

**FROM CIVIL RIGHTS 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**

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INTRODUCTION: A TALE OF TWO HIGH-WATER MARKS

For fourteen years, members of Congress repeatedly introduced legislation directed at a single subject. A key underpinning for the necessity of the legislation was provided by the opinions of two Supreme Court justices. Yet, for the past nine years, Congress has gone silent on the same topic. This Article argues that it is past time for Congress to reconsider this topic, and that if it will not do so, the Supreme Court can rectify the situation without engaging in judicial legislation.

Perhaps the best view of Congress’s efforts can be seen by examining the high-water mark of those efforts, which occurred in 2006. In that year, it was the belief of 247 United States representatives that “the Establishment Clause [of the United States Constitution] does not secure an individual right.”<sup>1</sup> Therefore, they believed attorney’s fees should not be available in Establishment Clause cases under 42 U.S.C. §§ 1983 and 1988, the federal civil rights and fee shifting statutes that make such awards possible.<sup>2</sup>

Similarly, by 2006, two Supreme Court Justices had indicated that the Establishment Clause did not protect individual rights.<sup>3</sup> Indeed, the 247 Congressmen explicitly

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<sup>1</sup> H.R. REP. NO. 109-657, at 11 (2006). The number 247 should perhaps be qualified with the phrase “at least arguably.” The quoted language comes from the Report issued by the House Judiciary Committee in support of the passage of H.R. 2679, Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Act of 2006. *Id.* It is possible, of course, that some representatives voted for H.R. 2679, which would have stripped attorney’s fees in Establishment Clause cases, without endorsing the particular view quoted from the Report, but no other rationale was ever expressed in the Report or the debate. The recorded vote was 244–173. 152 CONG. REC. H7422-23 (daily ed., Sept. 26, 2006) (Representative Mollohan (D-WV)’s vote change from “yea” to “nay” is already reflected in the vote count). However, three additional representatives stated in the Congressional Record that had they been present, they would have voted in favor of the bill or its underlying rule. *Id.* (statement of Rep. Green); 152 CONG. REC. E1856 (Extensions of Remarks, Sept. 28, 2006) (Personal Explanation of Rep. Castle); 152 CONG. REC. E1920 (Extensions of Remarks, Sept. 29, 2006) (Personal Explanation of Rep. Pombo).

<sup>2</sup> See H.R. REP. NO. 109-657, at 11.

<sup>3</sup> See *infra* notes 4–5 and accompanying text.

relied on the words of one of those justices, Anthony Kennedy, for this proposition;<sup>4</sup> and Justice Thomas had by then made the even more emphatic, unequivocal statement that “[t]he Establishment Clause does not purport to protect individual rights.”<sup>5</sup>

And yet, here we are, fourteen years later, and attorney’s fees are still being awarded in Establishment Clause cases under 42 U.S.C. § 1988.<sup>6</sup> This Article will argue that this practice should stop, either by amendment of 42 U.S.C. §§ 1983 and 1988 or through a pronouncement by the Supreme Court that Establishment Clause claims can no longer be brought under 42 U.S.C. § 1983. By way of introduction, we can examine the backstory to how 247 representatives came to assert that the Establishment Clause does not secure any individual rights.

In 2000, an attorney for the Indiana Civil Liberties Union<sup>7</sup> asserted that in Establishment Clause cases, “[i]f we prevail, we get fees, and they’re going to pay the [Indiana Civil Liberties Union] an enormous amount of money.”<sup>8</sup> This and other statements and activities by the ICLU did not escape the attention of another Indianan who, in 1994, had been elected to Congress. By 1998—even before the ICLU so boldly threw down the gauntlet of attorney’s fees blackmail<sup>9</sup>—John Hostettler (IN-08) had had

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<sup>4</sup> H.R. REP. NO. 109-657, at 11 & n.43 (quoting *Lee v. Weissman*, 505 U.S. 577, 591–92 (1992)). This is a fair reading of Justice Kennedy’s words, despite his never having—by 2006 or since—joined any of Justice Thomas’s opinions addressed in the following footnote and accompanying text.

<sup>5</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring), *abrogated on another point by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *see also* *Town of Greece v. Galloway*, 572 U.S. 565, 606 (2014) (Thomas, J., concurring in part and concurring in the judgment); *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of cert.); *McDonald v. City of Chicago*, 561 U.S. 741, 851 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment) (reaffirming his view that the Establishment Clause is federalist and thus not capable of incorporation as a right); *Cutter v. Wilkinson*, 544 U.S. 709, 726–29 (2005) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–80 (2002) (Thomas, J., concurring).

<sup>6</sup> *See, e.g., Am. Humanist Ass’n v. Douglas Cty. Sch. Dist.*, 328 F. Supp. 3d 1203, 1214–15 (D. Colo. 2018).

<sup>7</sup> On January 1, 2006, the Indiana Civil Liberties Union changed its name to the “ACLU of Indiana.” *ICLU to Become ACLU of Indiana*, AM. CIV. LIBERTIES UNION (Dec. 22, 2005), <https://www.aclu.org/news/iclu-become-aclu-indiana?tab=case&redirect=organization-news-and-highlights/iclu-become-aclu-indiana> [<https://perma.cc/QV9F-CYGZ>].

<sup>8</sup> 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.

<sup>9</sup> For the use of the term “blackmail,” *see infra* text accompanying note 181. The legislation introduced multiple times in the House, *see supra* notes 1–4; *infra* notes 10–30, and twice in the Senate used the word “extort.” Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006, S. 3696, 109th Cong. (2006); Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2007, S. 415, 110th Cong. (2007). In fact, after passage in the House, the title of the Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006, was amended to A Bill to Amend the Revised Statutes

enough. That year, during the 105th Congress, he introduced the Public Expression of Religion Act of 1998.<sup>10</sup> Hostettler introduced similar legislation during the 106th, 107th, 108th, and 109th Congresses.<sup>11</sup> Until the 109th Congress, each resolution was referred to the House Judiciary Committee, and in turn, was referred to one of several subcommittees but advanced no further.<sup>12</sup>

But in the 109th Congress, Hostettler's bill, first entitled Public Expression of Religion Act of 2005, and later entitled Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006, made it out of the Constitution subcommittee and the Judiciary Committee with a published hearing<sup>13</sup> and a report.<sup>14</sup> As noted above, the House passed the Bill, and its counterpart was introduced in the Senate.<sup>15</sup> There, hearings were held and, together with submitted statements, were published as *Paying Your Own Way: Creating a Fair Standard for Attorney's Fee Awards in Establishment Clause Cases: Hearings Before the Senate Subcommittee on the Constitution, Civil Rights and Property Rights of the Committee on the Judiciary*.<sup>16</sup> Together, the House hearing and report, the Senate hearings, and the House debate demonstrate both what motivated the concern of Representative Hostettler (R-IN) and other representatives and senators, and why it is legitimate to believe that Establishment Clause cases ought not be brought under 42 U.S.C. § 1983.<sup>17</sup>

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of the United States to Prevent the Use of the Legal System in a Manner that Extorts Money from State and Local Governments, and the Federal Government, and Inhibits Such Governments' Constitutional Actions Under the First, Tenth, and Fourteenth Amendments, 152 CONG. REC. 19838 (2006), to comport with the Bill's long title. See H.R. 2679, 109th Cong. (2006).

In addition to the information provided here, and in the text accompanying the notes cited here, occasions of the use of the word "extort" can be found by going to the <https://www.congress.gov> website, select the "All Legislation" drop down from the menu at the upper left. Enter "Public Expression of Religion" in the search box and hit enter. Choose each bill in turn. For each bill, choose both the "Text" tab and the "Titles" tab to see whether some form of the word "extort" was used. Note also the use of "chilling." [<https://perma.cc/SF8T-9582>].

<sup>10</sup> H.R. 3288, 105th Cong. (1998).

<sup>11</sup> See *infra* note 12 (following all steps except the last).

<sup>12</sup> Search Results, CONGRESS.GOV, <https://www.congress.gov> (select the "All Legislation" drop down from the menu at the upper left; enter "Public Expression of Religion" into the search box and hit enter; choose each bill in turn; once a bill is chosen, click on "Actions" to find each bill's fate) [<https://perma.cc/SF8T-9582>].

<sup>13</sup> See H.R. REP. NO. 109-657, at 14 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> S. 3696, 109th Cong. (2006).

<sup>16</sup> *Paying Your Own Way: Creating a Fair Standard for Attorney's Fee Awards in Establishment Clause Cases: Hearings Before the Senate Subcommittee on the Constitution, Civil Rights and Property Rights of the Committee on the Judiciary*, 109th Cong. (2006) [hereinafter *Paying Your Own Way*].

<sup>17</sup> The above represents the high-water mark for the Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act, although another Indianan, Dan Burton (R-IN), continued to introduce it in the 110th through 112th Congresses, and Senator Brownback (R-KS) introduced the bill in the Senate again in the 110th Congress,

As for the legitimacy of eliminating fees for Establishment Clause cases, both the House and Senate Reports endorsed the views of witnesses and of those who submitted written statements, including the present author, that emphasized that § 1983 was enacted to protect the historic civil rights of individuals and that the Establishment Clause was instead a structural provision aimed at prohibiting the establishment of a national religion.<sup>18</sup> That this is so and that § 1988 was also never intended to apply to Establishment Clause cases is the major thesis of this Article.

However, it is worth emphasizing just how alert Congress had become to the blackmail issue.<sup>19</sup> As noted, the ICLU had bragged in 2000 that it would earn “enormous” fees whenever it prevailed in an Establishment Clause case.<sup>20</sup> However, Rep. Hostettler was, in part, motivated by similar earlier threats from the ICLU, which perhaps had been more restrained in how it characterized the fees it routinely seeks:

I first introduced the Public Expression of Religion Act in the 105th Congress after I realized that the mention of attorneys fees in these kinds of cases were jeopardizing our constituents’ constitutional rights. An example of this was in 1993. [sic] when the Indiana Civil Liberties Union, which is affiliated with the American Civil Liberties Union, mailed a letter to all the public educators in the State of Indiana. In this letter, the ICLU informs the educators that should they support a prayer at graduation, the ICLU will sue both the school and any individuals who approve the graduation prayer. The letter plainly states the ICLU will win and that whoever is sued will have to pay not only their attorneys fees but the ICLU fees as well.

These threats to teachers, who are highly unlikely to be able to pay their own attorneys fees let alone the exorbitant attorneys fees of the ICLU. [sic] make it very likely educators would capitulate to the ICLU before even checking to make sure the ICLU has their facts right.<sup>21</sup>

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as he had in the 109th. *See supra* note 12 (follow the steps in the note for pertinent information on these bills).

Similarly, bills were introduced both before and after the high-water mark that would have allowed schools to use federal funds to defend schools that were sued for putative Establishment Clause violations and that would have disallowed fees in such cases, but these bills either never passed, or the fee provisions were removed prior to passage. *See supra* note 12 (follow the steps in the note using the following search terms: “Establishment Clause” AND “attorney’s fee” AND school; a few false hits will be produced, but the reader will be able to dig deeper into the specifics noted in the text accompanying this note).

<sup>18</sup> *See, e.g.*, H.R. REP. NO. 109-657, at 11 n.42 (2006).

<sup>19</sup> *See supra* note 12 and accompanying text.

<sup>20</sup> *See* AM. CIV. LIBERTIES UNION, *supra* note 7.

<sup>21</sup> 152 CONG. REC. 19804 (2006) (statement of Rep. Hostettler).

But the ICLU was not the only strict separationist organization on Congress's radar screen. The House Report refers to "the ACLU or similar organizations"<sup>22</sup> and "the ACLU and its affiliates."<sup>23</sup> And one Senate witness years earlier in the hearings for the Civil Rights Attorney's Fees Awards Act of 1976 had referred to "the 'separationist' groups which bring the majority of these cases (the ACLU, AJCongress, Americans United, Freedom From Religion Foundation)."<sup>24</sup> However, most of the ire was directed towards the ACLU generically.<sup>25</sup> Deriving its information from witnesses, submitted statements, and members' own knowledge, the House Report illustrated its view that the elimination of fees in Establishment Clause cases was necessary with a bulleted list of then-recent fee awards and settlements in cases brought by the ACLU:

- The ACLU received \$950,000 in a settlement with the City of San Diego in a case involving the San Diego Boy Scouts.
- The ACLU received \$150,000 from Barrow County, Georgia, after a Federal judge ordered the county to remove a framed copy of the Ten Commandments from a hallway in the County Courthouse.
- The ACLU received \$121,500 from Kentucky in a case to remove a Ten Commandments monument outside the Capitol.
- The ACLU received \$38,000 in legal fees in a case against Hamilton County, Tennessee, to remove the Ten Commandments from a court building.
- The ACLU and two other groups received nearly \$550,000 in an Alabama case to remove the Ten Commandments from a courthouse.
- The ACLU received nearly \$75,000 from Habersham County, Georgia, in a case involving two Ten Commandments displays, one at the county courthouse and one in the county swimming pool building.<sup>26</sup>

The Report also pulled no punches in documenting the blackmailing tactic of the ACLU:

A huge number of these legal "victories" have been trumpeted in ACLU press releases, in which the ACLU often openly acknowledges it was the threat of lawsuits against localities that could least afford them that resulted in the ACLU's getting its way. The following are examples of ACLU press releases:

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<sup>22</sup> H.R. REP. NO. 109-657, at 4 (2006).

<sup>23</sup> *Id.* at 27.

<sup>24</sup> *Paying Your Own Way*, *supra* note 16, at 185 (prepared statement of Marc Stern, General Counsel, American Jewish Congress).

<sup>25</sup> *See* H.R. REP. NO. 109-657, at 6 n.13.

<sup>26</sup> *Id.* (citations omitted).

- “County Officials in Iowa Agree to Remove Ten Commandments from Courthouse Grounds” (March 15, 2001) (“Ben Stone, Executive Director of the Iowa Civil Liberties Union [said] ‘[w]e . . . wanted to spare the community a divisive and costly lawsuit.’”) (emphasis added);
  - “ACLU of Montana Settles Lawsuit Over Ten Commandments, Nativity Scene Placed on County Property” (October 12, 2000) (“The ACLU said the lawsuit was a ‘last attempt’ to nudge Custer County into addressing the *possible* unconstitutionality of the displays.”) (emphasis added);
  - “ACLU Action Prompts [Val Verde, California] School Board to Abandon Posting of Ten Commandments” (November 24, 1999) (“*The school board’s decision came in the wake of the filing of a lawsuit last week by the ACLU . . .*”) (emphasis added);
  - “ACLU of Illinois Lauds Officials’ Decision to Remove Religious Postings in Harrisburg Schools” (December 7, 1999) (The “Director of Communications for the ACLU [said] ‘*This action means the people of Harrisburg can focus all their energies, resources, and attention on the needs of their students, rather than worrying about a lengthy, expensive and disruptive court battle.*’”) (emphasis added);
  - “Commandments Come Down in West Virginia School” (August 27, 1999) (“School board attorney Brian Abraham recommended at a Thursday night meeting that the signs be taken down to *avoid* possible lawsuits.”) (emphasis added).
- The County of Los Angeles was recently extorted into removing a tiny cross from its official county seal (symbolizing the founding of the city by missionaries), which is costing the county around \$1 million as it would entail changing the seal on some 90,000 uniforms, 6,000 buildings, and 12,000 county vehicles.<sup>27</sup>

And it was clear that all restraint was gone: as quoted in Senate testimony, one ACLU official, after the ACLU and Americans United for Separation of Church and State attorneys were awarded \$2 million in a lawsuit against the Dover Area School District involving the teaching of intelligent design, stated, “[t]he \$2 million was a very conservative number, so they got a terrific deal. The next school district isn’t going to get the same break that Dover did.”<sup>28</sup>

In the intervening fourteen years, nothing has changed. To take an example other than the ACLU, the Freedom From Religion Foundation (FFRF) has also gotten

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<sup>27</sup> *Id.* at 7 (alteration in original) (footnotes omitted).

<sup>28</sup> *Paying Your Own Way*, *supra* note 16, at 16.



very aggressive in publicizing its use of threats via its website.<sup>29</sup> And until Congress or the Supreme Court eliminates the award of attorney's fees nothing will change. As *every* witness matter-of-factly admitted in their Senate testimony, § 1988 is a “club” to be used against governments.<sup>30</sup>

Whether Congress will ever surpass its previous high-water mark and get a bill through both houses and whether there would follow a veto fight are unknowns. But Congress is not the only institution that can remove the club, the blackmail, the extortion. Courts could accomplish the same thing if they would decline to permit fees to be awarded in Establishment Clause claims. Indeed, either Congress or the courts could go further than Congress's previous attempt. They could declare that Establishment Clause cases are not validly brought under § 1983.<sup>31</sup> Ultimately, the Supreme Court of the United States would need to weigh in.

In fact, two courts of appeals have already weighed in, and thus there is a judicial high-water mark to accompany the legislative high-water mark, albeit an older and less significant one.<sup>32</sup> In *Cammack v. Waihee*,<sup>33</sup> 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.<sup>34</sup> The Ninth Circuit, perhaps *anticipating* the points raised by this Article (without *making* those points), upheld the district court's granting of summary judgment in favor of the government defendants.<sup>35</sup> However, along the way, the Ninth Circuit questioned, without further addressing, the “efficacy” of bringing the Establishment Clause claim under § 1983:

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<sup>29</sup> See, e.g., FREEDOM FROM RELIGION FOUNDATION, <https://ffrf.org> (last visited Oct. 22, 2020) (enter “demand letter” in the search box; within many letters returned by the search, FFRF discusses the fee awards won in similar cases; other discussions of fee awards are prevalent on FFRF's website) [<https://perma.cc/SET4-FF72>].

<sup>30</sup> Obviously, such comments came from witnesses both opposing and supporting the bill, since *every* witness agreed to the point. See, e.g., *Paying Your Own Way*, *supra* note 16, at 23–27 (answers and comments of witnesses Stern, Woodruff, Rogers, Staver, and Lloyd).

<sup>31</sup> § 1983 has a jurisdictional counterpart, 28 U.S.C. § 1343(3) (2006). The Supreme Court of the United States has explained the relationship between § 1983 and § 1343(3). See, e.g., *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543–44 n.7 (1972). However, because many courts, including the Supreme Court of the United States, speak of jurisdiction under § 1983, this Article will follow suit and use this shorthand, except when the distinction is required, as it will be in the discussion of *Maine v. Thiboutot* and *Chapman v. Houston ETC.* and related cases. See *infra* Part II. For example, the following Westlaw search returns 823 court opinions as of this writing: adv: “jurisdiction #under s 1983” OR “jurisdiction #under 42 u.s.c. s 1983.”

This inconsistency of courts, including the Supreme Court, is unfortunate. It must be taken into account by those researching the issues covered by this Article.

<sup>32</sup> See, e.g., *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991).

<sup>33</sup> *Id.*

<sup>34</sup> Also challenged were state and city collective bargaining agreements regarding paid leave on Good Friday. *Id.* at 767–68.

<sup>35</sup> *Id.* at 768, 782.

Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under section 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, 103 S. Ct. 3330, 3332–33, 77 L.Ed.2d 1019 (1983) (simply noting that establishment clause challenge was brought under section 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).<sup>36</sup>

Since *Cammack*, additional cases, such as *Santa Fe Independent School District v. Doe*,<sup>37</sup> have reached the Supreme Court in a similar posture to *Allegheny*,<sup>38</sup> that is, the Establishment Clause claim had been brought under § 1983 without the Court acknowledging that fact. However, to date, in addition to *Marsh v. Chambers*,<sup>39</sup> only two Establishment Clause cases, *Van Orden v. Perry*,<sup>40</sup> and *McCreary County v. American Civil Liberties Union*,<sup>41</sup> exist that have been brought under § 1983 and in which the Court has both acknowledged that fact and decided the Establishment Clause claim.<sup>42</sup> Thus, no great body of Supreme Court case law stands for the proposition that Establishment Clause cases *should* or *can* be brought under § 1983.

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<sup>36</sup> *Id.* at 767 n.3.

<sup>37</sup> *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

<sup>38</sup> *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

<sup>39</sup> 463 U.S. 783 (1983).

<sup>40</sup> 545 U.S. 677 (2005).

<sup>41</sup> 545 U.S. 844 (2005).

<sup>42</sup> In only three other cases to date has the Court even acknowledged an Establishment Clause claim being brought under § 1983. In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, the Court acknowledged that all the claims, including the Establishment Clause claim, had been brought under § 1983. 508 U.S. 384, 389 (1993). However, the Court decided the case on the Free Speech claim and did not reach the Establishment Clause claim. *Id.* at 390. In *Karcher v. May*, the Third Circuit affirmed the district court's holding that a New Jersey statute violated the Establishment Clause "for lack of a valid secular purpose." 484 U.S. 72, 76 (1987). The Supreme Court once again did not reach the Establishment Clause issue but instead dismissed the appeal, brought under 28 U.S.C. § 1254(2), for lack of jurisdiction because the two defendants that represented the legislature's position in the matter were no longer legislative officers, and the new representatives of the legislature did not wish to appeal. *Id.* at 81, 83. Finally, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, a Christian school sought an injunction to prevent the Civil Rights Commission from investigating an employment discrimination complaint, claiming it would violate the Free Exercise and Establishment Clauses. 477 U.S. 619, 621 (1986). The merits of neither First Amendment claim were reached when the Court held that the district court, under *Younger v. Harris*, should have abstained from deciding the case, adding that the constitutional issues could be addressed in the state proceedings. *Id.* at 625, 628.



Furthermore, the Supreme Court has often allowed certain types of claims to come before it on multiple occasions without comment and then, when a party squarely raised the jurisdictional issue, decided that such claims were not properly brought.<sup>43</sup> In fact, the Court has done this on several occasions in the § 1983 context.<sup>44</sup> For example, the Court had often accepted cases in which a state had been sued under § 1983<sup>45</sup> before deciding in *Will v. Michigan Department of State Police* that a state is not a person for purposes of § 1983.<sup>46</sup> Significantly, the *Will* Court specifically noted that the “Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.”<sup>47</sup>

Until 2009, neither the Ninth Circuit nor any other court had ever revisited the possibility mentioned by the *Cammack* court that Establishment Clause cases ought not be brought under § 1983.<sup>48</sup> Although the author has made a shortened version of some of the arguments contained in this Article in amicus briefs filed with various courts, no court ever interacted with the argument until the Court of Appeals for the Tenth Circuit did so in its opinion in *Green v. Haskell County*,<sup>49</sup> a case in which the ACLU and its Oklahoma affiliate sued the county over its Ten Commandments display. That court rejected the argument for reasons with which this Article obviously disagrees.<sup>50</sup> Subsequently, the issue was raised in another Tenth Circuit case, *American Atheists, Inc. v. Duncan*,<sup>51</sup> a case in which American Atheists and the Utah Civil Rights and Liberties Foundation challenged roadside crosses memorializing slain state troopers, in which the author and the National Legal Foundation were involved.<sup>52</sup> There, the argument was made on behalf of the Utah Highway Patrol

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<sup>43</sup> See, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 66 (1989).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* at 63 n.4 (collecting cases).

<sup>46</sup> *Id.* at 71.

<sup>47</sup> *Id.* at 63 n.4 (alteration in original) (citing *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974)).

<sup>48</sup> See *Cammack v. Waihee*, 932 F.2d 765, 767 n.3 (9th Cir. 1991).

<sup>49</sup> 568 F.3d 784 (10th Cir. 2009).

<sup>50</sup> *Id.* at 788 n.1. The Tenth Circuit rejected the brief and this Article’s assertion that the Establishment Clause does not protect individual rights. *Id.*; cf. *infra* Parts II and III. The basis for the court’s rejection was its statement that “[t]he Establishment Clause protects religious liberty no less than the Free Exercise Clause does.” *Green*, 568 F.3d at 788 n.1 (citing multiple cases and a law review article in support of this proposition). True, but irrelevant. To say that the Establishment Clause protects religious liberty is not equivalent, or even tantamount, to saying that it protects an individual right. The Tenth Circuit also thought the brief and this Article’s thesis were foreclosed by the Supreme Court’s opinion in *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Id.*; cf. *infra* notes 76–78 and accompanying text and Section I.C. The amicus brief took on both of those arguments directly, as does this Article, and the Tenth Circuit’s rejection of the arguments seems to be based on missing the point of the historical legitimacy of both arguments. See *Green*, 568 F.3d at 788 n.1.

<sup>51</sup> 616 F.3d 1145 (10th Cir.), *amended and superseded on reh’g sub nom.* Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010).

<sup>52</sup> *Id.* at 1150–51.

Association, the defendant-intervenor-appellee.<sup>53</sup> However, in *Duncan*, the court merely dropped a footnote stating that the *Green* court had already rejected the argument.<sup>54</sup> No court has since entertained, accepted, or rejected the argument.

Furthermore—and this argument was not made to the Tenth Circuit in either *Green* or *Duncan*—the problem with challenging putative or real Establishment Clause violations under § 1983 *alone* is highlighted by both the majority and concurring opinions in *Inyo County v. Paiute-Shoshone*.<sup>55</sup> In *Inyo County*, the Paiute-Shoshone tribe sued in federal court under *both* § 1983 and 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1337 (commerce jurisdiction), and the “federal common law of Indian affairs.”<sup>56</sup> Justice Ginsburg, writing for an eight-member majority, wrote that the tribe was not a “person” who could sue under § 1983.<sup>57</sup> However, because the tribe had invoked the jurisdiction of the federal courts *via other means*, the Court remanded the case for consideration of jurisdiction *vel non* on those bases.<sup>58</sup> However, the relevant point here is that when plaintiffs invoke jurisdiction *only* under § 1983 in Establishment Clause cases—and assuming the court agrees that § 1983 does not provide such jurisdiction—the court would be required to dismiss the case for lack of subject matter jurisdiction.<sup>59</sup>

Furthermore, Justice Stevens’s concurring opinion in *Inyo County* is also problematic for Establishment Clause plaintiffs filing suit only under § 1983.<sup>60</sup> Justice Stevens believed that the tribe was a “person” under § 1983.<sup>61</sup> However, he opined that the tribe had alleged only a *putative* deprivation of a right, privilege, or immunity that was, in fact, no such thing.<sup>62</sup> While his reason for this belief will not be relevant in Establishment Clause cases (he believed that the tribe’s claim was instead based on a “judge-made doctrine”),<sup>63</sup> nevertheless, should a court agree that the Establishment Clause protects no rights, privileges, or immunities, it logically follows that claims brought only under § 1983 should be dismissed for lack of subject matter jurisdiction.<sup>64</sup>

With these high-water marks—the Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006 and *Cammack v. Waihee*—as background and with the author’s belief that Establishment Clause cases should indeed not be eligible to be brought under § 1983 and therefore ought not be eligible for an award of attorney’s fees under § 1988, certain obvious threshold

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1151–52 n.4.

<sup>55</sup> 538 U.S. 701, 702 (2003).

<sup>56</sup> *Id.* at 706.

<sup>57</sup> *Id.* at 712.

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.* at 713 (Stevens, J., concurring in judgment).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

questions must be asked. While these questions could be phrased in various ways, two rather basic phrasings serve as an adequate springboard for what follows: What is wrong with bringing Establishment Clause cases under § 1983? Isn't it done all the time? The answer to the second question is "yes," it is done all the time nowadays.<sup>65</sup> The answer to the first question is what this Article is all about. Along the way, the Article will also return to the first question and demonstrate that Establishment Clause claims historically were not brought under § 1983.<sup>66</sup> That prior practice should be reinstated—whether through legislation or through Supreme Court pronouncement—to remove the blackmail potential of § 1983.<sup>67</sup>

Part I of this Article will first show that the purpose of § 1988 is to allow attorney's fees in civil rights cases, including those brought under § 1983.<sup>68</sup> However, the Article will show in Part II, by examining the enactment of § 1983 as part of the Ku Klux Klan Act of 1871, that Establishment Clause cases should not be included within the "civil rights" rubric under either § 1988 or § 1983.<sup>69</sup> This thesis will be reinforced by examining, in Part III, portions of the congressional debate over the drafting of the Fourteenth Amendment, since the Ku Klux Klan Act was referred to as "[a]n Act to enforce the Provisions of the Fourteenth Amendment."<sup>70</sup> The Article will examine one counterargument based on the Supreme Court's current incorporation doctrine in Part IV.<sup>71</sup> The Article will end with some concluding remarks.<sup>72</sup> In sum, the Article will show that rather than fulfilling its original purpose of protecting racial minorities<sup>73</sup> § 1983—in combination with § 1988—is now being used by strict separationists

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<sup>65</sup> See *infra* Conclusion.

<sup>66</sup> See *infra* notes 326–28 and accompanying text.

<sup>67</sup> See *infra* notes 329–31 and accompanying text.

<sup>68</sup> See *infra* Sections I.A–B.

<sup>69</sup> See *infra* Part II.

<sup>70</sup> Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

<sup>71</sup> See *infra* Part IV.

<sup>72</sup> See *infra* Conclusion.

<sup>73</sup> Representative James Beck (D-KY) described the purpose of the statute as such: "Under it negroes, as well as Indians, Gipsies [sic], Chinese, and all the Mongolian races born in the United States, men and women, young and old, can now sue and be sued in the courts of the United States." CONG. GLOBE, 40th Cong., 3rd Sess. 691 (1869). Similar sentiments are scattered through the debates over the three Civil War Amendments, the Ku Klux Klan Act of 1871, and the other enforcement and civil rights acts preceding and following the Act. These sentiments often require significant context-setting, represent only one side of a debate, or both. Thus, I will limit myself to the above example from Representative Beck. However, one such act, the Civil Rights Act of 1866, plainly states that it applies to "citizens, of every race and color." Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). The significance of the Civil Rights Act of 1866 will be explored *infra* notes 275–78 and accompanying text.

A similar view (with regard to the three Civil War Amendments) is found in Justice Miller's opinion in the *Slaughterhouse Cases*:

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their

to “blackmail” state and local governments all across the country.<sup>74</sup> A statute, the very purpose of which is to ensure the enforcement of one of our nation’s most historic civil rights laws, should not be perverted in this manner.

I. THE CIVIL RIGHTS ATTORNEY’S FEES AWARDS ACT OF 1976 (42 U.S.C. § 1988)  
WAS DESIGNED TO AID CIVIL RIGHTS LITIGANTS ONLY

As has been stated elsewhere, “[t]he purposes for which § 1988 was enacted are not hard to discover.”<sup>75</sup> The legislative history of the Act is unambiguous. However, as will be discussed in Part II, the majority and minority opinions of the Supreme

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fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.

83 U.S. (16 Wall.) 36, 72 (1873).

Furthermore, the debates over the Civil Rights *Attorney’s Fees Awards Act* dealt extensively with discrimination against women. *See, e.g.*, 122 CONG. REC. 31,472, 31,851 (1976), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE, CIVIL RIGHTS ATTORNEY’S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S. 2278) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS at 22, 92 (1976) [hereinafter SOURCE BOOK] (statement of Sen. Kennedy); 122 CONG. REC. 31,488, *reprinted in* SOURCE BOOK at 56–58 (statement of Sen. Allen); 122 CONG. REC. 35,122, *reprinted in* SOURCE BOOK at 254 (statement of Rep. Drinan); 122 CONG. REC. 35,127, *reprinted in* SOURCE BOOK at 267 (statement of Rep. Holtzman).

<sup>74</sup> *See infra* Conclusion.

<sup>75</sup> The author made this statement in written testimony to both the United States House of Representatives and the United States Senate. The author made this statement with regard to the Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006. *Paying Your Own Way*, *supra* note 16, at 71. The author also made the statement with regard to Public Expressions of Religion Act of 2005, *Hearing on H.R. Res. 2679 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 203 (2006). *See supra* notes 1–30 and accompanying text for the legislative “high-water mark” context of this testimony.

Similar statements regarding the unambiguous 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 section of this Article will provide extensive documentation of § 1988’s purposes.

Court in *Maine v. Thiboutot*<sup>76</sup> came to opposite conclusions about § 1988's purpose, as well as about § 1983's purpose. Therefore, after supporting this Article's thesis that Establishment Clause cases ought not be permitted to be brought under § 1983 (and that attorney's fees are improper under § 1988) in Section I.C, it will be necessary to examine the conclusions of the two factions of the *Thiboutot* Court.<sup>77</sup> The reason this is necessary is because, in *Green v. Haskell County Board of Commissioners*, one of the reasons the Court of Appeals for the Tenth Circuit rejected this Article's thesis is because the court thought *Thiboutot* foreclosed the argument.<sup>78</sup>

But we turn first to the most important support for the Article's thesis: the evidence supplied by the enactment of the Civil Rights Attorney's Fees Awards Act of 1976 itself.

*A. The Senate Debate on the Civil Rights Attorney's Fees Awards Act of 1976 Shows that Fees Were to Be Awarded Only in Traditional Civil Rights Cases and Two Other Explicitly Named Analogous Categories of Cases*

In introducing the Civil Rights Attorney's Fees Awards Act of 1976, Senator John V. Tunney (D-CA), Chairman of the Senate Judiciary Subcommittee on Constitutional Rights,<sup>79</sup> cut straight to the chase:

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. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts are to continue previous policies of awarding fees under 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.<sup>80</sup>

Further tying the Act to the civil rights context, Senator Tunney explained that he had wanted the attorney's fee provision to be incorporated into the extension of the Voting Rights Act of 1965.<sup>81</sup> Because the Voting Rights Act was about to expire,

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<sup>76</sup> 448 U.S. 1 (1980).

<sup>77</sup> See *infra* Section I.C.

<sup>78</sup> See 568 F.3d 784, 788 n.1 (10th Cir. 2009).

<sup>79</sup> SOURCE BOOK, *supra* note 73, at ii.

<sup>80</sup> 121 CONG. REC. 26,806 (1975), reprinted in SOURCE BOOK, *supra* note 73, at 3 (statement of Sen. Tunney) (emphasis added).

<sup>81</sup> *Id.*

the Senate was unable to debate its own extension bill and voted on the House version instead.<sup>82</sup> That version did not contain an attorney's fees provision, so Senator Tunney introduced the Civil Rights Attorney's Fees Awards Act of 1976 as a stand-alone bill.<sup>83</sup>

As Senator Tunney explained,<sup>84</sup> *Alyeska Pipeline Service Corp. v. Wilderness Society*<sup>85</sup> was an environmental case, not a civil rights case.

Nonetheless, the Supreme Court had eliminated attorney's fees in all cases—not just in environmental cases—in which those fees were not explicitly authorized by statute, opining that it would be up to Congress to selectively allow attorney's fees by statute as it thought best.<sup>86</sup> The Court did so despite noting that it is “apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances.”<sup>87</sup>

Senator Tunney quoted this language<sup>88</sup> and noted that an anomaly now existed in our civil rights laws: attorney's fees were available in cases brought under Titles II and VII of the 1964 Civil Rights Act, but not in cases brought under other civil rights statutes.<sup>89</sup> Senator Tunney explained that attorney's fees were “equally appropriate in other civil rights statutes, because there, as in employment and public accommodations cases, Congress depends heavily on private enforcement.”<sup>90</sup>

Here Senator Tunney was addressing the “private attorney general” mechanism that Congress had built into Titles II and VII of the Civil Rights Act of 1964.<sup>91</sup> In the context of Title II, the Supreme Court has described the mechanism as follows:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a “private attorney general,” vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 4.

<sup>85</sup> 421 U.S. 240 (1975).

<sup>86</sup> *Id.* at 269.

<sup>87</sup> *Id.* at 271.

<sup>88</sup> 121 CONG. REC. 26,806, reprinted in SOURCE BOOK, *supra* note 73, at 4.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 3.



powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.<sup>92</sup>

Senator Tunney hammered this point home again and again. For example, Tunney explained that:

[T]he 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.<sup>93</sup>

Tunney also gave specific examples of the anomalies that faced civil rights plaintiffs:

[E]ven though the *Alyeska* decision turned on a question of judicial power and not on the merits of fee awards—and even though *Alyeska* was an environmental case and not a civil rights case—its 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, fees 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 the Federal Constitution or laws by officials sworn to uphold the laws.<sup>94</sup>

Finally, Tunney emphasized that he was seeking to re-establish the pre-*Alyeska* civil rights status quo:

If our civil rights laws are not to become mere hollow pronouncements, which the average citizen cannot enforce, we must

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<sup>92</sup> *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968).

<sup>93</sup> 121 CONG. REC. 26,806, *reprinted in* SOURCE BOOK, *supra* note 73, at 4.

<sup>94</sup> *Id.*

maintain the traditionally effective remedy of fee-shifting in these cases. This bill, then, contains 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 prior to the Court’s May decision. It does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes.<sup>95</sup>

Tunney’s introductory remarks, not surprisingly, often drew on language contained in the Report from the Committee on the Judiciary, which he presented to the Senate.<sup>96</sup> However, the Report was more explicit about the civil rights limitation:

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.<sup>97</sup>

Only two Senators, Senator Hugh Scott (R-PA) and Senator Charles “Mac” Mathias (R-MD)—both supporters of the bill—spoke prior to the bill being amended.<sup>98</sup> Senator Scott pointed out that the Act would rely on private enforcement, i.e., private attorneys general, and that it would restore attorney’s fees to cases brought under the Reconstruction Era civil rights statutes.<sup>99</sup> Senator Mathias pointed out that the loss of attorney’s fees under *Alyeska* had effectively shut the courthouse door to many civil rights plaintiffs due to the “staggering costs of litigation.”<sup>100</sup> In his statements, he reiterated the familiar themes: this bill was a direct response to *Alyeska* but it was intended to reach only civil rights cases.<sup>101</sup>

After Senators Scott and Mathias spoke, Senator Edward Kennedy (D-MA) introduced “an amendment in the nature of a substitute.”<sup>102</sup> The original bill, as introduced by Senator Tunney, read in its entirety:

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<sup>95</sup> *Id.* at 4–5.

<sup>96</sup> See S. REP. NO. 94-1011 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 8–13.

<sup>97</sup> *Id.* at 10.

<sup>98</sup> 122 CONG. REC. 31,471, reprinted in SOURCE BOOK, *supra* note 73, at 19–20.

<sup>99</sup> *Id.* at 19.

<sup>100</sup> *Id.* at 19–20.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 31,471–72, reprinted in SOURCE BOOK, *supra* note 73, at 21–22 (statement of Sen. Kennedy).

*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, Revised Statutes Section 722 (42 U.S.C. Sec. 1988) is amended by adding the following: “In any action or proceeding to enforce a provision of section 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.”*<sup>103</sup>

Senator Kennedy’s substitute did two things, one stylistic, one substantive. First, it provided for the citation of the Act as the Civil Rights Attorney’s Fees Awards Act of 1976.<sup>104</sup> 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 “or title VI of the civil rights Act of 1964.”<sup>105</sup> Senator Kennedy covered much familiar ground in summarizing the purpose of the bill: he noted that it was necessitated by *Alyeska*, that without it many plaintiffs would not be able to sue, and that it was designed to eliminate anomalies in our civil rights statutes.<sup>106</sup>

Kennedy also explained why an amendment was needed. 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.<sup>107</sup> This was necessary because Representative Elizabeth Holtzman (D-NY) had added an amendment to this effect to the House bill when it was under consideration in the House Judiciary Committee.<sup>108</sup>

Representative Holtzman had made it clear that her amendment was designed to fight discrimination.<sup>109</sup> Speaking during the House debate, she stated that the Act would “help to assure that all Americans can have access to the courts to obtain the protections against discrimination contained in our laws and the Constitution.”<sup>110</sup> She went on to note that she was “particularly pleased that the bill includes the amendment [she] offered in the Judiciary Committee adding title IX of the Education Amendments of 1972—which prohibits discrimination in education on the basis of

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<sup>103</sup> 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK, *supra* note 73, at 5. The *Revised Statutes of 1875* was the first codification of public laws in which those laws were categorized by subject matter and assigned title and section numbers. Then, in 1926, the first edition 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.

<sup>104</sup> 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK, *supra* note 73, at 21.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 22.

<sup>107</sup> 122 CONG. REC., *reprinted in* SOURCE BOOK, *supra* note 73, at 21 (statement of Sen. Kennedy) (referring to H.R. 15460).

<sup>108</sup> 122 CONG. REC., *reprinted in* SOURCE BOOK, *supra* note 73, at 267.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (statement of Rep. Holtzman).

sex—to the civil rights statutes covered by this bill.”<sup>111</sup> She also gave specific examples: “It is vitally important for protecting women from discrimination in admission to graduate school, tracking into vocational programs, which lead to dead end jobs, discrimination in faculty promotion and tenure decision, and other forms of discrimination.”<sup>112</sup>

In addressing Representative Holtzman’s amendment, Senator Kennedy was careful to fit the Title IX provision squarely under the civil rights and Fourteenth Amendment rubrics:

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] 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.<sup>113</sup>

The remainder of the Senate debate can be summarized as follows: First, numerous senators who favored the bill reiterated the points discussed above.<sup>114</sup> Second, those senators who opposed the bill filibustered and offered various amendments, the purpose

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<sup>111</sup> *Id.* (statement of Rep. Holtzman).

<sup>112</sup> *Id.* (statement of Rep. Holtzman).

<sup>113</sup> 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK, *supra* note 73, at 22 (statement of Sen. Kennedy).

<sup>114</sup> *See, e.g.*, 122 CONG. REC. 31,832 (1976), *reprinted in* SOURCE BOOK, *supra* note 73, at 74–75 (statement of Sen. Hathaway); 122 CONG. REC. 31,850–51, *reprinted in* SOURCE BOOK, *supra* note 73, at 91–92 (statement of Sen. Kennedy); 122 CONG. REC. 32,185, *reprinted in* SOURCE BOOK, *supra* note 73, at 138–39 (statement of Sen. Tunney).

of which was merely to delay the vote.<sup>115</sup> Third, one amendment was offered by those who supported the bill, 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."<sup>116</sup> Fourth, some substantive discussion of the content of the final bill occurred.<sup>117</sup>

One of the few additional insights available can be gleaned from comments by Senator Long (D-LA) who was worried about a slippery slope.<sup>118</sup> 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."<sup>119</sup>

Similarly, Senator Helms (R-NC) worried that "[t]he civil rights statutes affected by this legislation . . . are broad, ambiguous, and far-ranging in coverage. Depending upon who may interpret their effect, they could be easily interpreted by some to reach conduct which the vast majority of Americans would consider not only constitutionally permitted but totally proper."<sup>120</sup> Here, too, the slippery slope only extends to civil rights statutes, but once §§ 1983 and 1988 are extended to the Establishment Clause context, this worry becomes reality in light of the Supreme Court's confusing and inconsistent jurisprudence in that area.

Furthermore, the litigation explosion and the financial aspect of the slippery slope were discussed. For example, Senator Allen (D-AL) asked rhetorically, "Is the concern for protecting civil rights, or is it for protecting the fees of attorneys, who have grown fat on litigation of this sort?"<sup>121</sup> Senator Allen actually introduced an amendment to rename the bill "the Tunney-Kennedy Civil Rights Attorneys Relief Act of 1976."<sup>122</sup> And several senators noted that localities were in effect being blackmailed.<sup>123</sup> For example, Senator Long (D-LA) feared that the Act would "encourage everybody in America to sue every little town. Podunk will be sued, Cripple Creek will be sued,

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<sup>115</sup> See 122 CONG. REC. 31,850 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 91 (statement of Sen. Kennedy) ("This is an amendment offered by the Senator from Alabama which, along with many of his others, has the clear purpose to delay and frustrate the very serious objective of this legislation.").

<sup>116</sup> 122 CONG. REC. 31,792, reprinted in SOURCE BOOK, *supra* note 73, at 64.

<sup>117</sup> *E.g., id.* at 62–63. For a detailed discussion of these four aspects of the Senate debate, see *Paying Your Own Way*, *supra* note 16, at 75–77 (testimony of Fitschen).

<sup>118</sup> See 122 CONG. REC. 32,187 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 140 (statement of Sen. Long).

<sup>119</sup> *Id.*

<sup>120</sup> 122 CONG. REC. 31,834, reprinted in SOURCE BOOK, *supra* note 73, at 80.

<sup>121</sup> 122 CONG. REC. 31,474, reprinted in SOURCE BOOK, *supra* note 73, at 27.

<sup>122</sup> 122 CONG. REC. 31,850, reprinted in SOURCE BOOK, *supra* note 73, at 89.

<sup>123</sup> See 122 CONG. REC. 31,489, reprinted in SOURCE BOOK, *supra* note 73, at 62.

Dry Prong will be sued. Every little town in America will be sued.”<sup>124</sup> And Senator Helms addressed “public interest law suits where the legal fees have . . . ranged from \$200,000 to \$800,000” in 1976 or pre-1976 dollars.<sup>125</sup>

Furthermore, an exchange between Senators Helms and Kennedy demonstrates that cases in which abortion was an issue would not fall under the civil rights rubric.<sup>126</sup>

Another clear statement that the bill was meant to address only civil rights statutes occurred when Senator Kennedy addressed the amendment offered by Senator Allen that added attorney’s fees for cases in which the IRS harassed taxpayers:

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.<sup>127</sup>

Finally, we address that part of the Senate debate that was especially important to the Supreme Court in *Maine v. Thiboutot*.<sup>128</sup> Senator Kennedy 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 in a local cemetery, in which Black people had been kept off of juries, in which a Black man had been harassed by the police, in which doctors rendering assistance to Black people had been denied privileges at a local hospital, in which a highway was put through a Black rather than a White neighborhood, in which Black people were charged higher rents in a housing project, in which housing projects were segregated, in which a housing

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<sup>124</sup> 122 CONG. REC. 31,489, *reprinted in* SOURCE BOOK, *supra* note 73, at 62.

<sup>125</sup> 122 CONG. REC. 31,833, *reprinted in* SOURCE BOOK, *supra* note 73, at 78.

<sup>126</sup> 122 CONG. REC. 32,396, *reprinted in* SOURCE BOOK, *supra* note 73, at 169.

<sup>127</sup> 122 CONG. REC. 33,312–13, *reprinted in* SOURCE BOOK, *supra* note 73, at 196–98.

<sup>128</sup> *See* *Maine v. Thiboutot*, 448 U.S. 1 (1980).



project advertised “Whites only,” in which officials accepted Social Security Act funds and failed to provide services, and in which mental patients were forced into unpaid labor against their will.<sup>129</sup> Senator Kennedy mentioned no case names.<sup>130</sup> However, all but the last two cases are unremarkable for their relationship to civil rights. Nonetheless, 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*,<sup>131</sup> and we shall examine this fact in Section I.C.<sup>132</sup> Senator Kennedy did not identify the case involving mental patients, but it may be a confused description of a case cited in the House Report, which will be examined in the next subsection.<sup>133</sup>

Thus, the record is clear: absent these few stray references that will be addressed below, the entire debate in the Senate centered on guaranteeing attorneys’ fees in the civil rights context—whether statutorily or constitutionally based.

*B. The House Debate on the Civil Rights Attorney’s Fees Awards Act of 1976 Also Shows that Fees Were to Be Awarded Only in Traditional Civil Rights Cases and Two Other Explicitly Named Analogous Categories of Cases*

Next, we examine the record from the House of Representatives. The House debate was much shorter than the Senate debate—obviously the House was feeling even more time pressure than the Senate, since the bill was taken up on the last day of the session.<sup>134</sup>

The overall tenor of the Senate debate was repeated in the House: the bill was all about civil rights.<sup>135</sup> So for example, Representative Kastenmeier (D-WI) 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:

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<sup>129</sup> 122 CONG. REC. 33,314 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 201.

<sup>130</sup> *See id.*

<sup>131</sup> 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.” *Thiboutot*, 448 U.S., at 10 (alteration in original) (quoting Sen. Kennedy, 122 CONG. REC. 33,314 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 202).

<sup>132</sup> *See infra* Section I.C.

<sup>133</sup> *See infra* Section I.B.

<sup>134</sup> 122 CONG. REC. 35,115 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 238 (statements by Reps. Rousselot (R-CA) and Anderson (R-IL), respectively, indicating that “the hour is late” and they were “in the last day of [the] session”).

<sup>135</sup> *See* 122 CONG. REC. 35,114–16, 35,124, 35,126–28 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 236–39, 252–53, 259–60, 263–69.

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.<sup>136</sup>

Representative Kastenmeier went on to give examples of the types of cases that would be covered.<sup>137</sup> Interestingly, he chose four of the same cases that Senator Kennedy had given—the cases in which a Black veteran had been denied burial in a local cemetery, in which Black people had been excluded from juries, in which doctors rendering assistance to Black people had been denied privileges at a local hospital, and in which mental patients were forced into unpaid labor against their wills—but did *not* include the Social Security case or the highway construction case.<sup>138</sup>

Similarly, Representative Fish (R-NY) gave examples of the type of cases that would be impacted, citing examples of cases that had previously been litigated.<sup>139</sup> All of them involved civil rights, including the three that he specifically stated were filed under § 1983:

First. Suits under section 1977 of the Revised Statutes—and section 1978—against real estate companies which refused to sell lots to blacks. *Lee v. Southern Home Sites* (429 F. 2d 290 (5th Cir. 1970)).

Second. Suits under section 1978 of the Revised Statutes against realtors who discriminate in renting residential property. *Brown v. Dallas* (331 F. Supp. 1033 (N.D. Tex. 1971)).

Third. Suits under section 1979 of the Revised Statutes, by blacks denied employment by the State highway safety patrol on the basis of race, *Morrow v. Ortsler* (F. Supp. (S.D. Miss., Sept. 29, 1971)), and against a housing authority violating the 14th amendment equal protection clause by fixing rentals for

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<sup>136</sup> 122 CONG. REC. 35,126 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 263. There are numerous references to “the Justice Department,” “the Department of Justice,” and “the Administration” in the Source Book, both on the Senate side and the House side, as can be verified by searching for those terms in a searchable version of the Source Book, such as that available at <https://archive.org/details/attor00unit> [<https://perma.cc/5VTJ-83U8>]. Doing such a search will verify that statements such as “the Administration supports this legislation” is another way of documenting that the civil-rights-statutes-only interpretation of the Act is correct.

<sup>137</sup> *See id.*

<sup>138</sup> 122 CONG. REC. 35,126, reprinted in SOURCE BOOK, *supra* note 73, at 263–64. *See also supra* note 131 and accompanying text (statement of Sen. Kennedy). Like Senator Kennedy, Representative Kastenmeier did not mention the name of the mental patient case, so again we cannot know whether this was a garbled description of the mental patient case mentioned in the House Report. *See infra* text accompanying note 167.

<sup>139</sup> *See, e.g.*, 122 CONG. REC. 35,126 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 264–65.

welfare recipients at a higher rate than for nonwelfare recipients who had the same income. *Hammond v. Housing Authority and Urban Renewal Agency of Lane County, Oreg.* (328 F. Supp. 586 (D. Oreg. 1971)).

Fourth. Suits under section 1980 of the Revised Statutes—and sections 1977, 1979, and 1990—by inmates of a penitentiary alleging violation of the inmates’ rights under the 1st, 8th, 13th, and 14th amendments. *Gates v. Collier* (F. Supp. [(N.D. Miss., Feb. 14, 1973)).

Fifth. Suits under section 1981 of the Revised Statutes, which allows action against those having knowledge of a conspiracy to deprive persons of their civil rights and ability to prevent it, yet they do not, as in the case of police officers who witnessed one officer beat the plaintiff and did nothing to prevent it. *Symkowski v. Miller* (294 F. Supp. 1214 (D.C. Wis., 1969)).<sup>140</sup>

It is important to note that the reference to the First Amendment in Representative Fish’s statement is not a reference to the Establishment Clause. Rather it is a reference to rights implicated by the opening of inmate mail.<sup>141</sup>

Furthermore, the House Report listed all the laws that would be “covered or amended by” Public Law 94-559.<sup>142</sup> The list is repeated as Appendix A to the Source Book itself.<sup>143</sup> The listed statutes are, of course, those on the face of the Act, namely the Reconstruction Era statutes and the relevant provisions of Title IX.<sup>144</sup>

The real insight here can be gained from the “Scope of the Bill” section of the bill. There the report notes that the “affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas.”<sup>145</sup> It goes on to address each section individually.<sup>146</sup> In its description of § 1983, the report notes that § 1983 is utilized to challenge “official discrimination, such as racial segregation imposed by law,”<sup>147</sup> and cites *Brown v. Board of Education*.<sup>148</sup> The report also notes that § 1983 is used in non-racial situations, citing pertinent cases. The examples include poll taxes (which obviously affect minorities, but which is not per se racial, even though they can function as a proxy for race), unconstitutional searches, political affiliation discrimination, and unlawful terms and conditions of confinement.<sup>149</sup>

<sup>140</sup> 122 CONG. REC. 35,126, *reprinted in* SOURCE BOOK, *supra* note 73, at 265.

<sup>141</sup> *See* *Gates v. Collier*, 390 F. Supp. 482, 484 (N.D. Miss. 1975).

<sup>142</sup> SOURCE BOOK, *supra* note 73, at 222 (App. B to the House Report of Sept. 15, 1976).

<sup>143</sup> *Id.* at 281.

<sup>144</sup> *See id.* at 222, 281.

<sup>145</sup> H.R. REP. NO. 94-1558, at 4, *reprinted in* SOURCE BOOK, *supra* note 73, at 212.

<sup>146</sup> *Id.* at 4–5, *reprinted in* SOURCE BOOK, *supra* note 73, at 212–13.

<sup>147</sup> *Id.* at 4, *reprinted in* SOURCE BOOK, *supra* note 73, at 212.

<sup>148</sup> 347 U.S. 483 (1954).

<sup>149</sup> H.R. REP. NO. 94-1558, at 5, *reprinted in* SOURCE BOOK, *supra* note 73, at 213 (citing

Each of these § 1983 cases clearly falls under the civil rights rubric. The poll tax case, *Harper v. Virginia State Board of Elections*, was decided under the Fourteenth Amendment's Due Process Clause, the Court explicitly stating "[o]ur cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously *discriminate*."<sup>150</sup> The employment discrimination case, *Elrod v. Burns*, of course involves discrimination.<sup>151</sup> The unconstitutional search case, *Monroe v. Pape*,<sup>152</sup> requires a bit more explanation and foreshadows the discussion of Part II below. It also helps one understand the institutional confinement case, *O'Connor v. Donaldson*.<sup>153</sup> In *Monroe*, because the central question was the proper construction of § 1983 (in order to determine whether localities could be sued under § 1983), Justice Douglas, writing for a partially unanimous Court,<sup>154</sup> reviewed the history of its enactment, which demonstrates that the Court was clearly aware that the main evil targeted was the Ku Klux Klan.<sup>155</sup> Justice Douglas quoted statements made by various senators and representatives during debate on the Ku Klux Klan Act to demonstrate this, but also quoted other statements to show that the 42nd Congress, which debated the Act, clearly understood that the protections of the bill would extend to everyone, not just the freed slaves: "This section gives to *any person* who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts."<sup>156</sup> This point was made plain by the opponents of the bill, yet the majority in both Houses passed the bill with this knowledge.<sup>157</sup> The main point here is not that the protections extended beyond racial minorities (since the plaintiffs in *Monroe* were Black and were subjected to racial slurs during the search at issue).<sup>158</sup> The point is that the protections extended beyond discrimination. However, what was at issue was, in the words just quoted, "rights,

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*Harper v. Va. State Bd. 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'Connor v. Donaldson*, 422 U.S. 563 (1975) (institutional confinement).

<sup>150</sup> 383 U.S. at 666 (emphasis added).

<sup>151</sup> 427 U.S. 347.

<sup>152</sup> 365 U.S. 167. *Monroe* played an important role in the history of the interpretation of § 1983. In *Monroe*, the Supreme Court held that local governments are immune from suit under § 1983. See *id.* at 186. This aspect of *Monroe* was overturned in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978). It goes without saying that, had this aspect of *Monroe* not been overturned, localities would be able to be blackmailed under § 1983.

<sup>153</sup> 422 U.S. 563 (1975).

<sup>154</sup> See *Monroe*, 365 U.S. at 202 (Frankfurter, J., dissenting) (agreeing with the Court that the locality, the City of Chicago, was not liable under § 1983).

<sup>155</sup> See *id.* at 172–83 (majority opinion).

<sup>156</sup> *Id.* at 178 (quoting Rep. Kerr of Indiana in CONG. GLOBE, 42d Cong., 1st Sess. app. 50 (emphasis added)).

<sup>157</sup> *Id.* ("It was precisely that breadth of the remedy which the opposition emphasized.").

<sup>158</sup> *Id.* at 203 (Frankfurter, J., dissenting).

privileges, or immunities of *person or property*.”<sup>159</sup> The facts of *Monroe* are a sad modern-day counterpart to the violence § 1983 was originally aimed to cure. In his dissenting opinion, Justice Frankfurter summarized the facts alleged in the complaint:

The complaint alleges that on October 29, 1958, at 5:45 a. m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him “nigger” and “black boy”; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on “open” charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate’s courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him. It is also alleged that the actions of the officers throughout were without authority of a search warrant or an arrest warrant; that those actions constituted arbitrary and unreasonable conduct; that the officers were employees of the City of Chicago, which furnished each of them with a badge and an identification card designating him as a member of the Police Department; that the officers were agents of the city, acting in the course of their employment and engaged in the performance of their duties; and that it is the custom of the Department to arrest and confine individuals for prolonged periods on “open” charges for interrogation, with the purpose of inducing incriminating statements, exhibiting its prisoners for identification, holding them incommunicado while police officers investigate their activities, and punishing them by imprisonment without judicial trial.<sup>160</sup>

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<sup>159</sup> *Id.* at 178 (majority opinion) (quoting Rep. Kerr of Indiana in CONG. GLOBE, 42d Cong., 1st Sess. app. 50 (emphasis added)).

<sup>160</sup> *Id.* at 203–04 (Frankfurter, J., dissenting).

The violence and deprivation of rights alleged in *Monroe* corresponds all too well with the violence and deprivation of rights that prompted the enactment of the Ku Klux Klan Act.<sup>161</sup>

The *Monroe* Court noted that the Fourth Amendment's guarantee against unreasonable searches and seizures has been incorporated against the states by the Fourteenth Amendment.<sup>162</sup> As will be discussed below in Part II, the Framers of the Fourteenth Amendment did indeed intend to incorporate the Fourth Amendment and many other protections against the states but did not intend to incorporate the Establishment Clause.<sup>163</sup> For the purposes of this Section, it is sufficient to note that the rights, privileges, and immunities implicated by *Monroe* have a direct connection with the animating concerns behind the Ku Klux Klan Act, whereas Establishment Clause claims do not.<sup>164</sup> Having noted this, one can see that the institutional confinement case, *O'Connor v. Donaldson*, also falls within the proper coverage of § 1983—the plaintiff's very freedom was at issue since he had been confined against his will for fifteen years.<sup>165</sup> Although O'Connor was not forced to engage in labor against his will, this may be the case that Senator Kennedy had in mind when he gave his list of cases and mentioned mental patients being forced into unpaid labor against their will.<sup>166</sup> If Senator Kennedy had another case in mind, such a case would just as clearly fall within § 1983's coverage.

The House debate, like the House Report, also highlighted the fact that references to constitutional rights were references to only those constitutional rights that are related to civil rights, not references to any and every constitutional right.<sup>167</sup> For example, Representative Seiberling (D-OH) 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 rely both 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

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<sup>161</sup> See *infra* notes 243–50 and accompanying text.

<sup>162</sup> *Monroe*, 365 U.S. at 171.

<sup>163</sup> See *infra* Part II.

<sup>164</sup> See, e.g., *Monroe*, 365 U.S. at 171–72.

<sup>165</sup> 422 U.S. 563, 563 (1975).

<sup>166</sup> See *supra* note 129 and accompanying text.

<sup>167</sup> See CONG. REC. 36,128 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 269–70.



should facilitate that private enforcement and should—within reasonable limits—encourage potential civil rights plaintiffs to bring meritorious cases.<sup>168</sup>

One comment by Representative Drinan (D-MA) should be noted, even though it does not add any new insights, since it will be important when we examine the Supreme Court’s *Thiboutot* analysis in the next Section.<sup>169</sup> Representative Drinan specifically named two cases that had been brought under § 1983: *Brown v. Board of Education*<sup>170</sup> and *Blue v. Craig*.<sup>171</sup> As we shall see, the Court would find Drinan’s mention of the latter case to be significant.<sup>172</sup>

A final point may be offered in support of the civil rights emphasis of § 1988. Representative Drinan noted—as had the Report of the House Judiciary Committee<sup>173</sup>—that “civil rights attorneys and organizations have lost thousands of dollars in fees since the *Alyeska* decision.”<sup>174</sup> This point is not a new one. The same point was made by numerous senators, although usually by implication.<sup>175</sup> However, Representative Drinan was simply more forthright in explicitly saying so. In reality, it was the civil rights litigating community that was the real driving force behind the enactment of this legislation.<sup>176</sup> Perhaps Representative Drinan was more forthcoming because the “deal” with the civil rights community was cut on the Senate side, not the House side.<sup>177</sup> As one of the House Judiciary Committee witnesses has written:

Two fateful meetings took place in the winter of 1975–76 that set the stage for the Civil Rights Attorney’s Fee Awards Act of 1976. The first was a meeting of civil rights lawyers and activists with Clarence Mitchell, the legendary lobbyist of the NAACP. The subject was the legislative agenda for 1976, and the consensus was that what we needed was an attorney’s fee law to help enforce the substantive civil rights provisions that were already on the books.

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<sup>168</sup> *Id.*

<sup>169</sup> See *Maine v. Thiboutot*, 448 U.S. 1, 10 (1980) (quoting Rep. Drinan, 122 Cong. Rec. 35,122 (1976)).

<sup>170</sup> 347 U.S. 483 (1954).

<sup>171</sup> 505 F.2d 830 (4th Cir. 1974).

<sup>172</sup> See *Thiboutot*, 448 U.S. at 10.

<sup>173</sup> H.R. Rep. No. 94-1558 at 2–3 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 210–11.

<sup>174</sup> 122 CONG. REC. 35,123 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 256.

<sup>175</sup> See *supra* text accompanying notes 80–93.

<sup>176</sup> See *id.*; *infra* notes 178–80 and accompanying text.

<sup>177</sup> See, e.g., Armand Derfner, *Background and Origin of the Civil Rights Attorney’s Fee Award Act of 1976*, 37 URB. LAW. 653, 653 (2005).

The second meeting took place, not long after that, between Mitchell and Senator Robert Byrd of West Virginia, the then-Senate Majority Whip. Senate Majority Leader Mike Mansfield of Montana was about to retire, and Byrd wanted to move up. He wanted Mitchell's support, and Mitchell, in turn, said the civil rights community wanted an attorney's fee bill. Byrd committed to trying. The stage was set.<sup>178</sup>

The Report of the House Judiciary Committee acknowledges the involvement of the civil rights bar, although not the backroom machinations just mentioned:

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.<sup>179</sup>

This is just one final piece of evidence that the enactment of § 1988 was driven by a civil rights agenda and that Establishment Clause cases were not under consideration.

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<sup>178</sup> *Id.*

<sup>179</sup> H.R. REP. NO. 94-1558, at 2-3 (1976), *reprinted in* SOURCE BOOK, *supra* note 73, at 210-11 (citations omitted). The same discussion took place in the Senate.

Although not addressing Establishment Clause cases—since, as argued, Establishment Clause claims under § 1983 were not anticipated—Representative Richard White (D-TX), echoing the slippery slope arguments voiced in the Senate,<sup>180</sup> actually used the word “blackmail”: “We know that many actions today are brought in the nature of harassment or blackmail, but are difficult to be proved.”<sup>181</sup>

Although the record is clear on both the Senate and House sides, as noted at the beginning of Part I, the majority of the Supreme Court in *Thiboutot* did not think § 1988 should be limited in this fashion.<sup>182</sup> We turn now to that matter.

*C. The Supreme Court’s Opinion in Thiboutot Does Not Demonstrate that the Civil Rights Attorney’s Fees Awards Act of 1976 Should Apply Outside of the Civil Rights Context*

As noted at the beginning of Part I, the Tenth Circuit in *Green v. Haskell County Board of Commissioners* asserted that the Supreme Court’s opinion in *Maine v. Thiboutot* foreclosed this Article’s argument that Establishment Clause cases ought not be brought under § 1983 and thus should not be eligible for attorney’s fees under § 1988.<sup>183</sup> However, that assertion is incorrect.

In *Thiboutot*, the state of Maine had denied the Thiboutots certain benefits under the Federal Aid to Families with Dependent Children program.<sup>184</sup> The Thiboutots sued, alleging the denial of benefits violated their rights under the Social Security Act.<sup>185</sup> The Thiboutots brought their suit under § 1983.<sup>186</sup> As part of its analysis of the coverage of § 1983, the *Thiboutot* Court examined what the enactment of § 1988 could tell it.<sup>187</sup> The Court started its analysis of the legislative history of § 1988 by asserting that:

[a]s was true with § 1983, a major purpose of the Civil Rights Attorney’s Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights. Principal sponsors of the measure in both the House and the Senate, however, explicitly stated during the floor debates that the statute would make fees available more broadly.<sup>188</sup>

In light of the legislative history surveyed above, this assertion is hard to understand.<sup>189</sup> It is also hard to understand in light of the Supreme Court’s decision just

<sup>180</sup> See *supra* notes 118–26 and accompanying text.

<sup>181</sup> 122 CONG. REC. 35,124 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 258.

<sup>182</sup> See *supra* Section I.A; see also *supra* Section I.B.

<sup>183</sup> *Green v. Haskell Cty. Bd. of Comm’rs*, 568 F.3d 784, 788 n.1 (10th Cir. 2009).

<sup>184</sup> *Maine v. Thiboutot*, 448 U.S. 1, 3 (1980).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 2.

<sup>187</sup> See *id.* at 9–10.

<sup>188</sup> *Id.* at 9.

<sup>189</sup> See *supra* Section I.A; see also *supra* Section I.B.

a year earlier in *Chapman v. Houston Welfare Rights Organization*.<sup>190</sup> In *Chapman*, the Court held that neither 28 U.S.C. § 1343(3) nor § 1343(4) gave federal courts jurisdiction over Social Security Act cases, reasoning that the Social Security Act does not deal with the concept of “equality” or with the guarantee of “civil rights” as those terms are commonly understood.<sup>191</sup>

The Congress that enacted § 1343(3) was primarily concerned with providing jurisdiction for cases dealing with racial equality; the Congress that enacted § 1343(4) was primarily concerned with providing jurisdiction for actions dealing with the civil rights enumerated in 42 U.S.C. § 1985, and most notably the right to vote. While the words of these statutes are not limited to the precise claims which motivated their passage, it is inappropriate to read the jurisdictional provisions to encompass new claims which fall well outside the common understanding of their terms.<sup>192</sup>

Nonetheless, the *Thiboutot* majority was not bound by this jurisdictional barrier since the case was filed in state court.<sup>193</sup> Thus, it was free to evaluate whether the substantive provisions of § 1983—unlike its jurisdictional counterpart—covered non-civil rights laws.<sup>194</sup> Rather amazingly, the *Thiboutot* Court held exactly that; the federal courts have no jurisdiction over the Social Security Act under the Reconstruction-era jurisdiction statutes cases because such cases are not civil rights cases, but if federal court can otherwise obtain jurisdiction, the Social Security Act claims could be adjudicated because the Reconstruction-era civil right statute, § 1983, contained the unmodified, i.e., non-limited, phrase “and laws.”<sup>195</sup>

Writing just two years after *Thiboutot*, preeminent constitutional law and Supreme Court scholar, A.E. Dick Howard, wrote that “[a]fter *Chapman*, the Supreme Court’s decision in *Maine v. Thiboutot* one year later is nothing short of remarkable.”<sup>196</sup> As Howard explained:

Although *Thiboutot* gives new breadth to section 1983, it does not expand the jurisdiction of the federal courts. In its 1979 *Chapman* decision, the Court held that the jurisdiction of the

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<sup>190</sup> 441 U.S. 600 (1979).

<sup>191</sup> *Id.* at 601–02.

<sup>192</sup> *Id.* at 621.

<sup>193</sup> *Thiboutot*, 448 U.S. at 3–4.

<sup>194</sup> *Id.* at 4.

<sup>195</sup> *Id.*

<sup>196</sup> A.E. Dick Howard, *The States and the Supreme Court*, 31 CATH. U. L. REV. 375, 414 (1982).

federal district courts under 28 U.S.C. §§ 1343(a)(3) and (4) does not encompass a claim that a state welfare regulation is invalid because it conflicts with the Social Security Act. *Thiboutot* permits such a claim to be brought under section 1983, but it does not disturb the holding in *Chapman*. The result, of course, is an anomaly: that the remedial section (1983) is read more broadly than the jurisdictional sections.<sup>197</sup>

Furthermore, the *Thiboutot* majority concluded that § 1983's phrase "and laws" meant all laws, rather than only civil rights laws, over the minority's historically sounder analysis, which relied both on primary sources and on *Chapman* itself.<sup>198</sup> As the minority emphasized, "We have recognized consistently that statutes are to be interpreted not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed."<sup>199</sup>

Be all of that as it may, the point for this portion of the Article is the majority's assertion, just quoted above, that:

[A] major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights. Principal sponsors of the measure in both the House and the Senate, however, explicitly stated during the floor debates that the statute would make fees available more broadly.<sup>200</sup>

Of course, should Congress decide to address the issue of attorney's fees again, it can simply amend § 1988 to exclude Establishment Clause cases. And, should the Supreme Court seek to revisit the issue, it can simply overturn the relevant portion of *Thiboutot* on the understanding that the *Thiboutot* minority got the § 1988's legislative history right and the majority got it wrong. However, even lower federal courts could answer the question left unanswered by the Ninth Circuit in *Cammack v. Waihee*, when it questioned whether § 1983 is a proper vehicle for bringing Establishment Clause cases.<sup>201</sup> We will first address the *Thiboutot* majority's erroneous assertion, and then return to how the lower federal courts might proceed.<sup>202</sup>

The majority turned first to Representative Drinan's statement that § 1983 "authorizes suits against State and local officials based upon Federal statutory as well as

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<sup>197</sup> *Id.* at 417.

<sup>198</sup> *Thiboutot*, 448 U.S. at 11–34 (Powell, J., dissenting).

<sup>199</sup> *Id.* at 13–14 (Powell, J., dissenting).

<sup>200</sup> *Id.* at 9 (majority opinion).

<sup>201</sup> 932 F.2d 765, 767 n.3 (9th Cir. 1991).

<sup>202</sup> *See Thiboutot*, 448 U.S. at 1–10.

constitutional rights. For example, *Blue* against Craig, 505 F.2d 830 (4th Cir. 1974).<sup>203</sup> Because the claim in *Blue* arose under the Social Security Act,<sup>204</sup> the *Thiboutot* Court used Drinan's citation of *Blue* as authority for the proposition that all statutory rights are covered by § 1983.<sup>205</sup> However, Representative Drinan cited *Blue* for the simple proposition that § 1983 allows for suits based upon statutory rights as well as those based upon constitutional rights.

Assuming for the sake of argument that Drinan knew 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 Clause 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.<sup>206</sup> Furthermore, federal statutory benefits constitute a property interest, and the protection of property is a civil rights issue, as recognized by the inclusion of 42 U.S.C. § 1982<sup>207</sup> in the list of statutes the violation of which would warrant an attorney fee award. In fact, when the Civil Rights Attorney's Fees Act was being debated, the Supreme Court case *Mathews v. Eldridge* had just been decided. In *Mathews*, the Court explained:

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment.<sup>208</sup>

These characterizations of *Blue* bring it squarely under the civil rights rubric.

The *Thiboutot* majority also addressed Senator Kennedy's list of cases.<sup>209</sup> As mentioned earlier, the Court pointed out Kennedy's mention of a Social Security case and a case in which a highway was constructed through a Black neighborhood.<sup>210</sup> We have just examined the Social Security case, *Blue v. Craig*.

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<sup>203</sup> *Id.* at 10 (quoting Rep. Drinan, 122 CONG. REC. 35,122 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 253).

<sup>204</sup> *Id.* at 10 n.8.

<sup>205</sup> *Id.* at 9.

<sup>206</sup> *Blue v. Craig*, 505 F.2d 830, 844–45 (4th Cir. 1974).

<sup>207</sup> "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." 42 U.S.C. § 1982.

<sup>208</sup> 424 U.S. 319, 332 (1976) (citations omitted).

<sup>209</sup> *Thiboutot*, 448 U.S. at 10.

<sup>210</sup> *See id.* at 10 n.9.



As for the highway construction case, the majority postured it as one involving the Department of Transportation Act of 1966 and related statutes.<sup>211</sup> However, as we have seen above, Senator Kennedy saw this case as another type of racial discrimination—a Black neighborhood was targeted over a White neighborhood.<sup>212</sup> Thus, this case, too, is validly included under the civil rights rubric.

Based on this examination of the legislative history of the Act, we have seen that the *Thiboutot* minority was correct in its reading of the legislative intent. The minority correctly insisted that:

The only firm basis for decision is the historical evidence, which convincingly shows that the phrase [“and laws”] the Court now finds so clear was—and remains—nothing more than a shorthand reference to equal rights legislation enacted by Congress. To read “and laws” more broadly is to ignore the lessons of history, logic, and policy.<sup>213</sup>

As mentioned above,<sup>214</sup> should Congress ever again wish to deal with the blackmail effect of the current versions of §§ 1983 and 1988, it can simply amend the statutes as it once attempted to do and effectively render moot *Thiboutot*'s holding. Similarly, the Supreme Court could simply overturn *Thiboutot* on this point. However—to address the point hinted at above—the Court need not do so. Rather, the Court could acknowledge that deciding that § 1983 covers all laws (which after all, by definition, implicate rights, privileges and immunities) is analytically distinct from deciding that the *Establishment Clause* does not encompass *any* rights, privileges or immunities at all. This latter view is also important for the lower federal courts. Perhaps the Ninth Circuit was thinking of this very point in *Cammack v. Waihee*, when it questioned whether § 1983 is a proper vehicle for bringing Establishment Clause cases.<sup>215</sup> After all, the Ninth Circuit was well aware of *Thiboutot* when it questioned § 1983 jurisdiction for bringing Establishment Clause claims (having, according to a Westlaw search, cited or quoted it twenty-seven times prior to issuing its *Cammack* opinion),<sup>216</sup> yet it did not think that *Thiboutot* foreclosed the question.<sup>217</sup>

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<sup>211</sup> *Id.*

<sup>212</sup> See *supra* notes 129–31 and accompanying text.

<sup>213</sup> *Thiboutot*, 448 U.S. at 12 (Powell, J., dissenting).

<sup>214</sup> See *supra* Introduction.

<sup>215</sup> See 932 F.2d 765, 767 n.3 (9th Cir. 1991).

<sup>216</sup> Keycite Search, WESTLAW, <https://westlaw.com> (from the *Maine v. Thiboutot* opinion, hover over “Citing References” and select “Cases” from the dropdown menu; in the sidebar under “Search within results,” click “Jurisdiction”; click the “+” next to “Federal,” the “+” next to “Courts of Appeals,” and click the checkbox next to “Ninth Circuit Ct. App.”; click on “Date,” select “All dates before,” and type in “04/30/1991”; click “Apply”; this search yields the 27 citing references) (last visited Oct. 22, 2020).

<sup>217</sup> See generally *Cammack*, 932 F.2d 765.

The validity of this distinction becomes clear when one examines the legislative history of the Ku Klux Klan Act and the legislative history of, and scholarship about, the Fourteenth Amendment itself.<sup>218</sup> We will examine these matters in the next two Parts.

## II. THE KU KLUX KLAN ACT OF 1871 (42 U.S.C. § 1983) WAS DESIGNED TO PROTECT “RIGHTS, PRIVILEGES, AND IMMUNITIES” ONLY

We turn first to the original enactment of § 1983. It is one of the surviving provisions of the Ku Klux Klan Act of 1871.<sup>219</sup> Section 1983 started out as section 1 of that Act. As numerous courts and commentators have documented, section 1 was one of the least debated provisions.<sup>220</sup> As the Supreme Court explained in *Chapman*:

Section 1 of the Act generated the least concern; it merely added civil remedies to the criminal penalties imposed by the 1866 Civil Rights Act. The focus of the heated debate was on the succeeding sections of the Act, which included provisions imposing criminal and civil penalties for conspiracies to deprive individuals of constitutional rights, and authorizing the President to suspend the writ of habeas corpus and use armed forces to suppress “insurrection.”<sup>221</sup>

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.<sup>222</sup>

The bill that became the Ku Klux Klan Act was entitled “a bill to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes.”<sup>223</sup> Immediately after Representative Shellabarger (R-OH) reported the bill on behalf of the Select Committee,<sup>224</sup> and rules and times for debate were hashed out,<sup>225</sup> Representative Stoughton (R-MI) spoke to set the stage.<sup>226</sup> He started with the activity of the Ku Klux Klan in North Carolina.<sup>227</sup>

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<sup>218</sup> See *infra* Part III.

<sup>219</sup> Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

<sup>220</sup> E.g., *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 610 n.25 (1979); *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).

<sup>221</sup> *Chapman*, 441 U.S. at 610 n.25 (citations omitted).

<sup>222</sup> CONG. GLOBE, 42d Cong., 1st Sess. 317–22 (1871).

<sup>223</sup> *Id.* at 317.

<sup>224</sup> *Id.* at 317–19.

<sup>225</sup> *Id.* at 319.

<sup>226</sup> *Id.* at 319–22.

<sup>227</sup> *Id.* at 320.

He noted “murders, whippings, intimidation, and violence.”<sup>228</sup> For example, Representative Shellabarger summarized the testimony of a witness who had been a Confederate soldier and who had appeared before the Committee.<sup>229</sup> That witness had testified that the punishment for revealing Klan secrets was death, that a Black man had been hung in his county by a band of between eighty and one hundred Klansmen, that men were killed for being too prominent in politics, that a Black man was murdered in a pond, and that between 100 and 150 whippings of Black and White people had occurred in his county in the past two years, with some victims being whipped two or three times.<sup>230</sup>

He also read testimony from Thomas Settle, a state supreme court justice, regarding the Klan’s ability to protect its members from conviction for their crimes:

[I]t is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages. The defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury, or, if you do, the petit jury acquits the parties. In my official capacity I sit with Judge Pearson and Judge Dick. Judge Pearson issued a bench warrant last summer for some parties, and had them brought before him at Raleigh. He requested Judge Dick and myself to meet him. We did so, and the trial extended over three weeks, and there it came to our knowledge that it was the duty and obligation of members of this secret organization to put themselves in the way to be summoned as jurors, to acquit the accused, or to have themselves summoned as witnesses to prove an *alibi*. This they swore to; and such is the general impression. Of course, it must be so, for there has not been a single instance of conviction in the State.<sup>231</sup>

Representative Stoughton read the testimony of a Black man, who along with his family was repeatedly shot in his own home for voting the wrong way.<sup>232</sup>

Having illustrated the ravages of the Klan with these witnesses from North Carolina, Representative Stoughton made sure that his colleagues understood that the situation in North Carolina was *merely* an exemplar:

The report, Mr. Speaker, to which I have referred shows over one hundred and fifty authenticated cases where persons have

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 321.

either been murdered, brutally beaten, or driven away at the peril of their lives. And the same deplorable state of things exists in South Carolina, Georgia, Mississippi, Louisiana, Kentucky, Tennessee, and Texas. Jails have been broken open, the officers of the law killed while attempting to discharge their sworn duty, and the criminals turned loose upon the community. Revenue officers and mail agents of the United States have in some instances been murdered, and in others driven away from their posts. But a few days ago, over a hundred Alabama Ku Klux made a raid upon Meridian, Mississippi, and carried off their victims for execution. A meeting of the citizens was called to protest against these outrages. The Ku Klux became alarmed. At their instigation warrants were issued for the arrest of peaceable and well-disposed negroes upon the charge of “using seditious language.” When the court convened they again assembled in force, and commenced the work of death. Judge Bramlette, the presiding magistrate, was shot and the scene closed by driving the Republican mayor out of the city.<sup>233</sup>

Near the end of his remarks, Representative Stoughton 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 section five [of the Fourteenth Amendment], which declares that “Congress shall have power to enforce by appropriate legislation the provisions of this article.”<sup>234</sup>

If we look at Representative Stoughton’s last remark in juxtaposition to those of the next speaker, Representative George Morgan (D-OH), we see the tenor of the entire debate.<sup>235</sup> Representative Morgan disagreed strenuously with Representative Stoughton that the Fourteenth Amendment provided a valid constitutional basis for the many sections of the bill.<sup>236</sup> In particular, he objected to the third and fourth

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 322.

<sup>235</sup> *Id.* at 329–30.

<sup>236</sup> *Id.* at 331.

sections, which authorized the use of military force by the President to deal with the Klan.<sup>237</sup> Representative Morgan asked mockingly “whether Congress is a coordinate branch of the Government; whether the Legislature is an independent branch of this Government, or whether we are living under the dominion of a monarch who issues his edict which we have to obey?”<sup>238</sup> While other speakers discussed various other sections,<sup>239</sup> the points raised were the same: the outrages of the Klan and the constitutionality *vel non* of the Act. Again, for current purposes, we are interested in the light the legislative history sheds on the term “rights, privileges, and immunities,” which is examined next.

Examining what numerous representatives and senators understood the phrase to encompass, we find that they were not completely unified in what they thought it meant.<sup>240</sup> But for our purposes, it is important that there is no evidence that *anyone* thought it included the prohibition on the establishment of religion.<sup>241</sup>

We look first at a statement by Representative Benjamin Butler (R-MA), addressing an earlier unsuccessful 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 . . . .<sup>242</sup>

Representative Butler favored the Ku Klux Klan bill, as it would accomplish the same goals, which he supported.<sup>243</sup> In Representative Butler’s approach, we see an equating of “rights, privileges, and immunities” with life, liberty, and property, or in other words, with the idea of inalienable rights articulated in the Declaration of

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<sup>237</sup> *Id.* at 331–32.

<sup>238</sup> *Id.* at 331.

<sup>239</sup> For example, over the next few days of debate, the following representatives spoke in opposition to the bill while commenting on specific sections: Whitthorne (D-TN), sections one through five, *id.* at 337–38; Beck, sections three and four, *id.* at 351–52; Blair (LR-MO), sections two through four, CONG. GLOBE, 42d Cong., 1st Sess. app. 71–74 (1871); and Swann (D-MD), sections one through three, CONG. GLOBE, 42d Cong., 1st Sess. 361 (1871). In response, Representatives Kelley (R-PA), *id.* at 338–41, and Bingham, CONG. GLOBE, 42d Cong., 1st Sess. app. 81–86 (1871), spoke generally in support of the bill.

<sup>240</sup> See *infra* notes 249, 243–70 and accompanying text.

<sup>241</sup> See *infra* Part III.

<sup>242</sup> CONG. GLOBE, 42d Cong., 1st Sess. 449 (1871).

<sup>243</sup> *Id.*

Independence.<sup>244</sup> Of course, for reasons stated above and below, this says nothing about the Establishment Clause, and—more than merely saying nothing—most logically indicates that freedom from establishment is not in sight.<sup>245</sup>

Other articulations followed. We begin with the important statement of Representative John Coburn (R-IN):

Affirmative action [not as the term is used today, but in the sense made obvious in the following context] 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 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

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<sup>244</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

<sup>245</sup> See *supra* notes 1–5 and accompanying text; *infra* Part III.



plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution.<sup>246</sup>

This quotation 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.<sup>247</sup> Furthermore, this quotation demonstrates a close connection between the concepts of equal protection and of rights, privileges, and immunities in the minds of the drafters of the Ku Klux Klan Act.<sup>248</sup> Moreover, we also see some specific rights mentioned, i.e., “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.”<sup>249</sup>

Turning to the debates on the Senate side, a few helpful comments can be found there, too. For example, Senator George Edmunds (R-VT) passed quickly over section 1, showing that in this chamber, too, it was not overly controversial:

The first section 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.<sup>250</sup>

That is not to say it attracted no attention.<sup>251</sup>

It is also clear that the opponents of the bill understood what the phrase “rights, privileges, and immunities” meant to at least some of 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.”<sup>252</sup>

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<sup>246</sup> CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871).

<sup>247</sup> See *supra* notes 229–35 and accompanying text.

<sup>248</sup> See *infra* note 249 and accompanying text.

<sup>249</sup> CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871).

<sup>250</sup> *Id.* at 568.

<sup>251</sup> Despite Senator Edmunds’s statement, there was some debate over the meaning of “citizens of the United States” and “privileges and immunities.” See *infra* notes 253–61 and accompanying text.

<sup>252</sup> CONG. GLOBE, 42d Cong., 1st Sess. 573 (1871).

Also, during the debate, an exchange occurred between Senators Lyman Trumbull (LR-IL), Edmunds (R-VT), and Matthew Carpenter (R-WI) that provides significant insight into views on the meaning of “privileges and immunities”: Senator Trumbull, a leading figure in the Liberal Republican movement, stated his belief that the Privileges or Immunities Clause of the Fourteenth Amendment simply reiterated the Privileges and Immunities Clause of the pre-Civil-War-Amendments Constitution, i.e., that the privileges and immunities of the Fourteenth Amendment were the same as the privileges and immunities of Article IV.<sup>253</sup> He was challenged on that point by Senator Edmunds who understood the original clause to protect the citizens of each state qua citizens of individual states when they traveled to states not their own.<sup>254</sup> He understood the new clause, on the other hand, to extend “universal citizenship” to United States citizens qua citizens of the United States.<sup>255</sup> At that point Senator Matthew Carpenter jumped in and reiterated the position of Senator Edmunds.<sup>256</sup> After an excursus, to which we will return momentarily, Senator Trumbull admitted to Senator Carpenter that Senator Edmunds’s position was correct, but went on to articulate a position that would later be adopted by the Supreme Court in the *Slaughter-House Cases*.<sup>257</sup> This is of particular interest because most commentators have viewed the *Slaughter-House Cases* as gutting the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>258</sup> Although Senator Trumbull was the Chairman of the Senate Judiciary Committee when the Fourteenth Amendment was passed,<sup>259</sup> he was among a small group of Republicans who believed the Ku Klux Klan Act to be dangerous or unconstitutional or both.<sup>260</sup>

Thus, after acknowledging that the new clause does protect the privileges and immunities of United States citizens, Senator Trumbull 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.”<sup>261</sup> 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

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<sup>253</sup> *Id.* at 576–77.

<sup>254</sup> *Id.* at 576.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> 83 U.S. (16 Wall.) 36, 74–79 (1873). For the position as stated by Senator Trumbull see *infra* notes 261–64 and accompanying text.

<sup>258</sup> *E.g.*, CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 62 (1997); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1119 (1953); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-2, at 1302, § 7-3, at 1303 (3d ed. 2000).

<sup>259</sup> ANTIEAU, *supra* note 258, at 81.

<sup>260</sup> Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1682 (citing ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 456 (1988)).

<sup>261</sup> CONG. GLOBE, 42d Cong., 1st Sess. 576 (1871).

immunities of national citizenship were national in character.<sup>262</sup> 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.<sup>263</sup> However, for present purposes, merely note that the minority in the Ku Klux Klan Act debate certainly did not believe that the Establishment Clause represented a right, privilege, or immunity that would apply against the states.

The excursus mentioned above provides some insight if one is careful not to confuse Senator Trumbull's terminology with the terminology used by those quoted in our discussion of the Civil Rights Attorney's Fees Awards Act debate; the terms of art had changed by then.<sup>264</sup> Senator Carpenter had used an illustration involving voting rights.<sup>265</sup> Senator Trumbull replied that "[t]he words 'privileges and immunities' . . . have nothing to do with voting. They refer to civil rights. [Senator Carpenter's] illustration about the right to vote has no application. Women do not vote."<sup>266</sup> Senator Carpenter acknowledged the point, and Senator Trumbull further explained that the reason that the phrase "privileges and immunities" does not protect the right to vote is because voting is a political, not a civil, right.<sup>267</sup>

This distinction seems strange to the modern ear, and those who are not students of the era will find the following black letter summary helpful in dispelling any confusion over the two terms:

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.<sup>268</sup>

During the entire Reconstruction era, debate existed as to whether suffrage was a civil or a political right, although the majority opinion—as the above exchange demonstrates—was that it was a political right.<sup>269</sup> All of this gives an important insight

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<sup>262</sup> *Id.* at 577.

<sup>263</sup> *Id.*

<sup>264</sup> *See supra* Part I.

<sup>265</sup> CONG. GLOBE, 42d Cong., 1st Sess. 576 (1871).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> 15 AM. JUR. 2D *Civil Rights* § 2, Westlaw (database updated Feb. 2020) (citations omitted).

<sup>269</sup> This was also true of other issues, such as serving on juries. These and similar matters

into what “rights, privileges, or immunities” meant to the drafters of the Ku Klux Klan Act. The right to be free from establishment could certainly not be considered a civil right in light of the history of establishment in this country.<sup>270</sup> Thus, even on the majority side, the right to be free from establishment was not in view. However, since this is equally true of the Fourteenth Amendment itself, we will postpone the review of that point until we look at the debates over that amendment.<sup>271</sup>

For now, we will examine the few remarks from the Ku Klux Klan Act debate that bear most directly upon the Establishment Clause issue. In answering a question as to whether a provision dealing with 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 section could reach it.<sup>272</sup>

This is a direct mention of religion, but it has nothing to do with preventing an establishment of religion.

Finally, Senator Stockton, just prior to his comments quoted earlier, disparaged the arguments of his opponents:

[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 to any

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arose repeatedly during debates over the pre- and post-Fourteenth Amendment statutes, as well as over the Fourteenth Amendment itself. Two books provide especially good summaries of all such matters. First, ANTIEAU, *supra* note 258, organizes issues related to the Fourteenth Amendment topically, collecting data across enactments. For example, with regards to whether voting is a civil or a political right, *see id.* at 22–30, 52–54. (Unfortunately, a few citation errors appear in this work, *e.g.*, *id.* at 113 nn.2–3; nonetheless, it is an indispensable research tool). Second, HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908), provides helpful summaries of the debates over the various enactments in chronological order and useful information on civil versus political rights is scattered throughout.

<sup>270</sup> *See infra* text accompanying note 275.

<sup>271</sup> *See infra* Part III.

<sup>272</sup> CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871).

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 will of one man [the President] . . . .<sup>273</sup>

While Senator Stockton's remark mentions the First Amendment, there is no way to determine whether the Establishment Clause is even in view here—after all, the First Amendment *does* protect the rights of religious exercise, speech, the press, assembly, and redress of grievances, in addition to prohibiting the establishment of religion. To determine whether references to the First Amendment, such as Senator Stockton's, were intended to include the Establishment Clause, we will have to look at the Fourteenth Amendment itself and judicial interpretations of it.

First, however, we pause to summarize the competing views of the meaning of rights, privileges, and immunities that are revealed in the legislative history. As discussed above, these may be summarized as follows: that rights, privileges, and immunities were synonymous with the Declaration's inalienable rights; that rights, privileges, and immunities were civil rights, as opposed to political rights; that rights, privileges, and immunities were the rights, privileges, and immunities of national citizenship, co-extensive with those protected by the Privileges and Immunities Clause of Article IV, undefined though they may have been; and that rights, privileges, and immunities were those things protected by the Bill of Rights. Only the last of these even arguably implicates the Establishment Clause. However, the Establishment Clause is unique among the provisions of the First Amendment, as just noted above. Furthermore, since many states still had established churches at the time of the ratification of the Bill of Rights,<sup>274</sup> as will be discussed in the next Part, the reference to the First Amendment in Senator Stockton's comment cannot be construed to support the view that either he or his opponents believed that the Establishment Clause contained any rights, privileges, and immunities at that time. If this is not clear enough already, the discussion below of the Fourteenth Amendment's definition of the phrase will provide additional support for this assertion.

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<sup>273</sup> *Id.* at 572.

<sup>274</sup> See GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 20–68 (1987) (citing primary and secondary sources) for a discussion of differing opinions among scholars and jurists as to how many states had established churches at the time of the ratification of the Bill of Rights. For more recent counts, see *Town of Greece v. Galloway*, 572 U.S. 565, 605 (2014) (Thomas, J., concurring in part and concurring in the judgment); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1457–97.

III. THE FRAMERS AND RATIFIERS OF THE FOURTEENTH AMENDMENT  
DID NOT BELIEVE THAT THE ESTABLISHMENT CLAUSE CONTAINED  
ANY PRIVILEGES OR IMMUNITIES

In examining the Fourteenth Amendment, it is important to remember that its Framers intended it to constitutionalize the Civil Rights Act of 1866.<sup>275</sup> Therefore, as background to the debates on the Fourteenth Amendment, it is important to note that, as introduced, the Act's first section declared:

That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.<sup>276</sup>

However, the first clause, “[T]hat there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery,” was struck from the final version.<sup>277</sup> This is significant in that the broader phrase “no discrimination in civil rights or immunities” was removed, leaving only the specific enumeration.<sup>278</sup> Notably, freedom from establishment was not enumerated. While it may not be possible to say that the Fourteenth Amendment was designed to protect *only* these rights, privileges, and immunities, the list is instructive in that all the items enumerated deal with specific problems facing freed slaves. Again, freedom from establishment simply does not fall into that category.

Moving on to the debates over the Fourteenth Amendment itself, we note that all of the views represented during the debate over the Ku Klux Klan Act were also expressed during the debates over the Fourteenth Amendment. So for example, the

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<sup>275</sup> See *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 721–22 (1989) (quoting debate statements and United States Supreme Court opinions); *Saenz v. Roe*, 526 U.S. 489, 526–27 (1999) (Thomas, J., dissenting).

<sup>276</sup> CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

<sup>277</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

<sup>278</sup> *Id.*



view that the Privileges or Immunities Clause meant the same thing in the Fourteenth Amendment as it did in Article IV was espoused by Representative Bingham (R-OH).<sup>279</sup> This view was very closely linked to some of the others, like the view expressed by Justice Washington in *Corfield v. Coryell* in construing the privileges and immunities of Article IV, 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.”<sup>280</sup> This is significant for two reasons. First, Justice Washington was interpreting the Privileges and Immunities Clause of Article IV, and Representative Bingham, a known admirer of Justice Washington and a drafter of the First Section of the Fourteenth Amendment,<sup>281</sup> articulated the meaning of that section’s Privilege and Immunities Clause in such a similar manner. It is also significant because Representative Bingham’s view clearly subsumes the Declaration of Independence approach. Thus, it becomes clear that, although various views can be distinguished, many of them are overlapping and interrelated.

Similarly—and we saw the same thing in the last quotation from the Ku Klux Klan Act debates—many senators and congressmen made 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 the Bill of Rights. Again, the views of Representative Bingham of Ohio are particularly important, since he was a drafter of the first section and also a manager of the Amendment.<sup>282</sup> In presenting the views of the House Judiciary Committee and speaking after the fact, Representative Bingham 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.”<sup>283</sup> However, numerous others echoed this sentiment, including Senators Jacob Howard (R-MI) and Allen Thurman (D-OH), and Representative Thad Stevens (R-PA).<sup>284</sup> Just as Representative Bingham’s language is particularly important due to his role as a drafter and manager of the Amendment, so is Senator Howard’s language in light of his role as the main manager on the Senate side. According to him, privileges and immunities included fundamental rights and “the personal rights guaranteed and secured by the first eight amendments” to the Constitution.<sup>285</sup>

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 Klan Act ignored the Establishment

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<sup>279</sup> ANTIEAU, *supra* note 258, at 53, 56.

<sup>280</sup> 6 F. Cas. 546, 551–52 (E.D. Pa. 1823).

<sup>281</sup> ANTIEAU, *supra* note 258, at 56.

<sup>282</sup> *See id.* at 85.

<sup>283</sup> *Id.* at 85–86 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. at 83–85 (1871)).

<sup>284</sup> *Id.* at 86–87.

<sup>285</sup> *Id.* at 86.

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 twofold: 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. The answer also recognizes that any so-called right to be free from establishment was *not*. The evidence of this follows.

Following the lead of Chester J. Antieau, one of the great § 1983 experts,<sup>286</sup> we will include insights from the debates over the passage of the Civil Rights Bill of 1866 in this evidence, since the Fourteenth Amendment was designed to constitutionalize this Bill.<sup>287</sup> Antieau has collected writings and statements from various congressmen during the debates over the Civil Rights Bill of 1866 and the Fourteenth Amendment, 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 (R-OH)’s statement during the Civil Rights Act debates that “the Southern States regularly denied to Black Americans their religious liberty” and that therefore “it was the duty and responsibility of the federal government to see that freedom of religion was guaranteed everywhere in the nation.”<sup>288</sup> Antieau also cited Senator Lyman’s description of the Act during those debates as being designed “to protect the rights of African Americans to worship publicly, with an embraced right to preach their religion everywhere.”<sup>289</sup> Additionally, Antieau collected contemporaneous and later opinions from four other representatives and senators, including from those who both favored and opposed the bill, and additional statements from Representative Bingham.<sup>290</sup> All explicitly state or demonstrate that freedom of religious exercise was considered to be among the privileges and immunities to be protected by the Act.

By contrast, Antieau found no evidence of any senator or representative mentioning freedom from establishment.<sup>291</sup> Antieau surveyed the exhaustive lists of the rights intended to be included under the Privileges or Immunities Clause compiled by three important commentators, Senator Howard, Representative Dawes (R-MA), and Fourteenth Amendment scholar Horace Flack. None of these lists mentions the Establishment Clause.<sup>292</sup>

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<sup>286</sup> His book, *FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE* (1971), was one of the earliest treatises addressing the history of § 1983. This work is now continued by Rodney A. Smolla in a two-volume treatise entitled *FEDERAL CIVIL RIGHTS ACTS* (3d ed. 1994).

<sup>287</sup> See ANTIEAU, *supra* note 258, at 57.

<sup>288</sup> *Id.* at 91.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 91–93.

<sup>291</sup> See *id.* at 109.

<sup>292</sup> See *id.*

Additionally, Antieau examined 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.<sup>293</sup> 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.<sup>294</sup> In seven of the twenty-seven ratifying states, the constitutions did not prohibit establishment.<sup>295</sup> As Antieau concludes, these states did not consider a ban on establishing religion to be fundamental.<sup>296</sup> This hardly comports with freedom from such establishment constituting a privilege or immunity. Another twelve states banned only preferential treatment of any one sect over others.<sup>297</sup>

One of Antieau's most interesting points is derived from a New Hampshire case that should not have been decided the way it was if the New Hampshire Supreme Court believed the newly ratified Fourteenth Amendment prohibited the states from establishing religion:

Under the New Hampshire Constitution applicable in 1868, only a Protestant could qualify as governor of the State, only a Protestant could become a state senator, only a Protestant could serve as a state representative, only a Protestant was eligible to become a councillor. Furthermore, the New Hampshire towns were authorized by the State constitution to pay the salaries of Protestant ministers. In that year, the case of *Hale v. Everett*, involving an establishment issue, came to the New Hampshire Supreme Court. The majority members of a Unitarian (recognized by all members of the Court as a Protestant denomination) meeting sought to enjoin use of the meeting house by the pastor and some of his adherents, who had admittedly deviated from orthodox Unitarian beliefs. The majority of the New Hampshire Court readily agreed to such judicial relief, giving no suggestion that providing such aid to a Protestant "state church" might conceivably violate the Fourteenth Amendment to the United States Constitution. Chief Justice Doe, a great jurist of the time, dissented, asserting that courts have no business applying what he called "a Protestant test," and adding that his brethren of the

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<sup>293</sup> See *id.* at 108–12; see also *id.* at 282–84 (discussing the Establishment Clause under the Equal Protection Clause).

<sup>294</sup> *Id.* at 110.

<sup>295</sup> *Id.*

<sup>296</sup> See *id.*

<sup>297</sup> *Id.* at 111.

majority, in giving governmental judicial assistance to the plaintiffs in the case, were “establishing a state religion.”<sup>298</sup>

While some might say that Antieau was too loose in connecting the dots here, it is also true that the newly enacted Fourteenth Amendment could not have escaped the attention of a state’s high court. And Antieau is surely correct that had the New Hampshire Supreme Court considered the Establishment Clause to be among the privileges and immunities now applicable against the states, it could not have reached or treated the question as it did.

But importantly, Antieau’s evidence also indicates that the view of privileges and immunities as encompassing those rights “which belong, of right to the citizens of all free governments,”<sup>299</sup> cannot embrace the Establishment Clause. Just as some states still had vestiges of state establishment, so also many others had explicit establishment earlier in their histories.<sup>300</sup> Surely neither Justice Washington, who coined the *Corfield* articulation, nor the framers of the Fourteenth Amendment such as Representative Bingham, who relied upon Washington’s articulation, would have considered these states to be unfree governments.

Because no view of the Privileges or Immunities Clause that was advocated in the Fourteenth Amendment debates saw the Establishment Clause as creating such privileges or immunities, we need not decide which of the views of the Privileges or Immunities Clause expressed in the *Slaughter-House Cases* is correct. None of them is in tension with the thesis of this Article.

In those 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.<sup>301</sup> Justice Field adopted the fundamental rights approach,<sup>302</sup> as did Justice Bradley.<sup>303</sup> These two Justices disagreed only as to the degree of abridgment to which these rights were subject.<sup>304</sup> Finally, Justice Swayne emphasized that the protections applied to all persons, not just Black people.<sup>305</sup>

To repeat, all of these views were expressed during the debates, and none of them are incompatible with this Article. Although the framers of the Fourteenth

<sup>298</sup> *Id.* at 109–10 (footnotes omitted).

<sup>299</sup> *See Corfield v. Coryell*, 6 F. Cas. 546, 551 (E.D. Pa. 1823).

<sup>300</sup> *See* ANTIEAU, *supra* note 258, at 108–11. I acknowledge—again—the tension between the various “counts” by jurists and scholars regarding which states had established religions at various points in history. However, even should readers disagree with Antieau’s count here, or with the significance of not prohibiting establishment, the larger point stands.

<sup>301</sup> *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–79; *see also* CONG. GLOBE, 42d Cong., 1st Sess. 576 (1871) (statements of Trumbull).

<sup>302</sup> *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).

<sup>303</sup> *See id.* at 114–19, 121–22 (Bradley, J., dissenting).

<sup>304</sup> *Compare id.* at 97–111 (Field, J., dissenting), *with id.* at 114–19, 121–22 (Bradley, J., dissenting).

<sup>305</sup> *See id.* at 129 (Swayne, J., dissenting); *see also id.* at 123 (Bradley, J., dissenting).

Amendment—like the justices of the *Slaughter-House* Court—were not unified in their understanding of what comprised privileges and immunities, the framers were uniform in believing that freedom from establishment was not a privilege or immunity.

#### IV. OF DOUBLE AND TRIPLE INCORPORATION

One could argue that since the United States Supreme Court has incorporated the Establishment Clause against the states, this Article has been much ado about nothing. However, such an argument would miss the point. The point of this Article has not been that the *First Amendment* has not been or should not be incorporated against the states. Further, for present purposes, the incorporation of the *Establishment Clause* became a *fait accompli* in *Everson v. Board of Education*<sup>306</sup> if not *Cantwell v. Connecticut*.<sup>307</sup> Certainly, there have been those who have argued against the current due process incorporation doctrine.<sup>308</sup> And as noted previously,<sup>309</sup> Justice Thomas has argued against the incorporation of the Establishment Clause specifically. Indeed to return to our high-water mark point of departure, Justice Thomas argued that the Establishment Clause “does not purport to protect individual rights.”<sup>310</sup> However, given the history recounted in this Article, a case can be made that Congress intended to incorporate the first eight Amendments of the Bill of Rights through the Privileges or Immunities Clause rather than through the Due Process Clause.<sup>311</sup> Under any of these scenarios, the Establishment Clause should not be covered by §§ 1988 and 1983. However, if one embraces incorporation through the Privileges or 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. This certainly makes sense in that it is worded as a limitation on the power of government. This was certainly the view of the majority in the high-water mark House of Representatives, with support from Justice Thomas and Justice Kennedy.<sup>312</sup>

However, one need not deviate from the contemporary conventional wisdom on incorporation to see that there is an analytical difference between deciding whether

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<sup>306</sup> 330 U.S. 1, 15 (1947).

<sup>307</sup> 310 U.S. 296, 303 (1940).

<sup>308</sup> See, 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 258, § 7-5 at 1317–20.

<sup>309</sup> *Supra* text accompanying note 5; see, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring).

<sup>310</sup> *Elk Grove Unified Sch. Dist.*, 542 U.S. at 50 (Thomas, J., concurring).

<sup>311</sup> E.g., ANTIEAU, *supra* note 258, at 59, 85–88; see also CROSSKEY, *supra* note 258, at 1089–1118; Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *YALE L.J.* 643, 647 (2000).

<sup>312</sup> See *supra* note 4 and accompanying text (discussing the fair reading of Justice Kennedy’s view).

the Establishment Clause has been incorporated against the states and deciding whether the Establishment Clause contains any privileges or immunities. Furthermore, the way in which violations of the provisions of the Bill of Rights have been thought to be validly brought under § 1983 has been dubbed the “double incorporation” doctrine.<sup>313</sup> In other words, “[Section 1983] incorporates the Fourteenth Amendment which in turn incorporates various provisions of the Bill of Rights and applies them to the states.”<sup>314</sup>

It certainly makes sense to believe that if the incorporation doctrine is one of selective incorporation, the double incorporation doctrine should be as well. The theory behind selective incorporation teaches that one looks to history to determine whether a particular provision of the Bill of Rights should be incorporated against the states.<sup>315</sup> Similarly, one should look to history to determine selectively whether the provision incorporated against the states should be “incorporated” the second time. In other words, simply because a provision is now binding upon the states does not mean that it constitutes a civil rights violation as understood by the framers of the Ku Klux Klan Act. As has been shown, the Establishment Clause does not pass that test.<sup>316</sup>

Indeed, in light of the history canvassed in this Article and the dispute between the majority and minority in *Thiboutot*, this Article posits a theory of triple incorporation.<sup>317</sup> In other words, assuming, arguendo, that the Establishment Clause passed the § 1983 hurdle, it cannot pass the § 1988 hurdle. The Establishment Clause simply is not the kind of provision the drafters of § 1988 were contemplating. To follow the double incorporation reasoning, one would say that triple incorporation occurs where § 1988 incorporates § 1983, which in turn incorporates the Fourteenth Amendment, which in turn incorporates the Bill of Rights; however, at each stage the incorporation is selective.

In order to take this last step (which is not really necessary at all since the Establishment Clause claim would fail the double incorporation step) one need only decide that the minority was correct in *Thiboutot* and that the mistake the Court made in applying § 1988 fees to non-civil rights statutes should not be compounded by applying § 1988 fees to a non-civil rights constitutional provision.

Supreme Court cases such as *Lynch v. Household Finance Corp.*<sup>318</sup> and *United States v. Price*,<sup>319</sup> which are sometimes cited for the proposition that all of the

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<sup>313</sup> SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 2:3, Westlaw (database updated Oct. 2019).

<sup>314</sup> *Id.*

<sup>315</sup> See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (employing historical analysis in incorporating the Second Amendment through the Fourteenth Amendment).

<sup>316</sup> See *supra* Part III.

<sup>317</sup> Obviously since *Thiboutot* dealt with statutory rights, not provisions of the Bill of Rights, triple incorporation would not apply there. However, *Thiboutot* suggests the basis for triple incorporation in a Bill of Rights context. See generally *Maine v. Thiboutot*, 448 U.S. 1 (1980).

<sup>318</sup> 405 U.S. 538 (1972).

<sup>319</sup> 383 U.S. 787 (1966).



Constitution is applicable under § 1983,<sup>320</sup> would not be any obstacle to double or triple selective incorporation. A careful reading of these cases shows that the Court is merely saying that the *privileges and immunities* of the entire Constitution are applicable under § 1983. However, as we have already seen, the Establishment Clause contains no privileges or immunities at all.

CONCLUSION: THE CIVIL RIGHTS ATTORNEY’S FEES AWARDS ACT OF 1976 MUST NOT BE PERVERTED BY BEING USED AS A TOOL FOR “BLACKMAIL”

Until the passage of 42 U.S.C. § 1988, The Civil Rights Attorney’s Fee Awards Act of 1976, virtually no Establishment Clause cases were brought under § 1983.<sup>321</sup> Since then, the number of cases has exploded.<sup>322</sup> While the date of enactment is not a perfect dividing line, it is a close proxy. For ease of demonstration, the number of opinions available on Westlaw serves as an adequate indicator. To the best of the author’s ability to ascertain, prior to the enactment of § 1988, only eighty opinions are available in which both § 1983 is cited and terms relating to the Establishment Clause are used.<sup>323</sup> That’s eighty cases in the 106 years from 1871 to 1976. In contrast,

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<sup>320</sup> See, e.g., Michael G. Collins, “Economic Rights,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1541 & n.252 (1989); Case Note, *The Dormant Commerce Clause Secures Rights Within the Meaning of 42 U.S.C. § 1983*: Dennis v. Higgins, 25 CREIGHTON L. REV. 153, 168–69 (1991); Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 429 n.239 (1984).

<sup>321</sup> A search for Establishment Clause cases brought under § 1983 before 1976 yielded 47 results, LEXISNEXIS (last searched May 13, 2020). See *infra* note 327 and accompanying text.

<sup>322</sup> A search for Establishment Clause cases brought under § 1983 during and after 1976 yielded 4,001 results, LEXISNEXIS (last searched May 13, 2020). See *infra* note 327 and accompanying text.

<sup>323</sup> My attempt to determine appropriate statistics for this sentence and for the remainder of this paragraph was fairly strenuous, but undoubtedly not perfect. An obvious problem is to choose between searches that are overinclusive and those that are underinclusive, and any search will produce some false hits. After experimenting with various searches, I finally settled on the following, which includes all the ways in which § 1983 and § 1988 have been referred to over the years: (“42 U.S.C. § 1983” OR “42 U.S.C. 1983” OR “42 U.S.C. § 1988” OR “42 U.S.C. 1988” OR “Pub. L. 94-559” OR “P.L. 94-559” OR “rev. st. sec. 1979” OR “R.S. sec. 1979” OR “R.S. § 1979” OR “rev. stat. sec. 1979” OR “rev. stat. § 1979” OR “rev. statutes sec. 1979” OR “rev. statutes § 1979” OR “Apr. 20, 1871” OR “April 20, 1871” OR “Ku Klux Klan Act” OR “Ku Klux Act”) AND (“religious establishment” OR “establishing religion” OR “establishment of religion” OR “established religion” OR “establishes religion” OR “establish religion” OR “establishment clause” OR (“religion clause” AND establish!)). The search was run in Westlaw’s “All Cases” database in multiple iterations to filter for cases decided before and after the enactment of § 1988 and for reported and unreported cases.

The bigger issue deals with including terms that capture citations of § 1988. Obviously, including § 1988 will not impact the case count prior to its enactment. But including it in the searches after its date of enactment does impact the count. For example, including § 1988 captures a small number of opinions in which fees were awarded for claims brought under

in the forty-five years since § 1988's enactment (and as of this writing), 3,547 such cases can be found.<sup>324</sup> At the time that § 1988 was enacted, unreported opinions were not included in the "All Cases" database. Still, if we compare pre- and post-enactment counts, the eighty pre-enactment opinions are still heavily outweighed by 1,422 post-enactment opinions.<sup>325</sup>

If Establishment Clause cases ought not be brought under § 1983, what explains the fact that they uniformly are? The answer should be obvious at this point: the availability of § 1988 fees. Long before the evidence adduced in the Introduction to this Article had occurred, Justice Powell suggested the answer in his *Thiboutot* dissent: "[I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."<sup>326</sup> This was one of the main complaints of the opponents of the Act who wanted to dub it the "attorney's relief act."<sup>327</sup>

Certainly, numerous commentators early on documented the astronomical increase in § 1983 cases after the passage of the Civil Rights Attorney's Fees Awards Act of 1976.<sup>328</sup> Of course, in non-Establishment Clause cases, this use of § 1988 comports with the intent of its drafters; in Establishment Clause cases, it produces the non-intended blackmail discussed throughout this Article.<sup>329</sup>

Thus, we see that the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, which was designed to serve an admirable purpose, has been perverted. Starting as a statute in support of its historic counterpart, § 1983, a statute to protect racial minorities, § 1988 has now become a tool for blackmail in the Establishment Clause context, a context that, under any analysis, should not even be eligible for a § 1988 fee award.

Thus, Congress should revisit the issue and strip attorney's fee awards from Establishment Clause claims.<sup>330</sup> It could quite easily do so. The following addition would do the trick:

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the other statutes to which § 1988 is applicable. However, the search terms relating to the Establishment Clause minimizes the number of these hits. And, on the other hand, there are a significant number of opinions that address whether fees should be awarded under § 1983 that do not specifically mention that section by number. Therefore, I chose to include those terms. The point being made in the text accompanying this note does not rely on exact accuracy for its validity.

<sup>324</sup> *See id.*

<sup>325</sup> *See id.*

<sup>326</sup> *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting).

<sup>327</sup> 122 CONG. REC. 31,487–89, 31,850 (1976), reprinted in SOURCE BOOK, *supra* note 73, at 56–62, 89 (statements of Sens. Long and Allen).

<sup>328</sup> *See, e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.01(B), Westlaw (database updated 2020) (listing § 1988 as one of five reasons for the increase); Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 3 (1982) (suggesting § 1988 is responsible for at least some of the increase).

<sup>329</sup> *See supra* Introduction and Part I.

<sup>330</sup> As previously noted, the best approach would be to explicitly state that such claims cannot even be brought under § 1983. *See supra* Introduction.

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, 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 (1) 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; and (2) in any action brought to enforce a provision of section 1983 and based on an alleged violation of the Establishment Clause of the First Amendment to the Constitution, each party shall bear its own costs, including attorney's fees.

While some of the bills introduced prior to, during, and after the legislative high-water were nearly, but not quite, this simple, some were much more complex; and—as noted at the outset—some were limited to certain subcategories of Establishment Clause cases.<sup>331</sup>

Unless and until Congress acts, attorneys defending Establishment Clause cases should make the argument that the court lacks subject matter jurisdiction over Establishment Clause claims brought under § 1983. It's time for the blackmail to end.

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<sup>331</sup> See *supra* notes 9–19 and accompanying text (describing some bills and explaining how to search for others).