amendment was intended to foster a strict policy of state neutrality or indifference toward religion would have been met with, to use Justice Storey's words, "universal disapprobation, if not universal indignation."[156] It was the separation of a specific church from state, not the separation of all religion from the state, that was the aim of the framers. Since law was an expression of morality, and since morality derived from religion, it was seen as both impossible and undesirable to completely separate state from religion.[157] Consequently, the constitutional principles of church-state relations arose out of a framework wherein religion and American culture were "intertwined."[158]

By the 1780s, the justification for governmental support of religion had ceased having any real theological component. The need to glorify or worship God did not explain the late eighteenth century belief in the value of religion for the new republic. Instead, there was only "the civic justification that belief in religion would preserve the peace and good order of society by improving men's morals and restraining their vices."[159]

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[155] Richard Vetterli & Gary C. Bryner, "Religion, Public Virtue, and the Founding of the American Republic," in *Toward a More Perfect Union: Six Essays on the Constitution,* Neil L. York, ed., (Provo, Utah: Brigham Young University, 1988), 91-92.

[156] Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment,* (Westchester, Ill.: Crossway Books, 1987), 22.

[157] Ibid.

[158] Curry, *First Freedoms*, 218.

[159] McConnell, *"Accommodation of Religion,"* 2197.

Government Recognition and Support of Religion

Government during the founders' generation constantly supported religion.[160] It donated land for the building of churches and religious schools. It collected taxes to support ministers and missionaries. It outlawed blasphemy and sacrilege, as well as unnecessary labor on the Sabbath.[161] Indeed, as of 1789, six states still maintained some formal system of public-supported religion.[162]

Stating that the "good order and preservation of civil government" depended upon "religion and morality," the Massachusetts constitution of 1780 provided for the "support and maintenance" of teachers of "piety, religion and morality."[163] In Pennsylvania, civil law prohibited blasphemy.[164] The Maryland constitution of 1776 authorized the state legislature to support religion.[165] Similar provisions were included in the original constitutions of Connecticut and New Hampshire, whose constitution also stated that no person of one sect would have to pay

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[160] No one seriously disputed the close relation between government and religion. McConnell, *"Establishment and Disestablishment,"* 2193.

[161] John Witte, *Religion and the American Constitutional Experiment: Essential Rights and Liberties,* (Boulder, Co.: Westview Press, 2000), 53.

[162] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction,* (New Haven: Yale University Press, 1998), 32-33.

[163] Edwin S. Gaustad, "Religion and Ratification," in *The First Freedom: Religion and the Bill of Rights*, James E. Wood, Jr., ed. (Waco, Texas: Baylor University Press, 1990), 53 .

[164] Statutes at Large of Pennsylvania (1779), 9:313; Pennsylvania Statutes, 1794, printed in James Dunlop, General Laws of Pennsylvania, (1847), 151-54.

[165] *The Federal and State Constitutions,* Francis Thorpe, ed. (Washington, DC: Government Printing Office, 1909), 3:1189, 1705.

for the support of any other sect.[166]

Although the framers rejected the idea of an established church, they did not perceive any real tension between government and religious organizations.[167] To the contrary, the Bill of Rights was ratified in an age of close and on-going interaction between government and religion.[168] Congress appointed and funded chaplains who offered daily prayers, presidents proclaimed days of prayer and fasting, and the government paid for missionaries to the Indians. In the Northwest Ordinance, Congress even set aside land to endow schools that would teach religion and morality.[169]

The Public Expression of Religious Views

Religious beliefs found frequent expression in the acts and proceedings of early American legislative bodies. Five references to God appear in the Declaration of Independence. In setting up a government for the Northwest Territory in 1787, the Continental Congress

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[166] Curry, *First Freedoms,* 186.

[167] Viteritti, *Choosing Equality*, 16. And those who advocated government support of religion saw it as "compatible with religious freedom;" they did not equate it with establishment. Curry, *First Freedoms,* 217.

[168] Ellis Sandoz, *A Government of Laws: Political Theory, Religion, and the Founding,* (Baton Rouge: Louisiana State University Press, 1990), 16; Patricia U. Bonomi, Under the Cope of Heaven: Religion, Society and Politics in Colonial America, (New York: Oxford University Press, 1986).

[169] The Northwest Ordinance is reprinted in a footnote to Act of Aug. 7, 1789, ch.8, 1 Stat. 50. Edwin Gaustad, "Religion and Ratification," in *The First Freedom, Religion and the Bill of Rights*, 41-59.

charged it with furthering "religion, morality and knowledge" in the Territory.[170] Early in its first session, the Continental Congress resolved to open its daily sessions with a prayer,[171] and in 1782 it supported "the pious and laudable undertaking" of printing an American edition of the Scriptures.[172] Indeed, the proceedings of the Continental Congress are filled with references to God and religion.

When the First Congress reenacted the Northwest Ordinance in 1789, the very same Congress that created the Bill of Rights, it declared that religion and morality were "necessary for good government."[173] This language was taken from the Massachusetts Constitution of 1780 and later copied into the New Hampshire Constitution of 1784,[174] and it indicates that the First Congress did not believe the First Amendment to prohibit public encouragement of religious exercise.[175] Congress also consistently permitted invocations and other religious practices to be performed in public facilities.[176] Even Thomas Jefferson, who was probably the most

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[170] Anson Stokes & Leo Pfeffer, *Church and State in the United States*, (New York: Harper & Row, 1964), 85.

[171] Witte, *Religion and the American Constitutional Experiment*, 58.

[172] Rodney K. Smith, *Public Prayer and the Constitution: A Case Study in Constitutional Interpretation*, (Wilmington, Del: Scholarly, 1987), 66.

[173] Thomas Nathan Peters, "Religion, Establishment and the Northwest Ordinance: A Closer Look at an Accommodationist Argument," 89 *Kentucky Law Journal* 743, 772 (2000-2001) (The Northwest Ordinance was originally enacted by the Continental Congress in 1787, and then re-enacted and adopted in 1789 by the First Congress).

[174] David Tyack, et al., *Law and the Shaping of Public Education, 1785-1954,* (Madison: University of Wisconsin, 1987), 26-27.

[175] Peters, *"Religion, Establishment and the Northwest Ordinance," 772.*

[176] Ibid., 103.

separationist of any of the founding generation, supported a proposal inviting religious sects to conduct worship services at the University of Virginia, a state institution.[177]

On September 26, 1789, the day after the final language of the First Amendment was adopted by Congress, and in a spirit of jubilation over passage of the Bill of Rights, the House and Senate both adopted a resolution asking the President to "recommend to the people of the United States, a day of public fasting and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of the Almighty God."[178] Thus, the First Congress obviously did not intend to render all public prayer unconstitutional under the Establishment Clause.[179]

In the years following ratification of the First Amendment, Presidents George Washington and John Adams continued to issue broad proclamations for days of national prayer.[180] James Madison likewise recognized that the government could designate days of

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[177] Saul Padover, *The Complete Jefferson,* (Freeport, N. Y.: Books for Libraries 1969), 1110

[178] 1 Annals of Cong., 451.

[179] Beginning with the first session of the Continental Congress in 1774, the legislature opened its sessions with prayer; and the First Congress in 1789 established the office of Congressional Chaplain. Kurt T. Lash, "Power and the Subject of Religion," 59 *Ohio State Law Journal* 1069 (1998). Moreover, during the Constitutional Convention itself, Benjamin Franklin had asked that the Convention resort to prayer to overcome an impasse on certain divisive issues. Charles E. Rice, *The Supreme Court and Public Prayer,* (New York: Fordham University Press 1964) 36-37.

[180] Stokes & Pfeffer, *Church and State,* 87-88. Public religious proclamations were common in the post-constitutional period, from George Washington's first inaugural address in which he referred to the role of divine providence in guiding the formation of the United States, *see* Washington's First Inaugural Address, reprinted in United States, President, *A Compilation of the Messages and Papers of the Presidents*, 43, to opening sessions of Congress with a prayer. Smith, *Public Prayer,* 103.

solemn observance or prayer.[181] When he served in the Virginia legislature, he sponsored a bill which gave Virginia the power to appoint "days of public fasting and humiliation, or thanksgiving."[182] Later, during his presidential administration, Madison issued at least four proclamations recommending days of national prayer and thanksgiving.[183] He also oversaw federal funding of congressional and military chaplains, as well as missionaries charged with "teaching the great duties of religion and morality to the Indians."[184]

The Eighteenth Century Understanding of Establishment

Because the Framers did not want to duplicate the English experience with the established Anglican church, a state preference of one denomination over others was what was primarily thought to be an establishment of religion throughout the colonial and constitutional periods.[185]

Separation of church and state was a concept focused on ensuring the institutional

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[181] Dreisbach, *Real Threat and Mere Shadow*, 150. James Madison saw religious duties as being preeminent to civil duties. As he argues in his *Memorial and Remonstrance Against Religious Assessments*, an individual's duty to God "is precedent, both in order of time and in degree of obligation, to the claims of civil society. Before any man can be considered as a member of civil society, he must be considered a subject of the Governor of the Universe."

[182] Thomas Jefferson, *The Papers of Thomas Jefferson, II*, Julian Boyd, ed. (Princeton University Press, 1950), 556.

[183] Dreisbach, *Real Threat and Mere Shadow*, 151.

[184] James M. O'Neill, "Nonpreferential Aid to Religion is Not an Establishment of Religion," 2 *Buffalo Law Review* 242, 255 (1952).

[185] *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)(stating that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity").

integrity of religious groups, preventing government from dictating articles of faith or interfering in the internal operations of religious bodies.[186] As Elisha Williams wrote, every church should have the "right to judge in what manner God is to be worshiped by them, and what form of discipline ought to be observed by them, and the right also of electing their own officers" free of interference from government officials.[187] In the American view, the most repressive aspect of establishment involved government intrusion into religious doctrines and liturgies.[188] Under the Anglican system in England, for instance, the law mandated the type of liturgies and prayers to be used during worship services, as well as the fundamental articles of faith.

Although modern jurisprudence sometimes focuses on 'advancement of religion' as a key element of establishment, in eighteenth century America the key element taken from the Anglican experience was 'control.'[189] In England, it was the state that controlled the church, not the church that controlled the state; government officials dictated the appointment of ministers,

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[186] As Noah Feldman argues, the Establishment Clause was meant to protect religious liberty. Noah Feldman, "The Intellectual Origins of the Establishment Clause," 77 *New York University Law Review* 346 (2002), p. 403-05, 428. Similarly, Philip Hamburger interprets the Establishment Clause in terms of protecting religious liberty. He argues that the notion of 'separation of church and state' arose from the desire to keep religion uncorrupted by worldly influences. Philip Hamburger, *Separation of Church and State* (2002), 29, 38-39. Hamburger concludes from his historical study that the framers generation did not expect church and state to be kept apart from each other, but that the state would protect the church and would be the beneficiary of its moral influence. Ibid., 22, 24, 27.

[187] Elisha Williams, *The Essential Rights and Liberties of Protestants,* (Boston: Printed and sold by S. Kneeland and T. Green, 1744), 46.

[188] Witte, *Religion and the American Constitutional Experiment*, 51.

[189] McConnell, *Establishment and Disestablishment*, 2131.

and civil law controlled religious doctrine and articles of faith.[190] Thus, to the framers, an "establishment of religion" was understood to refer to "a church which the government funded and controlled and in which it used its coercive power to encourage participation."[191]

The ways in which the English establishment exerted control were twofold: to prohibit public religious worship outside of the Anglican Church; and to maintain government control over the ecclesiastical doctrines of the Church of England, rather than leaving such matters to the church clergy.[192] From the time of Elizabeth I, people not attending Anglican services were subject to monetary fines, the amount of which depended on the length of absence.[193] Marriages could be lawfully performed only by ministers of the Church of England, and the law refused to recognize the offspring of marriages performed outside the Church.[194] Thus, based on the English experience, Americans hinged their opposition to establishment not on any disagreement with government support of religion, but on an opposition to state tyranny over religious exercise.[195]

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[190] Religious doctrines and liturgies were governed by Parliament, which also enacted legislation restricting public worship by Catholics, Puritans and Quakers. Indeed, an array of penal laws punished Catholics, Puritans and Quakers who attempted the open exercise of religious faith outside the official church. Ursula Henriques, *Religious Toleration in England, 1787-1833*, (Toronto: University of Toronto Press, 1961), 6.

[191] Frederick Mark Gedicks, "A Two-Track Theory of the Establishment Clause," 43 *Boston College Law Review* 1071, 1091 (2002).

[192] McConnell, *Establishment and Disestablishment*, 2133.

[193] William Blackstone, *Commentaries on the Laws of England,* vol. 4 (Philadelphia: R. Welsh and Company, 1961), 51-52.

[194] Sanford H. Cobb, *The Rise of Religious Liberty in America: A History,* (New York: MacMillan, 1902), 49-51.

[195] Curry, *First Freedoms*, 211.

The Tradition of Nonpreferential Aid to Religion

During the constitutional period, there was a split of opinion on whether states could support and promote an individual Christian denomination. However, there was overwhelming agreement that government could provide special assistance to religion in general, as long as such assistance was given without any preference among sects.[196] Both before and after the Revolution, Americans made a conscious distinction between two types of state action: the granting of exclusive privileges to one church, and a non-exclusive assistance to all churches. Only the former was considered to be an "establishment" of religion.[197] Catholics in Maryland, for instance, opposed any state-established religion, yet supported state aid to religion if conferred without preference between sects.[198] According to Thomas Cooley, the Establishment Clause prohibited only "discrimination in favor of or against any one Religious denomination or sect."[199]

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[196] Patrick W. Carey, "American Catholics and the First Amendment," in *All Imaginable Liberty* Francis Graham Lee, ed.(Lanham, Md.:University Press of America, 1995),115. Even in Virginia, with the established Anglican Church, the growing sentiment in the late eighteenth century was that, while government could indeed give aid to religion, there should be equal treatment in such aid. Rodney Smith, *Public Prayer and the Constitution*, (Wilmington, Del.:Scholarly Resources, 1987), 45. As the French philosopher Jacques Maritain observed in *Reflections on America*, the term 'separation of church and state' in eighteenth century America meant "a refusal to grant any privilege to one religious denomination in preference to others." (cited in Michael Novak, "The Faith of the Founding," *First Things*, April, 2003, 27.)

[197] Curry, *First Freedoms*, 209. "The dominant image of establishment Americans carried with them from the colonial period on was that of an exclusive government preference for one religion (ibid., 210).

[198] Mary Virginia Geiger, *Daniel Carroll: A Framer of the Constitution*, (Washington, DC: Catholic University of America, 1943) 83-84.

[199] Thomas M. Cooley, *A Treatise on the Constitutional Limitations*, (Boston: Little, Brown 583 (1883). The Reverend Jaspar Adams, cousin of John Quincy Adams, wrote in 1833 that the term "establishment of religion" meant "the preference and establishment given by law

The framers recognized that granting exclusive privileges and monopoly status to one religious sect would only weaken religion, not strengthen it.[200] Madison, for one, declared that established religion tends toward "indolence in the clergy and servility in the laity."[201] The widespread eighteenth century view was that establishment exerted corrupting effects on the ministries of the established church.[202] Religious establishments were seen to "pervert rather than advance true religion."[203] Just as free markets were seen as producing a strong economy, disestablishment and free exercise were believed necessary to produce strong religions. Thus, it was for the purpose of strengthening religion that the Establishment Clause was drafted.[204]

During the Constitutional debates, Governor Samuel Johnston explained his support for the First Amendment and attempted to allay the fears of opponents by arguing that "there is no cause of fear that any one religion shall be exclusively established."[205] His wording was clear in

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to one sect of Christians over every other." Dreisbach, *Real Threat and Mere Shadow*, 70.

[200] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Bk. V., ch.I, pt. II, art. III, (Oxford: Clarendon Press, 1976 [1776]), 309-310.

[201] James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in 5 *The Founders Constitution* 82, Philip B. Kurland & Ralph Lerner, eds.(Indianapolis: Liberty Fund, 1978).

[202] Elisha Williams, *The Essential Rights and Liberties of Protestants: A Seasonable Plea for the Liberty of Conscience and the Right of Private Judgment in Matters of Religion Without Any Controul from Human Authority*, (1744), 24.

[203] Carl Esbeck, "Dissent and Disestablishment," 2004 *Brigham Young University Law Review* 1385, 1506 (2004). As some eighteenth century writers argued, an "established religion is ultimately a religion controlled by irreligious persons." Ibid., 1521.

[204] McConnell, *"Why is Religious Liberty the 'First Freedom'?"* 1257.

[205] Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J.B. Lippencott, 1941) 4:198-99.

its reference to the "exclusive" establishment of "one religion." To the Virginia ratifying convention of 1788, James Madison stated that religious liberty existed in America because of "that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society."[206] Richard Henry Lee, who thought any religion should be supported so as to foster public morality, did not consider disestablishment to mean the removal of government's "general ability to promote all religion."[207]

The framers' generation firmly embraced the nonpreferentialist tradition.[208] "It is revealing," historian Charles Antieau has noted, "that in every state constitution in force between 1776 and 1789 where 'establishment' was mentioned, it was equated or used in conjunction with 'preference.'"[209] North Carolina's constitution of 1776 stated that there "shall be no establishment of any religous church or denomination . . . in preference to any other."[210] Both the Delaware and New Jersey constitutions provided that "there shall be no establishment of any one religious sect . . . in preference to another."[211] (Later, over the course of the nineteenth and twentieth centuries, thirty-two different state constitutions would contain a "no preference"

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[206] Ibid., 3:330; Levy, *Establishment Clause*, 125.

[207] James Madison, *Papers* Hutchinson et al., eds. (Chicago: University of Chicago Press, 1962), 8:149.

[208] James McClellan, *Joseph Story and the American Constitution*, (Norman: University of Oklahoma Press, 1971), 134.

[209] Chester J. Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee, Wis.: Bruce Pub. Co., 1964), p. 132.

[210] Curry, *First Freedoms*, 151.

[211] Ibid., 159.

clause.[212] The Arkansas constitution of 1874 provided a typical example: "No preference shall be given, by law, to any religious establishment."[213])

According to the nonpreferentialist tradition, the religion clauses were designed to foster a spirit of accommodation between religion and the state, as long as no single church was officially established and governmental encouragement of religion did not deny any citizen the freedom of religious expression.[214] The very text of the First Amendment supports this view. The use of the indefinite article 'an,' rather than definite article 'the,' before the phrase 'establishment of religion' indicates that the drafters were concerned with government favoritism toward one sect, rather than a general favoritism of religion over nonreligion.[215] This notion is further supported in the congressional debates over the Establishment Clause. On August 15, 1789, Madison stated that he "apprehended the meaning of the words to be that Congress should not establish *a* religion, and enforce the legal observation of it by law."[216] This view was repeated in 1803 by Chief Justice Jeremiah Smith of New Hampshire who, subscribing to the view that an establishment constituted an exclusive government church, declared that New Hampshire had no establishment, even though the state had a tax system which provided

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[212] Witte, *Religion and the American Constitutional Experiment*, 91.

[213] Constitution of Arkansas (1874), Art. II.24, 25.

[214] Dreisbach, *"Real Threat and Mere Shadow*," 54.

[215] Michael S. Ariens & Robert A. Destro, *Religious Liberty In a Pluralistic Society*, (Durham, No.Car.:Carolina Academic Press, 1996), 89. The clause was not a prohibition on favoritism toward religion in general. Dreisbach, *Real Threat and Mere Shadow*, 70.

[216] 1 Annals of Cong., H.R., 1st Cong., 1st Sess., 758 (Joseph Gales ed., 1790) (emphasis added).

financial support to all denominations.[217] Neither Connecticut, Massachusetts nor Vermont considered their financial support of all churches to be an establishment of religion.[218] That was because, in the early American view, nothing in the language of the First Amendment foreclosed governmental promotion of religion in general, provided that it did so in a nonpreferential manner.[219]

James Madison repeatedly stressed that government could accommodate or facilitate religious exercise, so long as it did so in a nonpreferential way.[220] When he spoke of the proposed Establishment Clause as pertaining only to the establishment of a particular "national religion," he implicitly endorsed governmental "nondiscriminatory assistance" to religion in general.[221] At the Virginia Ratifying Convention, where delegates debated and voted on the proposed First Amendment, Madison spoke of the Establishment Clause in terms of an exclusive government preference for one religion. Edmund Randolph likewise spoke of "the establishment of any one sect, in prejudice to the rest." And Patrick Henry, arguing on behalf of the Establishment Clause, insisted that "no particular sect or society ought to be favored or

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[217] William Gerald McLoughlin, *New England Dissent, 1630-1833,* (Cambridge, Ma.:Harvard University Press, 1971), 2:864.

[218] Curry, *First Freedoms*, 191.

[219] Theodore Sky, "The Establishment Clause, The Congress, and The Schools: An Historical Perspective," 52 *Virginia Law Review* 1395, 1427 (1966).

[220] Smith, *Public Prayer and the Constitution*, 56. What Madison opposed was government promotion of religion in a manner that would compel individuals to worship contrary to their conscience (ibid., 82). He feared that one sect might obtain a preeminence and establish a religion to which it would compel others to conform. Laurie Messerly, "Reviving Religious Liberty in America," 8 *Nexus* 151, 154 (2003).

[221] Walter Berns, *The First Amendment and the Future of American Democracy* (New York, 1976), 9.

established, by law, in preference to the others."[222] As Thomas Curry notes in his history of the First Amendment, "by emphasizing the exclusive favoring of one particular sect, Americans appeared to draw a careful distinction between such an exclusive establishment and a favoring of all sects."[223]

The eighteenth-century adherence to nonpreferentialism hinged on the belief that the Exercise Clause is preeminent to the Establishment Clause.[224] Throughout the debates on the First Amendment, the prevailing view was that "the Establishment Clause should not be considered more important than the exercise of one's equal rights of conscience," and that the Establishment Clause "was to be treated merely as a means of facilitating the free exercise of one's religious convictions."[225] The preeminence of the Exercise Clause was also reflected in the belief that government should not be hindered in accommodating people's efforts to practice their religious beliefs.[226] Daniel Webster, for one, believed that government could actually promote religious exercise in the public square.[227]

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[222] *Debates*, Elliot, ed., 3:330, 204, 659.

[223] Curry, *First Freedoms*, 198. Even Rhode Island, which never gave any financial support to religion, proposed during its ratifying convention that the First Amendment provide that "no particular sect or society ought to be favored or established by law." Theodore Foster, *Theodore Foster's Minutes of the Convention Held at South Kingston, Rhode Island, in March, 1790,* Robert C. Cotner, ed, (Freeport, NY: Ayer Company Pub., 1929), 93.

[224] James Madison agreed with Justice Story's articulation of the intent of the framers: that the right of free exercise was the pre-eminent right protected by the First Amendment. Smith, *Public Prayer and the Constitution,* 84.

[225] Ibid., 79.

[226] Smith, *Public Prayer and the Constitution,* 84.

[227] Daniel Webster, *Works of Daniel Webster,* (Boston: C. C. Little and J. Brown, 1851), 6:176.

Coincidental with their belief in the doctrine of nonpreferentialism, early Americans were almost universally opposed to the kind of strict separation of church and state that twentieth-century separationists would later espouse. Because of the fear that such separation would hinder the free exercise of religion,[228] the strict separationist view was almost nonexistent during the constitutional period.[229] This view, in fact, was wholly rejected by "every justice on the Marshall and Taney courts."[230]

Prior to the 1947 decision in *Everson v. Board of Education*,[231] the 'wall of separation' metaphor had never appeared in Establishment Clause jurisprudence.[232] Its appearance in *Everson*, however, resulted more from cultural attitudes and beliefs than from constitutional

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[228] Ibid., 108. *See also* 2 Joseph Story, *Commentaries on the Constitution of the United States*, 2d ed., (1851), 593- 97. According to Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established, at the national level (ibid.).

[229] Strict separationists have ignored the historical data in their effort to build their case. They have selectively used snippets of history to justify an otherwise historically unsupportable position. Smith, *Public Prayer and the Constitution*, 55-6.

[230] McClellan, *Joseph Story and the American Constitution*, 136. On the other hand, the more separationist view espoused by Jefferson "was clearly not shared by a large majority of his contemporaries (ibid.). Until the mid twentieth century, American courts consistently endorsed the importance of religion in the nation's public life. Douglas W. Kmiec & Stephen B. Presser, *The American Constitutional Order: History, Cases, and Philosophy*, (Cincinnati: Anderson Publ. Co., 1998) 185-86.

[231] Thomas Jefferson, "Reply to a Committee of the Danbury Baptist Association" (Jan. 1, 1802), in *The Writings of Thomas Jefferson*, Vol. 16, Andrew A. Lipscomb & Albert Ellery Bergh eds., (Washington, DC: Thomas Jefferson Memorial Association 1905), 281-282.

[232] The 'wall of separation' phrase, however, did make its first appearance in a Supreme Court opinion on Free Exercise in *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878). But since Jefferson was not even present at the convention preparing the Constitution nor at the congressional debates over the Bill of Rights, he is not an appropriate authority for stating the intended meaning of the Establishment Clause. *Reynolds*, 98 U.S. 145, 163 (Jefferson was absent as minister to France.)

precedent.[233] As Justice Rehnquist would later argue, "the greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights."[234]

The Framers' View of Religion

At around the time of the drafting of the First Amendment, individual states were ratifying their own constitutions and passing their own laws governing religion. In 1785, a bill for the "support of the public duties of religion" passed the Georgia legislature by a vote of forty-three to five.[235] The Delaware legislature declared in 1787 that it was their "duty to countenance and encourage virtue and religion by every means in their power."[236] In 1789, the New Jersey legislature appointed a committee to "report their opinion on what may be proper and competent for the Legislature to do in order to promote the Interest of Religion and Morality among all ranks of People in this State."[237] And throughout the constitutional period, a system of

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[233] Hamburger, *Separation of Church and State*, 454-55, 458. As Professor Hamburger points out, the majority of eighteenth century Americans did not wish to disconnect religion from government, only to disestablish denominations that were financially supported by the government. Ibid., 11-12. But when separation was adopted as a constitutional principle in the mid-twentieth century, it was done so by justices who had become so oriented by the prevailing culture to mistakenly think of religious freedom in terms of separation of church and state. Ibid., 458.

[234] *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

[235] Reba Carolyn Strickland, *Religion and the State in Georgia in the Eighteenth Century*, (New York: Columbia University Press, 1939), 166.

[236] State of Delaware, *The First Laws of the State of Delaware,* 2, pt. 1, John D. Cushing ed., (Wilmington, Del.: Michael Glazier 1981, [1797]), 878-79.

[237] *Journal of the Proceedings of the Legislative Council of New Jersey,* Sept., 13, 1789, Oct. 30, 1789.

compulsory financial support for religion continued to prevail in Massachusetts, Connecticut, New Hampshire and Vermont.[238]

The religion clauses of the First Amendment provide for a legal separation between church and state, not a moral separation.[239] To the framers, a government isolated from religious influence was just as unintended as a civil government devoid of moral influences.[240] The notion that the constitutional framers were afraid of religious influences over the state "is nonsense."[241] The whole justification of the Revolution had been interwoven with claims that freedom was a God-given right.[242]

According to the most eminent nineteenth century constitutional scholars, the framers did not intend to expunge religious influence from society or even foster a climate of detached neutrality towards religion.[243] A primary objective of the First Amendment was not to insulate

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[238] McConnell, *"Establishment and Disestablishment,"* 2158.

[239] Jacob Marcellus Kirk, *Church and State*, (New York: Thomas Nelson & Sons, 1963), 116. Moreover, the words 'church' and 'state' refer to institutions; whereas 'religion' refers more generally to the beliefs and practices of society.

[240] As Professor Esbeck argues, a "separation of religion-based values from government and public affairs would have been received with wide disapprobation in the new nation." Esbeck, "Dissent and Disestablishment," p. 1580.

[241] Stephen Carter, "Reflections on the Separation of Church and State," 44 *Arizona Law Review* 293, 297 (2002).

[242] Bernard Bailyn, *The Ideological Origins of the American Revolution,* (Cambridge Mass.: The Belknap Press of Harvard University Press, enlarged ed., 1992), 315. *Political Sermons of the American Founding Era, 1730-1805*, Ellis Sandoz ed., (Liberty Fund, Inc., 1991), 139, 165, 713, 738.

[243] Story, *Commentaries on the Constitution,* II, 3rd ed., (1858), 663 (stating that "at the time of the adoption of the Constitution, and of the [first] amendment to it..., the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of

society from religion, but to advance the interests of religion.[244] The framers wanted to create an environment in which the strong moral voice of religious congregations could influence the federal government and where the clergy could speak out boldly, without fear of retribution, on matters of public morality and the nation's spiritual condition.[245]

To the extent early Americans believed in separation of church and state, they believed in dividing church from state, not God from state.[246] Moreover, the purpose of the separation was not to protect the state from religion, but to protect religious institutions from being regulated and corrupted by the state.[247]

Drafting and Debating the First Amendment

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religious worship"). Cooley, *The General Principles of Constitutional Law*, 205-06 (stating that it "was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects"). Moreover, the political debates of the framers made frequent use of biblical references. One scholar surveyed 3,154 citations made by the Founders and discovered that more than one-third of them were to the Bible. Anderson, "Secular Europe, Religious America," 143.

[244] Mark DeWolfe Howe, *The Garden and the Wilderness*, (Chicago: University of Chicago Press, 1965), 31. The conventional wisdom of the time was that "the existence of healthy religious institutions was essential to the health of the state, and that the existence of healthy religious institutions depended on the support and protection of the state." Esbeck, "Dissent and Disestablishment," p. 1574.

[245] Dreisbach, *Real Threat and Mere Shadow*, 84. Robert Allen Rutland, *The Birth of the Bill of Rights*, (Chapel Hill: Published for the Institute of Early American History and Culture by the University of North Carolina Press, 1955) 127, 166-67, 184, 209.

[246] Carter, *"Reflections on the Separation,"* 296.

[247] Ibid., 294.

The framers' principal concern in drafting the Establishment Clause was to ensure equality among religions, not between religion and nonreligion.[248] They did not think that the government "should adopt a position of being areligious or certainly anti-religious."[249] To the contrary, they believed that government had a duty to affirmatively support religion.[250]

During the years immediately preceding enactment of the First Amendment, interest in some form of official support for religion was on the rise.[251] Many leaders were convinced that public virtue was declining, and this led to a loss of confidence in democracy.[252] The decline was attributed to the paucity of public religious worship and teaching, a result of the collapse of the established Anglican church.[253] Consequently, nearly every state witnessed a movement to strengthen religious institutions and practices within its borders. So just as the creation of the American republic coincided with a dismantling of the pro-monarchical Church of England, it simultaneously inspired a concern for strengthening religion in general, which in turn would promote republican virtue.[254] As Tocqueville wrote:

> Religion is much more needed in the republic they advocate than in the monarchy they attack, and in democratic republics most of all. How could society escape

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[248] Witte, *Religion and the American Constitutional Experiment*, 47.

[249] Antieau et al., *Freedom from Federal Establishment*, 187-88 (1964) (describing the Framers' understanding of the presence of religious ideals in governmental institutions).

[250] Curry, *The First Freedoms,* 190.

[251] McConnell, *"Establishment and Disestablishment,"* 2194.

[252] Ibid.

[253] Thomas E. Buckley, *Church and State in Revolutionary Virginia*, (Charlottesville, Va.: Press of Virginia, 1977), 73-74, 81-82.

[254] McConnell, *"Establishment and Disestablishment,"* 2196.

> destruction if, when political ties are relaxed, moreal ties are not tightened? And what can be done with a people master of itself if it is not subject to God?[255]

On April 15, 1789, before beginning debate on the religion clauses, the First Congress voted to appoint two chaplains of different denominations to serve in each house for the duration of the debates.[256] During the ensuing proceedings on the Establishment Clause, one framer voiced his fear "that it might be thought to have a tendency to abolish religion altogether."[257] Mr. Gerry thought the amendment would be better if it stated that "no religious doctrine shall be established by law." Madison said he understood the amendment to mean that Congress "should not establish a religion and enforce the legal observation of it by law." Benjamin Huntington worried that the Establishment Clause "might be taken in such latitude as to be extremely harmful to the cause of religion." He specifically feared that the public support of ministers or the building of churches "might be construed into a religious establishment." Finally, he hoped that the amendment would be interpreted so as "not to patronize those who professed no religion at all." Madison, in explaining the term establishment, stated that the primary fear of the drafters was that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."

Much of the debates focused on the prohibition of government favoritism of one sect over any others. But there is another aspect of those debates worth noting, an aspect that

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[255] Alexis De Tocqueville, *Democracy in America*, J.P. Meyer & Max Lerner eds., (New York: Harper & Row,1966)[1835], 294.

[256] 1 Annals of Cong., cols. 18-19, 233.

[257] United States. *The Debates and Proceedings in the Congress of the United States, Compiled from Authentic Materials,* Joseph Gales and W.W. Seaton eds., 42 vols. (Washington, D.C., 1834-56), I:448-59.

encompasses the whole eighteenth century dialogue over religious establishment. As one historian has noted, a remarkable feature of the religion debates was that the advocates of the existing state establishments "tended to offer secular justifications grounded in the social utility of religion, whereas the most prominent voices for disestablishment often focused more on the theological objections."[258] In other words, the state needed religion more than religion needed the state. This was why governmental support of religion during this period "had nothing to do with religious belief."[259]

None of the twenty drafts of the First Amendment religion clauses in 1788 and 1789 ever included the principle of separation of church and state.[260]

The Post-Ratification Environment

Scholars have noted that "close ties between religion and government continued . . . even after the adoption of the Bill of Rights."[261] The first four presidents included prayers in their first official acts as president.[262] Indeed, these prayers and religious messages set a tradition that

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[258] McConnell, "*Establishment and Disestablishment*," 2205.

[259] Curry, *The First Freedoms,* 183.

[260] Witte, *Religion and the American Constitutional Experiment*, 91.

[261] Charles J. Russo, "Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?," 1999 *Brigham Young University Education and Law Journal* 1, 2 (1999). For a review of the status of state established churches at the time of the Revolutionary War, Richard Hoskins, "The Original Separation of Church and State in America," 2 *Journal of Law and Religion* 221 (1984); Kent Greenwalt, "Religious Convictions and Lawmaking, 84 Michigan Law Review 352 (1985).

[262] *Engel v. Vitale*, 370 U.S. 421, 445 (1962). This is evidence that "some forms of public prayer were not believed to constitute an establishment of religion." Jonathan Van Patten, "In the End is the Beginning: An Inquiry into the Meaning of the Religion Clauses," 27 *Saint*

continued to endure for another two hundred years.[263] Lincoln's famous and pervasively religious Second Inaugural Address has been called a "theological classic," containing "fourteen references to God, many scriptural allusions, and four direct quotations from the Bible."[264] And during the D-Day invasion of World War II, President Roosevelt read to the nation a prayer for the success of the mission.[265]

In an 1811 case affirming a conviction for blasphemy, Chief Justice Kent of the New York Supreme Court stated that in America "the morality of the country is deeply ingrafted" upon religion.[266] A year earlier, Massachusetts Chief Justice Theophilus Parsons in a religious establishment case noted the connection between the public good and the state of public morality: "The object of a free civil government . . . cannot be produced but by the knowledge and practice of our moral duties."[267] To Justice Parsons, civil laws were not sufficient to achieve order and justice. He argued that society depends upon behavior that cannot be legally enforced – behavior like charity and hospitality, benevolence and neighborliness, familial responsibility

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Louis University Law Journal 1, 23 (1983).

[263] And late into the twentieth century, a congressional law still required the president "to set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer." 36 U.S.C. §169(h) (1976).

[264] Elton Trueblood, *Abraham Lincoln: Theologian of American Anguish* (1973), p. 135-36.

[265] Titled *Let Our Hearts Be Stout: A Prayer by the President of the United States*, it read in part: "Almighty God - Our sons, pride of our nation, this day have set upon a mighty endeavor, a struggle to preserve our Republic, our religion and our civilization, and to set free a suffering humanity."

[266] *People v. Ruggles,* 8 Johns. 290, 295 (N.Y. Sup. Ct. 1811).

[267] *Barnes v. First Parish in Falmouth*, 6 Mass. 401, 404 (1810).

and patriotism. The best way to inculcate such values, according to Parsons, was to support religion. Later, in 1844, the U.S. Supreme Court noted the close relation of church and state when it recognized that "religion is a part of the common law."[268]

Even the 1833 Massachusetts state constitutional amendment which abolished the mandated payment of tithes for religion left intact the provisions that commended religious ceremony and morality. The preamble of the constitution continued to assert that it was "a covenant" between God and the people of Massachusetts.[269] Similar endorsements of religious morality appeared in other state constitutions. Connecticut, Delaware and Maryland stated that it was the duty of citizens to worship God. Another six constitutions repeated the language of the Northwest Ordinance that "religion, morality and knowledge" were necessary for good government.[270]

During the post-constitutional period, federal statute mandated the refunding of import duties paid on vestments, paintings and furnishings for churches, and on plates for printing the Bible.[271] In 1819, New Hampshire passed a law authorizing towns to support Protestant ministers, a law that remained on the books for the rest of the century.[272] However, education was the area involving perhaps the closest ties between church and state. The school system was

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[268] *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 198 (1844).

[269] Witte, *Religion and the American Constitutional Experiment,* 94.

[270] Ibid, 96.

[271] John T. Norman, Jr., *The Lustre of Our Country,* (Berkeley; University of California Press, 1998) 218.

[272] Cobb, *The Rise of Religious Liberty in America,* 516.

largely overseen by the clergy, usually with the support of local taxes.[273] In New York in 1805, for instance, schools run by Presbyterian, Episcopalian, Methodist, Quaker, and Dutch Reformed groups all received public support.[274] Later, these groups were joined by Baptists, Catholics and Jews.[275]

Tocqueville observed in 1833 that in America "almost all education is entrusted to the clergy."[276] During the nineteenth century, it was common practice for religious schools in New Jersey, Connecticut, Massachusetts and Wisconsin to be supported by state-generated revenue.[277] In 1850, the California legislature gave religious organizations control over a large part of the state's education budget, as it was those organizations that were educating the burgeoning immigrant population.[278] Up until 1864, education in the District of Columbia was provided entirely through private and religious schools which received public support.[279] And many of the nation's first public schools and state universities had mandatory courses in religion and required

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[273] Bernard Bailyn, *Education and the Forming of American Society*, (New York: Vintage Books, 1960).

[274] Diane Ravitch, *The Great School Wars, New York City, 1805-1973: A History of the New York City Public Schools As a Battlefield of Social Change,* (New York: BasicBooks, 1974), 6-7.

[275] Ibid.

[276] Alexis de Tocqueville, *Democracy in America,* Philips Bradley, ed., (New York:A. A. Knopf, 1945), 320, n.4.

[277] Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860,* (New York: Hill and Wang, 1983), 166-67.

[278] Tyack,, et al., *Law and the Shaping of Public Education*, 90-91.

[279] Richard J. Gabel, *Public Funds for Church and Private Schools,* (Washington, D.C.: The Catholic University of America Press, 1937), 173-79.

attendance at daily chapel and Sunday worship services.

Aside from education, there was a strong religious character to whatever social welfare systems existed in the community.[280] Government depended on churches and religious organizations for providing most social services in the community.[281] Even by the end of the nineteenth century, the federal government was financing the construction of religiously affiliated hospitals.[282]

Remaining Vestiges of Religion's Public Role

Many signs of America's historical religious identity survive today. Witnesses in courts swear on the Bible and take an oath that concludes "So help me God." Presidential proclamations invoke God. The Supreme Court opens its sessions with the invocation "God save the United States and this honorable Court," and overlooking the Court's chamber is a frieze depicting the Ten Commandments. In the House and Senate chambers appear the words "In God We Trust." The Great Seal of the United States proclaims "Annuit Coeptis," which means "God has smiled on our undertaking," and under the seal is inscribed the phrase from Lincoln's Gettysburg Address, "This nation under God." Adorning the walls of the Library of Congress are the words of Psalm 19:1 and Micah 6:8, and engraved on the metal cap of the Washington

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[280] Philip R. Popple & Leslie Leighninger, *Social Work, Social Welfare, and American Society*, (Boston: Allyn and Bacon, 1990), 103-07. It was religious organizations that performed most social services, including education. William C. Bower, *Church and State in Education*, (Chicago, Ill.: University of Chicago Press, 1944), 23-24. (stating that "the earliest education in America was predominantly religious."

[281] Mark E. Chopko, "Religious Access to Public Programs and Governmental Funding," 60 *George Washington Law Review* 645, 647 (1992).

[282] *Bradfield v. Roberts,* 175 U.S. 291, 296-97 (1899).

Monument are the words "Praise be to God." Both houses of Congress, as well as many state legislatures, precede their daily work with a prayer given by a public-funded legislative chaplain, and the national currency carries the motto "In God We Trust."

CONCLUSION

The Public Expression of Religion Act should be enacted so as to eliminate the chilling effect on First Amendment freedoms caused by the current damages and remedies available in Section 1983 lawsuits alleging Establishment Clause violations. The fear of incurring these damages and remedies, a fear intensified by the confusing and inconsistent judicial applications of the Establishment Clause, may well cause governmental units to discriminate against religious speech on public property, prohibiting it entirely. Moreover, even if the Public Expression of Religion Act is not found to be necessary to prevent First Amendment restrictions, it is nonetheless permissible as a constitutionally accepted accommodation of religion.

For all the reasons stated above, it is also suggested that, while H.R. 2679 applies to state and local governments, a similar measure should be adopted that would apply to Establishment Clause actions brought against the federal government.

Mr. CHABOT. Thank you very much, Professor Garry.

We are now at that time where Members of the panel here will have 5 minutes to ask questions. And I will yield myself 5 minutes for that purpose.

Mr. Lloyd, if I could begin with you. First of all, let me thank you for your service to our country.

Mr. LLOYD. Thank you.

Mr. CHABOT. In your opinion, is there any danger that the crosses, for example, at Arlington Cemetery that are honoring our brave men and women who have given their lives in defense of this country could fall under the argument that it is in violation of Establishment Clause and potentially have difficulties there?

Mr. LLOYD. I think there is a great danger of that happening because of the precedents that have been set at Mojave Desert Veterans Memorial case and Mount Soledad case. And we do not in the American Legion consider this to be nonsense, this legislation or this threat. There is absolutely nothing in the law right now to prevent declared haters of America, including terrorists in our midst or their sympathizers, from following the Mojave Desert case precedent or Mount Soledad and suing our veterans memorials because the symbols there are on Federal property. And that is the premise upon which these decisions are based.

I am on an honor detail at Riverside National Cemetery, which is the home of the national medal of honor recipient memorial and the POW-MIA memorial. And the centerpiece of which is a dramatic sculpture of a POW sculpted by a veteran, Lee Millett, Jr., a member of the American Legion who waived the entire $100,000 artist's fee so the memorial could be built. Lee Millett engraved on the base of that memorial a prayer: "I look not to the ground because I have no shame. I look not to the horizon for they never came. I look to God. I look to God."

Today under the jurisprudence that we are faced with, that is indeed vulnerable. A lawsuit could be mounted on that. And we need to be able to defend against it. There is 80,000 graves there, almost all of them with crosses or Stars of David or other symbols. They are at risk.

At Normandy Beach, there are over 9,000 raised crosses and Stars of David. They are on the American cemetery. It is considered our property administered by the French. They are at risk. All the terrorist sympathizers, one of the Osama bin Laden's minions, has to do is to say look at this precedent, walk into a Federal court, file the suit, win it like shooting ducks in a barrel and get the money.

Now, I understand that in the testimony of Mr. Stern—and I respect his testimony—he said, of course, by denying attorney fees the act makes it likely that few suits would be brought, even in cases where an injunction would be appropriate. I happen to agree with his analysis in that regard.

But I don't think for a minute that there is anything in the law today that will protect us from such suits by terrorists or their sympathizers and their right to get attorney fees because you can't give it to the ACLU and deny it to Osama bin Laden. And we have nothing to protect us except passage of this bill, the Public Expression of Religion Act. And I urge its passage.

Mr. CHABOT. Thank you.

Mr. Staver, if I could go to you next. Are you aware of cases where cities and towns have felt that religious references in their public square were constitutional but they could not afford to defend those references?

Mr. STAVER. Absolutely, Mr. Chairman. In fact, we receive calls all the time from around the country. Liberty Council has been in existence since 1989. And we provide our services at no cost to the plaintiff or to the defendant, depending upon whether the constitutional principle is one that should be defended. But even in those situations where we would represent county or Government officials at no cost to them, the fact is many of them back down from a threat, just simply a letter or even a phone call because of the possibility that they would have enormous financial burdens at the end of this litigation if they were to lose.

Take, for example, the Ten Commandments case. The Ten Commandments case is, I think, universally—and Mr. Stern, I am sure, will agree with me on this. In fact, I don't know anybody on either side of this aisle, whether you are more separationist or less separationist, that doesn't agree with this proposition. And that is this. The Supreme Court has absolutely given confusing and conflicting notions with regards to how do you deal with the Ten Commandments.

In the Ten Commandments case that I argued, the court actually said you could have an identical Ten Commandments display in one county or one part of the State that would be constitutional but another one that looks exactly the same in another part of the county, a different neighboring county could be unconstitutional. In fact, you could have the same thing in the same county in different governmental buildings. And the sole difference between the constitutionality of one versus the other, even though they are identical, is the subjective statements that were made by the governmental officials, whether they may have referenced God when it was going up or may they have referenced, in fact, that it was just simply an educational display.

Now, when you are dealing with situations like that and somebody might have made a statement or somebody who was religiously affiliated came by and made a statement at the display of these particular monuments or displays and it is printed in the newspaper, that alone could make something unconstitutional. And, in fact, in that case, Justice Souter cited a newspaper article of a clergy who showed up at the actual display whose clergy was the pastor of one of the governmental officials. And because of that used that as at least an example of how they must have had some religious motivation and, therefore, it is unconstitutional.

And this same display since I argued the case we have also defended it in other parts around the country at the Federal courts of appeals has been upheld, the same, exact, identical display at the 7th Circuit Court of Appeals and now at the 6th Circuit Court of Appeals. And it is the 6th Circuit Court of Appeals on December 20, 2005, that says the Supreme Court has left us in first amendment purgatory.

So what that means is this. When we receive calls or see situations where someone gets a letter, whether it be from the ACLU

or Americans United for Separation of Church and State or someone else, and they are threatened with litigation, even though they wouldn't have to pay their attorney's fees for having their own defense, the risk of having to factor this into a limited school board budget or city council budget is too great for them to bear. And so, they back down simply because of threat.

Mr. CHABOT. Thank you very much.

My time has expired, so I am out of time for questions.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr.—thank you, Mr. Chairman.

First of all, let me say that it would be a great day for this country when the terrorists bring lawsuits instead of plant bombs.

Mr. Stern, can you cite any case in which a religious symbol on an individual grave marker has been challenged in court on establishment grounds?

Mr. STERN. No, that charge is demagoguery. Nobody is going to bring it. That is clearly the statement of the person or the family——

Mr. NADLER. That being the cross or the Star of David on the grave?

Mr. STERN. There is no such case. I know of no organization that has even contemplated such a lawsuit. All the lawsuits involve symbols erected by the Government owning the cemetery and represent the Government's speech, not the speech of individuals. I might add, just to be technical, that a lawsuit against the Federal Government is not relevant to today's discussion because the attorney's fees statute does not apply against the Federal Government.

Mr. NADLER. Thank you.

Mr. STERN. And so, all those things——

Mr. NADLER. Thank you.

Mr. Staver, have you or any organization you have represented been awarded attorney's fees?

Mr. STAVER. Yes, we have.

Mr. NADLER. Thank you. Do you know what percent of the budget of Liberty Council of the American Center for Law and Justice comes from attorney's fees?

Mr. STAVER. I don't know, but I know from ours——

Mr. NADLER. Could you submit it for the record, please?

Mr. STAVER. I could submit it.

Mr. NADLER. Thank you.

Mr. STAVER. I know from ours it is very little.

Mr. NADLER. Thank you, but submit it for the record, please.

And could you provide a record of the fees you have been awarded of this type in dollar amounts as a percentage of the annual budget for the record, as you just said?

Mr. STAVER. We could do that.

Mr. NADLER. Thank you.

Mr. STAVER. It is a public record.

Mr. NADLER. Mr. Stern, if the Government willfully violates an injunction under this act, what remedy is available apart from the attorney's fees issue?

Mr. STERN. If it violates an injunction under the act, presumably all the remedies that are available, although, whether that includes

damages afterwards or attorney's fees for enforcing the original injunction, is entirely unclear.

Mr. NADLER. Well, under this bill it would not include——

Mr. STERN. There might be, there might be nothing. So that, in fact, the San Diego case, which Mr. Lloyd talks about, has a $900,000 or $500,000 attorney's fees because for 15 years the city of San Diego and its supporters have simply refused to abide by a Federal court order. And what this bill will do, by taking away the attorney's fees, is encourage people to ignore Federal court orders because there is no penalty for violating a Federal court order, a binding Federal court order.

Mr. NADLER. And also—but under this bill if you violate an injunction, there would be no damages, correct?

Mr. STERN. There would be no damages. And worse yet, in a case in which you could——

Mr. NADLER. So what would stop under this bill—what would stop a recalcitrant governing authority and a local government from violating a Federal court injunction?

Mr. STERN. Nothing. And what is worse is even if you only got a—if you only had a case where you could get declaratory relief—for example, a one-time violation of the Establishment Clause where an injunction is impossible because there is no possibility of future repetition—you are utterly without remedy, no attorney's fees, no nominal damages, no declaratory judgment and no punitive damages. It is an open invitation for people to defy the Constitution in the interest of political convenience at their will.

Mr. NADLER. Thank you, Mr. Stern.

Finally, take a case where the law is unclear. A teacher prays after school. I think you made reference to a given case. She claims she has a free speech right to do so. The school thinks—the school thinks it violates the Establishment Clause. How would this legislation affect the school's calculus and deciding what to do about it?

Mr. STERN. It would not because the teacher is free to bring a case. She gets attorney's fees. The school board in any event is not entitled to attorney's fees if it is vindicated. In fact, it is even unclear if a third party, let us say a parent of a student, intervened in that case and the school board won, whether the intervener would be entitled to attorney's fees.

Mr. NADLER. It is unclear under the current law or under the statute?

Mr. STERN. It is unclear both. That would not change.

Mr. NADLER. So, therefore, this doesn't affect——

Mr. STERN. But the calculus doesn't change for the school board. They are still faced with the possibility of attorney's fees if they lose, nothing if they win. And a completely viable Establishment Clause claim does not get——

Mr. NADLER. Would this include forced prayer in violation of Barnette?

Mr. STERN. Does this include—this includes any Establishment Clause violation, including as cited in my testimony——

Mr. NADLER. So there would be no remedy, then?

Mr. STERN. No remedy. Cases where, as the school board in Montgomery County did and Ann Arbor did, liberal bastions where they imposed a liberal form of religion on the students, which is an

Establishment Clause violation equally, there would be no remedy for those students, either. And one of those cases involved a one-time violation.

Mr. NADLER. So do you think that forced prayer involves the violation of individual rights?

Mr. STERN. Well, not according to Justice Thomas, who Professor Garry—whose views Professor Garry has endorsed. I think it does.

Mr. NADLER. And——

Mr. STERN. The Supreme Court thinks it does.

Mr. NADLER. Okay.

Mr. Staver, final question. Atheists and wiccans have asked that their symbols be placed on individual grave markers of their adherents in military cemeteries. Do you support their right to have their symbols on their tombstones in military cemeteries?

Mr. STAVER. Certainly, anyone has a right if they wanted to have their own particular choice of whatever religious symbol on their——

Mr. NADLER. Including wiccans?

Mr. STAVER. Including wiccans. But I would also like to say that in response to this violating a court injunction, it is not true that you would not have some attorney's fees because the fact is——

Mr. NADLER. Under this bill?

Mr. STAVER. Under this bill because you can get a damage award or an attorney's fee award for violating a court injunction irrespective of whether there is a fee shifting of damaging shifting statute. So in this hypothetical you gave, that would be a violation of a court ordered injunction. And that would be punishable by attorney's——

Mr. NADLER. Mr. Stern, would you come in on that, please?

Mr. CHABOT. The gentleman's time is expired.

But you can comment, if you would like to.

Mr. STERN. I don't know on what authority and what statute a court would rely on to award damages other than the underlying constitutional violation.

Mr. NADLER. I am confused. So——

Mr. STERN. In any event——

Mr. NADLER. Mr. Staver is saying that despite this bill, if someone violated—if some Government authority violated an injunction, you could still get attorney's fees?

Mr. STAVER. You could get attorney's fees.

Mr. NADLER. Okay.

And, Mr. Stern, you are saying——

Mr. STERN. I think that is not the case. I am prepared to submit a legal memorandum. I may be wrong, but I believe that that is the case.

Mr. NADLER. Thank you.

Mr. STERN. And the bill certainly leaves that unclear.

Mr. NADLER. Thank you.

Mr. CHABOT. Would we have to pay attorney's fees for that legal memorandum?

Mr. STERN. At a very enhanced rate, Your Honor.

Mr. CHABOT. Okay, thank you.

The gentleman from Indiana, the chief sponsor of the proposed legislation, is recognized for the purpose of asking questions for 5 minutes.

Mr. HOSTETTLER. Mr. Stern, are you familiar with the fact that the bill allows for injunctive relief?

Mr. STERN. Yes, but—excuse me. But——

Mr. HOSTETTLER. That is my question.

Mr. STERN. Yes, but——

Mr. HOSTETTLER.—and we will have a chance for another. So the answer is yes.

Professor Garry, if an injunction is granted and an individual violates the injunction, is there grounds for a contempt citation?

Mr. GARRY. Yes.

Mr. HOSTETTLER. Is the contempt citation, if violated, grounds for fines?

Mr. GARRY. As far as I know, yes.

Mr. HOSTETTLER. Irrespective of the language of this legislation?

Mr. GARRY. Yes.

Mr. HOSTETTLER. Mr. Stern, when you voluntarily offered in your testimony that there would be no penalty whatsoever of an individual that would violate the Establishment Clause and, therefore, defy an injunction, did you know that a contempt citation——

Mr. STERN. A fine doesn't remedy the plaintiff's harm. It goes to the Government.

Mr. HOSTETTLER. No, that wasn't the question. The question was——

Mr. STERN. It is not what the testimony is talking about. The testimony is talking about the harm to the plaintiff.

Mr. HOSTETTLER. In your——

Mr. STERN. The plaintiff is not remedied by a fine that goes to the U.S. Treasury.

Mr. HOSTETTLER. That is not, that is not your statement. Your statement was there was no penalty of the, of the——

Mr. STERN. There is no penalty to the plaintiff. If I need to amend the testimony, I will, but that is what I meant.

Mr. HOSTETTLER. And that is true. But that was not the—that was not what you said. You said there was no reason for the defendant to not—to not——

Mr. STERN. Look at the San Diego case.

Mr. HOSTETTLER.—injunction.

Mr. STERN. Fifteen years we are litigating an order that is final.

Mr. HOSTETTLER. I have another——

Mr. STERN. And public officials defy it because it is in their political interest to defy it.

Mr. HOSTETTLER. I have another question for you, Mr. Stern. You talk in your testimony about having a client who was a football player who objected to school-sponsored prayer in the case *Berlin v. Okaloosa County*. What was the decision in that case?

Mr. STERN. We lost the temporary preliminary injunction because the school board threatened to riot at the football game. After the school superintendent's election was safely out of the way, the school board settled. That case was later controlled by—it was later controlled by Doe and——

Mr. HOSTETTLER. But according to your testimony, the reason why they settled—here the availability of attorney's fees put an end to a calculated defiance of the Constitution for cheap political advantage. The facts of the case—in Okaloosa County, was it mandatory for attendance at a football game?

Mr. STERN. If you are the punter on the team, yes.

Mr. HOSTETTLER. My son was a place kicker on a team. And he never had to go to a football game. It was never required.

Mr. STERN. If he wanted to be a place kicker on the team, he had to be where the team was.

Mr. HOSTETTLER. Was it mandatory—was it mandatory for participation in high school athletics?

Mr. STERN. Congressman, if you want to re-argue *Santa Fe School District*, I am perfectly prepared to re-argue it.

Mr. HOSTETTLER. No.

Mr. STERN. The Supreme Court rejected that argument. And *Lee v. Weisman* is the same thing. It was not mandatory to attend graduation. That is Justice Scalia's submission. As I count, he didn't get five votes.

Mr. HOSTETTLER. Thank you.

Mr. STERN. If you don't get five votes on the Supreme Court, you lose.

Mr. HOSTETTLER. Right. Thank you for the filibuster.

But given the fact that neither attendance at the football game was mandatory, nor participation in varsity athletics in Okaloosa County was mandatory, is it possible, Professor Garry, is it possible that a later Supreme Court may find that because of no mandatory attendance, no mandatory participation, that, in fact, no coercion on the part of the school district or the Government took place in the school sponsored prayer at the football game?

I am not asking you if it is constitutional law today because 25 years ago it was unconstitutional, according to *Stone v. Graham*, to have the Ten Commandments in a public place. But in 2005, that changed. My question is, is it possible, given what I have just asked you, that some future Supreme Court may say that this is not a violation of the Establishment Clause?

Mr. GARRY. Well, Representative, I think it is more than possible. Of course I think it is possible. And I outline the arguments in a recent book I published on the Establishment Clause.

Mr. HOSTETTLER. Well, thank you.

So we have a situation whereby the case was not decided. The case was determined as the result of the coercion on the part of the plaintiffs to get the school district to say we will take you to court, you will pay our attorney's fees. And so, the case never went to court. And, in fact, as is the testimony, an interim injunction was actually denied by the court.

So it is possible, possible that the case may have been lost, not probable, not likely, but possible that the case would have been lost on the part of the plaintiff and this school sponsored prayer could have continued.

Mr. Chairman, this is why we need PERA because of the sword of Damocles that hangs over everyone's head given the muck of Establishment Clause jurisprudence as it is today. I yield back the balance of my time.

Mr. CHABOT. The gentleman's time is expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you.

Mr. Stern, can you bring a 1983 action against the Federal Government?

Mr. STERN. No.

Mr. SCOTT. No?

Mr. STERN. No.

Mr. SCOTT. Okay.

If you have a 1983 action, Mr. Lloyd—you talked about attorney's fees against the American Legion. The American Legion isn't the defendant in this case. Is that right? So you wouldn't have to pay attorney's fees?

Mr. LLOYD. I raised the point, Representative, that if we attempt to intervene as parties and fully participate in the adjudication then we risk the fee shifting of the ACLU's attorney fees to us. That has a chilling effect on us and everybody else who would get in and attempt to fight for these. And if I may, the point about the imposition of attorney fees under 1983 and Federal defendants, we believe in the American Legion that the Equal Access to Justice Act must be reformed in the same way as 42 U.S.C. 1988. And it should be.

In the *Mojave Desert Veterans Memorial* case, the ACLU pleaded for fees under both. They said give us fees under the Civil Rights Act of 1976. And then they said or give us fees under the EAJA. They ended up getting $63,000 under the EAJA. We think they both should be reformed.

Mr. SCOTT. Mr. Staver, if there were no attorney's fees, would the law in this area be any clearer?

Mr. STAVER. I don't think it would be any clearer, Congressman. I think we have to have the Supreme Court make it clearer and then the lower Federal court judges have some principles and rules to follow. And right now they don't have any consistent area of law. It is not going to make it clearer.

Mr. SCOTT. Okay.

Mr. STAVER. The problem, however, is——

Mr. SCOTT. It would still be the same confusing law that it is. You mentioned standing, too. If people who are offended by the State action, who could?

Mr. STAVER. Well, this would not affect standing. What has happened—and in the normal standing rules, you have to have three criteria you meet. And primarily you have to have a direct and concrete injury, not imaginatory or conjecture. But in the Establishment Clause, there has been a huge area that is carved out that has opened up the floodgates so essentially anybody who drives by that sees something that they are offended to can bring a suit and walk into court.

Mr. SCOTT. Well, who else—who else would there be to bring the case?

Mr. STAVER. Well, I think as Judge Easterbrook said in the 7th Circuit case involving the Ten Commandments, the issue of whether words alone that make an offense to you give you a cause of action to come to court should be reconsidered.

Mr. SCOTT. Who else could bring the case other than someone—other than someone who is offended, who else could bring the case?

Mr. STAVER. Well, someone who is actually injured by the activity. For example, it is one thing if you are forced to participate in a religious activity. It is another thing if you are driving by on a highway and you see a cross on a city seal as a police car drives by at 40 miles per hour and all of a sudden you are offended.

Mr. SCOTT. Who else could—who could bring the case?

Mr. STAVER. Somebody who has either a penalty or force or some kind of coercion in participating in a religious activity or exercise.

Mr. STERN. It is not true, in any event, that anybody who drives by—the courts have uniformly insisted that you change your behavior in some way. You don't go into the courthouse. You walk around to some other entrance and the like. It is simply a misstatement of current standing law to say that anybody who drives by can bring a case.

Mr. STAVER. But all that means is that instead of going down First Street, you divert and go down Second Street. You change literally nothing in your behavior.

Mr. SCOTT. Well, I would be, I would be hard pressed to find somebody—if the local city put up a religious symbol in the courthouse, that would be hard for us to find somebody who has an economic loss as a result. So if, so if the people who are offended by that can't sue, there wouldn't be a plaintiff.

Mr. STAVER. Well, the fact is this does not change any standing rules. The standing rules are a whole different issue that the courts need to deal with. What this does is because the floodgates have been opened because of the standing rules and because it is so confusing that people don't know what to do, the threat of attorney's fees and damages are inappropriate. In fact, what you have is a court awarding damages to one particular situation that is identical and to the opposite situation awarding damages because they don't know which side of this issue to come down on.

Mr. SCOTT. What is a disincentive to a locality, Mr. Stern, from just violating the law intentionally?

Mr. STERN. None.

Mr. CHABOT. Will the gentleman yield?

Mr. SCOTT. Even in a—even in a case that is not even close.

Mr. STERN. Take a case——

Mr. SCOTT. And if the victim——

Mr. STERN. Take the case in Michigan which is cited in my case. A school district sponsors a panel of liberal clergymen to explain why the Bible does not ban homosexuality. It was a diversity day. That is the day that this event occurs. It is a one-time event. It is a clear violation of the Establishment Clause. By the time you get to court and litigate this case, diversity day is long forgotten. There is a clear violation of the Establishment Clause.

Under this bill the conservative Christians who brought suit would have no remedy. They can't get an injunction. It is moot. They can't get any attorney's fees because the bill says so. There is no declaratory judgment because the bill says so. There is no nominal damages because the bill says so. And there are no punitive damages because the bill says so. Nobody remedies.

Mr. SCOTT. I just have a couple of seconds left, and I wanted to get this chart——

Mr. CHABOT. The gentleman doesn't have a couple seconds left. But the gentleman has an additional minute.

Mr. SCOTT. Thank you, Mr. Chairman.

Just since the Chairman pointed out what happened during court, who was in control, let me break the color code down. Red is Republican presidents. Purple is Democratic presidents.

And you can use your own adjectives to describe what happened when the 10-year forecast starting in the beginning of 2001 dropped $9 trillion after that red line fell off the chart. And that is—interest on the national debt is going up hundreds of billions of dollars from what had been projected just then. And that money could have gone to veterans and other needs or could have paid off the national debt.

Mr. CHABOT. Would the gentleman—would the gentleman explain how the PERA bill that Mr. Hostettler has proposed would affect that?

Mr. SCOTT. Yes, because we have suggested all these attorney's fees are causing the lack of veterans' health care. And I suggest that part of the $9 trillion deterioration in the budget could have been used for veterans' health care rather than worrying about the few hundred thousand dollars. We are talking trillions, not billions, not millions, few hundred thousand dollars that naturally may have gone to some of these attorney's fees.

We could have gotten a lot more done if we had not ruined the budget. And you can use whatever adjective you want to describe that——

Mr. CHABOT. The gentleman's time has expired.

But the Chair would just note that we would be happy to provide reams and reams of documentation to show that under Republican administrations there have been significant improvements in veterans' health care and a whole range of other issues. But that is not the jurisdiction that this Committee has.

Mr. SCOTT. Mr. Chairman, could I be recognized for unanimous consent?

Mr. CHABOT. Pardon me?

Mr. SCOTT. Could I be recognized for unanimous consent?

Mr. CHABOT. Without objection.

Mr. SCOTT. I have letters from the Leadership Conference on Civil Rights, Americans United, and a coalition of many civil rights organizations opposed to the legislation that I would like to enter into the record.

Mr. CHABOT. Without objection.

[The letters referred to are located in the Appendix.]

Mr. SCOTT. Thank you.

Mr. STAVER. Mr. Chairman, may I be recognized for just one moment to correct something?

Mr. CHABOT. Yes.

Mr. STAVER. Congressman Scott mentioned whether there would be any disincentive if this bill were passed. I would like to underscore that this is not a radical or unusual bill. In fact, this would make the State as it relates to Establishment Clause exactly how it has always been with regards to the Federal Government. And

the Federal Government would have exactly the same disincentive not to violate a constitutional right.

We haven't seen the Federal Government running away rampant because they don't have an attorney's fee or damage provision under Section 1983 or 1988. So I don't think this opens up the floodgates to the Government run amok because it simply puts the States back into the same thing we have always dealt with, the Federal Government.

Mr. STERN. If Mr. Staver wants to see 1988 repealed entirely, that would be fine. The question before the Committee is why selectively repeal it. You don't have a 1988 for the Federal Government on free speech.

Mr. CHABOT. Okay. The Chair—the Chair—we are going to go back to regular order here.

And the gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank you, gentlemen, for coming. And I want to be very, very brief here with my questions because I would like to yield to another gentleman here.

So, Mr. Stern, earlier the question was brought up as to the crosses or Stars of David on military cemeteries. And I thought I heard you say, and I believe I did—and I just want you to clarify very transparently, very courageously your own opinion, not stating a fact, but your own opinion.

If the family or the soldier that has died is the one that designates the cross or the Star of David or the wiccan, whatever it is, is it then appropriate or is it your opinion that that is constitutional——

Mr. STERN. Completely.

Mr. FRANKS.—for the Federal Government then to pay for that tombstone and for that cross or that Star of David or whatever the family designates? Is that your opinion, a yes or no, sir?

Mr. STERN. Yes. And it would be inappropriate for the Government not to do so.

Mr. FRANKS. Okay. I appreciate your—do you think that that is the ACLU's opinion?

Mr. STERN. Yes.

Mr. FRANKS. Okay. And you think that the Supreme Court—and that is constitutional?

All right. That is what I wanted to know. And I appreciate it.

Mr. STERN. They litigated such a case, and they made it clear——

Mr. FRANKS. I appreciate the transparency.

Mr. Lloyd, if I am understanding the gentleman's position, he says that it is appropriate as long as the family decides or the soldier what that religious symbol is, that it is appropriate for Government to pay for the creation of that symbol.

Then how is it—and you understand where I am on—I am a cosponsor of this bill. How is it then, when you incorporate someone that built a cross out here on private money—how is it then unconstitutional for that to be incorporated into some type of cemetery situation?

Your opinion, sir?

Mr. LLOYD. Well, I would not dream of being so presumptuous as to explore the thinking that has resulted at modern jurisprudence in this issue because it is so confusing. In my small mind I couldn't grasp it. Certainly, the people making the decisions can't.

I don't believe it is unconstitutional to erect on private land a cross or a Star of David or any other religious symbol that later gets taken over or put into Federal or State or local public land and then declare it to be unconstitutional even though it was not unconstitutional when it was erected. And that is certainly the situation at Mount Soledad in California. It went up in 1913. There wasn't even an incorporation of the Establishment Clause against the States and localities until 1947. And somehow the sky didn't fall, and the republic survived.

Mr. FRANKS. Thank you, Mr. Lloyd.

And I just—Mr. Chairman, just a brief statement. You know, sometimes we are always seemingly surprised by all of a sudden what has happened in the last 30 or 40 years of certain things that we always thought were constitutional, crosses out here or Stars of David out here. We always thought those things were okay. And all of a sudden, we are shocked and we are amazed that the ACLU has found how unconstitutional they have always been.

And so, it is always a shock to me. And I am wondering some day if we won't see the ACLU bring suits that say we have to stop listening to families' positions on that. I see no reason in the direction they are going why that won't happen.

And with that, I would like to yield the balance of my time to Mr. Hostettler.

Mr. HOSTETTLER. I thank the gentleman for yielding.

Mr. Chairman, I would like to continue to clear up this idea of a disincentive. The question was posed, as Mr. Staver said earlier from Representative Scott to Mr. Stern, is there a disincentive for violating the Establishment Clause. And Mr. Stern's response was no.

Mr. Staver, in your experience, is the probability of an injunction to stop an activity or a move, a particular symbol, is that a disincentive for violating the Establishment Clause?

Mr. STAVER. Absolutely, it is. It is a disincentive for a number of reasons, not the least of which is the political ramifications that that creates where someone has literally violated a law. Now a court is telling them to stop violating a particular law. It is an absolute disincentive.

Mr. HOSTETTLER. And I am not an attorney, but, Mr. Staver, if you could answer this question, too. Mr. Stern likewise said there was no remedy under the legislation PERA. Is injunctive relief in legal terms a remedy?

Mr. STAVER. It is. And Mr. Stern also, I think, incorrectly, I believe, stated that you wouldn't even have declaratory relief. Well, injunctive relief is the primary relief that you would have in any of these kinds of cases where a court issued an order telling you to stop doing something or to start doing something. But in this case, it would be to stop a particular activity. That is the remedy that is primarily sought. That remedy will always be there.

Mr. HOSTETTLER. It is primarily sought because ostensibly the reason why the plaintiff is bringing the case—maybe not why the

interest group is defending or is representing them, but the reason why the individual is bringing the case is to stop what they see as a violation of their constitutional rights. Is that not true?

Mr. STAVER. That is true.

Mr. HOSTETTLER. Thank you.

I yield back the balance of my time.

Mr. CHABOT. The gentleman's time is expired.

If the gentleman is available, the gentleman from Iowa?

Mr. KING. Excellent.

Mr. CHABOT. The gentleman from Iowa is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. This is the story of my life, just in under the wire.

And I want to thank the witnesses for the testimony this morning and thank Mr. Hostettler for bringing this bill and Mr. Chairman for holding this hearing this morning.

I am not so much with questions for the panel as I am just an opportunity to reflect somewhat on my overall viewpoint on this. And I think it is framed a great deal on the remark that was made by Mr. Hostettler when he said given the muck of Establishment Clause jurisprudence today.

And, of course, I don't know if there has been testimony here and discussions about the text of the Constitution. But it has always been a source of despair to me to go to the Supreme Court of the United States, the very center of the place where one might go if they were seeking to hear profound constitutional arguments before the Supreme Court of the United States. I have gone there a number of times to listen to those profound constitutional arguments and those profound issues that so much shape this society and that are the core, I believe, of one of the foundations at least and the most important foundation of the greatness of America.

And a couple of those arguments before the court would be the affirmative action cases that came in some couple of years ago and the Ten Commandments cases that were before the court. I don't remember the exact date on that, but I sat in on that.

And as I listened to those profound constitutional arguments, I listened for them. But I have not heard one before ht Supreme Court. It takes a very nuanced ear to pick out a constitutional argument before the Supreme Court. And yet we are here arguing case law as if somehow it were decided upon the Constitution when yes, you can read the briefs and you can find constitutional arguments there.

But the case law that is being argued before the court is targeted at the nuances of the psychological analysis of perhaps a swing justice. And to sit there for an hour on a case and listen to those nuanced arguments targeted at the idiosyncrasies perhaps, maybe even the legal idiosyncrasies of a swing justice and then conclude that somehow the Supreme Court has ruled upon the text of the Constitution is a source of great frustration to me.

And, in fact, when I walk to the Supreme Court to hear the Ten Commandments cases, I walked in out of the bright sunlight and before my eyes adjusted to the darkness inside the Supreme Court building, I was met by a security guard. And I introduced myself, and I said, "I am Congressman Steve King, and I am here to hear

the Ten Commandments cases." And he said—and this is for the record—"My name is Moses, and I am here to lead you."

And he was a wonderful guard. Moses led me in, and he led me out. He led me past the oaken doors that have the Ten Commandments inscribed in them into the chamber of the Supreme Court where up on the frieze as if I were sitting in Justice Ginsburg's seat, I would make my expression to the Moses upon the frieze in this fashion up above on her left and on the left of all the justices. And she referenced the Moses with the Ten Commandments there and said that he is simply up there among, I believe she said, 25 other lawmakers or lawgivers.

Now, the only figure I recognize up there is Moses. And the rest of them are pretty obscure from my understanding of Greek mythology or history. And it is—and so, then on the other side of the Supreme Court building, on the east side, on the pediment, there sits Moses also with the Ten Commandments on his knees as he sits down opened up for all to see. And he sends a message out for all to notice that here this is a nation that is based upon the rule of law and the foundation of that rule of law is God's law.

You cannot escape that. And if architects—excuse me, archeologists should somehow or another—or if something happens like Pompeii to America and we were sealed off with a lava flow and in 10,000 years if they would dig up this city and chisel the lava off of our buildings, they would see expressions of religion engraved into the marble and into the stone and into the concrete as part of who we are, of the foundation of this nation.

And so, that foundation is this Constitution. And the Constitution says Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

They will read this Constitution. And then I would challenge those archeologists to go back and read through this case law, not having any institutional memory of the Constitution, but just simply starting with the most recent case law and then begin to read and understand like hieroglyphics and divine what was the foundation for these decisions. And I don't care how smart they might be 10,000 or 20,000 years from now. No one could discern the Constitution by reading backwards through the case law.

And that is why we have this debate here today, because we have gotten so far away from the text and the original intent of the Constitution. It is unrecognizable in the case law today.

And I thank you, Mr. Chairman. I yield back the balance of my time.

Mr. CHABOT. Thank the gentleman.

I want to thank the witnesses and thank the panel here as well today. I thought this was a very enlightening discussion. The panel did an excellent job of letting us know various points of views which exist. So——

Mr. NADLER. Mr. Chairman?

Mr. CHABOT. I think I already did that. But I will recognize the gentleman.

Mr. NADLER. You may have done one of them. Let me make sure.

Mr. CHABOT. Go ahead.

Mr. NADLER. Mr. Chairman, I ask unanimous consent that all Members have 5 legislative days to revise the extent of their remarks, include additional materials in the record.

Mr. CHABOT. Without objection, so ordered, even though I already did it.

Mr. NADLER. And, Mr. Chairman, I don't think you did this one yet. I understand that an earlier draft of Mr. Stern's testimony has been included in the materials. I ask unanimous consent that he be permitted to substitute the final version of his testimony for the record.

Mr. CHABOT. Without objection, so ordered.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. CHABOT. Okay.

But I want to thank again the panel for their testimony here this afternoon.

If there is no further business to come before the Committee, we are adjourned. Thank you.

[Whereupon, at 11:32 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

Statement: H.R. 2679 – the "Public Expression of Religion Act"
Rep. John Conyers, Jr.
June 22, 2006

On the heels of this Subcommittee's successful consideration of legislation reauthorizing the Voting Rights Act of 1965, I am troubled that we take up legislation that would limit a person's ability to enforce their constitutional rights. H.R. 2679 – the "Public Expression of Religion Act" – is nothing less than an offense against the values of **Fannie Lou Hamer, Rosa Parks, and Coretta Scott King**, the civil rights heroes whom we sought to honor in renaming our voting rights legislation.

The contrast between the two bills could not be more shocking from a constitutional perspective. Where the Voting Rights Act sought ease the burden of enforcing constitutional rights, this bill limits a claimant's ability to obtain relief under the establishment Clause – the provision of the Constitution requiring a separation between the church and state. Where our voting rights legislation expanded the ability of plaintiff to obtain the expert witness fees so crucial to protecting their rights, this bill eliminates attorney's fees.

As Mr. Stern points out in his written testimony, the bias present in this legislation is plain for all to see. It seeks to relegate this those who seek to enforce their constitutional rights against state sanctioned religion to the back of the bus. My question to all the witness, especially those in favor of H.R. 2679, is why they believe this is a good idea. I have been in Congress long enough to see this kind of "court-stripping" legislation in many forms. At its worst, there were those who would have used this kind of measure to strip courts of their ability to enter school desegregation orders.

I hope all of you can respond with a rational basis for distinguishing between establishment clause claims and all other constitutional claims bought under Section 1983. This is really the fundamental question for the hearing.

I was struck while reviewing the background materials by the outrage directed toward the ACLU for bringing – and winning – establishment clause cases. There is clearly a fundamental disagreement over the place of public expression of religion. However, as we have seen around the country, there has been no shortage of people who would use religion for political gain.

I fear that this bill would embolden them and hamstring plaintiffs in their ability to protect their constitutional rights. Absent the ability to obtain declaratory relief and monetary damages, I am not sure how we can sanction these violations. That is the major question, pending the passage of this bill.

As a matter of the Constitution, I am highly dubious about this legislation. The law seems well settled that Congress may not pick and choose among favored constitutional rights without any acceptable rational basis for drawing a distinction. If we begin to limit relief and deny attorney's fees to unpopular cases, there will be no end to the loopholes we might be pressed to create, with devastating effect on the Constitution. After months of inclusive bipartisanship, it seem a shame to use committee time on legislation that departs so radically from the ideals of the framers.

ADDITIONAL INFORMATION SUBMITTED BY MATHEW D. STAVER, FOUNDER AND CHAIRMAN, LIBERTY COUNSEL, INTERIM DEAN, LIBERTY UNIVERSITY SCHOOL OF LAW

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Reply to: Virginia

July 7, 2006

The Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Follow up to Testimony on PERA

Dear Rep. Chabot:

The purpose of this letter is to respond to questions raised by Congressman Nadler during my testimony before the Subcommittee on the Constitution regarding the Public Expression of Religion Act, H.R. 2679. Rep. Nadler asked me to provide details concerning the amount of attorney's fee awards received by Liberty Counsel and the American Center for Law and Justice during the last fiscal year.

For the fiscal year ending June 30, 2006, Liberty Counsel has not received any fee awards under 42 USC § 1988. During the same year, the organization received attorney fees as a result of negotiated settlements in four cases which were for $33,000.00, $10,000.00, $7,500.00, and $800.00.

I reviewed the IRS form 990 for the fiscal year ending March 31, 2005, for the American Center for Law and Justice (ACLJ). It appears that any attorney fees received are listed on line 103 of the 990 as "Case Recoveries." The amount listed is $9672.00, which is less than .5% of the reported $14,485,514 budget.

If you have further clarifications, please do not hesitate to contact me.

Sincerely,

Mathew D. Staver

ADDITIONAL INFORMATION SUBMITTED BY MARC D. STERN, GENERAL COUNSEL, AMERICAN JEWISH CONGRESS

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July 5, 2006

Honorable Steve Chabot
Chair
Subcommittee on the Constitution
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20015-6216

Honorable Jerrold Nadler
Ranking Member
Subcommittee on the Constitution
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20015-6216

Dear Representatives Chabot and Nadler,

I am writing to correct a mistake I made in my testimony at last week's hearing on H.R. 2679, the Public Expression of Religion Act.

As you will recall, Mr. Staver made the point that the Supreme Court sometimes changes its mind in Establishment Clause cases and that it is therefore unfair to tax local and state governments with the costs of attorney's fees. As an example, Mr. Staver cited to the litigation over New York City's Title I program, compare *Aguilar v. Felton*, 473 U.S. 402 (1985) with *Agostini v. Felton*, 521 U.S. 203 (1997).

As I acknowledged in my response, it is true that the Court changed its position in the two *Felton* cases. I was also correct in my statement (contrary to Mr. Staver's assertion) that the *Aguilar* plaintiffs did not seek fees because lead counsel in the ligitation, Leo Pfeffer, was concerned that taking such fees would lead to charges that the litigation was motivated by monetary concerns.

However, I cited the wrong case in my remarks. While *PEARL v. Nyquist*, 413 U.S. 756 (1973), indeed invalidated a New York aid to parochial school program, it was not (as I suggested) relevant to the Title I program. *Flast v. Cohen*, 392 U.S. 83 (1968), was, and it was brought long before there was an attorney's fees statute. *Wheeler v. Barrera*, 417 U.S. 402 (1974), another challenge to a state Title I program, was likewise litigated without any possibility of recovering attorney's fees.

Thank you for allowing me to correct the record.

Sincerely,

Mark D. Stern

PREPARED STATEMENT OF THE ALLIANCE DEFENSE FUND CONCERNING H.R. 2679, THE "PUBLIC EXPRESSION OF RELIGION ACT OF 2005"

TESTIMONY

of the

ALLIANCE DEFENSE FUND

before the

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

concerning

HR 2679, THE PUBLIC EXPRESSION OF RELIGION ACT OF 2005

July 10, 2006

The Alliance Defense Fund ("ADF") thanks the Chairman and members of the committee for inviting ADF to submit testimony on the constitutionality of HR 2679, the Public Expression of Religion Act of 2005 ("PERA"). ADF is a national legal alliance defending the right to hear and speak the Truth through strategy, training, funding and litigation. ADF, through its staff attorneys and hundreds of allied private practice attorneys across America, regularly litigates First Amendment issues in federal and state courts.

ADF is honored to have the opportunity to address the Committee regarding Congress' clear power to enact PERA, as a legislative correction to the application of the Civil Rights Attorney's Fees Act of 1976 beyond its originally-intended scope.

I. Congress clearly intended the Civil Rights Attorney's Fees Act of 1976 to encourage pursuit of "civil rights" claims, i.e., remediation of prohibited discrimination.

The legislative history of 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Act of 1976 ("Section 1988," "the 1976 Fees Act"), is straightforward. Congress enacted prevailing party attorney's fees as a legislative incentive for private enforcement of federal civil rights guarantees. It did so in reaction to the Supreme Court's decision the prior year in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

In *Alyeska Pipeline*, the Supreme Court held that federal courts do not have inherent power to award prevailing party attorney's fees to remedy government violations of the law. The Court observed that the "American Rule" (each party bearing its own attorneys fees) is "deeply rooted in our history and in congressional policy." 421 U.S. at 270. Accordingly, fee-shifting relief can only validly be awarded by courts when statutorily authorized by Congress, in specific exceptions to the general rule. *Id.* at 269. One example the Court gave of such an exception was where "encouragement of private action to implement public policy has been viewed as desirable," that is, the private attorney general concept. *Id.* at 270.

With the 1976 Fees Act, Congress gave the express authorization *Alyeska Pipeline* required for courts to award attorney's fees to prevailing parties, in federal civil rights cases not already covered by fee-shifting statutes:

> In response to the Alyeska decision, Congress swiftly enacted numerous fee-shifting statutes. Foremost among them was the Civil Rights Attorney's Fees Awards Act of 1976 ("Fees Act"), which "authorizes the courts to award reasonable attorney's fees to the prevailing party in suits instituted under certain civil rights acts." The Fees Act explicitly applies to suits brought under 42 U.S.C. § 1983, the statute that provides a federal cause of action for instances of official discrimination, such as violations of the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

Daniel Steuer, ANOTHER BRICK IN THE WALL: ATTORNEY'S FEES FOR THE CIVIL RIGHTS LITIGANT AFTER BUCKHANNON, 11 Geo. J. on Poverty L. & Pol'y 53, 54 (2004) (footnotes omitted). *See also* S. Rep. No. 94-1011, p. 1 (1976), 1976 U.S.C.C.A.N. 5908, 5909 (noting the Act is intended to "remedy anomalous gaps in our civil rights laws created by" *Alyeska Pipeline*, by giving federal courts "discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866").

The legislative history for Section 1988 is replete with references to Congress' intent: to encourage private parties to pursue federal civil rights litigation. Authorizing courts to grant attorney's fees to prevailing parties in such cases was considered an important

incentive to plaintiffs and their attorneys. The Senate Report declares:

> The purpose and effect of S. 2278 are simple -- it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits *to enforce the civil rights acts which Congress has passed since 1866.* S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. 1973l(e). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. Rep. No. 94-1011, p. 2 (1976), 1976 U.S.C.C.A.N. 5908, 5909-10 (emphasis added). The character of the existing laws given here as analogs for the 1976 Fees Act emphasize Congress' intent to encourage plaintiffs seeking enforcement of federal civil rights statutes.

The Senate Report stresses that both early and modern civil rights legislation has depended on attorney's fees relief to encourage private plaintiffs to advance Congressional policy. Not only has "[t]he remedy of attorneys' fees . . . always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven," but "[m]odern civil rights legislation reflects a heavy reliance on attorneys' fees as well." *Id.*, S. Rep. No. 94-1011 at 3, 1976 U.S.C.C.A.N. at 5910-11. Emphasizing the latter point, the Senate Report notes that "[s]ince 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions." *Id.*, S. Rep. No. 94-1011 at 3, 1976 U.S.C.C.A.N. at 5911.

The point of the Report's review of the history of encouraging private federal civil rights enforcement through fee shifting provisions is clear. Congress did not intend the 1976 Fees Act to be revolutionary or even evolutionary. Congress instead intended to restore the historically consistent availability of attorney's fees in suits to enforce federal civil rights guarantees. *Alyeska Pipeline* had disrupted that consistency by disapproving fee awards in cases brought under statutes lacking express authorization for such relief. It is this context that the Senate Report notes that the Fees Act "is limited to cases arising under our civil rights laws, a category of cases in which attorneys' fees have been

traditionally regarded as appropriate." *Id.*, S. Rep. No. 94-1011 at 4, 1976 U.S.C.C.A.N. at 5912. The closing sentence of the Senate Report stresses one final time Congress' limited intent: "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." *Id.*, S. Rep. No. 94-1011 at 6, 1976 U.S.C.C.A.N. at 5913.

The greater weight of legislative history on the 1976 Fees Act was generated by the Senate. Nevertheless, the House Report confirms that Section 1988 was intended to encourage private enforcement of federal civil rights guarantees, as the Act's formal name indicates. It was not intended to encourage private litigation of claims arising under any and all federal law, whether statutory or constitutional in nature. One chief example of this intended narrow focus is found in the House Report's discussion of the scope of the bill. After noting that "the affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas," the House Report discusses each of those sections in turn. H. Rep. No. 94-1558, pp. 4-5 (1976). The Report emphasizes that Section 1983 provides a claim to remedy "official discrimination, such as racial segregation imposed by law" (citing *Brown v. Board of Education*), while acknowledging that Section 1983 is also applied where race is not a factor. Examples of the latter included claims arising from criminal rights violations, poll taxes, and discrimination aimed at political affiliation. H. Rep. No. 94-1558, *id.*

The statements of individual Senators and Congressmen during the debates over the 1976 Fees Act consistently confirm this Congressional intent to encourage private enforcement of federal civil rights laws. For instance, when Senator John V. Tunney, the Chairman of the Senate Judiciary Subcommittee on Constitutional Rights introduced the bill that would eventually become the 1976 Fees Act, he stated:

> [t]he purpose and effect of this bill is simple — it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights *under our civil rights statutes* . . . . This bill simply applies the type of "fee-shifting" provision

> already contained in titles II and VII of the 1964 Civil Rights Act to *the other civil rights statutes* which do not already specifically authorize fee awards.

121 Cong. Rec. 26,806 (1975) (introduction of S. 2278 by Senator Tunney) (emphases added).[1]

II. <u>The Supreme Court has expanded the availability of prevailing party attorney's</u> fees far beyond Congress' clearly expressed intent in enacting the 1976 Fees Act.

The 1976 Fees Act is now thirty years old. Since its passage, the Supreme Court has read the Act in a progressively expansive manner, despite the limited intent of Congress clearly expressed in the legislative history. Some justices of the High Court have criticized this expansive interpretation, albeit in different contexts than that of Establishment Clause litigation addressed by the bill before this Subcommittee. They have noted its inconsistency with the clear tenor of limited Congressional intent displayed in the legislative history.

Just four years after the passage of the 1976 Fees Act, the Supreme Court rejected the limited scope Congress clearly intended for Section 1988, in a case which also dramatically expanded Section 1983 beyond its intended scope. In the case of *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980), the Court first held that Section 1983 creates a cause of action for deprivations under color of state law of *any* federal statutory right. The Court rejected

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[1] Many similar statements from Senators and Congressmen speaking in support of the passage of the 1976 Fees Act appear in the Act's legislative history. *See generally*, SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S. 2278), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (Comm. Print 1976). A comprehensive review of the legislative history of the 1976 Fees Act will be featured in a forthcoming law review article by Steven W. Fitschen, President of the National Legal Foundation and an instructor at Regent University School of Law. *See* Steven W. Fitschen, FROM BLACK MALES TO BLACKMAIL: HOW THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976 (42 U.S.C. § 1988) HAS PERVERTED ONE OF AMERICA'S MOST HISTORIC CIVIL RIGHTS STATUTES, draft available online at http://www.nlf.net/articles/blackmail.pdf (site last reviewed July 8, 2006).

the notion that Section 1983 was only meant to cover suits to vindicate civil rights, *i.e.*, "federal legislation providing specifically for equality of rights." 448 U.S. at 7-8. The Court summarily asserted that the legislative history of Section 1983 "does not demonstrate that the plain language was not intended" to have the broad scope the Court found it to have. 448 U.S. at 8. Nevertheless, the Court suggested that arguments that Section 1983's language was not carefully drafted to reflect Congress' true intent were "best addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983." *Id.*

Similarly emphasizing plain language over any contrary legislative history, the Court also rejected any limitation on which classes of Section 1983 claims could merit prevailing party attorney's fees under Section 1988. *Thiboutot*, 448 U.S. at 9. Though the majority found the plain language of Section 1988 conclusive, it added that "the legislative history [of Section 1988] is entirely consistent with the plain language." *Id.*

Justice Powell, joined in dissent by Chief Justice Burger and Justice Rehnquist, assailed the majority's literalistic reading of both Section 1983 and Section 1988, as departing radically from Congress' intended scope for both laws:

> The Court holds today, almost casually, that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right. Having transformed purely statutory claims into "civil rights" actions under § 1983, the Court concludes that 42 U.S.C. § 1988 permits the "prevailing party" to recover his attorney's fees. These two holdings dramatically expand the liability of state and local officials and may virtually eliminate the "American Rule" in suits against those officials.

Thiboutot, 448 U.S. at 11-12 (Powell, J., dissenting).

Justice Powell took the majority to task for an inadequate reading of and inadequate judicial respect for the legislative history of the civil rights laws at issue, then turned specifically to Section 1988. His strong criticism of the majority's failure to read Section 1988 in the limited fashion Congress intended presages the concerns now animating the

proposal before this Subcommittee:

> No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial. And the Court advances no reason to believe that any Congress-from 1874 to the present day-intended this expansion of federally imposed liability on state defendants.
>
> . . . .
>
> Even when a cause of action against federal officials is available litigants are likely to focus efforts upon state defendants in order to obtain attorney's fees under the liberal standard of 42 U.S.C. § 1988. There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where "civil rights" of any kind are at best an afterthought . . . . The uses of this technique have not been explored fully. But the rules of pendent jurisdiction are quite liberal, and plaintiffs who prevail on pendent claims may win awards under § 1988. Consequently, ingenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant. Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 suggests that Congress intended to remove so completely the protection of the "American Rule" in suits against state defendants.

Thiboutot, 448 U.S. at 24 (internal citations and footnotes omitted).

Members of the Supreme Court have continued to register concern with the Court's expansive reading of Section 1988, in the years since the *Thiboutot* majority somewhat flippantly suggested Congress could rein it in if it chose to do so. For instance, ten years after the passage of the 1976 Fees Act, Justice Powell reminded the Court that "[i]t is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs *in unpopular civil rights cases*." *City of Riverside v. Rivera*, 477 U.S. 561, 586, 106 S.Ct. 2686, 2700 (1986) (Powell, J., concurring) (emphasis added).

Five years later, Justice Kennedy, joined by Chief Justice Rehnquist, scolded the Court for extending the 1976 Fees Act beyond its originally intended scope:

> In the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, 90

> Stat. 2641, codified at 42 U.S.C. § 1988, Congress authorized the award of attorney's fees to prevailing parties in, inter alia,§ 1983 litigation. The award of attorney's fees encourages vindication of federal rights which, Congress recognized, might otherwise go unenforced because of the plaintiffs' lack of resources and the small size of any expected monetary recovery. See S.Rep. No. 94-1011, p. 6 (1976), U.S.Code Cong. & Admin.News 1976, p. 5908. *Congress was reassured that § 1988 would be "limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate."* Id., at 4, U.S.Code Cong. & Admin.News 1976, p. 5912.

Dennis v. Higgins, 498 U.S. 439, 464, 111 S.Ct. 865, 879-880 (1991) (Kennedy, J., dissenting) (emphasis added). As with Justice Powell in *Thiboutot*, Justice Kennedy noted that the Court's overly broad readings of Section 1983 and Section 1988 continued to combine for results far beyond Congress' intent to promote enforcement of civil rights. "[T]he significance of the Court's decision, in this and future Commerce Clause litigation, is that a § 1983 claim may permit dormant Commerce Clause plaintiffs to recover attorney's fees and expenses under 42 U.S.C. § 1988." *Id.* at 464.

III. <u>Congress Clearly May Enact PERA as a Legislative Correction to Overly Broad Judicial Application of Section 1988.</u>

Objective consideration of the bill before this Subcommittee, HR 2679, should take place against this backdrop of the Supreme Court's repeated expansion of Section 1988 through broad construction. Congress can rationally choose to begin rolling back the judicial over-expansion of Section 1988, by first identifying those areas in which the encouragement of aggressive pursuit of claims through fee shifting has proven most problematic. Indeed, as noted by the majority in *Thiboutot*, arguments that Section 1988 should not reach as broadly as the Supreme Court has construed it "can best be addressed to Congress." 448 U.S. at 8.

This Subcommittee has been presented with evidence that aggressive assertion of prevailing party attorney's fees in the specific sphere of Establishment Clause claims has

pressured government into censoring permissible religious expression. Congress could thus conclude that PERA is a needed corrective to the expansion of the 1976 Fees Act beyond its originally intended scope.

Evidence presented in this hearing indicates that in Establishment Clause cases, the threat of liability for plaintiffs' attorney's fees has the effect of encouraging government actors to adopt an attitude of practical hostility toward expression of or about religion in any public manner. The result is unnecessary and unfortunate censorship: self-censorship of government's own permissible recognition of the value of religion in the history and public life of America, and censorship of the public religious expression of private citizens. This censorship comes from a perception that merely *allowing* public religious expression could be deemed a forbidden "establishment of religion" exposing the government to liability.

Congress could decide that the promotion of such attitudes among the government bodies in our nation is antithetical to the fundamental policies underlying the First Amendment. Other witnesses before this Committee have thoroughly documented how the last few decades of Establishment Clause litigation have created great confusion over government's proper and permissible role. The Establishment Clause was intended by the Framers and understood by the first several generations of Americans to protect religious freedom broadly by preventing the government from restricting permissible belief and practice to a specific state-approved orthodoxy. Understood this way, the prohibition on establishment of religion was intended to protect rigorous free exercise rather than act as a check on it. The unified goal of the First Amendment religion clauses was a citizenry well-equipped by strong religious conviction for the moral and ethical demands of self-government. The current litigation environment has instead prompted suppression of public expression concerning religion by government and private citizens, out of fear that some citizens may be offended that the government has even a minimally positive attitude toward religious belief.

Ironically, around the time that Congress passed the 1976 Fees Act, Justice Brennan sagely observed:

> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion . . . . It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

McDaniel v. Paty, 435 U.S. 618, 641, 98 S.Ct. 1322, 1336 (1978) (Brennan, J., concurring).

More recently, the United States Court of Appeals for the Sixth Circuit noted that the practical hostility by government toward religion promoted by the present confusion in Establishment Clause jurisprudence contravenes the intent of the First Amendment. In *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), the Sixth Circuit dismissed an ACLU Establishment Clause challenge to the presence of the Ten Commandments in a courthouse display of numerous historical documents formative in our nation's legal history. The court first identified the chief culprit of modern Establishment Clause confusion:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state.

Mercer County, 432 F.3d at 638-639 (citing *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), *Zorach v. Clauson*, 343 U.S. 306, 312 (1952), *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001), *Stark v. Indep. Sch. Dist., No. 640.*, 123 F.3d 1068, 1076 (8th Cir. 1997), and *ACLU of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001)).

The *Mercer County* court hearkened to the Sixth Circuit's earlier *en banc* decision in *Capitol Square* dismissing strict church/state separatism as "a notion that simply perverts our history." *Mercer County*, 432 F.3d at 639 (quoting *Capitol Square*, 243 F.3d at 300). According to the Sixth Circuit, the "tiresome extra-constitutional construct" of the so-called "separation of church and state" is fundamentally incompatible with America's "unbroken history" of government acknowledgment and accommodation of the religious beliefs of its

citizens:

> Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (upholding Sunday closing laws); *see also Lynch*, 465 U.S. at 674, 104 S.Ct. 1355 ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); *Capitol Square*, 243 F.3d at 293-99 (describing historical examples of governmental involvement with religion). After all, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313, 72 S.Ct. 679. Thus, state recognition of religion that falls short of endorsement is constitutionally permissible.

Mercer County, 432 F.3d at 639.

Some witnesses before this Committee who oppose the passage of PERA posit that singling out Establishment Clause cases for a repeal of the fee-shifting remedy lacks any rational legislative purpose. They assert that PERA could only be motivated by an impermissible hostility toward enforcement of the Establishment Clause. This criticism of PERA exhibits a willful blindness of the unique problems that have developed in our constitutional jurisprudence and governmental practice in this one area. Congress may legitimately conclude that these unique problems counsel against giving plaintiffs the additional threat of attorney's fees awards in this particular area. As the Chairman's opening statement for the June 22 hearing rightly observed:

> PERA will level the playing field against groups such as the ACLU who have won millions of dollars in attorney's fees while extorting state and local governments into suppressing the religious speech and free exercise of religion of private individuals, tearing down veterans' memorials that happen to have religious symbols on them, removing the Ten Commandments from public buildings, booting the Boy Scouts off public property, and blotting out crosses from official county seals.

These examples show that encouraging the aggressive pursuit of Establishment Clause claims, in the modern environment of legal uncertainty as to its proper scope and application, carries a risk not present with most other species of Section 1983 litigation.

Establishment Clause claims frequently involve one private plaintiff pressuring government to censor the religious expression of other private citizens, or pressuring government to self-censor legitimate acknowledgment of the religious faith of its citizens. Modern Establishment Clause claims thus present a unique "zero sum" situation -- a win by the plaintiff private citizen often means a loss to other private citizens, through censorship of their religious expression or loss of their government's acknowledgment of the importance of religion to them. This dynamic is not at work in other common civil rights litigation where the only directly interested and affected parties are the plaintiff and the government defendant (*e.g.*, an excessive force claim against a police department, a claim of free speech infringement, an equal protection challenge).

Testimony before this committee in opposition to PERA has done little more than weakly feint supposed constitutional problems with the proposal, instead focusing almost entirely on policy objections. There is a reason for this: Congress plainly and logically has the power to repeal a remedy that was not constitutionally compelled when it was enacted, particularly in an area where experience shows that it is achieving undesirable results.

As a starting point, the federal cause of action for a violation of constitutional rights by a state actor, 42 U.S.C. § 1983, is itself a statutory expression of the discretionary power granted to Congress by Section 5 of the Fourteenth Amendment. Section 5 states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *See Monroe v. Pape*, 365 U.S. 167, 171 (1961) (Section 1983 was "one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment"). Thus, as vitally important as Section 1983 has become as part of our nation's scheme for ensuring that federal rights are afforded equally to every American, it is in the end a legislative policy choice as an enforcement mechanism, not a constitutional mandate.

Accordingly, the kinds of relief a court is permitted to award in cases brought under

Section 1983 are also within the discretion of Congress to regulate. Indeed, the statutory authorization for an award of attorneys fees to a prevailing party in a Section 1983 action was not enacted until 1976, more than 100 years after Section 1983 was adopted. Yet, such authorization was given by Congress under the same authority as Section 1983 itself – § 5 of the Fourteenth Amendment. *See* S. Rep. No. 94-1011 (1976), p. 5 ("Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5").

As discussed in Section I above, the 1976 Fees Act was motivated by legislative policy choice rather than constitutional imperative. The Act was adopted in response to the Supreme Court's *Alyeska Pipeline* decision holding that prevailing party fee awards are not a form of relief inherent in the power of courts to remedy government violations of the law, and can only validly be awarded when authorized by statute.

Inherent in any area of Congress' legislative discretion is the choice to address only those parts of a public policy problem that seem most needful of a statutory remedy. As the Supreme Court has observed:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. State of Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash Co.*, 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955). A logical corollary of Congress' right to address only "one phase of one field" while "neglecting the others" is its right to repeal that portion of a statutory scheme which has proven unwise, unworkable, or otherwise undesirable. A legislative act repealing a statute which was not constitutionally compelled is itself constitutionally valid. *See Perpich v. Department of*

Defense, 496 U.S. 334, 354-355 (1990) (repeal of statutory requirement not compelled by Constitution was constitutionally permissible legislative policy choice).

PERA can thus be viewed as a valid exercise of Congress' discretion to roll back a statutory remedy not constitutionally compelled, in a particular area where Congress may conclude that it has produced undesirable results.

Conclusion

For the reasons discussed above, PERA is a constitutionally permissible step toward restoring Congress' original limited intent for Section 1988. In the unique arena of modern Establishment Clause litigation, confusing, contradictory and constantly shifting jurisprudence has created a mine field for local and state governments. The potent threat of expensive prevailing party attorney's fees awards currently aids aggressive litigation by strict separationist and secularist plaintiffs. This has created an environment where both public expression of private religious beliefs, and public acknowledgment of the importance of religion in American history and life, are presumed to violate the Establishment Clause. Congress has the prerogative to conclude that this should not be the prevailing environment under our First Amendment, in which religious freedom is the first liberty. Congress has the discretion to enact PERA to change the currently prevailing incentives for government censorship of religious expression.

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July 10, 2006

PREPARED STATEMENT OF STEVEN W. FITSCHEN, PRESIDENT,
THE NATIONAL LEGAL FOUNDATION

THE NATIONAL LEGAL FOUNDATION

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WITH REGIONAL OFFICES THROUGHOUT THE UNITED STATES

July 10, 2006

The Honorable Steve Chabot
United States House of Representatives
Via E-mail

Dear Chairman Chabot:

I am delighted to be able to submit the accompanying written testimony concerning House Resolution 2679, The Public Expression of Religion Act (PERA) to the House Judiciary Subcommittee on the Constitution.

By way of introduction, I am Steven W. Fitschen, President and Executive Director of the National Legal Foundation, and Research Professor of Law at Regent University School of Law. The National Legal Foundation is a public interest law firm, which among other things, defends various governmental defendants when they are sued for allegedly violating the Establishment Clause. Also, as Research Professor of Law, one of my areas of expertise is Establishment Clause jurisprudence.

In neither of these capacities do I endorse legislation. However, I do from time-to-time render opinions on the constitutionality of or necessity for various pieces of legislation. I have testified before the Alaska and Colorado legislatures.

In the case of PERA, my testimony, at bottom, makes the case that the Establishment Clause was never intended to be covered by either 42 U.S.C. 1988 or 42 U.S.C. 1983. Thus, should this Congress pass PERA, it would not be doing anything radical but would simply be restoring §§ 1983 and 1988 to their intended boundaries.

Along the way, it would be removing the ability of plaintiffs to "blackmail" governmental entities—especially small ones—with the threat of attorneys fee awards. As I discuss in my testimony, even when governmental entities are fully persuaded that they have not violated the Establishment Clause, they will often acquiesce to the demands of would-be plaintiffs out of fear of attorneys fees should they eventually lose.

As I note at the end of my testimony, PERA would not prevent anyone from suing a governmental entity for an Establishment Clause violation. The federal courts will remain open for business as usual. All that will happen is that the "blackmailing" factor will be removed.

Thank you again for the opportunity of submitting this testimony.

Sincerely,

Steven W. Fitschen
President

WRITTEN TESTIMONY OF STEVEN W. FITSCHEN CONCERNING HOUSE RESOLUTION 2679, THE PUBLIC EXPRESSION OF RELIGION ACT SUBMITTED TO THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION JULY 10, 2006

Mr. Chairman and members of Congress, I am pleased to be able to submit this testimony to you regarding House Resolution 2679, The Public Expression of Religion Act (hereinafter PERA). By way of introduction, I am Steven W. Fitschen, President and Executive Director of the National Legal Foundation, and Research Professor of Law at Regent University School of Law. The National Legal Foundation is a public interest law firm, which among other things, defends various governmental defendants when they are sued for allegedly violating the Establishment Clause. Also, as Research Professor of Law, one of my areas of expertise is Establishment Clause jurisprudence.

In neither of these capacities do I endorse legislation. However, I do from time-to-time render opinions on the constitutionality of or necessity for various pieces of legislation. I have testified before the Alaska and Colorado legislatures.

In the instant case, I have personal knowledge of the deleterious effect of the possibilities of attorney's fees being awarded under 42 U.S.C. 1988. From 1990-1993, I was employed at the American Center for Law and Justice, a public interest law firm similar to the National Legal Foundation. From 1993 until present I have been employed at the National Legal Foundation. At both of these public interest law firms, it has not been unusual to be contacted by state, county, or local government officials who have been threatened with lawsuits for putative violations of the Establishment Clause by organizations such as the American Civil Liberties Union or other so-called strict separationist organizations.

When we offer our services free of charge to defend these governmental defendants should the lawsuit actually be brought, the strict separationist organization will often reply, in effect, "That is fine if you win. But if you don't, you will end up paying *our* attorney's fees." In such situations, the governments often give in to the demands of the separationist organizations, even though they and we believe that no actual violation of the Establishment Clause has occurred.

Thus, the result has nothing to do with the merits of the asserted Establishment Clause violation. Rather, the outcome is determined by the economic reality—especially with small towns and counties—that the would-be defendant simply cannot take the chance that it will loose and end up having to figure out how to finance attorneys' fees. In this country—where the role of religion has been both historically pervasive and recently controversial; and where Establishment Clause jurisprudence has been in complete disarray—at the very least, the merits of such threatened lawsuits should be determined on a level playing field. America's religious heritage and the public acknowledgment of that heritage should not give way to what I have elsewhere called blackmail.[1] The description just given of the response of governments to

[1] The is testimony is largely derived from a forthcoming law review article, tentatively entitled, FROM BLACK MALES TO BLACKMAIL: HOW THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (42 U.S.C. § 1988) HAS PERVERTED ONE OF AMERICA'S MOST HISTORIC CIVIL RIGHTS STATUTES. In that article, I note that many of the original civil rights statutes were designed to protect Black males. Thus, while "Black males" is sometimes used synecdochially for all minorities, it is also sometimes used literally. This provides the basis for the play on words between "Black males" and "blackmail." Therefore, in the article as well as in my testimony, (other than when quoting) I will use the word "Black" even when older sources might use the words "Negro" or "Colored" or where newer sources might use the term "African American."

threats of lawsuits suffices to demonstrate why I call this phenomenon "blackmail."

In light of the above, it would be possible to accumulate numerous examples of the fees actually awarded in various Establishment Clause cases. However, it is more to the point to illustrate how the *threat* of attorneys' fees has perverted the intent of both the Congress that drafted what is today known as 42 U.S.C. 1983 and the Congress that drafted what today is known as 42 U.S.C. 1988. Consider the following quartet of quotations.

The first is a quotation from Senator Tunney as he introduced the bill that became the Civil Rights Attorney's Fee Act of 1976:

> Mr. President, today I am introducing a bill which would allow a court, in its discretion, to award attorney's fees to a prevailing party in suits brought to enforce the civil rights acts which Congress has passed since 1866.
>
> . . . .
>
> The purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. . . . [2]

What the civil rights statutes were concerned about, in turn, can be discerned by the second quotation, which is from Senator Coburn during the debate on the Ku Klux Act of 1871. Section 1 of that Act exists today as 42 U.S.C. 1983.

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it. If, in

[2] 121 CONG. REC. 26,806 (1975) (statement of Senator Tunney introducing S. 2278), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S. 2278), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, at 3 (Comm. Print 1976) [hereinafter SOURCE BOOK].

> addition to all this, the State should fail to ask the aid of the General Government in putting down the existing outlawry, would not a more complete and perfect case of denial of protection be made out? Indeed, it would be difficult to conceive of a more glaring instance of the denial of protection.
>
> It may be safely said, then, that there is a denial of the equal protection of the law by many of these States.[3]

This was the historical root of the original civil rights statutes. As my testimony will shortly demonstrate, it was still civil rights as historically understood that 42 U.S.C. 1988 was intended to protect. The Establishment Clause was simply not intended to be covered by either § 1983 or § 1988.

However, today that is not the case. And, as suggested above, this has led to a deleterious state of affairs. Consider the third quotation. It is from a popular magazine, U.S. News and World Report, and describes one example of the current state of affairs:

> The yuletide work of the American Civil Liberties Union is never done.
>
> While others frolic, the grinches of the ACLU tirelessly trudge out each year on yet another crèche patrol, snatching Nativity scenes from public parks and rubbing out religious symbols. Sometimes, on school property, they catch a rabbi or a minister mentioning God or carolers singing "Silent Night" instead of just songs about snowmen. Then they have to turn everybody in to a judge. Otherwise, our liberties would be threatened.
>
> Last year, for instance, the crèche squad hit Vienna, Va., arguing that a Nativity scene on town property violated the Supreme Court's so-called plastic reindeer rule. In a notably tortured 1984 decision, the court said that a crèche on private land in Pawtucket, R.I., was permissible because it was part of a predominantly secular display including candy canes and plastic reindeer. In an attempt to ward off the crèche patrollers, the crèche in Vienna was surrounded with two plastic Santas, one reindeer and one snowperson. No good. The ACLU found a judge to strike it down. Presumably a future Supreme Court decision will determine the precise number of reindeer needed to excuse the presence of one baby Jesus in a Christmas display.
>
> This year, *mindful of the legal fees it would have to pay if the ACLU struck again*, the town ordered the Vienna Choral Society to ban all religious carols (including a Hanuka [sic] song) from its performance at the annual Christmas pageant and stick to songs like "Jingle Bells." To its credit, the choral society was unwilling to accept the town's pre-emptive censorship and quit the pageant. Now the town has a Christmas pageant that contains no hint of Christmas, at least as traditionally understood to refer to Jesus. But an ACLU grinch in Richmond, Stephen Pershing, is apparently still not satisfied. According to the Washington Post, he thinks Vienna may be violating the Constitution by having any kind of Christmas program at all.
>
> Frosty, yes. Jesus, no. How did we reach the point where running off to the judges to get every trace of religion extinguished from public life seems normal? The Founding Fathers would certainly be aghast at the ACLU's

[3] CONG. GLOBE, 42nd Cong., 1st Sess. 459 (1871) (statement of Senator Coburn).

> fundamentalist version of what separation of church and state requires. . . .[4]

The final quotation comes from a state representative of the ACLU:

> "If we prevail, we get fees, and they're going to pay the [Indiana Civil Liberties Union] an enormous amount of fees."[5]

It is noteworthy that, although this last statement is now almost six years old, it was made by the same lawyer, Kenneth Falk, who has sued the Indiana legislature to prevent its chaplains from praying as they see fit.

My point is simple: Section 1983 was enacted to protect the civil rights of the newly-freed slaves from the actions of the Ku Klux Klan and from the inaction of the states. It was and is one of America's most historic and important legislative milestones. But now it is being perverted to achieve the agenda of the strict separationists. When strict separationists employ §§ 1983 and 1988 in ways never intended by Congress, it is entirely appropriate for this Congress to enact legislation that will simply return § 1988 to its original boundaries.

I begin by noting that at least one federal court has questioned whether § 1983 is a valid vehicle under which to bring an Establishment Clause claim. In *Cammack v. Waihee*,[6] resident taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution and the co-extensive Establishment Clause of the Hawaii Constitution.[7] The Ninth Circuit upheld the district court's granting of summary judgment in favor of the government defendants.[8] However, along the way, the Ninth Circuit questioned, without further addressing, the "efficacy" of bringing the Establishment Clause claim under § 1983:

> Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under § 1983. We note that this route has been traveled before without exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983) (simply noting that establishment clause challenge was brought under § 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).[9]

However, neither the Ninth Circuit nor any other court has ever revisited the possibility that § 1983 is an improper vehicle. That, of course, is precisely why PERA is a valid response to the "blackmailing" problem discussed above.

I turn first to the purpose of § 1988. While this Congress is free to enact PERA regardless of the original purpose of § 1988, it is instructive to understand, as stated above, that

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[4] John Leo, *A Secular Christmas to All*, U.S. NEWS & WORLD REPORT, Dec. 28, 1992, at 31 (emphasis added).
[5] Rick Thackeray, *All Eyes Poised on the 7th Circuit Outcome; 'Commandments' Decision Seen as Key to Glut of Cases*, THE IND. LAWYER, Nov. 22, 2000, at 1.
[6] 932 F.2d 765 (9th Cir. 1991).
[7] Also challenged were state and city collective bargaining agreements regarding paid leave on Good Friday. *Id.* at 767-68.
[8] *Id.* at 768, 782.
[9] *Id.* at 767 n.3.

PERA would actually be reinforcing the original purpose of § 1988, not running counter to it.

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (42 U.S.C. § 1988) WAS DESIGNED TO AID CIVIL RIGHTS LITIGANTS ONLY

The purposes for which § 1988 was enacted are not hard to discover.[10] The legislative history of the Act is unambiguous. However, the majority and minority opinions of the Supreme Court in *Maine v. Thiboutot*[11] came to opposite conclusions about § 1988's purpose. Therefore, it is necessary to examine the conclusions of the two factions of the Court after examining the legislative history of § 1988 in light of the facts of *Thiboutot*.

A brief description of the case will suffice to set the stage. In *Thiboutot*, the Thiboutots challenged The Maine Department of Human Services' determination that they would no longer receive certain benefits based upon the Department's interpretation of the governing federal statute.[12] The Thiboutots, in addition to seeking review of administrative determinations, filed a claim under § 1983. The Supreme Court faced two questions: "(1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing party . . . ."[13] While the fight in *Thiboutot* was over what *laws* should be reached by § 1988, this debate has important implications for the question of Establishment Clause claims brought under § 1988.

When a majority and minority of the Court disagree on a matter of legislative history, one of the best ways to determine who had the better of the argument is to see whose survey of the available material is more complete.[14] Driven by this desire to be fair by being thorough, my examination of the legislative history of the Civil Rights Attorney's Fees Awards Act will be fairly extensive.

As introduced, The Civil Rights Attorney's Fees Awards Act of 1976 was designed to do one thing. This single purpose was noted in the first of my introductory quotations, to which I now return. Senator John V. Tunney, as Chairman of the Senate Judiciary Subcommittee on Constitutional Rights,[15] noted when he introduced the original version of the bill that became the Act that

> [t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent Alyeska decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under

[10] Similar statements regarding the purposes of § 1988 can be found in many law review articles. *See, e.g.*, Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1018 n.122 (1991); Stanley M. Grossman, *Statutory Fees Shifting in Civil Rights Class Actions: Incentive or Liability?*, 39 ARIZ. L. REV. 587, 589, 592 (1997); Edward A. Morse, *Taxing Plaintiffs: A Look at Tax Accounting for Attorney's Fees and Litigation Costs*, 107 DICK. L. REV. 405, 420-21 (2003). However, few do anything more than baldly assert the proposition or give a few brief fragmentary quotations (and these are often relegated to footnotes). This article will give more extensive quotations.
[11] 448 U.S. 1 (1980).
[12] *Id.* at 2.
[13] *Id.*
[14] *See, e.g.*, Keith A. Fournier, *In the Wake of* Weisman*: The* Lemon *Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still*, 2 REGENT U. L. REV. 1, 18-19 (1992).
[15] SOURCE BOOK at II.

> all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.[16]

Senator Tunney went on to emphasize that the Court, in *Alyeska Pipeline Service Corp. v. Wilderness Society*,[17] was dealing with "an environmental case not a civil rights case."[18] Indeed, *Alyeska*, withdrew the availability of attorney's fees in all cases—not just civil rights—for which Congress had not specifically authorized such fees.[19] However, as Senator Tunney's remarks quoted above indicate, his purpose in introducing his bill was to restore attorney's fees *only* in civil rights cases, not in all cases.

Senator Tunney noted that civil rights litigants often have no funds with which to hire an attorney and that often no damages are awarded from which the attorneys could draw a fee.[20] According to Senator Tunney, "Congress recognized this need when it made specific provision for such fee-shifting in titles II and VII of the Civil Rights Act of 1964, which apply to discrimination in public accommodations and employment."[21] Tunney added that attorney's fees provisions were "equally appropriate in other civil rights statutes, because there, as in employment and public accommodations cases, Congress depends heavily on private enforcement."[22]

Just two more examples out of the many available will suffice to show that Senator Tunney's sole concern was with civil rights litigation. He explained that

> the reason why this legislation specifically authorizing fees awards under all our civil rights laws was not introduced years ago is simply that, until very recently [in *Alyeska*], it was widely believed and held that the courts already had the power to award counsel fees in all civil rights cases as part of their inherent equity power.[23]

Finally, it is profitable to note the specific examples that Tunney used to illustrate his concern:

> [*Alyeska's*] effect was to create an unexpected and anomalous gap in our civil rights laws whereby awards of fees are suddenly unavailable in the most fundamental civil rights cases. For instance, fee are now authorized in an employment discrimination suit brought under title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a suit under title II of the 1964 act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. 1983 redressing violations of

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[16] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 3.
[17] 421 U.S. 240 (1975).
[18] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 4.
[19] *See* 421 U.S. at 269.
[20] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 3.
[21] *Id.* at 26,806, SOURCE BOOK at 3-4.
[22] *Id.* at 26,806, SOURCE BOOK at 4 (referring to the private attorney general concept).
[23] *Id.*

the Federal Constitution or laws by officials sworn to uphold the laws.[24]

In making these remarks, Tunney often used language contained in the Report from the Committee on the Judiciary, which he presented to the Senate.[25] So, for example, the Committee Report stated that the purpose of the bill "is to remedy anomalous gaps in our civil rights laws created by [*Alyeska*]."[26] Similarly, the Report expressed concern that attorney's fees were now "unavailable in the most fundamental civil rights cases"[27] and demonstrated the anomaly with the same examples quoted above from Senator Tunney.[28]

However, the Report was more explicit, indeed emphatic, that the attorney's fees were not to be available in all cases impacted by *Alyeska*:

> This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.[29]

Furthermore, the Report was explicit that the bill was designed to remedy defects in the Reconstruction-era laws: "The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization [for attorney's fees]."[30]

Only two Senators, Senator Hugh Scott and Senator Mathias spoke during the debate of the bill prior to its amendment. Both reiterated the familiar themes: this bill was a direct response to *Alyeska* but it was intended to reach only civil rights cases.[31]

At this point in the debate, Senator Edward Kennedy introduced "an amendment in the nature of a substitute."[32] The original bill, as introduced by Senator Tunney, read in its entirety:

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,* Revised Statutes § 722 (42 U.S.C. Sec. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of § 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[33]

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[24] *Id.*
[25] *See generally* S. REP. NO. 94-1011 (1976), *reprinted in* SOURCE BOOK at 7-13.
[26] *Id.* at 1, SOURCE BOOK at 7.
[27] *Id.* at 4, SOURCE BOOK at 10.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK at 19-20.
[32] *Id.* at 31,471-72, SOURCE BOOK at 21-22.
[33] 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 5. The *Revised Statutes of 1875* was the first codification of public laws that were categorized by subject matter and assigned title and section numbers. Then, in 1926, the first addition of the *United States Code* was published and sections of the *Revised Statutes* were rearranged, still by subject, into the new titles of the *Code* and assigned new section numbers. Hence, § 1979 of the *Revised Statutes* is the 1875 version of the current *Code* § 1983.

Senator Kennedy's substitute did two things. First, it provided for the citation of the act as The Civil Rights Attorney's Fees Awards Act of 1976.[34] Second, it added the words "title IX of Public law 92-318," *i.e.*, the Education Amendments of 1972, between "sections 1977, 1978, 1979, 1980, and 1981 of the Revised statutes" and "title VI of the civil rights Act of 1964."[35] Kennedy stated that the purpose of the amendment was to "expedite final enactment of [the] bill" by conforming it to the version pending in the House of Representatives.[36]

Senator Kennedy then commented upon his amendment. He started by reiterating what Senators Tunney, Scott, and Mathias had previously stated: The bill was a reaction to *Alyeska* and was intended to apply only to civil rights case.[37]

Senator Kennedy then explained why the House had added title IX to its version of the bill: "inclusion of cases brought under title IX would mean that where educational programs which receive Federal assistance discriminate on the basis of sex or blindness, courts would be able to make discretionary awards of attorneys' fees . . . ."[38]

Senator Kennedy was careful to fit the title IX provision squarely under the civil rights rubric, and indeed, within the Fourteenth Amendment rubric, thus implicitly harkening back to the Reconstruction-era legacy:

> In recent years, there has been a growing recognition that discrimination on the basis of sex is both pervasive and persistent. For that reason Congress has banned sex discrimination in such areas as employment, housing, credit, and, in title IX of the Emergency School Aid Act, education programs or activities which receive Federal assistance. The title is the analog, in the field of education, of title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or sex, they [sic, read "which"?] violate fundamental rights which are at the bedrock of our society's notion of fair play and human decency. It is Congress' obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 have been included. As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing attorneys' fees in this essential area of the law.
>
> . . . .
>
> Title IX also reaches another pernicious form of discrimination—that against blind people and those who are visually impaired—and in these circumstances the same fundamental principles apply.[39]

Senator Kennedy repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight "discrimination"[40] in areas such as "jobs, housing, credit, or education"[41]

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[34] 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK at 21.
[35] *Id.*
[36] *Id.* at 31,472, SOURCE BOOK at 21-22 (referring to H.R. 15460).
[37] *Id.* at 31,472, SOURCE BOOK at 21.
[38] *Id.* at 31,472, SOURCE BOOK at 22.
[39] *Id.*
[40] *Id.* at 31,472, SOURCE BOOK at 22-23.

using the "civil rights laws."[42] He noted that fee-shifting was currently used in other areas of the law[43] and that fee-shifting in other areas of the law was pending at the moment.[44] Clearly, Senator Kennedy conceived of the amended bill as extending Reconstruction-era protection to women and blind people and no further.

The remainder of the Senate debate was marked by only a handful of notable components. First, numerous Senators who favored the bill reiterated the points discussed above.[45] Second, those Senators who opposed the bill filibustered and offered various amendments, the purpose of which was merely to delay the vote.[46] Third, one amendment was offered by those who supported the bill.[47] Fourth, some substantive discussion of the content of the final bill occurred.[48]

Numerous amendments (in addition to Senator Kennedy's) were offered. None had a serious chance of passage until Senator Allen agreed to "trade" an amendment for ending the filibuster,[49] as will be discussed below. The first amendment was offered by Senator Jesse Helms (R, NC). It would have added six more sections to the bill, running 120 lines long,[50] that would have, in Senator Helm's words, "grant[ed] successful litigants in civil cases or agency hearings against the Federal Government, and acquitted criminal defendants, the right to an award of legal fees and other expenses [such as expert witness fees and costs of studies, reports, tests, and similar items] incurred in preparing and pursuing the litigation or the defense against prosecution for a Federal crime."[51] The amendment was tabled by a vote of 54 to 27.[52]

Immediately after this vote, Senator Allen (D, AL) offered an amendment adding the title IX provision to Senator Tunney's original bill because he did not want Senator Kennedy's "substitute . . . [to] cut off all other amendments."[53] This amendment was tabled by a vote of 54 to 24.[54] Thereafter, amendments continued to be offered to both the original and the substitute bills.[55]

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[41] *Id.* at 31,472, SOURCE BOOK at 23.
[42] *Id.*
[43] *Id.* Also see SOURCE BOOK app. E, listing 90 laws with fee-shifting provision to which many speakers referred. *E.g.*, 122 Cong. Rec. 31,472, 31,851 (1976), *reprinted in* SOURCE BOOK at 23, 92 (Kennedy); *id.* at 32,185, SOURCE BOOK at 138 (Tunney); *id.* at 35,114, 35,117, SOURCE BOOK at 236, 242 (Anderson); *id.* at 35,116, 35,122, SOURCE BOOK at 240, 252 (Drinan); *id.* at 35,124, SOURCE BOOK at 259 (Railsback); *id.* at 35,126, SOURCE BOOK at 263 (Kastenmeier).
[44] 122 CONG. REC. 31,472 (1976), *reprinted in* SOURCE BOOK at 23. The pending bill to which Senator Kennedy referred was introduced early in the year 1976 as S. 2715 "which would authorize, among other things, awards of attorneys' fees in judicial actions for review of certain Federal administrative decisions." *Id.* The bill was an amendment to the Administrative Procedure Act found in title 5, chapter 5 of the U.S. Code. S. REP. NO. 94-863, at 1 (1976), but spent the next four years in both House and Senate Committees until finally enacted in 1980 and codified in 5 U.S.C. §504. Equal Access to Justice Act, Pub. L. No. 96-481, Title II, sec. 203(a)(1), §504, 94 Stat. 2325 (1980).
[45] *See, e.g.*, 122 CONG. REC. 31,832 (1976), *reprinted in* SOURCE BOOK at 74-75 (Hathaway); *id.* at 31,850-51, SOURCE BOOK at 91-92 (Kennedy); *id.* at 32,185, SOURCE BOOK at 138-39 (Tunney).
[46] *See infra* notes 49-62 and accompanying text.
[47] 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 63-64 (offered by Bumpers).
[48] *See generally* 122 CONG. REC. 32,396, 33,311-15 (1976), *reprinted in* SOURCE BOOK at 169-70, 193-205.
[49] *Id.* at 33,311, SOURCE BOOK at 194.
[50] *Id.* at 31,477-78, SOURCE BOOK at 34-36.
[51] *Id.* at 31,478, SOURCE BOOK at 36.
[52] *Id.* at 31,480-81, SOURCE BOOK at 43-45.
[53] *Id.* at 31,481, SOURCE BOOK at 45.
[54] *Id.* at 31,483, SOURCE BOOK at 51-53.
[55] SOURCE BOOK app. C.

After these first two votes, it was obvious to those opposing the bill that they did not have nearly enough votes to defeat it. Indeed, Senator Allen explicitly admitted as much on the Senate floor.[56] Nevertheless, the fight went on.

First of all, numerous amendments were introduced, the content of which has been lost to the legislative history. The Senate Debates simply record that they were introduced and were ordered to be printed and to lie on the table.[57] These amendments were obviously dilatory in nature as evidenced, for example, by Senator Allen's introduction of twenty-two and Senator Thurmond's introduction of eleven amendments at once, none of which were ever acted upon.[58]

A few other amendments contain enough information to discuss. Of the remaining seventeen amendments considered significant enough to be included in the legislative history appendices,[59] sixteen were offered by those opposing the bill. Of these, thirteen were tabled.[60] These included five by Senator Helms of North Carolina, five by Senator Allen of Alabama, two by Senator Thurmund of South Carolina, and one by Senator Scott of Virginia.[61] One might assume that because they were offered as delaying tactics by opponents and were quickly tabled, they grant us no insight into the purpose of the Act. And indeed, for some of the amendments that is the case.

However, some of the other amendments do tell us something. The hallmark of these amendments was to make attorney's fees available in a wide range of cases.[62] Had those favoring the bill had no problem with throwing the door wide open they could have agreed to such amendments rather than fight them. This is especially significant for instant purposes since the very point of this march through legislative history is to demonstrate that only civil rights cases were in view during the debates over and passage of the Civil Rights Attorney's Fee Act.

Instead, the only idea that had any traction was the idea of adding attorney's fees in proceedings involving the Internal Revenue Service. Thus, an amendment to the original bill, proposed by Senator Goldwater, providing certain remedies in the case of a taxpayer being audited for a second time, was adopted.[63] Since Senator Kennedy's substitute was eventually passed in lieu of the original bill, Senator Goldwater's amendment came to naught. Of course, Senator Allen's much simpler amendment addressing IRS proceedings eventually became part of the final bill.[64] As mentioned previously, this was what he "traded" for ending the filibuster.[65]

However, Senator Goldwater's amendment was debated. In this context, Senator Muskie

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[56] 122 CONG. REC. 31,488 (1976), *reprinted in* SOURCE BOOK at 58.

[57] *E.g.*, *id.* at 31,500, SOURCE BOOK at 63 (two amendments); *id.* at 31,792, SOURCE BOOK at 64 (fifteen amendments besides Bumpers'); *id.* at 32,326, SOURCE BOOK at 146 (thirty-four amendments).

[58] *Id.* at 32,326, SOURCE BOOK at 146.

[59] Only amendments voted on during the debates were included. SOURCE BOOK app. D at 295 n.1.

[60] SOURCE BOOK app. C.

[61] *Id.*

[62] *See supra* notes 50-51 and accompanying text. Additionally, amendment No. 2378 awarded reasonable attorneys' fees, at the court's discretion, to a prevailing defendant even if they could not show the plaintiff brought the action in bad faith, 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 64; amendment No. 473 awarded attorneys' fees to the prevailing party upon a showing of bad faith of the losing party, *id.* at 31,834 ; SOURCE BOOK at 81; amendment No. 2350 reimbursed taxpayer's expenses in certain cases, *id.* at 31,846-47, SOURCE BOOK at 84-85; amendment No. 2409 awarded reasonable attorneys' fees, at the court's discretion, for frivolous action, *id.* at 32,394, SOURCE BOOK at 163; and amendment No. 2392 awarded reasonable attorneys' fees as part of the costs awarded a prevailing defendant, other than the United States, when the plaintiff acted in bad faith in bringing certain actions. *id.* at 32,394-95, SOURCE BOOK at 165-66.

[63] *Id.* at 32,175-76, SOURCE BOOK at 131-32.

[64] *Id.* at 33,311, 33,315, SOURCE BOOK at 194, 204.

[65] *See supra* note 49 and accompanying text.

(D, ME) made a point, also raised by other Senators during the debate, that the Civil Rights Attorney's Fees Awards Act was narrow, applying to civil rights only.[66]

Only one amendment was offered by anyone supporting the bill. Senator Bumpers introduced an amendment, which was never voted upon, that would have allowed prevailing defendants to be awarded attorneys' fees without having to show that the lawsuit had been brought "in bad faith, frivolously, vexatiously, or for the purpose of harassing such defendant."[67] Senator Bumpers thought it necessary to add this provision because the Judiciary Committee Report had stated that defendant attorneys' fees would be awarded only when such motivations could be shown.[68] The most important implication for instant purposes is Senator Bumpers' statement that he believed that the courts would interpret the new legislation consistently with the Report.[69]

Thus, in summary, what little can be gleaned by examining the many proffered amendments comports completely with the introductory comments, the Judiciary committee report and the floor debate that occurred up to and including the time at which Senator Kennedy offered his substitute.

Finally, the floor debate viewed as a whole is also instructive. That portion not dedicated to dealing with the amendments discussed above is remarkable for its consistent theme—this bill is about civil rights only. Statements similar to those already quoted in this article were made repeatedly.[70] In fact very few of the remarks shed any additional insight since the majority of them were so redundant.

One of the few additional insights can be gleaned from comments by Senator Long (D, LA) who was worried about the "slippery slope." However, even his "slippery slope" was limited to discrimination cases: "When you start out with this, you cannot decline to pay the lawyer's fee for those who sue because of sex discrimination, because of disability discrimination, because of any type of discrimination whatever, with respect to those who have a meritorious lawsuit."[71]

Another insightful exchange occurred between Senators Helms and Kennedy:

> Mr. Helms. . . . . As author of the provision adding title IX to the bill, does the Senator anticipate that it will apply to cases where the question of abortion is involved?
>
> Mr. Kennedy. I believe the answer to that would be "No."
>
> Mr. Helms. In other words, the Senator is saying that even in an

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[66] Senator Muskie was concerned that the bill would die in the House if it was broadened by Senator Goldwater's IRS amendment, so he introduced a letter addressed to Senator Kennedy from the Chairman of the House Judiciary Committee stating, among other things, that "S. 2278 presently is a very narrow bill intended to enable private enforcement of civil rights acts." 122 CONG. REC. 32,184 (1976), *reprinted in* SOURCE BOOK at 136-37.

[67] *Id.* at 31,792, SOURCE BOOK at 64.

[68] *Id.* at 31,792, SOURCE BOOK at 63-64 (quoting Report, *supra* note 34).

[69] *See* 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 64. The Report stated that "[s]imilar standards [requiring proof of bad faith] have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. *Id.* So, even though the plain language of S. 2278 provided for awarding attorneys' fees to the prevailing party without explicitly mentioning any "bad faith" exceptions, cannons of statutory construction presume that a new statute is enacted in light of previous judicial decisions or the judicial construction of previous statutes regarding the same subject. 73 AM JUR. 2D *Statutes* § 79 (2001) (citations omitted).

[70] *See id.* at 31,832, SOURCE BOOK at 74-75 (Hathaway); *id.* at 32,185, 33,313-14, SOURCE BOOK at 138, 199-200 (Tunney); *id.* at 33,314, SOURCE BOOK at 200-02 (Kennedy); *id.* at 33,314, SOURCE BOOK at 202-03 (Abourezk).

[71] *Id.* at 32,187, SOURCE BOOK at 140.

> employment case where a woman is dismissed for having an abortion: and while there is an allegation of a constitutional right, her suit also alleges sex discrimination since only women have abortions. The answer is "No"?
>
> Mr. Kennedy. Title IX cases are brought solely to remedy discrimination on the basis of sex.
>
> Mr. Helms. So the Senator does not intend that this provision apply in cases where abortion is an issue?
>
> Mr. Kennedy. I do not see the point the Senator is making, quite frankly. I do not see the relevancy of the argument. The question of abortion would not generally arise under title IX . . . .

From there, Senator Kennedy's response was based upon the legislative history of title IX.[72]

However, the instructive point here is that Senator Kennedy *could* have responded that the constitutional right to an abortion was already implicated under § 1983 without the inclusion of title IX. Such an answer would have indicated a belief that constitutional rights other than those protecting civil rights were intended to be covered by the bill. While Senator Kennedy's choice of answer could have been motivated by any number of reasons, it is at least worth noting that it was consistent with his own prior statements and those of many other Senators that the bill was only intended to reach civil rights.

Finally, after the Allen amendment adding fees for IRS actions was adopted, Senator Kennedy yet again emphasized that there had been one original purpose of the bill and that Senator Allen's amendment was the sole deviation from that purpose:

> I welcome the Allen amendment. While the original purpose of this bill was to authorize awards of fees in court actions brought to enforce our civil rights laws, there is no question that there are numerous other situations where fees are justified.
>
> One such situation is indeed where taxpayers suffer harassment from the Internal Revenue Service. . . .
>
> . . . .
>
> It should be clear, then, that a provision authorizing fee awards in tax cases has a fundamentally different purpose from one authorizing awards in lawsuits brought by private citizens to enforce the protections of our civil rights laws. In enacting the basic civil rights attorney's fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws. By authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, however, Congress merely intends to protect citizens from becoming victims of frivolous or otherwise unwarranted lawsuits.[73]

Senator Kennedy also gave examples of the type of cases in which attorney's fees had been awarded prior to *Alyeska*. He cited cases in which a Black veteran had been denied burial

[72] *Id.* at 32,396, SOURCE BOOK at 169.
[73] *Id.* at 33,312-13, SOURCE BOOK at 196-98.

in a local cemetery, Blacks had been kept off of juries, a Black man had been harassed by the police, doctors rendering assistance to Blacks had been denied privileges at a local hospital, a highway was put through a black rather than a white neighborhood, blacks were charged higher rents in a housing project, housing projects were segregated, one housing project advertised "whites only," officials accepted Social Security Act funds and failed to provide services, and mental patients were forced into unpaid labor against their will.[74] Senator Kennedy's reference to the cases involving Social Security funds and highway construction was of great significance to the Supreme Court majority in *Thiboutot*,[75] and we shall return to this fact shortly.

Thus, the record is clear—the entire debate in the Senate centered on guaranteeing attorneys' fees in the civil rights context—whether statutorily or constitutionally based.

Next I turn to the record from the House of Representatives. The House debate was much shorter than the Senate debate—obviously the House was feeling time pressure.[76] Indeed, no amendments were offered.[77] A motion to re-commit was easily defeated by a vote of 104 to 268,[78] and the bill quickly passed by a vote of 306 to 68.[79]

Furthermore, much of the same sentiment—that the bill was all about civil rights—was repeated in the House.[80] So for example, Representative Kastenmaier noted, "We held 3 days of hearings, and determined, consistent with the Justice Department suggestions, that our initial approach to the problem would be to respond with narrowly drawn legislation: such as, to authorize attorney's fees in those specific situations where private enforcement of civil and constitutional rights was anticipated and to be supported."[81] Representative Kastenmaier went on to give examples of the types of cases that would be covered. Interestingly he chose four of the same cases that Senator Kennedy had given, but did *not* include the Social Security case.[82] Similarly, Representative Fish gave examples of the type of cases that would be impacted. All of them involved civil rights, including the three that he specifically stated were filed under § 1983.[83]

However, a few additional insights can be gained here too.[84] First, the House was much more explicit that the legislation was in direct response to the financial impact of the *Alyeska* case on the public interest movement. For example, in the Report of the House Judiciary Committee, one reads the following:

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[74] *Id.* at 33,314, SOURCE BOOK at 201.

[75] The Court identified the cases *Bond v. Stanton*, 528 F.2d 688 (7th Cir. 1976), regarding Social Security funds, and *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D.Cal. 1972), regarding highway construction, as "an example of the cases 'enforc[ing] the rights promised by Congress or the Constitution' which the Act [§ 1988] would embrace." Maine v. Thiboutot, 448 U.S. 1, 10 (1980) (quoting Senator Kennedy, 122 CONG. REC. 33,314 (1976) [SOURCE BOOK at 202]).

[76] 122 CONG. REC. 35,115 (1976), *reprinted in* SOURCE BOOK at 238 (statements by Representatives Rousselot and Anderson respectively, indicating that "the hour is late" and they were "in the last day of [the] session.").

[77] *See* SOURCE BOOK app. C (listing no amendments in the summary table); *see generally id.* at 35,114-18, 35,121-30, SOURCE BOOK at 235-278 (record of the House debate).

[78] 122 CONG. REC. 35,129 (1976), *reprinted in* SOURCE BOOK at 272.

[79] *Id.* at 35,130, SOURCE BOOK at 276.

[80] *See generally id.* at 35,114-16, 35,122, 35,124, 35,126-28, SOURCE BOOK at 236-39, 252-53, 259-60, 263-69.

[81] *Id.* at 35,126, SOURCE BOOK at 263.

[82] *Id.* at 35,126, SOURCE BOOK at 263-64. *See also supra* note 74 and accompanying text (statements of Kennedy).

[83] *Id.* at 35,126, SOURCE BOOK at 265. *See also Id.* at 35,127, SOURCE BOOK at 267 (Holtzman regarding inclusion of title IX).

[84] Some of these insights, however, are not germane to my testimony, e.g., whether the bill creates new private rights of action. *Id.* at 35,124, SOURCE BOOK at 259.

> In the hearings conducted by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses in the field testified to the devastating impact of the case on litigation in the civil rights area. Surveys disclosed that such plaintiffs were the hardest hit by the decision. The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.
>
> It should be noted that the United States Code presently contains over fifty provisions for attorney fees in a variety of statutes. In the past few years, the Congress has approved such allowances in the areas of antitrust, equal credit, freedom of information, voting rights, and consumer product safety. Although the recently enacted civil rights statutes contain provisions permitting the award of counsel fees, a number of the older statutes do not. It is to these provisions that much of the testimony was directed.[85]

Thus, from a different angle—that of the financial impact on the public interest law movement—one can clearly see that the House was aware that *Alyeska's* impact went beyond the issue of civil rights, but that Congress intended to limit its response to that category of cases.

Another insight can be gained from the House Report. Under a section entitled "Scope of the Bill," the Report notes that the "affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas . . . ."[86] It goes on to address each section individually.[87] In its description of § 1983, the Report notes that § 1983 is utilized to challenge "official discrimination, such as racial segregation imposed by law,"[88] and cites *Brown v. Board of Education*.[89] The report also notes that § 1983 is used in non-racial situations. The examples include poll taxes, unconstitutional searches, political affiliation discrimination, and unlawful terms and conditions of confinement.[90] Each of these, while not facially aimed at racial discrimination, have historically been especially problematic in minority populations. So, for example, each of the cases cited involved practices (such as the poll tax) that were historically targeted at Blacks, dealt with Black plaintiffs and explicitly connected the case facts to the history of § 1983, analogized the plaintiffs to Blacks, or dealt with basic liberty interests of other

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[85] H.R. REP. NO. 94-1558, at 2-3 (1976), *reprinted in* SOURCE BOOK at 210-211 (citations omitted). The same discussion took place in the Senate.
[86] *Id.* at 4, SOURCE BOOK at 212.
[87] *Id.* at 4-5, SOURCE BOOK at 212-213.
[88] *Id.* at 4, SOURCE BOOK at 212.
[89] 347 U.S. 483 (1954).
[90] H.R. REP. NO. 94-1558, at 5, SOURCE BOOK at 213 (citing *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (poll taxes); *Monroe v. Pape*, 365 U.S. 167 (1961) (unconstitutional search); *Elrod v. Burns*, 427 U.S. 347 (1976) (employment discrimination); and *O'Conner v. Donaldson*, 422 U.S. 563 (1975) (institutional confinement)).

targeted groups (the mentally ill).[91]

The House debate also highlighted the fact that references to constitutional rights were references to those constitutional rights that are related to civil rights, not references to any and every constitutional right. For example, Representative Seiberling stated:

> If the law does not authorize the awarding of attorneys' fees in meritorious civil rights cases, many potential plaintiffs will be deterred from bringing deserving cases to remedy violations of the Constitution . . . .
>
> Mr. Speaker, neither the Constitution nor the civil rights laws are self-executing. Instead, they both rely on public or governmental and on private enforcement. The government obviously does not have the resources to investigate and prosecute all possible violations of the Constitution, so a great burden falls directly on the victims to enforce their own rights. Our laws should facilitate that private enforcement and should—within reasonable limits—encourage potential civil rights plaintiffs to bring meritorious cases.[92]

Thus, the record is clear once again. The House Report and debate are in complete accord with the Senate Report and debate: the Civil Rights Attorney's Fees Awards Act of 1976 is about exactly what its title indicates—civil rights.

However, we must remember that the Supreme Court in *Thiboutot* did not think so. The entire point of the long examination of the legislative history just conducted was to set the stage for a fair evaluation of the views of the *Thiboutot* majority and the *Thiboutot* minority. The majority latched onto Representative Drinan's statement that "[u]nder applicable judicial decisions, § 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)."[93] Noting that *Blue* involved a claim that "North Carolina's Medicaid plan was inconsistent with the [Social Security Act],"[94] the *Thiboutot* Court used Drinan's citation of *Blue* as authority for the proposition that *all* statutory rights are covered by § 1983.

However, this assertion cannot be sustained based upon Representative Drinan's citation of *Blue*. First, Drinan cited *Blue* for a simple proposition, namely that § 1983 allows for suits based upon statutory rights. He never even indicated that *Blue* involved anything other than civil rights. Drinan's remarks give no indication as to whether he knew the case was about Medicaid and the Social Security Act.

Even assuming for the sake of argument that Drinan did know what *Blue* was about, the *Thiboutot* Court's assertion cannot stand. The *Blue* court itself pointed out that the case before it could be categorized as an equal protection case since the plaintiffs were representative of a class that claimed to be deprived of a federal right solely on the basis of membership in that class.[95] This characterization of *Blue* brings it squarely under the civil rights rubric.

Having eliminated Drinan's citation of *Blue* as a valid reason for claiming that §§ 1988 and 1983 are applicable outside the civil rights context, we are left with the Court's use of Senator Kennedy's list of cases.[96] As mentioned earlier, the Court pointed out Kennedy's

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[91] *See* cases cited at *id.*
[92] 122 CONG. REC. 35,128 (1976), *reprinted in* SOURCE BOOK at 269-270.
[93] 448 U.S. 1, 10 (1980) (quoting Representative Drinan, 122 CONG. REC. 35,122 (1976) [SOURCE BOOK at 253]).
[94] *Id.* at 10 n.8.
[95] 505 F.2d 830, 844-45 (4th Cir. 1974).
[96] 448 U.S. at 10.

mention of a Social Security case and a case in which a highway was constructed through a Black neighborhood.[97]

Even this is a flimsy reed upon which to rest the Court's argument. First of all, the Court postured the highway case as one involving the Department of Transportation Act of 1966 and related statutes.[98] However, as we have seen above, Senator Kennedy saw this case as another type of racial discrimination. Thus, this case, too, is validly included under the civil rights rubric.

That leaves the Social Security Act case, *Bond v. Stanton*,[99] to be explained. Several possible reasons for Senator Kennedy's use of this case present themselves. First, this case involved welfare benefits and several of the plaintiffs were welfare rights advocacy groups.[100] In the minds of many, the battle for welfare rights was part and parcel of the civil rights movement.[101] A second possible reason, although one that from the context of Senator Kennedy's comments is not as likely, is that this case was used as an example of attorney's fees being granted on the basis of bad faith. This was the basis of the fee award in the case and bad faith fees had been discussed both in the Senate Report[102] and debate.[103]

Of course, the possibility exists that Senator Kennedy mentioned the case for neither of these reasons. If that is true, it is one lone comment about a non-civil rights case that would benefit from enactment of the Civil Right Attorney's Fees Act.

Based on this examination of the legislative history of the Act, we can now decide whether the *Thiboutot* majority or minority was correct in its reading of the legislative intent. The majority held that § 1988 applies to *any* § 1983 action.[104] In the face of everything else in the legislative history of the bill, the *Thiboutot* minority, not the majority, is surely correct. As the minority wrote, "The few references to [non-civil rights] statutory claims cited by the Court fall far short of demonstrating that Congress considered or intended the consequences of the Court's interpretation of § 1983."[105]

I have spent so much time looking at *Thiboutot's* use of the Act's legislative history because of what it said about whether §§ 1983 and 1988 should be limited to the civil rights context. Ironically, the battle in *Thiboutot* was over the phrase "and laws," something not at issue in an Establishment Clause case. Thus, I can pass over the 1874 amendment of § 1983 to include that phrase.[106] I pause long enough to note that the debate over the legislative intent of

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[97] *See supra* note 74 and accompanying text.
[98] 448 U.S. at 10.
[99] 528 F.2d 688 (7th Cir. 1976).
[100] Plaintiff groups included New Day Welfare Rights Organization, Gary AFDC Mothers' Organization Welfare Rights Organization, and East Chicago Welfare Rights Organization. *Id.* at 688.
[101] Ruling in favor of welfare recipients on the authority of *Van Lare v. Hurley*, 421 U.S. 338 (1975), the Fifth Circuit "reasoned that statutory rights concerning food and shelter [from the Social Security Act] are 'rights of an essentially personal nature,' [citation omitted]; that 42 U.S.C. § 1983 provides a remedy which may be invoked to protect such rights; and that § 1983 is an act of Congress providing for the protection of civil rights within the meaning of that jurisdictional grant." Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).
[102] S. REP. NO. 94-1011, at 5 (1976), *reprinted in* SOURCE BOOK at 11.
[103] *E.g.*, 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 63-64 (Bumpers); *id.* at 31,832, SOURCE BOOK at 75 (Abourezk/Hathaway exchange); *id.* at 31,833, SOURCE BOOK at 77 (Helms, regarding amendment 473); *id.* at 32,185, SOURCE BOOK at 139 (Tunney).
[104] 448 U.S. 1, 9 (1980).
[105] *Id.* at 25 n.14 (Powell, J., dissenting).
[106] Amended by § 1979 of the Revised Statutes. Revised Statutes of the United States, Title XXIV, § 1979, 18 pt.1 Stat. 347 (1873-74). Even less important are the subsequent amendments of 1979 and 1996. The 1979 amendment related to Acts of Congress exclusively applicable to the District of Columbia. Act of Dec. 29, 1979, Pub. L. No.

this amendment, and the variations of language in the jurisdictional counter-parts have been discussed in *Thiboutot*[107] and *Chapman v. Houston Welfare Rights Organization*[108] as well as in the literature[109]

The point, to reiterate, is not that this Congress is bound by the intent of the Congress that enacted § 1988. That has not been the reason for retracing all this history. Rather the point is that the Supreme Court majority, as pointed out by the majority, got it wrong in *Thiboutot*. Thus, by enacting PERA, this Congress could undo the Supreme Court's mistake and return to the original purpose of § 1988.

Having demonstrated that § 1988 should only apply to civil rights cases, we must now ascertain what properly falls under that rubric. While I have already touched upon this issue tangentially, I will now examine the specific intended coverage of § 1983.

THE KU KLUX ACT OF 1871 (42 U.S.C. § 1983) WAS DESIGNED TO PROTECT "RIGHTS PRIVILEGES AND IMMUNITIES" ONLY

Thus, I come next to the original enactment of § 1983. It is one of the surviving provisions of the Ku Klux Act of 1871.[110] Section 1983 started out as § 1 of that act. As numerous courts and commentators have documented, § 1 was one of the least debated provisions.[111] However, for our purposes, we are interested in determining what "rights, privileges, and immunities" means and for that we can examine the debate over the entire act.

I note first that the bill was entitled "A Bill to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States , and for other purposes."[112] Immediately after Representative Shellabarger (R, OH) reported the bill on behalf of the Select Committee, Representative Stoughton (R, MI) spoke to set the stage.[113] He started with the activity of the Ku Klux Klan in North Carolina.[114] He noted "murders, whippings, intimidation, and violence."[115] He also discussed the Klan's ability to protect its members from conviction for their crimes because other members would commit perjury as witnesses or refuse to vote to convict when serving on juries.[116] Representative Stoughton's remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee.[117] He read testimony from Blacks who had been victims of violence[118] and he read

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96-170, § 1, 93 Stat. 1284. The 1996 amendment provided immunity for judicial officers under certain circumstances, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, Title III, sec. 309(c), 110 Stat. 3847, 3853.

[107] *See generally* 448 U.S. at 6-8.

[108] *See generally* 441 U.S.600, 608-20 (1979).

[109] *See, e.g.*, George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 947-49 (2003); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 401-08 (1982). *See generally* Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws"*, 67 GEO. WASH. L. REV. 51 (1998).

[110] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Also known as Ku Klux Klan Act of 1871 and Civil Rights Act of 1871. U.S.C.A. POPULAR NAME TABLE (West 2004).

[111] *E.g.*, 441 U.S. at 610, 617 n.34; Adickes v. S.H. Kress & Co., 398 U.S. 144, 164-65 (1970); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1155 (1977).

[112] CONG. GLOBE, 42nd Cong., 1st Sess. 317 (1871).

[113] *Id.* at 319-22.

[114] *Id.* at 320.

[115] *Id.*

[116] *Id.*

[117] *See generally, id.* at 320-21.

testimony from Whites who knew the inner workings of the Klan,[119] as well as of judges who knew of incidents of perjury.[120] Near the end of his remarks, he summarized the need for the act:

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to § five [of the Fourteenth Amendment], which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."[121]

If we look at Representative Stoughton's remarks in juxtaposition to those of the next speaker, Representative George Morgan (D, OH), we see the tenor of the entire debate. Representative Morgan disagreed strenuously with Representative Stoughton that the Fourteenth Amendment provided a valid constitutional basis for the many of the sections of the bill. In particular, he objected to the third and fourth sections, which authorized the use of military force by the President to deal with the Klan.[122] While other speakers discussed various sections,[123] the points raised were entirely the same: the outrages of the Klan and the constitutionality *vel non* of the act. Again, for our purposes, we are interested in what light the legislative history sheds on the term "rights, privileges, and immunities" and I turn now to that.

Various comments are helpful in determining what the representatives and senators understood the phrase to encompass. The first of these is a statement by Representative Benjamin Butler (R, MA), addressing an earlier attempt by Congress to protect rights, privileges, and immunities: "The bill further provided that the wrongs committed against the citizens of the United States, for the purpose of depriving such citizens of enjoyment of life, liberty, and property, guaranteed to him by the Constitution, be made crimes against the laws of the United States and cognizable by its courts. The bill further provided that every citizen should have remedy in the Federal courts against the party depriving him of such rights, immunities, and privileges . . . ."[124] We see here an equating of "rights, privileges, and immunities" with life, liberty, and property.

Other articulations followed. First, I return to the statement of Representative John Coburn (R, IN), which was one of my quartet of quotations at the outset of this testimony:

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State

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[118] *Id.* at 321.
[119] *Id.* at 320-21.
[120] *Id.* at 320.
[121] *Id.* at 322.
[122] *Id.* at 331-32.
[123] For example, over the next few days of debate, the following representatives spoke in opposition to the bill while commenting on specific sections: Whitthorne, sections one through five, *id.* at 337-38; Beck, sections three and four, *id.* at 351-52; Blair, sections two through four, *id.* at app.71-74; and Swann, sections one through three, *id.* at 361. In response, Representatives Kelly, *id.* at 338-41, and Bingham, *id.* at app.81-86, spoke generally in support of the bill.
[124] *Id.* at 449.

> may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it. If, in addition to all this, the State should fail to ask the aid of the General Government in putting down the existing outlawry, would not a more complete and perfect case of denial of protection be made out? Indeed, it would be difficult to conceive of a more glaring instance of the denial of protection.
>
> It may be safely said, then, that there is a denial of the equal protection of the law by many of these States. It is therefore the plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution.[125]

This quotation, typical of many others, reminds us that we must never stray far from the historical context of Klan abuses if we want to understand what § 1983 was intended to do. Here, we also see a close connection between the concepts of equal protection and of rights, privileges, and immunities. Moreover, we also see some specific rights mentioned, *i.e.*, "the right[s] to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms."[126]

A few helpful comments can also be found in the Senate debates. Senator John Edmunds (R, VT) passed quickly over § 1, showing that in that chamber, too, it was not overly controversial:

> The first § is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which have since become a part of the Constitution.[127]

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[125] *Id.* at 459.
[126] *Id.*
[127] *Id.* at 568. That is not to say it attracted no attention. There was some debate over the meaning of "citizens of the United States" and "privileges and immunities." *See infra* notes 119-31 and accompanying text as well as other passages in the CONG. GLOBE surrounding those cited..

It is also clear that the opponents of the bill understood what the phrase "rights, privileges, and immunities" meant to the advocates of the bill. For example, Senator John Stockton (D, NJ) summarized the view to which he objected:

> It is insisted that when the fourteenth amendment declares that "all persons born or naturalized in the United States shall be citizens of the United States" the privileges of that citizenship attach to every individual, and the United States Government is bound to protect them. These privileges are alleged to be such as are asserted in the Declaration of Independence, namely, "the enjoyment of life and liberty, with the right to acquire and possess property."[128]

We also note with particular interest, an exchange between Senators Lyman Trumbull (R, IL), Edmunds, and Matthew Carpenter (R, WI):

Senator Trumbull started out by stating his belief that the Privileges and Immunities Clause of the Fourteenth Amendment simply reiterated the Privileges and Immunities Clause of the "old Constitution."[129] He was challenged on that point by Senator Edmunds who understood the original Clause to protect the citizens of each state *qua* citizens of states when they traveled to states not their own.[130] He understood the new Clause, on the other hand, to extend "universal citizenship" to United States citizens *qua* United States citizens.[131]

However, he added, "but we have not advanced one step by that admission. The fourteenth amendment does not define the privileges and immunities of a citizen of the United States any more than the Constitution originally did."[132] Later in this exchange, Trumbull would get no more specific than to say that the states, not the national government, were to defend citizens in their individual rights of person and property; and that the rights, privileges, and immunities of national citizenship were national in character.[133] To this tautology he added nothing more helpful than that they would be the kind of rights that the national government would protect from foreign aggression.[134]

However, during the debate, an excursus occurred that adds some insight if one is careful not to confuse Senator Trumbull's terminology with the terminology used by others quoted in the Civil Rights Attorney's Fees Awards Act debate. Senator Carpenter had used an illustration involving voting rights.[135] Senator Trumbull replied that "[t]he words 'privileges and immunities' . . . have nothing to do with voting. They revere to civil rights. His illustration about the right to vote has no application. Women do not vote."[136] After a brief response by Senator Carpenter acknowledging the point, Senator Trumbull added, "the 'privileges and immunities' referred to in the Constitution are of a civil character, applying to civil rights, and not to political rights, and were never so understood."[137]

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[128] *Id.* at 573.
[129] *Id.* at 576.
[130] *Id.*
[131] *Id.*
[132] CONG. GLOBE, 42nd Cong., 1st Sess. 576 (1871).
[133] *Id.* at 577.
[134] *Id.*
[135] *Id.* at 576.
[136] *Id.*
[137] *Id.*

It is clear that Senator Trumbull was using the term in a very narrow sense. The following black letter summary will help dispel any confusion over the two uses and allow us to concentrate on the import of Senator Trumbull's comment:

> It has been said that political rights are included within the more comprehensive term "civil rights," but that they are differentiated in that a political right is a right exercisable in the administration of government, or a right to participate, directly or indirectly, in the establishment or management of government, while civil rights have no relation to the establishment or management of government. Political rights have also been distinguished on the ground that a civil right is a right accorded to every member of a distinct community or nation, which is not necessarily true with regard to political rights.[138]

Even in Trumbull's day there was a dispute as to whether suffrage was a civil or a political right.[139] All of this may give some small insight into what "privileges and immunities" meant to the drafters of the Ku Klux Act and some insight into why the word "rights" was added to § 1983. Certainly many of the speakers addressed rights that Senator Trumbull would not have considered "civil."

Finally, a few remarks can be found that may seem to bear most directly upon the Establishment Clause issue. For example, in the context of answering a question as to whether obstructing justice would apply to obstructing justice in a state court, Senator Edmunds replied,

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this § could reach it.[140]

This is a direct mention of religion that, assuming *arguendo*, is a correct understanding of the reach of the Act, has nothing to do with preventing an establishment of religion.

Finally, there is a direct reference to the First Amendment. Senator Stockton, just prior to his comments quoted earlier, disparaged the arguments of his opponents in the following words:

> [T]he construction of the fourteenth amendment necessary to make this bill constitutional is simply this: that as the amendment provided that no State should deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, therefore Congress can, whenever it pleases, interfere with all these rights, restrict and deny them in despite of all the express reservations and prohibitions contained in the amendments, articles one, four, five, nine, and ten; . . . Nay, more: you claim the power to subordinate the whole Bill of Rights to the absolute and uncontrolled

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[138] 15 AM. JUR. 2D *Civil Rights* § 2 (2000) (citations omitted).
[139] ANTIEAU, *supra* note 147, at 22-30, 52-54.
[140] CONG. GLOBE, 42nd Cong., 1st Sess. 567 (1871).

will of one man [the President] . . . .[141]

This ambiguous remark at least mentions the First Amendment. However, there is no way to determine whether the Establishment Clause is even in view here. For that we will have to look at the Fourteenth Amendment itself and judicial interpretations of it.

Before doing so however, I note that the legislative history of the Ku Klux Act does show that there were some additional views of what "rights, privileges, and immunities" meant. They track almost identically the various views of what the term "privileges and immunities" means in the Fourteenth Amendment.[142] I will not delineate these variations here since I will do so in the next section immediately below where they are more important. Suffice it to say, however, that none of these include anything like "freedom from establishment of religion." The discussion below of the Fourteenth Amendment's definition of "privileges and immunities" will provide support for this assertion.

THE FRAMERS AND RATIFIERS OF THE FOURTEENTH AMENDMENT DID NOT BELIEVE THAT THE ESTABLISHMENT CLAUSE CONTAINED ANY PRIVILEGES OR IMMUNITIES

In turning to the Fourteenth Amendment, we need not avail ourselves of as lengthy nor as many quotations. It is well documented that all of the views represented during the debate over the Ku Klux Act were also expressed during the debates over the Fourteenth Amendment. So for example, the view that the Privileges and Immunities Clause meant the same thing in the Fourteenth Amendment as it did in Article Four was represented by Senator Bingham.[143] This view was very closely linked to some of the others, such as the view that privileges and immunities are synonymous with natural or fundamental rights, *i.e.*, with those rights "which belong, of right to the citizens of all free governments," such as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety."[144] This latter view is derived from Justice Bushrod Washington's opinion as Circuit Justice in *Corfield v. Coryell*,[145] in which he interpreted the meaning of the Privileges and Immunities Clause of Article IV. Clearly, this subsumes the Declaration of Independence approach.

Similarly, and to return to our last quotation from the Ku Klux Act debates from the prior section of my testimony, many Senators and Congressmen did make statements during the debates over the Fourteenth Amendment that the privileges and immunities protected by the Clause were those contained in the first eight amendments. Of particular importance are the views of Congressman John Bingham of Ohio, a principal drafter and manager of the Amendment.[146] He flatly stated that "the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States."[147]

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[141] *Id.* at 572.
[142] *See generally* the entire debate in the CONG. GLOBE.
[143] ANTIEAU, *supra* note 147, at 53, 56.
[144] *Id.* at 56.
[145] 6 F. Cas. 546, 551-52 (1823).
[146] *Id.* at 85.
[147] *Id.* at 85-86.

Numerous others echoed this sentiment including Senator Jacob Howard (R, MI), Senator Allen Thurman (D, OH), Representative Thad Stevens (R, PA), and Representative Henry Dawes (R, MA).[148] The phraseology of Senator Jacob Howard of Michigan, the amendment's main manager on the Senate side, is particularly noteworthy. According to him, privileges and immunities included fundamental rights and "the personal rights guaranteed and secured by the first eight Amendments to the Constitution."[149]

Since the First Amendment, by definition, is one of the first eight amendments, this at last brings us squarely to the question: Since the framers of the Civil Rights Attorney's Fees Awards Act and the Ku Klux Act ignored the Establishment Clause, is there anything in the history of the Fourteenth Amendment that indicates that its framers did or did not believe that the Establishment Clause implicates any *personal* rights?

A complete answer is two-fold. It recognizes that the framers of the Fourteenth Amendment did believe that the *free exercise* of religion was fundamental, *i.e.*, was among the privileges and immunities to be protected. It also recognizes the "right to be free from Establishment" was *not*.

Chester Antieau, one of the great § 1983 experts[150] has collected writings and statements from various Congressmen during the debates over the Civil Rights Bill of 1866 (which served as the model for the Fourteenth Amendment and which the Fourteenth Amendment was designed to "constitutionalize"[151]) and from Congressmen looking back on the passage of the Fourteenth Amendment. These statements clearly demonstrate that the free exercise of religion was intended to be covered by the term privileges and immunities. Antieau cites Representative Ralph Buckland's statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect it.[152]

By contrast, Antieau could find no evidence of any Senator or Representative mentioning "freedom from establishment."[153] There is more here than a mere argument from silence. At least three important commentators, Senator Howard, Representative Dawes, and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause.[154]

Additionally, Antieau examined other evidence of the practice of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity.[155] This evidence includes state statutes, constitutions, and court decisions. Some states still had vestiges of true establishment. For example, both New Hampshire and Massachusetts still provided constitutional preferences for Protestant Christianity.[156] Incidentally, but importantly, this same evidence indicates that the view

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[148] *Id.* at 86-87.
[149] *Id.* at 86.
[150] His book, *Federal Civil Rights Acts: Civil Practice*, was one of the earliest treatises on § 1983. This work is now continued by Rodney Smolla in a two volume treatise entitled *Federal Civil Rights Acts*.
[151] CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 7 (1997).
[152] *Id.* at 91.
[153] *Id.* at 109
[154] *Id.*
[155] *Id.* at 109-12. *See also id.* at 282-84 (discussing the Establishment Clause under Equal Protection).
[156] *Id.* at 110.

of privileges and immunities encompassing those rights "which belong, of right to the citizens of all free governments,"[157] cannot embrace the Establishment Clause. Just as some states still had vestiges of state establishment, so many others had had explicit establishment earlier in their histories. Surely neither Justice Washington who coined the *Corfield* articulation discussed above nor the framers of the Fourteenth Amendment would have considered these states to be un-free governments.

In summary, those references to the first eight amendments of the Bill of Rights were concerned with "personal rights." The drafters of the Fourteenth Amendment saw the personal right of religious liberty as being protected by the Free Exercise Clause. The Establishment Clause was simply not implicated.

Because no view of the privileges and immunities clause saw the Establishment Clause as creating such privileges or immunities, we need not decide which of the views of the Privileges and Immunities Clause expressed in the *Slaughter House Cases* is correct.

In the *Slaughter-House Cases,* Justice Miller, writing for the majority believed that the privileges and immunities protected by the Clause were of national citizenship as had been stated by Senator Trumbull.[158] Justice Field adopted the fundamental rights approach,[159] as did Justice Bradley.[160] These two justices disagreed only as to the degree of abridgment to which these rights were subject.[161] Finally, Justice Swayne emphasized that the protections applied to all persons, not just Blacks.[162]

Thus, we see that the legislative history of the Fourteenth Amendment shows definitively what the legislative histories of §§ 1983 and 1988 strongly hinted at: The Establishment Clause contains no personal rights and therefore was not intended to be covered by language addressing rights, privileges or immunities. This is true f the Fourteenth Amendment and is therefore true of § 1983 and is therefore also true of § 1988.

Based upon this realization, I will end my testimony with some practical comments about PERA

PRACTICAL CONSIDERATIONS CONCERNING THE APPROPRIATENESS OF AND NEED FOR PERA

One could argue that since the United States Supreme Court has incorporated the Establishment Clause against the states that this testimony has been much ado about nothing. However, this would be to miss the point. The point of this testimony has not been that the Establishment Clause has not been nor should not be incorporated against the states. Obviously, the incorporation of the Establishment Clause became a *fiat accompli* in *Everson*[163] if not *Cantwell.*[164] Certainly there have been those who have

[157] *Corfield*, 6 F. Cas. at 551.
[158] 83 U.S. (16 Wall.) 36, 74-79 (1873).
[159] 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).
[160] *Id.* at 114-22 (Bradley, J., dissenting).
[161] *Compare* 83 U.S. (16 Wall.) at 97-111 (Field, J., dissenting), *with* 83 U.S. (16 Wall.) at 114-22 (Bradley, J., dissenting).
[162] *Id.* at 129 (Swayne, J., dissenting). *See also id.* at 123 (Bradley, J., dissenting).
[163] 330 U.S. 1 (1947).
[164] 310 U.S. 296 (1940).

argued against the current Due Process Incorporation Doctrine.[165] However, given the history recounted in this article, the case can be, and has been, made that Congress intended to incorporate the first eight articles of the Bill of Rights through the Privileges and Immunities Clause rather than through the Due Process Clause.[166]

However, under any of these scenarios, the Establishment Clause should not be covered by §§ 1988 and 1983. First, should the incorporation doctrine be rejected, then under the analysis contained in this testimony, it is beyond peradventure that a putative violation of the Establishment Clause does not implicate the privileges and immunities as that phrase was used by the drafters of § 1988, § 1983, or the Fourteenth Amendment. Similarly, if one embraces incorporation through the Privileges and Immunities Clause rather than through the Due Process Clause, the analysis described above demonstrates that the Establishment Clause does not contain any privileges or immunities. Rather the Privileges and Immunities Clause was designed to protect *personal* rights. This certainly makes sense in that it is worded as a limitation on the power of government.

Thus, since the incorporation doctrine is no barrier (nor even a rebuttal) to anything I have said, I will end my testimony by pointing out the appropriateness, and some might even say, the need for the passage of PERA. Until recently there seemed to be an inherent sense that Establishment Clause claims should be brought quite simply, "under the Establishment Clause," i.e. not under 1983 and its jurisdictional counterpart. After all 28 U.S.C. 1331 confers jurisdiction on the federal district courts for all cases involving a federal question. This certainly includes putative Establishment Clause violations. Thus, plaintiffs could still have their day in court but without the element of blackmail that I have discussed.

Why then this sudden use of § 1983 to bring Establishment Clause claims? The answer is almost certainly the availability of § 1988 fees, or as I put it, the blackmail factor. Justice Powell suggested the answer in his *Thiboutot* dissent: "[i]ngenous pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."[167] This was one of the main complaints of the opponents of the act which became § 1988, who sarcastically wanted to dub it "The Attorney's Relief Act."[168]

Certainly, numerous commentators have documented the astronomical increase in § 1983 cases since the passage of the Civil Rights Attorney's Fees Awards Act of 1976.[169] However, in Establishment Clause cases, the problem is especially severe and unique. As I mentioned at the outset of my testimony, I can personally verify that potential governmental defendants will often give up without going to court even when

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[165] *E.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2 (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22 (1980); TRIBE, *supra* note 147, §7-5 at 1317-20.

[166] *E.g.*, CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 59, 85-88 (1997); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1119 (1953); 1 LAURANCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §7-2, at 1089-1118 (3d ed. 2000).; Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 647 (2000).

[167] 448 U.S. 1, 24 (1980).

[168] 122 CONG. REC. 31,489, 31,850 (1976), *reprinted in* SOURCE BOOK at 62, 89 (statements of Senators Long and Allen).

[169] *See, e.g.*, Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 33 (1982) (suggesting § 1988 is responsible for at least some of the increase); 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.01(B) (4th ed. 2003) (listing § 1988 as one of five reasons for the increase).

they believe that their locality has not, in fact, violated the Establishment Clause. This Congress could level the playing field by enacting PERA. Doing so would not open the floodgates to rogue governmental bodies trampling upon the Constitution. For any real violations of the Establishment Clause, the federal courts will be open for business as usual.

Again, I thank the subcommittee for the opportunity to submit this testimony.

LETTER FROM RUTH FLOWER, LEGISLATIVE DIRECTOR, FRIENDS COMMITTEE ON NATIONAL LEGISLATION, TO THE HONORABLE STEVE CHABOT, DATED JUNE 19, 2006

June 19, 2006

Representative Steve Chabot
129 Cannon House Office Building
Washington D.C. 20515

Dear Representative Chabot:

We at the Friends Committee on National Legislation are alarmed at the introduction of H.R. 2679, the "Public Expression of Religion Act of 2005." The bill, which has been referred to the House Judiciary Committee's Subcommittee on the Constitution, would effectively deny access to the courts for individuals wishing to protect their religious rights.

As members of a minority religion whose foremothers and forefathers came to this country to escape the religious intolerance of the English government, Quakers cherish the U.S. Constitution's protections of religion from the dictates of government. The Bill of Rights was written to protect individuals, not the government or its officials. These rights are articulated and guaranteed to balance the playing field *against* government officials acting in their official capacities.

Proposing an ironic twist, H.R. 2679 would turn the "no establishment of religion" clause on its ear, protecting government officials against individuals.

Cases protesting government actions under the establishment clause rarely involve money. The object is almost always to get the school district, or the registrar's office, or some other local or state official, to carry out regulations and programs in a constitutionally sound manner, without giving preference to a particular religious view or affiliation. Because these cases usually involve no monetary damages, they do not generate funds with which to pay the lawyers.

If the "Public Expression of Religion Act" becomes law, individuals who seek to protect their First Amendment rights against the establishment of religion would be barred from collecting damages or attorneys fees. Denying attorney's fees would effectively deny access to the courts for individuals wishing to protect their religious rights.

We urge you to reject H.R. 2679 and support individual rights guaranteed by the First Amendment.

Sincerely,

Ruth Flower
Legislative Director

LETTER FROM WADE HENDERSON, EXECUTIVE DIRECTOR, AND NANCY ZIRKIN, DEPUTY DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, TO MEMBERS OF THE JUDICIARY COMMITTEE, DATED JUNE 21, 2006

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COMPLIANCE/ENFORCEMENT COMMITTEE CHAIRPERSON
Karen K. Narasaki
Asian American Justice Center

EXECUTIVE DIRECTOR
Wade J. Henderson
(*deceased)

June 21, 2006

Dear Judiciary Committee Member,

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we urge you to oppose the "Public Expression of Religion Act of 2005" (H.R. 2679). H.R. 2679 would bar attorney's fees to parties who prevail in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution. It would also make injunctive relief the only remedy available in such cases.

H.R. 2679 is unprecedented. It would, for the first time, single out one area of constitutional protections under the Bill of Rights and prevent its full enforcement. It would greatly undermine the ability of citizens to challenge Establishment Clause violations, as legal fees often total tens or even hundreds of thousands of dollars, making it difficult to impossible for most citizens to pursue their rights without the possibility of recovering attorney's fees. In addition, because a prevailing party would not even be able to recoup court costs, it would prevent most attorneys from even taking cases on a *pro bono* basis.

By deterring attorneys from taking Establishment Clause cases, H.R. 2679 would leave many parties whose rights have been violated without legal representation. As such, it would effectively insulate serious constitutional violations from judicial review. It would become far easier for government officials to engage in illegal religious coercion of public school students or in blatant discrimination against particular religions.

If the rights guaranteed under the U.S. Constitution are to be meaningful, every American must have full and equal access to the federal courts to enforce them. The ability to recover attorney's fees in successful cases has long been an essential component of this enforcement, as Congress has recognized in the past. As such, we strongly urge you to oppose H.R. 2679.

Thank you for your consideration. If you have any questions, please contact Rob Randhava, LCCR Counsel, at 202-466-6058 or randhava@civilrights.org.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

LETTER FROM CAROLINE FREDRICKSON, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION DATED JUNE 22, 2006

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RICHARD ZACKS
TREASURER

June 22, 2006

U.S. House of Representatives
Judiciary Committee, SD-224
Subcommittee on the Constitution, Civil Rights, and Property
Washington, DC 20515

RE: THE PUBLIC EXPRESSION OF RELIGION ACT (H.R. 2679)

Dear Representative,

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we urge you to oppose H.R. 2679, the "Public Expression of Religion Act of 2005." This bill would bar damages and awards of attorneys' fees to prevailing parties asserting their fundamental constitutional rights in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution.[1] H.R. 2679 would limit the longstanding remedies available in cases brought under the Establishment Clause under 42 U.S.C. 1988, which provides for attorneys' fees and costs in *all* successful cases involving constitutional and civil rights violations.

H.R. 2679 Shuts the Courthouse Doors.
If this bill were to become law, Congress would, for the first time, single out one area protected by the Bill of Rights and prevent its full enforcement. The only remedy available to plaintiffs bringing Establishment Clause lawsuits would be injunctive relief. This prohibition would apply even to cases involving illegal religious coercion of public school students or blatant discrimination against particular religions.

Congress has determined that attorneys' fee awards in civil rights and constitutional cases, including Establishment Clause cases, are necessary to help prevailing parties vindicate their civil rights, and to enable vigorous enforcement of these protections. The Senate Judiciary Committee has found these fees to be "an integral part of the remedies necessary to obtain . . . compliance."[2] The Senate emphasized that "[i]f the cost of private

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[1] The Establishment Clause of the First Amendment requires the separation of church and state. *See* U.S. CONST. amend. I, cl. 1.

[2] S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1776 U.S.C.C.A.N. 5908, 5913.

enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."[3]

Unfortunately, H.R. 2679 would turn the Establishment Clause into a hollow pronouncement. Indeed, the very purpose of this bill is to make it more difficult for citizens to challenge violations of the Establishment Clause. It would require plaintiffs who have successfully proven that the government has violated their constitutional rights to pay their legal fees -- often totaling tens, if not hundreds, of thousands of dollars. Few citizens can afford to do so, but more importantly, citizens should not be required to do so where there is a finding that our government has engaged in unconstitutional behavior.

The elimination of attorneys' fees for Establishment Clause cases would deter attorneys from taking cases in which the government has violated the Constitution; thereby leaving injured parties without representation and insulating serious constitutional violations from judicial review. This effectively leaves religious minorities unable to obtain counsel in pursuit of their First Amendment rights under the Establishment Clause.

H.R. 2679 Favors Enforcement of the Free Exercise Clause Over the Establishment Clause.
Among the greatest religious protections granted to American citizens are the Establishment Clause and the Free Exercise Clause.[4] H.R. 2679 creates an arbitrary congressional policy in favor of the enforcement of the Free Exercise Clause, while simultaneously impeding individuals wronged by the government under the Establishment Clause.

Through the denial of attorney's fee awards under H.R. 2679, plaintiffs will be unable to afford the expense of litigation only when they are seeking to protect certain constitutional rights but not others. This bad congressional policy serves to create a dangerous double standard by favoring cases brought under the Free Exercise Clause, but severely restricting cases under the Establishment clause.

H.R. 2679 Denies Just Compensation.
Finally, despite proponents' assertions to the contrary, attorneys' fees are not awarded in Establishment Clause cases as a punitive measure. Rather, as in any case where the government violates its citizens' civil or constitutional rights, the award of attorneys' fees is reasonable compensation for the expenses of litigation awarded at the discretion of the court. After intensive fact-finding, Congress determined that these fees "are adequate to attract

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[3] *Id.* at 6.

[4] The Free Exercise clause of the First Amendment guarantees the right to practice one's religion free of government interference. *See* U.S. CONST. amend. I, cl. 2.

competent counsel, but . . . do not produce windfalls to attorneys."[5] HR. 2679 is contrary to good public policy -- it reduces enforcement of constitutional rights; it has a chilling effect on those who have been harmed by the government; and it prevents attorneys from acting in the public's good. The award of fees in Establishment Clause cases is not a means for attorneys to receive unjust windfalls -- it is designed to assist those whose government has failed them.

If the Constitution is to be meaningful, every American should have equal access to the federal courts to vindicate his or her fundamental constitutional rights. The ability to recover attorneys' fees in successful cases is an essential component of the enforcement of these rights, as Congress has long recognized. The bill is a direct attack on the religious freedoms of individuals, as it effectively shuts the door for redress for all suits involving the Establishment Clause. We urge members of Congress to oppose H.R. 2679.

If you have any questions, please contact Terri Schroeder, Senior Lobbyist at (202) 675-2324.

Sincerely,

Caroline Fredrickson
Director

[5] S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1776 U.S.C.C.A.N. 5908, 5913.

LETTER FROM THE AMERICAN CIVIL LIBERTIES UNION, *ET. AL.*, DATED JUNE 22, 2006

Oppose H.R. 2679, the "Public Expression of Religion Act"

June 22, 2006

Dear Representative,

We write to urge you **to oppose the "Public Expression of Religion Act of 2005" (H.R. 2679).** This bill would bar the award of attorney's fees to prevailing parties asserting their fundamental constitutional rights in cases brought under the Establishment Clause of the First Amendment to the U.S. Constitution. This bill would limit the longstanding remedies available under 42 U.S.C. 1988 (which provides for attorneys fees and costs in successful cases involving constitutional and civil rights violations) in cases brought under the Establishment Clause. If this bill were to become law, the only remedy available to plaintiffs bringing Establishment Clause lawsuits would be injunctive relief. As a result, Congress would, for the first time, single out one area of constitutional protections under the Bill of Rights and prevent its full enforcement.

Religious expression is not threatened by the enforcement of the Establishment Clause, but is protected by it. The Establishment Clause promotes religious freedom for all by protecting against government sponsorship of religion. While the signers of this letter may differ on the exact parameters of the Establishment Clause or even on the outcome of particular cases, we all believe that the Establishment Clause together with the Free Exercise Clause, protects religious freedom. The purpose of this bill, however, is to make it more difficult for citizens to challenge violations of religious freedom. But with legal fees often totaling tens — if not hundreds — of thousands of dollars, few citizens can afford to do so. Most attorneys cannot afford to take cases, even on a pro bono basis, if they are barred from recouping their fees and out-of-pocket costs if they ultimately prevail. The elimination of attorney's fees for Establishment Clause cases would deter attorneys from taking cases in which the government has violated the Constitution, thereby leaving injured parties without representation and insulating serious constitutional violations from judicial review.

This bill raises serious constitutional questions and would set a dangerous precedent for the vindication of all civil and constitutional rights. If the right to attorney's fees is taken away from plaintiffs who prove violations of the Establishment Clause, other fundamental rights are likely to be targeted in the future. What will happen when rights under the Free Exercise Clause are targeted? Can we imagine a day when citizens cannot enforce their longstanding free speech rights, or bring a case under the constitution to challenge the government's use of eminent domain to take their property, simply because they cannot hire an attorney to represent them? Surely, these and other fundamental rights might not be far behind once Congress opens the door to picking and choosing which constitutional rights it wants to protect and which ones it wants to disfavor.

If the Constitution is to be meaningful, every American should have equal access to the federal courts to vindicate his or her fundamental constitutional rights. The ability

to recover attorney's fees in successful cases is an essential component for the enforcement of these rights, as Congress has long recognized. We urge you to protect the longstanding ability of Americans to recoup their costs and fees when faced with basic constitutional violations and urge you in the strongest terms to oppose H.R. 2679.

Sincerely,

American Civil Liberties Union
American Humanist Association
American Jewish Committee
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee
Jewish Council For Public Affairs (JCPA)
Lawyers' Committee for Civil Rights Under Law
Legal Momentum
National Council of Jewish Women
National Partnership for Women & Families
National Women's Law Center
People For the American Way
Secular Coalition for America
The Interfaith Alliance
Union for Reform Judaism

LETTER FROM THE REVEREND BARRY W. LYNN, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, TO CHAIRMAN CHABOT AND RANKING MEMBER NADLER, DATED JUNE 22, 2006

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Oppose H.R. 2679, the "Public Expression of Religion Act"

June 22, 2006

Dear Chairman Chabot and Ranking Member Nadler:

I write to you on behalf of Americans United for Separation of Church and State to share our opposition to H.R. 2679, the "Public Expression of Religion Act." Americans United represents more than 75,000 individual members throughout the fifty states and the District of Columbia, as well as cooperating clergy, houses of worship, and other religious bodies committed to preserving religious liberty. H.R. 2679 is an extreme and unwise proposal that will deter Americans from seeking to enforce in the federal courts their fundamental constitutional rights to worship freely and to make decisions about religion for themselves and their families, without interference or coercion from the government. This ill-conceived measure will also set a broader precedent for abolishing court-awarded attorney's fees in all civil-rights cases, thus undermining the system that Congress carefully wrought to ensure that those who suffer unconstitutional discrimination will be able to obtain legal representation to vindicate their civil rights. Accordingly, Americans United opposes H.R. 2679 and urges your careful deliberation on this matter.

H.R. 2679 would prohibit the federal courts from awarding reasonable attorney's fees and costs to parties who prevail in actions brought to enforce their rights under the Establishment Clause of the First Amendment to the U.S. Constitution, and it would limit the remedies available to Establishment Clause plaintiffs to injunctive relief, thus barring federal courts from awarding either damages or other equitable relief to parties who prevail on Establishment Clause claims. If passed, H.R. 2679 would thus, for the first time since the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, eliminate an entire category of civil-rights claims from those for which federal courts can award attorney's fees and costs, and it would in many cases deprive plaintiffs of any effective remedy for substantial constitutional violations.

The Public Expression of Religion Act Would Substantially Impair the Ability of Americans to Enforce Their Religious-Freedom Rights under the Establishment Clause

Congress recognized the importance of the remedy of fee shifting to the enforcement of civil-rights laws when it passed the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988:

Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws

are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 94-1011, at 6 (1976). Indeed, the enactment of the fee-shifting provision was not an expansion of civil-rights plaintiffs' rights but instead was merely a codification of pre-existing practice that Congress viewed as especially important: Responding to an earlier Supreme Court ruling that courts could no longer award attorney's fees to a prevailing party unless specifically authorized to do so by federal statute (*see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)), Congress recognized that the fee-shifting provision "creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorney's fees which had been going on for years." S. Rep. No. 94-1011, at 6. The "Public Expression of Religion Act" would thus eliminate an important remedy that has been recognized by statute for three decades and by court practice for far longer.

This turnabout would have a substantial effect on the ability of Americans who have suffered violations of their right to religious freedom to seek redress in the courts because they will be unable to afford counsel to represent them. Indeed, the Act would make it difficult for victims of Establishment Clause violations even to obtain representation from lawyers who might otherwise be willing to represent them *pro bono* because those lawyers would no longer be able to recoup their actual, out-of-pocket expenses — which can often total tens or even hundreds of thousands of dollars.

Although the bill's sponsors claim that the Act would "eliminate the chilling effect on the constitutionally protected expression of religion by State and local officials," few, if any, Establishment Clause plaintiffs seek to challenge personal religious expression by governmental officials. Rather, most Establishment Clause plaintiffs simply seek to ensure that government does not coerce them or their children to participate in religious activities that conflict with their own sincerely held beliefs.

Many plaintiffs are like the parents in Dover, Pennsylvania, who courageously challenged a decision by their school board to require their ninth-grade students to listen in a biology class to a statement by school administrators disparaging the scientific theory of evolution and encouraging them to accept "intelligent design," a religious view of the origins of life. As one of these plaintiffs, Steven Stough, said, "I have joined this lawsuit because I believe that religious education is a personal matter whose instructional component is best reserved for home or at a church of one's choice. It is my responsibility for the direction of my daughter's religious instruction not the public high school."

But without the availability of attorney's fees, parents like Mr. Stough would not be able to afford the cost of hiring a lawyer: The court in the Dover case found that the plaintiffs were entitled to a reasonable fee award, of which more than $250,000 represented the plaintiffs' attorneys' actual, out-of-pocket expenses to bring the case. Had the "Public Expression of

Religion Act" been the law of the land, the parents of Dover, Pennsylvania, might well never have been able to vindicate their right to direct the religious upbringing of their children without interference by the local school board, for they simply could not have afforded the expenses for the case, much less any attorney's fees, for litigation that required the full-time commitment of a half dozen lawyers for more than a year.

The problem is far more serious in most other cases. Although the Dover plaintiffs were represented *pro bono* by institutional civil-rights litigators and a large law firm, many Establishment Clause plaintiffs rely on lawyers who work in small private practices. Indeed, the bulk of constitutional tort litigation is brought by local, small-firm lawyers. *See* Stewart J. Schwab, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768-69 (1988). So while large law firms and institutional civil-rights litigators may continue to represent Establishment Clause plaintiffs even in the absence of a fee-shifting statute, the majority of Establishment Clause violations will go unredressed because the small-firm lawyers who typically litigate them will be unable to afford to take the cases.

Again, the issue is not one of lawyers' profits: Just as the most well-established civil-rights organizations and largest law firms can ill afford to pay the litigation costs for major cases, so too must most small firms and solo practitioners decline to provide representation in more modest cases when they have no ability to cover the out-of-pocket expenses required even in cases where the law is clear and the civil-rights violation egregious.

Compounding the problem is the Act's limitation on the relief available to Establishment Clause plaintiffs. In most other classes of civil litigation, plaintiffs who win their cases receive money damages from the defendant and are able to use a portion of those damages to pay their lawyers. But in Establishment Clause cases, like most civil-rights cases, prevailing parties are usually entitled only to injunctive relief, not damages, and thus receive no funds from the litigation to pay their lawyers. Not content to deny Establishment Clause plaintiffs the fee-shifting protections that Congress has wisely provided, the "Public Expression of Religion Act" would eliminate the possibility of money damages even in the incredibly rare case where Establishment Clause plaintiffs might be able to show a compensable injury, thus denying them the protection of a damages remedy that is available for every other class of legally cognizable injury.

What is more, the Act would forbid federal courts from awarding prevailing Establishment Clause plaintiffs any equitable relief other than injunctive relief, leaving no remedy at all for plaintiffs who allege that the government has violated their constitutional rights by disbursing their tax dollars to fund religious activity. For when government funds have already been illegally spent, the only legal remedy available is "recoupment," or return of the funds to the government treasury. As Judge Richard Posner recently explained, the legal claim of taxpayers who complain that the government has spent money in violation of the Establishment Clause "would be moot * * * if the district court could make no order that would compensate them in whole or in part for the injury consisting of the improper expenditure." *Laskowski v. Spellings*, 443 F.3d 930, 933-34 (2006). But because those plaintiffs' injury "can be rectified

simply by the restoration of the money" to the government treasury from whence it came, the court can provide "meaningful relief." *Id.* at 934. In eliminating the ability of federal courts to order this type of restitution — "a standard remedy and one ordered in public-law as well as private-law cases" (*id.*) — the "Public Expression of Religion Act" would abolish the only remedy in cases where taxpayers' tax dollars have been spent in violation of the Establishment Clause. Further, because "[a]bsence of remedy is absence of right," (Karl N. Llewellyn, THE BRAMBLE BUSH 94 (1960)), the Act would eviscerate a bedrock constitutional principle that the framers of the Constitution considered essential to religious freedom. For "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* MADISON: WRITINGS 29, 31 (Jack N. Rakove ed., Library of Am. 1999) (1785).[1]

The Public Expression of Religion Act Might Perversely Lead to More Establishment Clause Litigation, Further Clogging the Dockets of the Federal Courts

The fee-shifting provision in 42 U.S.C. § 1988 levels the playing field between private citizens and the government in constitutional tort litigation by encouraging private lawyers to take meritorious cases and by increasing the potential costs of litigation to government defendants. It thus deters government from committing many egregious civil-rights violations just the way that damages remedies deter unlawful action in the ordinary run of tort and contract cases. While eliminating attorney's fees would surely reduce the number of Establishment Clause claims being brought, even in cases where the law is most clearly on the plaintiff's side, it would also ensure that those cases that are filed will be more costly and more time-consuming to litigate because the government defendants will have no incentive to settle or to mitigate the costs of litigation, but instead will view as "costless" a fight to defend even the most overt violations of individuals' rights to religious freedom, and so will clog the courts with cases that should be readily resolved.

Unlike private parties, government has virtually unlimited resources with which to litigate cases and can use those resources to drag out litigation. Indeed, government defendants in Establishment Clause cases may not have to spend even one penny of their own money on litigation if, as is becoming increasingly frequent, they are represented for free by a faith-based law firm committed to encouraging public officials to violate citizens' Establishment Clause rights. For example, the Thomas More Law Center provided free representation to the defendants in *Kitzmiller v. Dover Area School District*, leading the school board to conclude that, even though the school district's regular lawyer had warned that the district would lose the case, it should still fight a costless battle to force the school board members' preferred faith on students without regard to the students or their parents' religious beliefs. After the school district lost the

[1] *See also* THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, *in* JEFFERSON: WRITINGS 346, 346 (Merrill D. Peterson ed., Library of Am. 1984) (1784) ("That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness * * *").

case, as its lawyer warned it would, the court held that it was liable to the plaintiffs for their attorney's fees and costs. That award was essential not just because it made it possible for the Dover parents to bring the case, but because it provides a greater incentive to other school boards in the future to avoid the same wrongdoing that the Dover school board committed, or at least to settle early those cases they cannot win, rather than compounding the violations of parents and students' constitutional rights, and compounding costs to everyone, by fighting lost causes to the bitter end.

Just weeks after the *Kitzmiller* decision, for instance, several California parents filed an Establishment Clause challenge to their school district's decision to teach a course on intelligent design and asked a federal court to issue a temporary restraining order prohibiting the school district from offering the course. *See Hurst v. Newman*, No. 1:06-CV-00036 (C.D. Cal.). Recognizing that its actions were unlawful and that it would likely owe substantial attorney's fees and costs to the plaintiffs if it continued to fight, the school board gratefully accepted the plaintiffs' offer to waive their right to request attorney's fees in exchange for the school district canceling the unconstitutional class — a quick and amicable resolution of the case that would not have been possible if the availability of attorney's fees had not been a deterrent to the school board tying up the courts and dividing the community over its dogged but futile pursuit of a plainly unconstitutional policy.

And in Florida, the prospect of attorney's fees had a similar salutary effect: A school district was sued by parents who objected on Establishment Clause grounds to the district's decision to hold several high school graduations in a church, with students accepting their diplomas and having their commencement photos taken beneath a large cross. Although a federal district judge preliminarily found that the parents were likely to win their case on the merits, the school board initially planned to fight the case all the way through a full trial. But with the specter of a mounting bill for the parents' legal fees on the horizon, the school district ultimately thought better of that plan, promising to hold future graduations in secular locations in exchange for an agreement by the parents' attorneys to charge the district only half the fees that they had accrued up to that point. Again, but for the threat of a fee award, justice to the parents would have been delayed and judicial resources would have been squandered. Indeed, without the possibility of being liable for attorney's fees, governmental entities like the Florida and California school districts just described will have every incentive to engage in straightforwardly illegal conduct, infringing the religious freedom of the public — and most especially children, who are most likely to have their complaints about religious discrimination and coercion fall on deaf ears unless their families have recourse in the federal courts.

In Dover, the belief that fighting was costless led the school board to adopt "an imprudent and ultimately unconstitutional policy." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005). Indeed, the court characterized the board's decision as one of "breathtaking inanity" and decried the school board's decision to defend the policy in court, asserting that "[t]he students, parents, and teachers of the Dover Area School District deserved better than to be dragged into this legal maelstrom, with its resulting utter waste of monetary and personal resources." *Id.* Actually making it costless for the government to defend Establishment Clause violations will reproduce that sad state of affairs everywhere.

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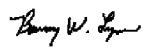
In passing the Civil Rights Attorney's Fees Awards Act, Congress recognized that rights are meaningless unless individual citizens are able to enforce them against the government:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, at 2 (1975). Abolishing attorney's fees in Establishment Clause cases would not simply increase plaintiffs' cost to file these cases; it would render the Establishment Clause — a critical safeguard for religious freedom embodied in the First Amendment of the U.S. Constitution — a dead letter. As the federal courts have consistently acknowledged, the Establishment Clause works in tandem with the Free Exercise Clause to protect Americans' right to practice their religion as they choose. *See, e.g., Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997) (Free Exercise and Establishment Clauses "embody 'correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom [of religion]'") (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting)). So although the avowed purpose of the "Public Expression of Religion Act" is to protect the religious expression of state and local officials, its effect would be to undermine the religious liberty of all Americans.

If you have any questions regarding this legislation or would like further information on any other issues of importance to Americans United, please contact Aaron D. Schuham, Legislative Director, at (202) 466-3234, extension 240.

Sincerely,



Rev. Barry W. Lynn
Executive Director