The Public Expression of Religion Act: Promoting Equality in Establishment Clause Jurisprudence

Kristen Morgan

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol57/iss2/7
THE PUBLIC EXPRESSION OF RELIGION ACT:
PROMOTING EQUALITY IN ESTABLISHMENT CLAUSE JURISPRUDENCE

Kristen Morgan*

Until September 14, 2004, the Los Angeles County seal depicted ten symbols reflecting the county's history, one of which was a small cross.1 This cross represented the important role Catholic missionaries played in the history of the area.2 But in May of 2004, the American Civil Liberties Union (ACLU) sent a letter to the county stating that the cross was an unconstitutional government endorsement of religion, and threatening the county with a lawsuit.3 If the ACLU had been successful in its suit, it could have sought attorneys' fees from the county for tens or even hundreds of thousands of dollars under a civil rights fee-shifting statute currently applicable to Establishment Clause cases.4 Facing the expense

---

1. B.A., The University of Oklahoma; J.D. Candidate, May 2009, The Catholic University of America, Columbus School of Law. The author thanks Professor Robert A. Destro for his guidance in the writing process and her husband Justin Morgan for his ongoing support and encouragement.


3. Fox, Facing Suit, supra note 1 (“The American Civil Liberties Union argued that the official insignia . . . was unconstitutional because it reflects 'an impermissible endorsement of Christianity by the county government' . . . .'”); J. Michael Kennedy, County Seal Has a Cross the ACLU Can't Bear, L.A. TIMES, May 25, 2004, at B3 (“'[W]e said we would sue them in 14 days, but if they agree to remove the cross we would give them more time.'” (quoting ACLU Executive Director Ramona Ripston)). Notably the ACLU made no mention of the Pagan Goddess Pomona who adorned the center of the seal. See Fox, Facing Suit, supra note 1 (“'[T]his seal in no way favors the practice or promotion of any religion over another, just as the Goddess Pomona certainly does not encourage the act of pagan worship.'” (quoting Councilwoman Janice Hahn)). However, that symbol too was replaced, by the symbol of a “Native American woman holding a bowl of acorns.” Fox, Officials Vote to Replace County Seal, supra note 1; see also Kennedy, supra (discussing the ACLU's letter to Los Angeles County supervisors).

4. See Fox, Officials Vote to Replace County Seal, supra note 1 (mentioning the costly nature of potential litigation); 42 U.S.C. § 1988 (2000) (“In any action or proceeding
of litigating the issue, the County reached a settlement with the ACLU in which the group agreed not to sue if the cross was removed.\footnote{See Fox, Facing Suit, supra note 1.}

Because Establishment Clause jurisprudence is a particularly unsettled area of law,\footnote{See, e.g., Jordan C. Budd, Cross Purposes: Remedyng the Endorsement of Symbolic Religious Speech, 82 DENV. U. L. REV. 183, 185 (2004) ("[T]hese [religious] symbols have given rise to a vast and complicated jurisprudence that, in certain of its aspects, has been justly criticized as conflicting and incoherent."); Patrick M. Garry, A Congressional Attempt to Alleviate the Uncertainty of the Court's Establishment Clause Jurisprudence: The Public Expression of Religion Act, 37 CUMB. L. REV. 1, 4 (2006) ("Because of all the different tests used by the courts, and all the different ways in which those tests have been applied, the current terrain of Establishment Clause jurisprudence is almost impossible to chart with any coherence."); John W. Huleatt, Accommodation or Endorsement? Stark v. Independent School District: Caught in the Tangle of Establishment Clause Chaos, 72 ST. JOHN'S L. REV. 657, 657 (1998) ("To say that the Court has had difficulty identifying and applying the precise principles of the Establishment Clause would be an understatement. . . . [R]ecent developments have done little to assist lower courts seeking guidance from the confounding array of Establishment Clause cases."); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions, 65 OHIO ST. L.J. 491, 494 (2004) ("During the past half century, constitutional theories of religious freedom have been in a state of great controversy, perpetual transformation, and consequent uncertainty.").} it is not self-evident that the cross on the Los Angeles County seal was an unconstitutional government endorsement of religion.\footnote{The U.S. Supreme Court first discussed the unconstitutional "endorsement" of religion in \textit{Lynch v. Donnelly}. 465 U.S. 668, 681 (1983). There, the Court held a city-sponsored Christmas display that included a nativity scene, did not violate the Establishment Clause. \textit{Id.} at 687. The Court has also held that a religious display whose purpose is "acknowledgement" of our nation's history does not violate the Establishment Clause. \textit{S}ee Van Orden v. Perry, 545 U.S. 677, 688 (2005).} But because of the threat of expensive attorneys' fees, the people of Los Angeles County were deprived of the opportunity to defend their seal in court.\footnote{See Fox, Facing Suit, supra note 1 ("Los Angeles County supervisors . . . ended an emotional debate over the symbolism of the tiny gold cross on the county seal by deciding to remove it rather than defend it against a . . . potentially costly court fight [which one supervisor predicted] 'we are going to lose.'"); Fox, Officials Vote to Replace County Seal, supra note 1 ("[T]he Los Angeles County Board of Supervisors stripped a tiny cross from the county seal . . . to avoid a law suit."). Indeed there is evidence both of uncertainty in the Board's decision to remove the cross, see \textit{id.} (noting that the decision was approved to enforce a provision of [section 1983 and other civil rights statutes] 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. . . .")}. This resulted in an unfair advantage for the...
ACLU because it could achieve its desired result without having to defend its position in open court. This coercive use of the fee-shifting statute chills even constitutionally protected religious expression because such expressions are removed so as to avoid the potential litigation costs to taxpayers rather than because a court held them to be unconstitutional.

Establishment Clause jurisprudence would be more equitable if fee-shifting statutes no longer applied to Establishment Clause plaintiffs. To achieve this equality, the Public Expression of Religion Act (PERA) was introduced in the U.S. House and Senate.

The full title of PERA reveals its core purpose: "[a] bill [t]o amend the Revised Statutes 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." PERA would amend 42 U.S.C. §§ 1983 and 1988 to remove Establishment Clause cases from the purview of the fee-shifting

9. See infra note 70 and accompanying text.
10. See Garry, supra note 6, at 2 ("[T]he threat of an attorney's fee award is particularly chilling because of the highly uncertain and inconsistent status of current constitutional doctrines governing the Establishment Clause."); 152 CONG. REC. H7390 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) ("[C]urrent litigation rules are hostile to religion because they allow some groups to coerce states and localities into removing any reference to religion in public places.").
11. See infra Part II.A.
13. S. 415; H.R. 725. The title of the original version of PERA was: "A [b]ill [t]o amend the Revised Statutes of the United States to eliminate the chilling effect on the constitutionally protected expression of religion by State and local officials that results from the threat that potential litigants may seek damages and attorney's fees." H.R. 2679.
This would prevent the coercive use of fee-shifting and promote fairness in the resolution of constitutional issues. Because more cases would go to court instead of settling, all parties would be permitted to present their arguments.

This Comment argues that the Public Expression of Religion Act should be passed because it would restore the vitality of constitutional public religious expression. In Part I, this Comment discusses the background and purpose of the civil rights fee-shifting statute and the background of the Establishment Clause. It next examines the history of fee-shifting in Establishment Clause cases, showing how fee-shifting has been used as a tool of coercion and how it fails to serve its intended purpose in such cases. In Part II, this Comment discusses the purpose of PERA and the reasons for its introduction in Congress, and examines the bill's text and legislative history. Part III addresses some of the objections to PERA and considers how Establishment Clause fee-shifting can be distinguished from fee-shifting in other civil rights cases. Finally, this Comment argues that the enactment of PERA is necessary to protect constitutional public religious expressions.

I. “ESTABLISHING” THE NEED FOR THE PUBLIC EXPRESSION OF RELIGION ACT: THE HISTORICAL BACKDROP FOR PERA

This Comment focuses specifically on legal challenges arising under the Establishment Clause. However, some Establishment Clause cases are subject to the federal civil rights fee-shifting statute, and therefore issues in Establishment Clause litigation are rooted in the development of fee-shifting and civil rights legislation.

A. Civil Rights, Fee-shifting, and the Establishment Clause

The statute is dependent on § 1983 because § 1988 provides attorneys' fees "[i]n any action or proceeding to enforce a provision of section[] . . . 1983." The history and purpose of these statutes can be traced back to the Reconstruction period following the Civil War.


Although the civil rights fee-shifting statute was introduced only thirty years ago, § 1983 was enacted in the aftermath of the Civil War. Congress passed the Civil Rights Act (also known as the Ku Klux Klan Act) to "enforce the Provisions of the Fourteenth Amendment." The first section of this act provided a cause of action for civil rights violations. In 1979, this section was codified at 42 U.S.C. § 1983.

A pivotal case in the development of § 1983 jurisprudence was Monroe v. Pape, which the Supreme Court decided in 1961. This decision was significant because it recognized for the first time that an "action could be 'under color of state law' for purposes of § 1983 even though the state official acted beyond the scope of her duties and even if the official contravened state law." In Monroe, the Supreme Court held that the alleged egregious abuses by the police, which included "ransack[ing]" an apartment without a warrant and forcing its occupants to stand naked in

22. See 42 U.S.C. § 1988 (noting that the civil rights fee-shifting amendment was enacted in 1976).
23. See Monroe, 365 U.S. at 172 ("[S]ection 1983 grew out of a message sent to Congress by President Grant on March 23, 1871. . .").
24. See id. at 171.
25. Id. Section 5 of the Fourteenth Amendment gives Congress the power to enforce the provisions of that Amendment. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
26. See Monroe, 365 U.S. at 171 ("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 . . . " (quoting Senator Edmunds on the first section of the Act)).
29. Brown, supra note 28, at 65 n.47.
the living room,\textsuperscript{30} were actionable under § 1983.\textsuperscript{31}

In order to understand the type of plaintiff § 1983 sought to protect, it is useful to consider the history of the 1871 Civil Rights Act. This history suggests that at least one major purpose of the Act was to restore order in the Reconstructionist South.\textsuperscript{32} In describing what the Civil Rights Act sought to remedy, one Representative commented: "[M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent."\textsuperscript{33} In Monroe, the Court also observed that in enacting the Civil Rights Act of 1871, Congress was concerned with providing a federal right of action in cases where state courts might fail to protect civil rights.\textsuperscript{34}

The Court's subsequent decision in Adickes v. S. H. Kress & Co. exemplifies the purpose behind Congress' enactment of § 1983.\textsuperscript{35} There, a young white female teacher was denied service at a lunch counter in Hattiesburg, Mississippi, because she was in the company of six African American students.\textsuperscript{36} She left the store with her students but was subsequently arrested for vagrancy.\textsuperscript{37} Thereafter, she sued the store, alleging that both the refusal of service and the arrest were the product of a conspiracy to violate her civil rights by officials acting under color of state law.\textsuperscript{38} Here, Adickes' suit under § 1983 served Congress' dual purposes of eliminating racial discrimination\textsuperscript{39} and remedying the failure of southern states to apply federal civil rights law.\textsuperscript{40} So as to better effect Congress' goal, new legislation was passed to make easier the burden born by plaintiffs bringing civil rights cases.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{30} Monroe, 365 U.S. at 169.
\item \textsuperscript{31} Id. at 172.
\item \textsuperscript{32} Id. at 172-73 (quoting a message sent by President Grant to Congress discussing the lawless conditions then existing in the South and recommending that Congress take actions to remedy this problem).
\item \textsuperscript{33} Id. at 175 (citing CONG. GLOBE, 42nd Cong., 1st Sess., 428 (1871) (quoting Rep. Beatty of Ohio)).
\item \textsuperscript{34} Id. at 180.
\item \textsuperscript{36} Id. at 146.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id. at 147-48.
\item \textsuperscript{39} See supra note 33 and accompanying text.
\item \textsuperscript{40} See supra note 34 and accompanying text.
\item \textsuperscript{41} See Blanchard v. Bergeron, 489 U.S. 87, 93-94 (1989) ("[T]he purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs. . . . ").
\end{itemize}
2. Civil Rights Fee-shifting — § 1988

Congress enacted the civil rights fee-shifting statute in 1976.\footnote{Promoting Equality in the Establishment Clause} Section 1988(b) provides that “[i]n any action or proceeding to enforce a provision of section[...], 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.”\footnote{Promoting Equality in the Establishment Clause} The Supreme Court has stated that the purpose of this statute is to “ensure ‘effective access to the judicial process’ for persons with civil rights grievances.”\footnote{Promoting Equality in the Establishment Clause}

With respect to attorneys’ fees, the “American rule” generally provides that they are not recoverable by the prevailing party.\footnote{Promoting Equality in the Establishment Clause} This rule was affirmed by the Court in Alyeska Pipeline Service Co. v. Wilderness Society.\footnote{Promoting Equality in the Establishment Clause} There, the Court considered the “private attorney general” exception to the general rule barring recovery of attorney’s fees and concluded that exceptions to the ordinary “American rule” against fee-shifting have generally been statutory.\footnote{Promoting Equality in the Establishment Clause} Justice White, writing for the

\begin{itemize}
  \item \footnote{Promoting Equality in the Establishment Clause} Congress enacted the civil rights fee-shifting statute in 1976.\footnote{Promoting Equality in the Establishment Clause} Section 1988(b) provides that “[i]n any action or proceeding to enforce a provision of section[...], 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.”\footnote{Promoting Equality in the Establishment Clause} The Supreme Court has stated that the purpose of this statute is to “ensure ‘effective access to the judicial process’ for persons with civil rights grievances.”\footnote{Promoting Equality in the Establishment Clause}
  \item With respect to attorneys’ fees, the “American rule” generally provides that they are not recoverable by the prevailing party.\footnote{Promoting Equality in the Establishment Clause} This rule was affirmed by the Court in Alyeska Pipeline Service Co. v. Wilderness Society.\footnote{Promoting Equality in the Establishment Clause} There, the Court considered the “private attorney general” exception to the general rule barring recovery of attorney’s fees and concluded that exceptions to the ordinary “American rule” against fee-shifting have generally been statutory.\footnote{Promoting Equality in the Establishment Clause} Justice White, writing for the
  \item \footnote{Promoting Equality in the Establishment Clause} Congress enacted the civil rights fee-shifting statute in 1976.\footnote{Promoting Equality in the Establishment Clause} Section 1988(b) provides that “[i]n any action or proceeding to enforce a provision of section[...], 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.”\footnote{Promoting Equality in the Establishment Clause} The Supreme Court has stated that the purpose of this statute is to “ensure ‘effective access to the judicial process’ for persons with civil rights grievances.”\footnote{Promoting Equality in the Establishment Clause}
  \item With respect to attorneys’ fees, the “American rule” generally provides that they are not recoverable by the prevailing party.\footnote{Promoting Equality in the Establishment Clause} This rule was affirmed by the Court in Alyeska Pipeline Service Co. v. Wilderness Society.\footnote{Promoting Equality in the Establishment Clause} There, the Court considered the “private attorney general” exception to the general rule barring recovery of attorney’s fees and concluded that exceptions to the ordinary “American rule” against fee-shifting have generally been statutory.\footnote{Promoting Equality in the Establishment Clause} Justice White, writing for the
majority, concluded that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted," but rather had made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." This "scheme" made it "apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."

Indeed, the Court noted that to adopt fee-shifting in this case would open the door to "a wide range of statutes [that] would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant." And, were this the case, "if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983?" Congress responded to the Court's statement by enacting the civil rights fee-shifting statute that would award fees to private litigants who brought successful claims under § 1983. The civil rights fee-shifting statute simply provides that "the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee." The statute leaves unanswered a question first posed by Justice White in his majority opinion in Alyeska Pipeline: who is considered a prevailing party?

Before answering this question, it is necessary to understand what parties may be involved in civil rights litigation. One party is the plaintiff...
or plaintiffs who bring the civil rights claim. A second party is the defendant, which in § 1983 cases must be a government entity, a state actor, or an individual acting in a conspiracy with a state actor. An intervening party might also be involved as either a plaintiff or a defendant.

Commonly, a prevailing party under § 1988 is a plaintiff who has brought a successful constitutional claim. However, others may also be considered candidates for attorneys' fees as prevailing parties. The language of the statute excludes the United States from being awarded attorneys' fees, but a court may award fees to prevailing "state-funded entities." Also, although a court may award an intervening party fees if


56. See 42 U.S.C. § 1983 (2000) (providing a cause of action against any person who deprives another of his rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia").


58. FED. R. CIV. P. 19. The Federal Rules allow a person to be joined as a party if in their absence "complete relief cannot be accorded among those already parties" or if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Id. at 19(a). This rule also provides that "[i]f the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff." Id.

59. See, e.g., Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 823-24 (5th Cir. 1999) aff'd 530 U.S. 290 (2000) ("Under § 1988, the district court may make an award of attorney's fees only if it determines that the claimant is a 'prevailing party.'" (emphasis added)); Moeller v. Bradford County, 444 F. Supp. 2d 316, 328 (M.D. Pa. 2006) ("It is clear that a Plaintiff, who wins only nominal damages in his § 1983 action, is still entitled to attorneys' fees.").

60. See infra notes 65-68 and accompanying text.

61. 42 U.S.C. § 1988(b) (2000) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ." (emphasis added)).

62. See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 n.31 (1982) ("Appellants . . . challenge the Court of Appeals' award of attorney's fees to the School District plaintiffs arguing that state-funded entities are not eligible to receive such awards from the State. . . . Nothing in the history of the statutes suggests that [the language barring the United States from collecting attorney's fees as a prevailing party] was meant
"the intervenor plays a significant role in the litigation,\textsuperscript{63} Congress did not intend "such an award be as nearly automatic as it is for a party prevailing in its own right.\textsuperscript{64}"

Where the defendant is the prevailing party, they can only be awarded attorneys' fees under § 1988 if "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."\textsuperscript{65} On the other hand, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."\textsuperscript{66} Although defendant-intervenors are not precluded from recovering attorneys' fees,\textsuperscript{67} they are usually required to make the same showing of frivolity as a prevailing defendant.\textsuperscript{68}

3. The Problem: Fee-Shifting and the Establishment Clause

Fee-shifting in Establishment Clause cases is problematic because it prevents the difficult issues surrounding public expression of religion from being determined in full and public proceedings.\textsuperscript{69} There are numerous examples of local governments surrendering their right to defend themselves in court out of fear of expensive litigation.\textsuperscript{70} This
to exclude state-funded entities. To the contrary, the Courts of Appeals have held with substantial unanimity that publicly funded legal services organizations may be awarded fees.\textsuperscript{71} (citation omitted)).

\textsuperscript{63} Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1535 (9th Cir. 1985).
\textsuperscript{64} ECOS, Inc. v. Brinegar, 671 F. Supp. 381, 387 (M.D.N.C. 1987).
\textsuperscript{67} For an example of a case in which a court awarded attorney's fees to a defendant-intervenor, see Baker v. City of Detroit, 504 F. Supp. 841, 850-51 (Mich. 1980) (finding defendant-recovery rule did not apply because defendant-intervenors were seeking to enforce their own civil rights).
\textsuperscript{68} See id. at 850 ("Thus, a defendant who is victorious should ordinarily not be allowed to collect attorneys' fees unless the suit brought against him was baseless.").
\textsuperscript{69} See generally 152 CONG. REC. H7389 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) ("[The Act will] eliminate the chilling effect on the constitutionally protected expression of religion by state and local officials that results from the threat that potential litigants may seek damages and attorney's fees. . . .").
\textsuperscript{70} See Garry, supra note 6, at 6-7 ("Because of the varying tests the Court applies in its respective Establishment Clause cases, and because of the subjective ways in which those tests have been applied, it is reasonable to conclude that governmental entities, fearing an award of attorney's fees against them, would simply play it safe and forbid any kind of religious expression that might somehow be subject to an Establishment Clause challenge."); see also 152 CONG. REC. H7390 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) ("[L]ocal governments are being forced to accede to the demands of those seeking to remove religious words or tear down symbols, and ban religious people from using the public square, even when allowing those uses might, in fact, be constitutional."). In Redlands County, California, for example, the county agreed to remove a small cross from its county seal as part of a settlement with the ACLU. Kennedy, supra note 3. Similarly,
phenomenon is especially troubling because Establishment Clause jurisprudence is such an unsettled area of law.\footnote{71}

\section*{B. The Root of the Issue: An Overview of Establishment Clause Jurisprudence}

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."\footnote{72}

\subsection*{1. The Application of the Establishment Clause to the States}

At the time of its ratification, the Establishment Clause applied only to the federal government,\footnote{73} but it has since been applied to state and local
governments as well.\textsuperscript{74} Using the doctrine of incorporation,\textsuperscript{75} the Supreme Court held that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact . . . law[s] respecting the establishment of religion or prohibiting the exercise thereof."\textsuperscript{76}

This rule was subsequently affirmed by the Court in \textit{Everson v. Board of Education of Ewing Township}.\textsuperscript{77} There, a New Jersey statute authorized local school districts to "make rules and contracts for the transportation of children to and from schools,"\textsuperscript{78} Acting pursuant to this statute, Ewing Township authorized reimbursements to parents for money expended on public transportation to school.\textsuperscript{79} Some of these reimbursements went to parents who sent their children to Catholic parochial schools.\textsuperscript{80}

A New Jersey taxpayer brought suit against the township, arguing that the statute supported religious schools, and therefore was an

\begin{flushleft}
\footnotesize
74. See infra notes 76-109 and accompanying text.
75. See \textsc{Charles A. Shanor}, \textit{American Constitutional Law: Structure and Reconstruction} 557 (2d ed. 2003) ("Beginning [in 1897], the Court began incorporating the various Bill of Rights provisions into the Due Process Clause of the Fourteenth Amendment." (citing Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897)). The doctrine of incorporation provides that "those portions of the Bill of Rights 'implicit in the concept of ordered liberty,' those matters 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' [are] part of the 'due process' limiting state power." \textit{Id.} (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
76. \textit{Cantwell v. Connecticut}, 310 U.S. 296, 303 (1940). In \textit{Cantwell}, the Court first applied the First Amendment Free Exercise clause to the states. \textit{Id.} There, appellants, who were Jehovah's Witnesses, were arrested for "inciting a breach of the peace," by going door to door distributing religious materials and soliciting donations. \textit{Id.} at 300-01. The Supreme Court ruled that the statute under which the appellants were convicted "deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment." \textit{Id.} at 303. Because the Fourteenth Amendment "embraces" the First Amendment, the Court ruled that the statute deprived the appellants' liberty by impeding their right to the free exercise of religion. \textit{Id.} at 303-04.
78. \textit{Id.} at 3. The New Jersey Statute read:

\begin{quote}
When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.
\end{quote}
80. \textit{Id.}
\end{flushleft}
unconstitutional government establishment of religion.\textsuperscript{81} The court found it prudent to take American colonial history into account when interpreting the First Amendment.\textsuperscript{82} It began with a discussion of religious persecution in both Europe and the American colonies.\textsuperscript{83} It then explained the subsequent movement to prevent government establishment of religion, noting that the First Amendment was intended to prevent the government from compelling citizens to support a particular church.\textsuperscript{84}

The \textit{Everson} Court concluded that the Establishment Clause was part of the liberty guaranteed by the Fourteenth Amendment and should therefore apply to the states:

The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause.\textsuperscript{85}

As a result, the Court had to decide whether the New Jersey statute violated the Establishment Clause.\textsuperscript{86} It concluded that the statute did not because it provided only "general State law benefits."\textsuperscript{87}

Four justices dissented from the majority's opinion. Justice Jackson, joined by Justice Frankfurter, agreed with the majority's advocacy for "complete and uncompromising separation of Church from State."\textsuperscript{88} However, Justice Jackson thought that the majority failed to apply this

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} at 3, 5 ("This is alleged to be a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.").
\item \textsuperscript{82} \textit{Id.} at 8 ("[I]t is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.").
\item \textsuperscript{83} \textit{Id.} at 8-10 ("These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment.").
\item \textsuperscript{84} \textit{Id.} at 11-13 (comparing the First Amendment of the U.S. Constitution to the Virginia Bill for Religious Liberty).
\item \textsuperscript{85} \textit{Id.} at 15 (footnote omitted).
\item \textsuperscript{86} \textit{Id.} at 16.
\item \textsuperscript{87} \textit{Id.} at 16-17 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.").
\item \textsuperscript{88} \textit{Id.} at 19 (Jackson, J., dissenting).
\end{itemize}
principle. He concluded that the statute violated the Establishment Clause because it provided transportation reimbursements on the basis of religious beliefs.

In a separate dissenting opinion, Justice Rutledge, joined by Justices Frankfurter, Jackson, and Burton, concluded that the New Jersey statute was an unconstitutional breach of "the wall raised between church and state." Like the majority, Justice Rutledge examined the historical origins of the First Amendment. He then concluded that the New Jersey statute effectively taxed citizens for the support of a religion, and was therefore unconstitutional.

2. Establishment Clause Jurisprudence as an Unsettled Area of Law

Establishment Clause jurisprudence is a particularly unsettled area of law. The Supreme Court has articulated multiple tests for Establishment Clause cases since its ruling in Everson, including the "Lemon Test," the "Endorsement Test," and the "Coercion Test." It can be difficult to predict which test a court will use and application of each test can yield different results. It is this difficulty that causes local governments to surrender the rights of their constituents rather than risk the cost of expensive litigation.

Even the test most commonly used, the Lemon test, is less than certain. The Supreme Court has stated that its factors "serve as 'no more
than helpful signposts."\textsuperscript{98} The Court has also stated that "[t]he Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application. We acknowledged in [Lemon] that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'\textsuperscript{99}

For example, in 2005 the Court decided two cases on the same day involving the public display of the Ten Commandments.\textsuperscript{100} These cases not only had conflicting holdings, but the Court applied different tests in each case.\textsuperscript{101} In \textit{Van Orden v. Perry}, the Court concluded that a monument displaying the Ten Commandments on the grounds of the Texas state capitol was not unconstitutional.\textsuperscript{102} Before reaching the primary issue in the case, the Court noted the "two faces" of Establishment Clause jurisprudence: "Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state."\textsuperscript{103} Declining to apply the \textit{Lemon} test,\textsuperscript{104} the Court concluded that the display was a constitutional "passive" acknowledgement of the "role of God in our Nation's heritage."\textsuperscript{105}

That same day, the Court ruled that a Ten Commandments display in \textit{McCreary County v. American Civil Liberties Union of Kentucky} was an unconstitutional establishment of religion.\textsuperscript{106} \textit{McCreary} involved posters of the Ten Commandments displayed in two county courthouses.\textsuperscript{107} After reviewing the facts of the case, the Court focused on the "purpose" prongs of the \textit{Lemon} test.\textsuperscript{108} It then adopted the District Court's finding

\textsuperscript{98} \textit{Van Orden}, 545 U.S. at 686 (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).


\textsuperscript{100} \textit{See Garry, supra note 6, at 2.}

\textsuperscript{101} \textit{See id. at 2-3.}

\textsuperscript{102} \textit{Van Orden}, 545 U.S. at 681.

\textsuperscript{103} \textit{Id. at 683.}

\textsuperscript{104} \textit{See Garry, supra note 6, at 2 ("[T]he [Van Orden] plurality opinion did not even mention what had, up to that time, become the most prominent test for judging public displays or expressions of religion—the endorsement test—nor did the Court employ the infamous Lemon test.").}

\textsuperscript{105} \textit{Van Orden}, 545 U.S. at 686-87.

\textsuperscript{106} \textit{McCreary County v. Am. Civil Liberties Union of Ky.}, 545 U.S. 844, 858 (2005).

\textsuperscript{107} \textit{Id. at 851. The posters also contained excerpts with religious themes from other documents, including the Declaration of Independence, the Constitution of Kentucky, and a Proclamation by President Lincoln. Id. at 853-54.}

\textsuperscript{108} \textit{Id. at 864-66.}
that the displays had a predominantly religious purpose, and concluded that they were unconstitutional.\textsuperscript{109} As a result of this uncertainty, it is necessary that Congress act "to prevent a governmental chilling of free speech and free exercise rights under the First Amendment."\textsuperscript{110}

C. The Public Expression of Religion Act: A Solution to the Problem?

1. The Intersection of the Establishment Clause and § 1988

Section 1988, one of the civil rights fee-shifting statutes, provides successful litigants attorneys' fees in Establishment Clause cases. This is because the fee-shifting statute applies to case brought under 42 U.S.C. § 1983.\textsuperscript{111} In \textit{Everson}, the Court held that the Establishment Clause was applicable to state action by the Fourteenth Amendment.\textsuperscript{112} Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution."\textsuperscript{113} Therefore, where violations of the Establishment Clause are categorized as deprivations of constitutional rights under § 1983, attorneys' fees may be awarded in these cases under § 1988.\textsuperscript{114} The provision of attorneys' fees under § 1988

\begin{itemize}
\item \textsuperscript{109} Id. at 858.
\item \textsuperscript{110} Garry, supra note 6, at 1.
\item \textsuperscript{112} \textit{Everson v. Bd. Of Educ.}, 330 U.S. 1, 15 (1947); see also supra note 85 and accompanying text.
\item \textsuperscript{113} 42 U.S.C. § 1983 (2000).
\item \textsuperscript{114} Despite the Court's holding that the Establishment Clause is a liberty, the deprivation of which is actionable under section 1983, many scholars believe the Court's holding is "indefensible-historically, textually, and practically." Michael Allen Paulsen, \textit{Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication}, 61 NOTRE DAME L. REV. 311, 314 (1986); see also Daniel O. Conkle, \textit{Toward a General Theory of the Establishment Clause}, 82 NW. U. L. REV. 1113, 1142 (1988) ("The language of the fourteenth amendment, coupled with the federalistic motivation for the establishment clause, make it exceedingly difficult to argue that the framers and ratifiers of the fourteenth amendment intended to incorporate the establishment clause for application against the states."); Garry, supra note 6, at 5 ("Unlike the Free Exercise Clause of the First Amendment, which protects a substantive individual right, the Establishment Clause is a structural clause, governing the relationship between 'church and state[;]' [therefore] Establishment Clause violations [do] not fit within the § 1983 emphasis on individual rights violations."); Russell A. Hilton, \textit{The Case for the Selective Disincorporation of the Establishment Clause: Is Everson a Super-Precedent?}, 56 EMORY L.J. 1701, 1706 (2007) ("Insofar as the only Bill of Rights provisions that are candidates for incorporation under the Fourteenth Amendment are those that guarantee individual rights, the Establishment Clause was never an appropriate candidate for incorporation."); Paulsen, supra, at 317 ("[T]o the extent that the Framers drafted the establishment clause to address concerns of federalism, it makes no more sense to "incorporate" it against the states than it does to incorporate the other provisions in the Bill of Rights which are federalism-oriented."); LAURENCE H. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} § 14-2, at 814 n.5 (2d ed. 1988) ("[W]ith respect to] the special
and the uncertainty in Establishment Clause litigation create an inequality in the defense of constitutionally protected religious expressions.  

2. The Public Expression of Religion Act: A Solution to the Problem?

Representative John Hostettler (R-IN) and Senator Sam Brownback (R-KS) originally introduced the Public Expression of Religion Act (PERA) into the U.S. House of Representatives and U.S. Senate, respectively. Representative Hostettler explained the purpose of the bill during the House debate on PERA, stating that "the mention of attorneys fees in these kinds of cases were jeopardizing our constituents' constitutional rights." Representative Hostettler argued that PERA would "prevent the mere threats of the legal system to intimidate communities, States, and groups like the American Legion into relenting without ever darkening the doorsteps of a Federal courthouse."  

II. THE ARGUMENTS FOR PERA, THE HISTORY OF THE FIRST AMENDMENT, AND SOME VIEWS ON THE ESTABLISHMENT CLAUSE

PERA is necessary to prevent inequality in the application of the civil rights fee-shifting statute. Supporters of the bill argue it will provide Establishment Clause cases greater access to courtrooms by preventing plaintiffs from intimidating local governments into avoiding potentially costly litigation. Additionally, the Establishment Clause occupies a unique place in the Bill of Rights and can reasonably be distinguished from other rights for the purpose of the fee-shifting statute.

problems of incorporating the establishment clause. . . [f]irst, some objected—with historical support—that the absorption of the first amendment's ban against establishment was conceptually troublesome inasmuch as the Framers intended the establishment clause to block Congress from disestablishing existing official state churches. . . . Second, some had suggested that the 'liberty' guaranteed by the fourteenth amendment could not be held to encompass the establishment clause because that clause did not protect a 'freedom' of the individual.".

115. See supra note 70 and accompanying text.


118. Id.

119. See, e.g., 152 CONG. REC. H7356, 7359 (daily ed. Sept. 26, 2006) (statement of Rep. Gingrey) ("[W]e need a balancing of rights. That is what this is all about. Let's level the playing field. We are not eliminating anybody's constitutional rights under the establishment clause.").

120. See infra Part II.C.
A. The Language of PERA: Amending Sections 1983 and 1988

Though the original PERA died in the Senate, an identical version was reintroduced to the 110th Congress in January, 2007.\textsuperscript{121} If passed, PERA would amend two different sections of the U.S. Code in order to prevent the award of attorney's fees to Establishment Clause plaintiffs.\textsuperscript{122} Section 1983 would be amended by adding the following language to a new subsection (b): "The remedies with respect to a claim under this section are limited to injunctive and declaratory relief where the deprivation consists of a violation of a prohibition in the Constitution against the establishment of religion shall . . . ."\textsuperscript{123} Additionally, the actual fee-shifting statute, § 1988, would also be amended by adding the following language to the end of the section: "However, no fees shall be awarded under this subsection with respect to a claim described in subsection (b) of [§ 1983]."\textsuperscript{124}

Together, these two changes would make Establishment Clause jurisprudence more equitable.\textsuperscript{125} Organizations such as the ACLU would no longer be able to use fee-shifting to pressure governments to remove public expressions of religion without stepping foot into a court room.\textsuperscript{126} Rather, these organizations, in order to accomplish their objectives, would be forced to take the issue to court, resulting in equitable protection for constitutional rights to religious expression.\textsuperscript{127}

B. Promoting Access to the Courtroom Amidst the Confusion

Perhaps the most important argument in favor of PERA is that it provides greater access to the courts in the unpredictable area of Establishment Clause litigation.\textsuperscript{128} Because of the inequality in the

\textsuperscript{121. See supra note 12 and accompanying text; Press Release, U.S. Senator Sam Brownback, Brownback Reinroduces Public Expressions of Religion Act (Jan. 29, 2007), http://brownback.senate.gov/pressapp/record.cfm?id=268117.}
\textsuperscript{122. See infra notes 150-53 and accompanying text.}
\textsuperscript{123. PERA, S. 415, 110th Cong. § 2(a) (2007); PERA, H.R. 725, 110th Cong. § 2(a) (2007).}
\textsuperscript{124. S. 415 § 2(b); H.R. 725 § 2(b).}
\textsuperscript{125. See infra Part III.}
\textsuperscript{126. See supra note 70 (citing examples of local governments surrendering their right to defend themselves in court).}
\textsuperscript{127. See 152 CONG. REC. H7393 (daily ed. Sept. 26, 2006) (statement of Rep. Hostetler) ("This legislation would allow establishment clause cases to go to court unfettered by fear or coercion on the part of the defendant."); see also infra notes 128-39 and accompanying text.}
\textsuperscript{128. See supra note 70 and accompanying text (discussing the unfair advantage organizations such as the ACLU have in bringing establishment clause suits against state and local governments).}
defense of constitutionally protected religious expressions, local governments surrender the rights of their constituents rather than risk the cost of expensive litigation.

The confusion surrounding Establishment Clause jurisprudence is one of the major reasons PERA supporters argue the legislation is necessary. In his comments on the House floor, PERA sponsor Representative Hostettler stated that this uncertainty compounded the other problems created by fee-shifting in the Establishment Clause: "What makes this even more difficult for States and localities is that the jurisprudence in establishment clause cases is about as clear as mud. Different districts and even the Supreme Court itself flip-flops on issues." Because of this confusion local governments cannot know whether their actions will be viewed as constitutional, and thus, cannot risk the cost of defending themselves in court.

For instance, after the Ten Commandments cases in 2005, it could be difficult to advise a city on what to do if an organization threatens to sue over a similar religious display. While legal scholars may be able to distinguish between Van Orden and McCreary, these slight distinctions cannot help predict how courts will apply these cases to a particular set of facts. In terms of fiscal responsibility, it is likely the city would be advised to remove the display rather than risk the expense of litigation.

129. See, e.g., 152 CONG. REC. H7357 (daily ed. Sept. 26, 2006) (statement of Rep. Gingrey) ("[W]hat is more concerning is when a defendant decides, a city or county like Barrow and Winder, Georgia, to settle without challenging the frivolous accusations not because they could not win but because they cannot match the challenger's legal war chest."); see also supra note 70 and accompanying text.
130. See supra note 70 and accompanying text.
131. See supra note 6 and accompanying text.
133. Id.; see also supra Part I.B.2.
134. See, e.g., 152 CONG. REC. H7356 (daily ed. Sept. 26, 2006) (statement of Rep. Gingrey) ("On July 19, 2005, a month after the Supreme Court ruled on the two Kentucky Ten Commandments cases, United States District Court Judge William O'Kelley ruled in my home State of Georgia that the courthouse in Barrow County, my daughter-in-law's home, had to remove a framed poster of the Ten Commandments and awarded the American Civil Liberties Union, the ACLU, $150,000. Mr. Speaker, small counties like Barrow cannot afford these costly lawsuits; and my daughter-in-law's parents . . . experienced an increase in their taxes to help pay for these court costs and the legal fees.").
136. See 152 CONG. REC. H7393 (daily ed. Sept. 26, 2006) (statement of Rep. Hostettler) ("In the Van Orden case, the court applied the Marsh test of historical perspective to determine the Ten Commandments in a public venue was constitutional in Texas; while the McCreary case used the Lemon test to determine the Ten Commandments in a public venue in Kentucky was unconstitutional.").
that could include the plaintiff's attorneys' fees. However, since the Supreme Court has ruled that at least some Ten Commandments displays are constitutional, it is possible that the display in this scenario could be constitutional. The fee-shifting statute therefore has the indirect effect of suppressing a constitutionally permissible expression of religion.

C. Interpreting the Establishment Clause

In addition to preventing inequality to the application of the civil rights fee-shifting statute, PERA partially remedies the Supreme Court's mistaken inclusion of Establishment Clause violations within § 1983's emphasis on civil rights violations. Several noted historians and scholars have argued that the founding fathers never intended the Establishment Clause to have the effect it has today. The Supreme Court's incorporation of the Establishment Clause for application to the states under the Due Process Clause of the Fourteenth Amendment significantly altered Establishment Clause jurisprudence. The Framers never intended the Establishment Clause to apply to the states, rather the clause was intended to focus "on the structural autonomy of . . . governmental institutions from the dictates of a chosen religious sect." In other words, "[t]he Constitution guarantees freedom of religion, not freedom from religion." By removing the possibility of attorneys' fees in Establishment Clause litigation, PERA thus properly distinguishes the

137. See supra notes 129-30.
138. See generally Van Orden, 545 U.S. at 691-92 (demonstrating that governments sometimes prevail).
139. See supra note 70 and accompanying text.
140. See Garry, supra note 6, at 4-5; see also supra note 114.
141. See, e.g., John S. Baker, Jr., The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 41, 42 (Eugene W. Hickok, Jr. ed., 1991) ("Given incorporation of the establishment clause, the Supreme Court's abandonment of the original understanding of the establishment clause has meant decisions in the area of religion that have generated tremendous [negative] popular reaction."); BARTON, supra note 73, at 24 ("The records are succinct; they clearly document that the Founders' purpose for the First Amendment is not compatible with the interpretation given it by contemporary courts."); PATRICK M. GARRY, WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION 21 (2006) ("[A]pplication of the establishment clause to the states actually contradicted the very essence of the clause, completely inverting its original purpose.").
142. See GARRY, supra note 141, at 20; see also supra Part I.B.2.
143. See Garry, supra note 6, at 5; see also GARRY, supra note 141, at 21.
144. Garry, supra note 6, at 5; see also GARRY, supra 141, at 21 ("[T]he framers meant [the Establishment Clause] to apply only to the national government, restraining it from interfering in any matter with individual state policies regarding religion.").
Establishment Clause from the individual rights encompassed by § 1983.\textsuperscript{146}

III. LEVELING A MUDDY PLAYING FIELD

Opponents of PERA have advanced two main arguments against the bill. First, they have argued that PERA would suppress challenges to government establishment of religion.\textsuperscript{147} During the House debate on PERA, several congressmen claimed that the bill “insulates serious constitutional violations from judicial review,”\textsuperscript{148} and “would encourage elected officials to violate the Establishment Clause whenever they find it politically advantageous to do so[, removing] the threat that exists to ensure compliance with the Establishment Clause.”\textsuperscript{149}

While it is true that PERA would change the operation of the Establishment Clause, it would in no way create a legal bar to Establishment Clause cases.\textsuperscript{150} Plaintiffs would still be able to seek injunctive and declaratory relief against violations of the Establishment Clause,\textsuperscript{151} protecting plaintiffs’ rights to be free from unconstitutional

\textsuperscript{146} See infra notes 159-60 and accompanying text.


\textsuperscript{150} See infra notes 151-55 and accompanying text.

\textsuperscript{151} See PERA, S. 415, 110th Cong. § 2(a) (2007) (proposing changes only for Establishment Clause litigation); PERA, H.R. 725, 110th Cong. § 2(a) (2007) (same); 152 CONG. REC. H7390 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) (“[W]hile Establishment Clause cases can continue to be brought against State and local governments, they can be brought only for injunctive relief.”); see also Garry, supra note 6, at 5 (“[T]he remedies awarded in most establishment cases are not money damages to individuals; instead, the remedies are most often injunctions against the offending governmental practice or an overturning of a particular law or ordinance.”).
government establishments of religion. At the same time, those who support public expressions of religion could defend their views in court. Thus, through the judicial system, unconstitutional establishments of religion would be excised while constitutional public expressions of religion would be protected. As Representative John Hostettler stated, "if an individual wants a particular activity to stop or a particular display to be removed, the court can in fact still say that that display must be removed or that that activity must cease."

PERA’s opponents have also claimed that the bill would limit the free exercise of religion. For example, Representative Jarrold Nadler stated "we would . . . be telling government officials everywhere that Congress thinks it is okay for them to violate people’s religious liberty with impunity." Representative Mark Udall referred in his objections to a free speech case, implying that PERA would have changed the outcome of that case. These arguments are unfounded because PERA would not change the operation of the Free Exercise Clause. Free Exercise Clause plaintiffs could still seek attorney’s fees under 42 U.S.C. § 1988.

152. See 152 CONG. REC. H7390 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) ("This means that a court can still order that a State official or local government stop doing whatever was an alleged violation of the Establishment Clause.").

153. See, e.g., 152 CONG. REC. H7393 (daily ed. Sept. 26, 2006) (statement of Rep. Hostettler) ("[Presently], that case could go to court, but it probably would not. Because those county officials, those officials would have this sword of Damocles hanging over their head, meaning we are going to take you to court, and when we win, you will have to pay our attorney's fees as well.").

154. See, e.g., id. ("The Public Expression of Religion Act would make sure these cases are tried on their merits and are not merely used to extort behavior via settlements outside our judicial system.").


156. See supra note 147 and accompanying text.


158. 152 CONG. REC. E1879 (daily ed. Sept. 28, 2006) (statement of Rep. Udall) ("For [an] example of where this might lead, consider the 2003 lawsuit against the school district in Ann Arbor. . . . [T]he plaintiffs complained that a former student's right to free speech was abridged when school officials denied the student an opportunity to give her opinion of homosexuality at a school forum on diversity. The judge ruled [the plaintiffs] were right, and ordered the school district to pay damages, attorneys' fees and costs . . . . I have no reason to think that was an abuse. I am glad that the law provides judges with the discretion to award attorneys' fees when people successfully defend their constitutional rights. This bill would limit that discretion unnecessarily. . . .").


Those opposing PERA have also argued that, even if plaintiffs will still be able to bring Establishment Clause cases for injunctive relief, PERA will prevent economically disadvantaged plaintiffs from seeking such relief. But, fee-shifting is unnecessary as a method for guaranteeing access in Establishment Clause cases. During the House debate, Representative Lamar Smith stated that he was not aware of an organization “that has said they will not bring a good cause case under the establishment clause if they can’t be awarded attorneys fees.” He noted that, “[i]n fact, the ACLU has said just the opposite.” PERA’s supporters have also noted that important Establishment Clause cases were brought before the fee-shifting statute was enacted. Although one opponent stated that PERA would result in mandatory prayer in school, it seems unlikely that organizations like the ACLU would refuse to represent plaintiffs in cases involving such clear constitutional violations. As Representative Hostettler stated, “A majority of the cases the ACLU and its affiliates represent are facilitated by staff attorneys or through pro bono work, so any attorneys fees awarded to them is icing on the cake.” On the other hand, PERA will allow greater access to the judiciary to local governments that are currently

Constitution to protect and promote religious freedom for all Americans. [PERA] would for the first time single out one of the constitutional protections afforded in the Bill of Rights, and prevent its full enforcement. If the right to attorney’s fees is taken away in these cases, a dangerous precedent would be set for the erosion of more civil liberties included in the U.S. Constitution.”)

161. 152 CONG. REC. H7359 (daily ed. Sept. 26, 2006) (statement of Rep. Edwards) (“It makes it harder, if not impossible, for many citizens to stop the intervention of government into our religious faith and our lives.”); 152 CONG. REC. E1904 (daily ed. Sept. 29, 2006) (statement of Rep. Ethridge) (“Few citizens can afford to pay attorney fees that can total hundreds of thousands of dollars in these cases. All of the rights in the Constitution are granted to every citizen of the United States, not just to those who can afford to pay for them.”).


163. Id.

164. Id. Rep. Smith also quoted Peter Eliasberg, a staff attorney for the ACLU of Southern California, as saying “‘Money has never been a deciding factor when we take cases. … [PERA] wouldn’t stop us from bringing lawsuits.’” Id.

165. 152 CONG. REC. H7362 (daily ed. Sept. 26, 2006) (statement of Rep. Hostettler) (“[L]et me remind you that the awards act came in 1976. In 1962, the United States Supreme Court struck down the notion of school prayer without the attorneys fees award act. In 1963, the Supreme Court struck down Bible reading in public schools, without the attorneys fees award act. This bill will simply allow the cases to actually continue to go to court.”).

166. 152 CONG. REC. H7394 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) (stating that the prohibition of fees in Establishment Clause cases “wouldn’t stop [the ACLU] from bringing lawsuits” (quoting Peter Eliasberg, staff attorney for the ACLU of Southern California)).

limited in their ability to defend public expressions of religion because of economic concerns.\textsuperscript{168}

While the civil rights fee-shifting statute, \textsection 1988, was enacted to provide greater access to the courts for those claiming violations of the Constitution,\textsuperscript{169} fee-shifting in establishment cases has prevented Establishment Clause issues from coming before the courts.\textsuperscript{170} Therefore, the equality promoted by PERA is more consistent with the spirit of \textsection 1988 than the current practice of awarding attorney’s fees in Establishment Clause cases.\textsuperscript{171}

\textbf{IV. CONCLUSION}

The Public Expression of Religion Act seeks to amend the civil rights fee-shifting statute to eliminate Establishment Clause cases from its purview. This amendment is necessary to provide both plaintiffs and defendants real access to the courts in an area of disagreement and confusion. Without PERA, supporters of public expressions of religion are often forced to settle because of fears of expensive litigation. This results in an imbalance in Establishment Clause cases—those who oppose public expressions of religion have every incentive to sue, while their opponents find their position economically untenable.

While opponents of PERA argue that it will inhibit Establishment Clause claims, this is not true. Plaintiffs will still be free to seek injunctive or declaratory relief for unconstitutional establishments of religion, and PERA will have no effect on Free Exercise Clause or other civil rights cases. Rather than “rolling back” civil rights legislation, as its opponents claim, PERA would promote greater access to courts for all parties.

\begin{footnotesize}
\begin{footnotes}{\footnotesize
\textsuperscript{168} See 152 CONG. REC. H7357 (daily ed. Sept. 26, 2006) (statement of Rep. Gingrey) (explaining that many defendants such as cities or counties “decide[] to settle without challenging the frivolous accusations not because they could not win but because they cannot match the challenger’s legal war chest”); see also supra note 70.

\textsuperscript{169} See supra note 44 and accompanying text.

\textsuperscript{170} See supra note 69 and accompanying text.

\textsuperscript{171} 152 CONG. REC. H7362 (daily ed. Sept. 26, 2006) (statement of Rep. Hostettler) (“[PERA] would simply allow [expression cases] to go to court, do not allow that sword of Damocles, that notion of intimidation to continue and let the case[s] go to court.”).
\end{footnotes}
\end{footnotesize}