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Changing the Rules of Establishment Clause Litigation: An Alternative to the Public Expression of Religion Act

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I. INTRODUCTION

In 2004, the American Civil Liberties Union (“ACLU”) threatened to sue the city of Redlands, California, if it did not remove a small cross from its city seal.¹ The cross represented the city’s religious heritage and its history as a city of churches.² Instead of facing the possibility of litigation and the more daunting risk of losing in court and being forced to pay the ACLU’s attorneys’ fees in addition to its own, the Redlands City Council agreed to change the seal.³ The City of Redlands not only could ill afford the risk of paying the ACLU’s attorneys’ fees; it also had insufficient municipal funds to replace the seal.⁴ Therefore, the city had to improvise. Blue tape covered the cross on many city vehicles, and some city employees used electric drills to “obliterate” the cross from their badges.⁵

After its success in Redlands, the ACLU turned its attention to the Los Angeles County seal, which contained a small cross symbolizing the Spanish missions that played an integral role in the county’s history.⁶ One newspaper columnist observed, “The cross was about one-sixth the size of a not-very-big image of a cow tucked away on the lower right segment of the seal, and maybe a hundredth of the size of a pagan god (Pomona, goddess of fruit) who dominated the seal.”⁷ The county’s attorneys advised that a loss in court would be

1. Marie Lundstrom, *At a Crossroads for Diversity, ACLU Helps Officials Take the Right Path*, SACRAMENTO BEE, June 3, 2004, at A3.

2. Roberto Hernandez, *Group Wants Cross Restored to Redlands City Logo*, PRESS ENTERPRISE (Riverside, Cal.), June 15, 2004, at B3.

3. Lundstrom, *supra* note 1.

4. See *id.* (discussing methods used to cover or remove the cross from the seals).

5. *Id.*

6. J. Michael Kennedy, *County Seal Has a Cross the ACLU Can't Bear*, L.A. TIMES, May 25, 2004, at B3.

7. John Leo, *How Many ACLU Lawyers Can Dance on the Head of a Pin?*, MOBILE REG., Oct. 25, 2005, at A8.

costly—the county would be responsible not only for the cost of changing the seal and its own legal fees, but also for the ACLU’s legal fees.⁸ In what was an unpopular decision, the county supervisors voted to redesign the seal.⁹ The transition to the new seal is costing the county around \$1 million and entails replacing the seal on approximately 90,000 uniforms, 12,000 vehicles, and 6,000 buildings.¹⁰

Events similar to these are taking place around the country.¹¹ Some Americans view these events as victories over governments endorsing a particular religion in violation of the First Amendment’s Establishment Clause and attempting to force religion upon their citizens. Others believe that these events are examples of communities being coerced into abandoning all acknowledgment of their religious values and heritage. Debates over this issue have increased recently, especially surrounding the Public Expression of Religion Act (“PERA”), which was introduced in Congress in response to events such as those that took place in Redlands and Los Angeles.¹² The U.S. House of Representatives passed PERA on September 26, 2006.¹³ The House forwarded the bill to the Senate, where it was referred to the Senate Committee on the Judiciary and currently awaits action.¹⁴ PERA would amend federal statutes to provide that plaintiffs who challenge government action as violating the Establishment Clause would not be able to recover attorneys’ fees. This change would be a departure from current federal law and practice, under which plaintiffs who are successful in a lawsuit brought under the Establishment Clause may (and almost always do) recover attorneys’ fees from the defendant government, whether local, state, or federal. PERA’s proponents argue that the current fee-shifting scheme,

8. 152 CONG. REC. H7389, H7393 (daily ed. Sept. 26, 2006) (statement of Rep. Hostettler).

9. See Troy Anderson, *Vote on Cross Upheld Before Angry Crowd*, L.A. DAILY NEWS, June 9, 2004, at N1 (“Despite passionate pleas from an overflow crowd of 2,000, Los Angeles County’s Board of Supervisors refused Tuesday to back down on its decision to remove a tiny Christian cross on the official seal because of a legal threat from the ACLU.”); Sue Fox, *Officials Vote to Replace County Seal*, L.A. TIMES, Sept. 15, 2004, at B7 (discussing public opposition to the board’s decision to change the seal).

10. H.R. REP. NO. 109-657, at 8 (2006) (citing *Hannity & Colmes* (Fox News television broadcast Dec. 30, 2005)).

11. See *infra* notes 113-23 and accompanying text.

12. See H.R. REP. NO. 109-657 (2006) (stating that the Act is, in part, designed to “protect cities and towns from . . . unfair and coercive practices,” and naming the suits against Los Angeles and Redlands among those that were the impetus for the Act).

13. 152 CONG. REC. H7422, H7423 (daily ed. Sept. 26, 2006).

14. 152 CONG. REC. S10874 (2006) (daily ed. Nov. 13, 2006) (listing H.R. 2679, the PERA bill, among the bills to be passed along to the Senate). The sponsor of the bill in the Senate is Sam Brownback, a Republican from Kansas. Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2007, S. 415, 110th Cong. (2007).

combined with the unpredictability of the Supreme Court's Establishment Clause jurisprudence, allows plaintiffs to force governments to accede to their demands and abandon all public acknowledgment of religion by greatly increasing the risk involved in defending Establishment Clause claims in court.

Like PERA, this Note recognizes that plaintiffs have an inordinate amount of leverage when they bring an Establishment Clause claim. Part II of this Note examines the two main factors contributing to this leverage. The first factor is the unsettled state of Establishment Clause jurisprudence. Part II first introduces the debate concerning the original purpose of the Establishment Clause. It then discusses the many tests the Supreme Court has applied in Establishment Clause cases and examines two recent cases that scholars cite as exemplifying the muddled state of Establishment Clause jurisprudence, *Van Orden v. Perry*¹⁵ and *McCreary County v. ACLU*.¹⁶ Part II then examines the second factor, 42 U.S.C. §§ 1983 and 1988, the federal fee-shifting statutes that enable successful plaintiffs in Establishment Clause cases to receive attorneys' fees from the defendant government.

Part III of this Note introduces PERA. It discusses the background of the bill, presents its provisions in detail, and examines the debates surrounding the bill. Part IV critically appraises PERA and the solution it proposes. Although this Note concludes that PERA is fundamentally flawed, it also asserts that a legitimate aim can and should be extracted from the bill. This aim is to protect a government's ability to defend the acknowledgment of its religious heritage. Part IV demonstrates that the Supreme Court's Establishment Clause jurisprudence allows for the acknowledgment of religious heritage and explains why this acknowledgment needs protection. Part IV concludes by examining why PERA's approach to this problem is flawed.

Finally, Part V proposes an alternative to PERA that would make it easier for governments to defend acknowledgments of their religious heritage without reducing the incentives for governments to avoid behavior that clearly violates the Establishment Clause. This alternative exempts governments from having to pay a plaintiff's attorneys' fees in Establishment Clause cases *unless* the challenged conduct violates clearly established law. This "clearly established law" standard is similar to the standard used in the Supreme Court's qualified immunity jurisprudence, which this part outlines. Part V

15. 545 U.S. 677 (2005).

16. 545 U.S. 844 (2005).

concludes by examining how courts could apply this standard in Establishment Clause cases.

II. THE FACTORS EMPOWERING ESTABLISHMENT CLAUSE PLAINTIFFS

A. *Rife with Confusion: The Supreme Court's Establishment Clause Jurisprudence*

1. The Historical Debate: Voluntarism & Separatism Versus Nonpreferentialism

“Congress shall make no law respecting an establishment of religion.”¹⁷ These few words of the First Amendment, known as the Establishment Clause, have created volumes of debate in recent years. Federal courts consistently have disagreed about how government action should be examined under the Establishment Clause.¹⁸ Even Supreme Court jurisprudence regarding the clause is a study in contradiction, as the Court has applied no fewer than five Establishment Clause tests in recent years, often switching between them without thorough explanation.¹⁹ It is unsurprising that courts have not been able to settle on a definitive application given the continuing debate over the original purpose of the Establishment Clause.

The most commonly accepted view of the purpose of the Establishment Clause, and the one that has been the most influential in shaping the Supreme Court’s jurisprudence, is that adopted in the 1947 decision *Everson v. Board of Education*.²⁰ In *Everson*, the Court held that a state may reimburse parents for transportation expenses incurred in sending their children to parochial schools.²¹ The Court announced that under the Establishment Clause, a government cannot “pass laws which aid one religion, aid all religions, or prefer one religion over another.”²² However, the real legacy of the *Everson* opinion, penned by Justice Hugo Black, has been twofold. First, it interpreted the fundamental principles behind the Establishment

17. U.S. CONST. amend. I.

18. See *infra* Part II.A.1-3.

19. See *infra* Part II.A.2-3.

20. 330 U.S. 1 (1947).

21. *Id.* at 17.

22. *Id.* at 15.

Clause to be voluntarism and separatism.²³ Second, it incorporated the Establishment Clause to apply to the States through the Fourteenth Amendment.²⁴

In interpreting the animating principles of the Establishment Clause to be voluntarism and separatism, Justice Black put great weight on the views of James Madison and Thomas Jefferson. He especially relied on the “Virginia Bill for Religious Liberty,” which Jefferson wrote and Madison sponsored in opposition to Virginia’s tax supporting an established church.²⁵ Voluntarism is the principle that people should be free to choose a particular religion or no religion at all and that religious groups should succeed or fail based on their own merits, not because of state intervention.²⁶ Separatism is the principle that both religion and government function best if they remain separate and unentangled.²⁷ The most influential expression of this principle is Jefferson’s statement that the First Amendment built a “wall of separation between Church and State,” which Justice Black elevated to the level of constitutional doctrine in the *Everson* opinion.²⁸ Since *Everson*, this quote has influenced most of the Court’s Establishment Clause tests and reasoning.

Once the Court interpreted voluntarism and separatism as the animating principles of the Establishment Clause, it logically followed that the clause should be incorporated against state action. As Madison’s *Memorial and Remonstrance Against Religious Assessments*

23. See Kathleen M. Sullivan & Gerald Gunther, *The Religion Clauses: Free Exercise and Establishment*, in CONSTITUTIONAL LAW 1503, 1504-05 (15th ed. 2004); Laurence Tribe, *Rights of Religious Autonomy*, in AMERICAN CONSTITUTIONAL LAW 1154, 1160 (2d ed. 1988).

24. *Everson*, 330 U.S. at 8.

25. *Id.* at 11-13 (“This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.” (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1879))). Among other things, the Virginia Bill for Religious Liberty provided: “That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief” *Id.* at 13.

26. See Sullivan & Gunther, *supra* note 23, at 1505; Tribe, *supra* note 23, at 1160-61. This principle plays a prominent role in James Madison’s *Memorial and Remonstrance Against Religious Assessments*. 2 THE WRITINGS OF JAMES MADISON 183-91 (Gaillard Hunt ed., 1901).

27. See Sullivan & Gunther, *supra* note 23, at 1505; Tribe, *supra* note 23, at 1161.

28. *Everson*, 330 U.S. at 16 (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’ ” (citation omitted)). This quote is from a letter Thomas Jefferson wrote to the Danbury Baptists with the purpose of silencing Federalist clergy who were criticizing Jefferson and the Republican Party from the pulpit. 8 WRITINGS OF THOMAS JEFFERSON 113 (H.A. Washington ed., 1869). Jefferson wrote that clergy should not preach on politics and that the First Amendment built “a wall of separation between church and State.” *Id.*

argued, an established State church, no less than a national church, inevitably would persecute non-members and impede the freedom of citizens to choose a particular religion voluntarily.²⁹ Although the *Everson* opinion's analysis justifying incorporation was not extensive, the Court reasoned that voluntarism and separatism could not be maintained unless the Establishment Clause applied to the States.³⁰

Although the Court has largely accepted Black's view of the Establishment Clause since *Everson*, a growing body of scholars, as well as several Supreme Court Justices, has argued that this view is incorrect. These scholars contend that the Establishment Clause was not intended to provide strict separation between religion and government, nor was it intended to apply to the States.³¹ They argue that the Founders intended the Establishment Clause to perform two main functions: (1) to prevent the federal government from establishing a *national* church or religion; and (2) to prevent the federal government from preferring one church or religion over others.³² This view of the Establishment Clause would allow government support for religion that does not prefer one religion over others, thus it is often called "Nonpreferentialism." Justices Rehnquist and Thomas have supported this view in recent years.

In his dissent in *Wallace v. Jaffree*, Rehnquist took issue with the Court's historical view of the Establishment Clause in *Everson* and subsequent cases, particularly with the characterization of Madison's and Jefferson's beliefs.³³ Rehnquist examined Madison's statements and actions during the debates over the religion clauses in detail and emphasized that Madison's original proposal prohibited the establishment of a "national religion."³⁴ He concluded that, despite the opinions expressed in *Everson*, Madison did not support a strict separationist view of the Establishment Clause, but viewed the clause as barring the establishment of a national religion and possibly

29. See *Everson*, 330 U.S. at 12 (citing Madison, *supra* note 26, at 183).

30. See *id.* at 15-16.

31. Two leading studies espousing this view are ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 15 (1982) and MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 23-27 (1965).

32. See, e.g., CORD, *supra* note 31, at 15, 20-23 (suggesting that the Establishment Clause was intended to prevent "the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status"); HOWE, *supra* note 31, at 23-27.

33. 472 U.S. 38, 92-99 (1985) (Rehnquist, J., dissenting). In *Jaffree*, the majority held that Alabama statutes allowing silent prayer and meditation in public schools violated the Establishment Clause. *Id.* at 60-61 (majority opinion).

34. *Id.* at 94 (Rehnquist, J., dissenting) (citing 1 ANNALS OF CONGRESS 434 (1789)).

preferential treatment of particular churches.³⁵ Rehnquist also objected to *Everson*'s reliance on Jefferson's "wall of separation" metaphor: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."³⁶ He noted that looking to Jefferson in interpreting the Establishment Clause is "less than ideal" because Jefferson was in France during the debates over the Bill of Rights and did not use the metaphor until fourteen years after the Bill of Rights was passed.³⁷ Rehnquist concluded that the "wall of separation" metaphor "should be frankly and explicitly abandoned."³⁸

While the beliefs of Madison and Jefferson are popular subjects of debate, at least one Justice has advised that the intentions of the Founders may not be especially relevant to modern application of the Establishment Clause. Two decades before Rehnquist's dissent in *Jaffree*, in his concurrence to *Abington School District v. Schempp*, which ended the practice of Bible-reading in public schools, Justice Brennan wrote, "A too literal quest for the advice of the Founding Fathers . . . seems to me futile and misdirected . . ."³⁹ He further explained that (1) "the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition"; (2) the Founders were preoccupied with the "imminent

35. Justice Rehnquist stated:

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of the government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

Id. at 98-99.

Justice Thomas later cited Rehnquist's *Jaffree* dissent in arguing that Madison, indeed, held a nonpreferentialist view of the Establishment Clause. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring). Thomas also advocated that a more lenient Neutrality Test should be applied to State action under the Establishment Clause. *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring). The majority in *Zelman* held that a school voucher program was consistent with the Establishment Clause because it did not prefer different religious schools over others. *Id.* at 639 (majority opinion). See also *infra* text accompanying notes 65-69 (discussing *Zelman*).

36. *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting).

37. *Id.*

38. *Id.* at 107.

39. 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

question of established churches"; and (3) "our religious composition makes us a vastly more diverse people than were our forefathers."⁴⁰ Though there seems to be wisdom in Brennan's advice, the debate over the intentions of the Founders continues to this day and significantly influences the Supreme Court's view of Establishment Clause cases. The varied views regarding the origins of the Establishment Clause have helped create a dizzying array of Establishment Clause tests.

2. The Many Tests of the Supreme Court's Establishment Clause Jurisprudence

"Rife with confusion."⁴¹ "In hopeless disarray."⁴² "Suffer[ing] from a sort of jurisprudential schizophrenia."⁴³ These are just a few of the phrases federal courts have used to describe the Supreme Court's Establishment Clause jurisprudence. As one professor observed, "[T]he Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective."⁴⁴ Another scholar wrote, "As a result of the multitude of tests and opinions stemming from Supreme Court Establishment Clause cases, there have been numerous inconsistencies among lower courts, as well as a general sense of confusion within society . . ."⁴⁵ Below is an overview of the major tests the Supreme Court has used in its Establishment Clause jurisprudence: the *Lemon* Test, the Endorsement Test, the *Marsh* Test, the Coercion Test, and the Neutrality Test.

The most influential test in Establishment Clause jurisprudence has been the *Lemon* Test. The Burger Court introduced this test in its 1971 *Lemon v. Kurtzman* decision, which held that States could not supplement the salaries of teachers teaching secular subjects in religious schools.⁴⁶ The *Lemon* Test requires three conditions to be met for a statute to be valid under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither

40. *Id.* at 237-40.

41. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999).

42. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

43. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 717 (9th Cir. 1999).

44. Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989).

45. Roxanne L. Houtman, *ACLU v. McCreary County: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 403-04 (2005).

46. 403 U.S. 602, 602 (1971).

advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”⁴⁷ Although scholars and courts criticize and often disregard the *Lemon* Test,⁴⁸ the Court continues to cite it regularly, and it has never been formally overruled.⁴⁹

In her *Lynch v. Donnelly* concurrence, Justice O’Connor refined the *Lemon* Test by narrowing it to the purpose and effects prongs.⁵⁰ Under this Endorsement Test, the purpose prong “asks whether government’s actual purpose is to endorse or disapprove of religion,” and the effects prong focuses on whether the contested activity would convey endorsement or disapproval to a reasonable observer.⁵¹ O’Connor is concerned with government’s endorsement of a particular religion or religious activity because “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁵² O’Connor’s Endorsement Test was applied by the majority in *County of Allegheny v. ACLU* in holding that a city’s Christmas nativity scene violated the Establishment Clause, but a separate display consisting of a large menorah and Christmas tree did not.⁵³ In distinguishing the unconstitutional nativity scene in *County of Allegheny* from the constitutional one in *Lynch*, the Court observed that the religiosity of the *Lynch* scene was muted by other objects surrounding it, including a talking wishing well, a clown, and a dancing elephant.⁵⁴ Although the Endorsement Test has been criticized by federal judges as “flawed in its fundamentals and unworkable in practice”⁵⁵ and requiring “scrutiny more commonly associated with interior decorators than

47. *Id.* at 612-13 (internal citations omitted).

48. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (agreeing with the majority’s refusal to apply the “discredited” *Lemon* Test); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (“The three-part [*Lemon*] test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.”).

49. See *Sullivan & Gunther, supra* note 23, at 1547.

50. 465 U.S. 668, 689-90 (1984) (O’Connor, J., concurring). *Lynch* held that a city’s Christmas crèche display was constitutional because of its historical origins. *Id.* at 686 (majority opinion).

51. *Id.* at 690 (O’Connor, J., concurring).

52. *Id.* at 688.

53. 492 U.S. 573, 592-94, 601-02, 620 (1989).

54. *Id.* at 596.

55. *Id.* at 669 (Kennedy, J., concurring in the judgment in part and dissenting in part).

with the judiciary,”⁵⁶ the Court has continued to apply it in some cases involving religious displays on public property.⁵⁷

In *Marsh v. Chambers*, the Court abandoned the *Lemon* inquiry altogether, upholding Nebraska’s practice of having a State-paid chaplain open each legislative session with a prayer.⁵⁸ The Court instead examined the history of the practice and concluded:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society. . . . [I]t is simply a tolerable acknowledgement of beliefs held among the people of this country.⁵⁹

Justice Kennedy later wrote, “*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings.”⁶⁰ As can be seen, the *Marsh* Test often would produce very different results from the other Establishment Clause tests.

The Court adopted the Coercion Test in *Lee v. Weisman*, which held that a rabbi-led prayer at a public school graduation ceremony violated the Establishment Clause.⁶¹ The Coercion Test asks whether a contested activity could coerce objectors into taking part in a religious activity.⁶² In *Lee*, the Court reasoned that because the graduation ceremony was essentially obligatory, objectors to the prayer would feel forced to participate.⁶³ The Court said that the Coercion Test is particularly appropriate for cases dealing with public schools because schoolchildren are especially susceptible to peer pressure and the risk of indirect coercion in schools is high.⁶⁴

The most recent addition to the Court’s Establishment Clause jurisprudence is the Neutrality Test, which is based on a nonpreferentialist view of the clause.⁶⁵ In *Zelman v. Simmons-Harris*,

56. Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

57. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000) (holding that a school district’s policy of allowing student-led prayer at football games was a violation of the Establishment Clause because it constituted an endorsement of religion).

58. 463 U.S. 783, 783 (1983).

59. *Id.* at 792.

60. *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

61. 505 U.S. 577, 586-87 (1992).

62. *Id.* at 588.

63. *Id.* at 586.

64. *Id.* at 592-93.

65. For more on the nonpreferentialist view, see *supra* notes 31-38 and accompanying text.

the Court held that a school voucher program was consistent with the Establishment Clause because it did not prefer religious schools of a certain faith over other schools.⁶⁶ Chief Justice Rehnquist's majority opinion focused on the neutrality of the program and explained that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the program usually will pass muster under the Establishment Clause.⁶⁷ Although Justice O'Connor contended in her concurrence that the majority's approach was simply a focused inquiry into the effects prong of the *Lemon* Test,⁶⁸ there is no indication in Rehnquist's majority opinion that he intended it to be so.⁶⁹ It appears that *Zelman* has added yet another test to the Court's Establishment Clause repertoire.

3. Exemplars of Contradiction: *Van Orden* and *McCreary County*

Two recent Supreme Court decisions, *Van Orden v. Perry* and *McCreary County v. ACLU*, often are cited as vivid examples of the Court's muddled Establishment Clause jurisprudence. In these two cases, both decided June 27, 2005, the Court handed down what appear to be opposite holdings regarding the public display of the Ten Commandments. In *Van Orden*, the Court held that a large stone monument inscribed with the Ten Commandments located on the grounds of the Texas state capitol building was constitutional under the Establishment Clause.⁷⁰ However, in *McCreary County*, the Court ruled that framed copies of the Ten Commandments hanging in the hallways of two Kentucky courthouses violated the Establishment Clause.⁷¹ Not only did the Court reach what appear to be opposing decisions, but it also used different Establishment Clause tests in the two cases.

The *Van Orden* plurality opinion, written by Chief Justice Rehnquist and joined by Justices Scalia, Kennedy, and Thomas, applied the *Marsh* Test in determining that there had been an unbroken tradition acknowledging the Ten Commandments as an

66. 536 U.S. 639, 652-53 (2002).

67. *Id.* at 652.

68. *Id.* at 669 (O'Connor, J., concurring).

69. See *id.* at 652 (majority opinion).

70. 545 U.S. 677, 692 (2005).

71. 545 U.S. 844, 844-49 (2005).

important part of America's heritage.⁷² It also explicitly discarded the *Lemon Test* as not useful in the case.⁷³ And the crucial fifth vote of the majority, Justice Breyer, appeared not to apply any recognized test, maintaining that justices should use their "legal judgment" in borderline cases such as this: "I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves."⁷⁴

In *McCreary County*, the majority opinion, written by Justice Souter and joined by Justices Stevens, O'Connor, Ginsburg, and Breyer, focused on the secular purpose prong of the *Lemon Test*.⁷⁵ The Court asked whether the display of the Ten Commandments had a predominantly secular purpose and determined that it did not.⁷⁶ It examined the history of the particular display in making this determination.⁷⁷ In a probable reference to *Van Orden*, the Court stated:

[I]t will be the rare case in which one of two identical displays violates the purpose prong. In general, like displays tend to show like objectives and will be treated accordingly. But where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently . . .⁷⁸

As Professor Douglas Laycock observed, the Supreme Court's holdings in *Van Orden* and *McCreary County* ensure that "we will be litigating these cases one at a time for a very long time."⁷⁹ Although these holdings leave much doubt as to whether a particular display will be found constitutional, governments still are forced to pay plaintiffs' attorneys' fees if they decide to defend a display in court and eventually lose.

B. The Fee-Shifting Statutes

Courts use §§ 1983 and 1988 of the United States Code to award attorneys' fees to plaintiffs in suits in which a government

72. *Van Orden*, 545 U.S. at 686-89 (citing as examples the portrayals of Moses and the Ten Commandments adorning the U.S. Supreme Court, the Library of Congress, and the Department of Justice).

73. *Id.* at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.").

74. *Id.* at 700, 703-04 (Breyer, J., concurring).

75. *McCreary County*, 545 U.S. at 864.

76. *Id.* at 865-66.

77. *Id.* at 866.

78. *Id.* at 866 n.14.

79. Douglas Laycock, *How to Be Religiously Neutral*, *LEGAL TIMES*, July 4, 2005, at 43.

deprived a citizen of his or her rights.⁸⁰ Courts routinely award attorney's fees to successful plaintiffs in Establishment Clause cases under these statutes. Congress enacted § 1983 to "create a right of action in federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal enforcement."⁸¹ The Court has held that § 1983 allows courts to award damages to plaintiffs when the challenged government action violates their constitutional rights and causes a compensable injury.⁸² However, courts rarely award damages in Establishment Clause cases. The main reason § 1983 is important in the Establishment Clause context is that it interacts with § 1988 to allow attorneys' fees to be awarded in Establishment cases.

Section 1988, "The Civil Rights Attorney's Fees Awards Act of 1976," allows successful § 1983 claimants to recover attorneys' fees.⁸³ Section 1988(b) provides that in an action to enforce certain civil rights statutes, including § 1983, "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 . . ."⁸⁴ This fee-shifting provision creates an exception to the American Rule in the case of enumerated civil rights claims.⁸⁵ The American Rule is the "general policy that all litigants must bear their own attorney's fees, including the prevailing party."⁸⁶ The Supreme Court has held on multiple occasions that it will not stray from the American Rule to award attorney's fees to a prevailing party absent statutory authorization from Congress.⁸⁷ After

80. 42 U.S.C. §§ 1983, 1988(b) (2000).

81. H.R. REP. NO. 96-548, at 1 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 2609. Section 1983 provides:

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

42 U.S.C. § 1983.

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

83. 42 U.S.C. § 1988.

84. *Id.* § 1988(b).

85. *Id.*

86. BLACK'S LAW DICTIONARY 34 (2d pocket ed. 2001).

87. See, e.g., *Buckhannon v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 602 (2001) ("[W]e follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority." (quoting *Key Tronic Corp. v. U.S.*, 511 U.S. 809, 819 (1994)) (internal

the Court made this position clear in *Alyeska Pipeline Service Co. v. Wilderness Society*,⁸⁸ Congress gave federal courts the explicit authority to award attorneys' fees in certain civil rights cases by enacting § 1988. As the Senate Committee Report on § 1988 explained: "The purpose and effect of [the statute] are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866."⁸⁹ Subsequently, the Supreme Court has found that the central purpose of § 1988 is to enable victims of civil rights violations to access the courts and to obtain competent legal representation that they may not have been able to afford otherwise.⁹⁰ This may help to explain why, although the Establishment Clause clearly is not a civil rights law passed since 1866, federal courts uniformly use § 1988 as an instrument to award attorneys' fees to successful plaintiffs in Establishment Clause cases.

Although the text of § 1988 leaves the decision to award attorneys' fees to prevailing *parties* to the court's "discretion,"⁹¹ the Supreme Court has limited this discretion. The Court has held that courts should award attorneys' fees to prevailing *plaintiffs* "unless special circumstances would render such an award unjust."⁹² It is not clear what would constitute "special circumstances" because courts simply do not find them. For all practical purposes, attorneys' fees are awarded automatically to successful plaintiffs under § 1988. In contrast, prevailing *defendants* may recover attorneys' fees only where the suit is "vexatious, frivolous, or brought to harass or embarrass the defendant."⁹³ Thus, plaintiffs bringing Establishment Clause claims can be confident that they will be awarded attorneys' fees if they are successful, yet do not have to worry about paying the defendant's fees if they are unsuccessful. The defendant governments, however, know

quotation marks omitted)); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975) ("Since the approach taken by Congress . . . has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of [a Congressional statute], those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation").

88. 421 U.S. at 269.

89. S. REP. NO. 94-1011, at 2 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5909-10.

90. See, e.g., *Kay v. Ehrler*, 499 U.S. 432, 437 (1991) ("[T]he overriding statutory concern [of § 1988] is the interest in obtaining independent counsel for victims of civil rights violations."); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." (quoting H.R. REP. NO. 94-1558, at 1 (1976))).

91. 42 U.S.C. § 1988(b) (2000).

92. *Hensley*, 461 U.S. at 429 (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)).

93. *Id.* at 429 n.2 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

that they will have to pay plaintiffs' attorneys' fees if they unsuccessfully defend an Establishment Clause claim and that they have almost no chance of recovering their own fees. The unpredictable state of Establishment Clause jurisprudence causes this risk of an attorneys' fee award to loom especially large over a government's decision of whether to defend a claim or settle.

III. THE PUBLIC EXPRESSION OF RELIGION ACT

A. *Background of PERA*

The Public Expression of Religion Act ("PERA") was introduced in the House of Representatives by John Hostettler, a Republican Congressman from Indiana, in May 2005.⁹⁴ The bill's original title, which stated its purpose, was: "To 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."⁹⁵ The House Committee on the Judiciary then revised the title to read, "To 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."⁹⁶ Most notably, as the revised title indicates, the bill was broadened to apply to lawsuits brought against the federal government, as well as those brought against state and local governments.⁹⁷ On September 26, 2006, the bill, as amended, passed the House by a vote of 244-173.⁹⁸ The bill then was sent to the Senate and referred to the Senate Committee on the Judiciary, where it currently awaits action.⁹⁹

94. Public Expression of Religion Act of 2005, H.R. 2679, 109th Cong. (2005) (as introduced in House, May 26, 2005). Rep. Hostettler subsequently lost his seat in the House in November's election. Maureen Groppe, *Democrat Ellsworth Ousts Hostettler in Bloody 8th*, INDIANAPOLIS STAR, Nov. 8, 2006, at A9.

95. H.R. 2679.

96. Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006, H.R. 2679, 109th Cong. (as passed by House, Sept. 26, 2006). This is the version of the bill that will be cited for the rest of this Note.

97. H.R. REP. NO. 109-657, at 2, 8-9 (2006).

98. 152 CONG. REC. H7422 (daily ed. Sept. 26, 2006).

99. 152 CONG. REC. S10874 (daily ed. Nov. 13, 2006) (listing H.R. 2679, the PERA bill, among the bills to be passed along to the Senate).

B. The Provisions of PERA

Section 1 of PERA states the bill's short title: "Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006."¹⁰⁰ Section 2 applies to Establishment Clause suits brought against State and local officials.¹⁰¹ This section performs two main functions. First, it explicitly limits relief that can be granted in Establishment Clause cases to injunctive or declaratory relief.¹⁰² It accomplishes this by amending 42 U.S.C. § 1983, which provides a civil action for the deprivation of rights.¹⁰³ This means that courts would be limited to ordering a government to cease an action that violates the Establishment Clause or to declaring what the law is; they would not be able to award monetary damages to successful plaintiffs. Second, Section 2 provides that courts may not award attorneys' fees to successful plaintiffs in Establishment Clause cases.¹⁰⁴ It accomplishes this by amending 42 U.S.C. § 1988(b), under which courts routinely award attorneys' fees in such cases.¹⁰⁵ Establishment Clause cases covered by Section 2 include, but are not limited to, those challenging:

- (1) a veterans' memorial's containing religious words or imagery;
- (2) a public building's containing religious words or imagery;
- (3) the presence of religious words or imagery in the official seals of the several States and the political subdivisions thereof; or
- (4) the chartering of Boy Scout units by components of States and political subdivisions, and the Boy Scouts' using public buildings of States and political subdivisions.¹⁰⁶

Section 3 of PERA applies the provisions of Section 2 to lawsuits against the federal government and its officials.¹⁰⁷ Therefore, Section 3 provides that plaintiffs successful in an Establishment Clause claim against the federal government are entitled only to injunctive or declaratory relief and cannot be awarded monetary damages or attorneys' fees.¹⁰⁸ Section 3's coverage is very similar to

100. H.R. 2679 § 1. However, the act is still commonly referred to as the Public Expression of Religion Act (PERA) and will be referred to as such in this Note.

101. *Id.* § 2.

102. *Id.* § 2(a).

103. *Id.*; see *supra* text accompanying notes 80-82.

104. H.R. 2679 § 2(b).

105. *Id.*; see *supra* text accompanying notes 83-90.

106. H.R. 2679 § 2(a).

107. *Id.* § 3.

108. *Id.*

Section 2's; however, it also explicitly covers challenges to religious words or imagery in the U.S. seal, U.S. currency, and the Pledge of Allegiance.¹⁰⁹ PERA's provisions are broad in scope and would alter substantially the rules of Establishment Clause litigation.

C. The Debate over PERA

1. Beneath the Text: Politics as Usual

Technically, PERA concerns procedural litigation reform. However, the underlying issue is a more controversial one: What is the proper interaction between religious expression and government? Unsurprisingly, the debate over PERA is partisan. The vote in the House illustrates the divide. Of the 244 Representatives voting for PERA, 218 were Republicans and 26 were Democrats.¹¹⁰ Of the 173 nays, there were 166 Democrats, 6 Republicans, and 1 Independent.¹¹¹ When analyzing the debates over constitutional interpretation and legal precedent, two things become clear regarding the purposes behind PERA. First, PERA is aimed at reducing challenges to specific acts of religious expression that the bill's predominantly conservative proponents view as permitted by the Constitution. Second, the activities of the ACLU are at the center of PERA and the debates surrounding it. These two facts highlight the political nature of PERA and underlie the debates concerning the bill.

The short title of the bill depicts its proponents' aims quite well. In Committee, the short title was changed from the "Public Expression of Religion Act of 2005" to the "Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006."¹¹² The bill's proponents believe that expression of religion in these contexts is appropriate and constitutional; thus, they seek to reduce challenges to such expression. Legislators changed the short title with specific events in mind, as is evidenced by the Committee Report. The Report cited two recent cases in which federal courts ordered crosses to be removed from veterans'

109. *Id.* § 3(b).

110. Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 480 (Sept. 26, 2006), http://clerk.house.gov/art_history/house_history/index.html (select "109th, 2nd Session (2006)" from menu, then go to "Roll Calls 400 Thru 499," then go to "480") (providing a break down of the vote by political party affiliation).

111. *Id.*

112. H.R. REP. NO. 109-657, at 1 (2006).

memorials.¹¹³ First, in *Buono v. Norton*, the Ninth Circuit Court of Appeals ordered the removal of a six-foot cross from a veterans' memorial located eleven miles from the main highway in Mojave National Preserve in California.¹¹⁴ The cross was erected on private land in 1934 to honor fallen World War I soldiers, but in 1994 the area was declared a national preserve.¹¹⁵ The ACLU, representing retired park ranger Frank Buono, successfully demanded that the cross be removed because Buono, who passed by the memorial several times a year, found it offensive.¹¹⁶ Second, in the summer of 2006, a federal judge ordered the City of San Diego to remove a cross from the Mount Soledad Veterans' Memorial, erected over fifty years earlier on the site of a memorial cemetery for veterans of the Korean War.¹¹⁷ In addition to citing these cases, some proponents of PERA expressed concern that the ACLU would attempt to have crosses removed from individual soldiers' gravestones located in national cemeteries.¹¹⁸

The Committee Report also cited situations where the ACLU brought lawsuits against municipalities and the federal government for supporting the Boy Scouts, an organization that allegedly forces members to swear religious oaths.¹¹⁹ In the settlement of a lawsuit concerning the San Diego Boy Scouts use of Balboa Park, the City of San Diego prohibited the Boy Scouts from using the public park and paid the ACLU \$950,000.¹²⁰ In response to a religious discrimination lawsuit brought by the ACLU in 2004, the U.S. Department of Defense agreed to end direct sponsorship of Boy Scouts units on military facilities overseas and in the U.S.¹²¹ PERA's proponents' concerns over public seals stem not only from the situations in Los Angeles and

113. *Id.* at 7-8 n.22.

114. 371 F.3d 543, 544-45, 550 (9th Cir. 2004).

115. Christopher Levenick, *Houses of Worship: High Noon at Sunrise Rock*, WALL ST. J., May 27, 2005, at W15.

116. *Id.*; H.R. REP. NO. 109-657, at 8 n.22.

117. Paulson v. City of San Diego, 2006 U.S. Dist. LEXIS 44740 (S.D. Cal. May 3, 2006); see also H.R. REP. NO. 109-657, at 7.

118. 152 CONG. REC. H7389, H7392 (daily ed. Sept. 26, 2006) (statement of Rep. Nadler). However, the ACLU explicitly rejected this notion in a letter to the House Judiciary Committee. *Id.* (explaining that symbols on gravestones are the choice of individual soldiers and their families and thus are different from government-sponsored symbols).

119. H.R. REP. NO. 109-657, at 8 n.22 (citing Press Release, ACLU, Pentagon Agrees to End Direct Sponsorship of Boy Scout Troops in Response to Religious Discrimination Charge (Nov. 15, 2004)).

120. *Id.* at 6 n.13 (citing Seth Hettena, *City of San Diego Settles Boy Scout Suit*, AP ONLINE, Jan. 8, 2004).

121. *Id.* at 8 n.22 (quoting Press Release, ACLU, *supra* note 119).

Redlands described above,¹²² as numerous other county and municipal governments also have either agreed or been forced to remove crosses from their seals.¹²³

As even a cursory glance at the debates over PERA makes clear, the ACLU is the primary target of this bill. The ACLU has brought a large number of high-profile Establishment Clause lawsuits, some of which have resulted in massive attorneys' fees awards. PERA's proponents' main concern is that the ACLU lawsuits, or even the mere threat of lawsuits, force governments to accede to the group's demands without going to court. Several examples of this result already have been described, including the situations in Los Angeles and Redlands concerning their seals and the settlement in the lawsuit over the San Diego Boy Scouts in which the ACLU received \$950,000.¹²⁴ The ACLU also has acknowledged openly that it often uses the threat of lawsuits against governments that could not afford them to get its way.¹²⁵

Proponents of PERA complain that taxpayers must foot the bill for the attorneys' fees awarded to the ACLU.¹²⁶ A few examples of attorneys' fees awards the ACLU has received in recent years in just Ten Commandments cases include: \$150,000 from Barrow County, Georgia for the removal of a framed copy of the Ten Commandments

122. See *supra* text accompanying notes 1-10 (describing how the threat of lawsuits by the ACLU caused both the City of Redlands and the County of Los Angeles to remove crosses from their government seals).

123. These governments include those of La Mesa, California; Zion, Illinois; Stow, Ohio; Bernalillo, New Mexico; Rolling Meadows, Illinois; and Edmond, Oklahoma. See H.R. REP. NO. 109-657, at 8 (citing Troy Anderson, *Will the Law Wipe L.A. Off the Map?; Courts: ACLU Challenge to Cross on County Seal Leads Some to Wonder If Holy City Names Are Next*, LONG BEACH PRESS-TELEGRAM, June 13, 2004, at A1). However, some courts have held that a cross appearing on a public seal does not violate the Establishment Clause. See, e.g., *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991) (holding that the city's insignia, which was adapted from the city founder's coat of arms and contained a Christian cross, did not violate the Establishment Clause), cert. denied, 505 U.S. 1219 (1992).

124. See *supra* text accompanying notes 1-10, 120.

125. H.R. REP. NO. 109-657, at 7 (citing numerous ACLU press releases acknowledging this tactic).

126. 152 CONG. REC. H7389, H7403 (daily ed. Sept. 26, 2006) (statement of Rep. King) ("American taxpayers currently have to pay for ACLU 'victories.'"). However, this is not always the case, as many governments are indemnified for this type of judgment. Thus, many times insurance companies end up footing this bill, not the taxpayers. For examples of state statutes that authorize indemnification for government officials who are held liable under § 1983, see Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 713 n.289 (2004).

in the county courthouse;¹²⁷ \$121,500 from Kentucky for the removal of a Ten Commandments monument outside the state capitol;¹²⁸ and \$550,000 from Alabama for the removal of the Ten Commandments from a courthouse (shared with two other groups).¹²⁹ In addition to complaining that taxpayers must foot these bills, PERA's proponents perceive the awards as windfalls for the ACLU. They argue that going to court is often a win-win situation for the ACLU and other advocacy groups that use staff or volunteer lawyers.¹³⁰ If they lose a lawsuit, they experience few financial consequences; however, if they win, they often are awarded attorneys' fees at the private sector's market rate and are able to use this money to fund more lawsuits. Proponents of PERA say that this state of affairs encourages frivolous and coercive Establishment Clause claims and that PERA would remedy this problem.¹³¹

2. The Proponents

PERA's proponents argue that current litigation rules and practices regarding the Establishment Clause are flawed in two main ways. First, such rules and practices alter the constitutional freedom of religion into a freedom *from* religion. Second, the rules, combined with the muddled Supreme Court jurisprudence, force many governments to settle outside of court and forego a defense of their constitutional expression.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹³² According to the proponents of PERA, the first two clauses of the First Amendment, the Establishment Clause and the Free Exercise Clause, together provide for freedom of religion. When governments are forced by threats of lengthy litigation and hefty attorneys' fees to remove all religious expression from the public square, the freedom of religion guaranteed by the First Amendment is

127. H.R. REP. NO. 109-657, at 6 n.13 (citing Cameron McWhirter, *10 Commandments: Barrow Removes Religious Display; County Complies with U.S. Judge*, ATLANTA J.-CONST., July 20, 2005, at 1B).

128. *Id.* (citing Jack Brammer, *State Legislature Fooths the Bill for ACLU Victory; Group Fought Lawmaker's Plan for Monument*, LEXINGTON HERALD LEADER, July 8, 2003, at B1).

129. *Id.* (citing Kyle Wingfield, *Legal Battle Over Ten Commandments Monument Will Cost Alabama Taxpayers More Than \$500,000*, ASSOCIATED PRESS, Apr. 14, 2004).

130. 152 CONG. REC. H7389, H7393 (daily ed. Sept. 26, 2006) (statement of Rep. Hostettler).

131. See, e.g., *id.* (statement of Rep. Hostettler) ("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.").

132. U.S. CONST. amend. I.

converted into a freedom *from* religion.¹³³ The Committee Report notes that the Supreme Court held that “the State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe.”¹³⁴ Representative Mike Pence from Indiana echoed the sentiments of many of the proponents when he explained that by authorizing the awarding of attorneys’ fees in Establishment Clause cases, § 1988 has weakened the freedom of religion:

It has become the tool of elements who would advance a radical secularist view of the public square in America, and who have used the opportunity to access the public Treasury in the form of attorney’s fees to not only finance massive litigations against government entities to scrub our public square of any vestige of reference to God or reference to the religious heritage of the American people, but also it has been used to prevent that day in court from happening.¹³⁵

As is evidenced by Representative Pence’s statements, PERA’s proponents’ main concern is that the threat of having to pay the plaintiff’s attorneys’ fees causes many governments to accede to plaintiffs’ demands and “scrub” the public square of all expression that acknowledges religion. The threat of attorneys’ fees is particularly daunting for governments because of the current state of Establishment Clause jurisprudence, which PERA’s sponsor described as “clear as mud.”¹³⁶ The Committee Report explained:

Caselaw under the Establishment Clause is so unpredictable that States and localities know defending themselves in such lawsuits is fraught with uncertainty. The threat of having to pay attorneys’ fees in such cases should they happen to lose sometimes leads States and localities to forego whatever rights they may have under the Constitution—and concede to the demands of those bringing Establishment Clause lawsuits—often before such cases even go to trial.¹³⁷

PERA’s proponents believe that taking away the threat of attorneys’ fees in Establishment Clause cases would allow more governments to defend themselves in court rather than to accede to the plaintiffs’ demands. They argue that the courts of law, not interest groups like

133. See, e.g., 152 CONG. REC. H7356, H7357 (daily ed. Sept. 26, 2006) (statement of Rep. Gingrey) (“The first amendment is an absolute right and should not be misinterpreted to allow these attacks on our freedom of religion. The attack on our religious heritage is just as wrong as denying a person the freedom to worship. The Constitution guarantees the freedom of religion, not freedom from religion.”).

134. H.R. REP. NO. 109-657, at 3 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963)).

135. 152 CONG. REC. H7389, H7400 (daily ed. Sept. 26, 2006) (statement of Rep. Pence).

136. *Id.* at 7393 (statement of Rep. Hostettler). The Supreme Court’s Establishment Clause jurisprudence is discussed *supra* Part II.A.2.

137. H.R. REP. NO. 109-657, at 2 (internal citation omitted).

the ACLU, should determine what government actions violate the Establishment Clause.¹³⁸

3. The Opposition

In challenging PERA, opponents argue that its provisions amending current litigation rules would (1) make it more difficult for individual plaintiffs to challenge government action under the Establishment Clause, (2) allow governments to violate the Establishment Clause with impunity, and (3) set a dangerous precedent. The opponents claim that without the possibility of recovering attorneys' fees, many plaintiffs would be unable to challenge Establishment Clause violations due to the high cost of litigating such cases.¹³⁹ According to this view, lawyers would stop representing plaintiffs on a pro bono basis because there would be no chance of compensation, and individual plaintiffs often could not afford to pay legal fees themselves.¹⁴⁰ The opponents concede that groups like the ACLU and Americans United for Separation of Church and State still would bring Establishment Clause challenges, but claim that individuals should not have to rely on another group to bring a suit when an individual right has been violated.¹⁴¹

PERA's opponents reason that because it will be more difficult for individuals to bring these suits, many Establishment Clause violations will be insulated from judicial review. Many opponents go further and claim that this is precisely what PERA is intended to accomplish. They contend that the bill's proponents do not like the federal courts' decisions concerning the public expression of religion, so they are trying to rig the process in their favor and keep the

138. See, e.g., 152 CONG. REC. H7356, H7363 (daily ed. Sept. 26, 2006) (statement of Rep. Hostettler) ("[Under PERA, a] blatant violation is determined by a court of law and not by ACLU attorneys behind closed doors.").

139. See, e.g., 152 CONG. REC. H7389, H7401 (daily ed. Sept. 26, 2006) (statement of Rep. Nadler).

140. See, e.g., 152 CONG. REC. H7356, H7357 (daily ed. Sept. 26, 2006) (statement of Rep. McGovern) ("If this bill is enacted, attorneys will stop representing people who feel that their rights are infringed upon because they won't be compensated for doing their jobs."); 152 CONG. REC. E1904 (daily ed. Sept. 29, 2006) (statement of Rep. Etheridge) ("Few citizens can afford to pay attorney fees that can total hundreds of thousands of dollars in these cases. In addition, attorneys cannot always take cases, even on a pro bono basis, if they are unable to recoup their fees and out-of-pocket costs when they prevail.").

141. See, e.g., 152 CONG. REC. H7389, H7401 (daily ed. Sept. 26, 2006) (statement of Rep. Nadler) ("[T]he various organizations say that even if [the House of Representatives] pass[es] this bill, they will still sue. But that is not the question . . . [A]ny individual should have the right and the ability to go to court.").

religious expression from being challenged in court.¹⁴² Law professor Erwin Chemerinsky did not mince words in arguing that “[s]uch a bill could have only one motive: to protect unconstitutional government actions advancing religion.”¹⁴³ PERA’s opponents also claim that PERA would cause a breach in the separation of church and state, invoking Thomas Jefferson’s “wall of separation” rhetoric to bolster their case.¹⁴⁴ Representative Chet Edwards said:

[PERA] would not just chip away, it would chisel away, the wall of separation of church and state. . . . By making it easier for government to step on the first amendment religious rights of all Americans, this bill does damage to what Jefferson called, with reverence, the wall of separation between church and state.¹⁴⁵

The opponents argue that the bill would allow governments to intrude in the religious sphere, thus inhibiting individuals’ religious freedom.¹⁴⁶

Finally, opponents claim that PERA would set a “dangerous precedent” by singling out “one of the constitutional protections afforded in the Bill of Rights, and prevent its full enforcement.”¹⁴⁷ They note that § 1983 has not been altered substantially since 1871 and never has been amended to limit the types of damages available to a plaintiff raising a specific constitutional issue.¹⁴⁸ Representative Jerrold Nadler said, “We have always expanded rights under section 1983, our nation’s oldest and most durable civil rights laws [sic].”¹⁴⁹ He adds that this change would disadvantage one class of people in

142. See, e.g., *id.*; 152 CONG. REC. H7356, H7357 (daily ed. Sept. 26, 2006) (statement of Rep. McGovern) (“[T]here are some on the other side of the aisle who don’t like some of the decisions the courts have handed down in regards to the display of certain religious symbols; and since they cannot win in court based on rights guaranteed in the Constitution of the United States, my good friends on the other side of the aisle are now attempting to rig the process in their favor.”).

143. Erwin Chemerinsky, Opinion, *Legislating Violations of the Constitution*, WASHINGTONPOST.COM, Sept. 30, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901055.html>.

144. 152 CONG. REC. H7356, H7358 (daily ed. Sept. 26, 2006) (statement of Rep. Edwards) (quoting Jefferson’s 1802 letter to the Danbury Baptists).

145. *Id.* at 7358-59.

146. See, e.g., *id.* at 7358 (“[T]his bill undermines the enforcement of the establishment clause of the first amendment, which was designed exactly to protect Americans from government intrusion into our faith.”).

147. 152 CONG. REC. E1904 (daily ed. Sept. 29, 2006) (statement of Rep. Etheridge); see also 152 CONG. REC. H7389, H7402 (daily ed. Sept. 26, 2006) (statement of Rep. Hoyer) (“Make no mistake, if this bill became law, it would single out one area of Constitutional Protections under the Bill of Rights and prevent its full enforcement. Without question, that would set a dangerous precedent.”).

148. 152 CONG. REC. H7389, H7391 (daily ed. Sept. 26, 2006) (statement of Rep. Nadler) (citing a memorandum from the Congressional Research Service confirming that in its history § 1983 had never been amended to limit the type of damages available).

149. *Id.*

particular: religious minorities, who are usually the ones bringing Establishment Clause challenges.¹⁵⁰ In summary, PERA's opponents believe the act would enable governments to infringe upon individuals' rights by endorsing religion in the public sphere with impunity.

IV. RIGHT IDEA, WRONG APPROACH: ANOTHER TAKE ON PERA

A. A Fundamental Flaw

While PERA's opponents raise several valid policy concerns regarding the bill, there is a more fundamental flaw in PERA's premise. The bill rests on the presumption that the government has a constitutionally protected right to express itself. The original title of the bill was "To 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 attorneys' fees."¹⁵¹ However, the Constitution does not protect the expression of religion by government officials when they are acting in their governmental capacity. The First Amendment restrains the government; it does not protect it. As an influential article on government speech explained, "If the government can claim to act as a First Amendment right holder, the First Amendment loses coherence, for in such situations there is nothing for the First Amendment to act on or constrain."¹⁵²

PERA's proponents also mischaracterize the scope of the bill. They argue that it would hinder groups that seek to scrub the public square of all religious expression.¹⁵³ However, scrubbing the public square of all religious expression is not what is at issue in PERA. Religious expression by private citizens and groups in the public square involves an entirely different line of cases.¹⁵⁴ In fact, the extent

150. *Id.*; see also *id.* at 7402 (statement of Rep. Conyers) (arguing that the bill treats religious minorities unfairly and leaves them without protection).

151. Public Expression of Religion Act of 2005, H.R. 2679, 109th Cong. (as introduced in House, May 26, 2005) (emphasis added).

152. Randall P. Beazanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1502 (2001).

153. See, e.g., 152 CONG. REC. H7389, H7390 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) (arguing that local governments are being forced to "ban religious people from using the public square"); *id.* at 7400 (statement of Rep. Pence).

154. These cases deal with the First Amendment's guarantee of freedom of speech. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that a school board policy excluding religious groups from the after-hours use of school facilities violated the groups'

to which governments can regulate and prohibit religious expression in the public square is restricted; they cannot use Establishment Clause concerns as an excuse to hinder private citizens' freedom of speech, even if it is religious speech in a public forum.¹⁵⁵ Despite the rhetoric of PERA's proponents, the bill does not apply to private religious expression; it applies to the government's expression of religion. And the government has no constitutional right to express religion. The Establishment Clause prohibits the government from expressing religion for religion's sake. Therefore, PERA is flawed in that it seeks to protect governments' expression of religion when no such right exists.

B. A Legitimate Aim: Protecting the Acknowledgment of Religious Heritage

Though PERA is based on the flawed premise that the government has a right to religious expression, its aims should not be entirely discarded. PERA correctly identifies a situation that is worthy of reform. Under current litigation rules, special interest groups like the ACLU are able to coerce governments into abandoning references to *the heritage of their citizens and cultures* if this heritage happens to be religious. Though the Establishment Clause prohibits governments from expressing religion for religion's sake, it does not prohibit them from acknowledging their religious heritage. This form of government expression, acknowledging a religious heritage, still is not a constitutional *right*. However, it is a *value* that the legislature may choose to protect. The Supreme Court's Establishment Clause

freedom of speech); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 862 (1995) (holding that a public university's refusal to subsidize a religious student organization's periodical, when it subsidized many nonreligious groups' periodicals, constituted viewpoint discrimination not allowed by the First Amendment's free speech guarantees); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that a private group must be granted a permit to erect a cross on a state-owned plaza, because the plaza was a public forum and denying all religious displays would violate the First Amendment's free speech guarantees); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (overturning a school board policy permitting outside groups to use school facilities unless they presented religious viewpoints).

155. See, e.g., *Good News Club*, 533 U.S. at 112 ("Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. . . . We disagree."); *Rosenberger*, 515 U.S. at 846 ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."); *Capitol Square*, 515 U.S. at 767 ("[The Establishment Clause does not] serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum."); *Lamb's Chapel*, 508 U.S. at 395 (holding that the fear of violating the Establishment Clause is not a valid defense to a claim that the government violated the plaintiff's freedom of speech).

jurisprudence permits governments to acknowledge their religious heritage in many circumstances and recognizes this constitutional acknowledgment as a legitimate target of legislative and judicial protection.

1. Acknowledgment of Religious Heritage in the Establishment Clause Tests

Although the Supreme Court's Establishment Clause jurisprudence is confused and unsettled as to exactly which activities and displays the clause prohibits, it clearly allows some government acknowledgment of religious heritage. None of the tests that the Court has used to evaluate public religious displays, namely the *Lemon* Test, the Endorsement Test, and the *Marsh* Test, presents a blanket prohibition of all expression that could be construed as religious.¹⁵⁶ All three take into account the purpose and history of the display or action. The first prong of the *Lemon* Test examines whether the government's action or display has a secular purpose.¹⁵⁷ The Endorsement Test, arguably the most popular choice for evaluating religious displays, also focuses on the secular purpose of the display. As Justice O'Connor explained, “[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.”¹⁵⁸ Finally, the *Marsh* Test most consciously examines the relationship between a display and its locality's heritage. In upholding Nebraska's practice of having a state-paid chaplain open each legislative session with a prayer, the Court held that the practice was “simply a tolerable acknowledgement of beliefs widely held among the people of this country.”¹⁵⁹ Federal courts of appeal have relied on the *Marsh* Test to allow governments to acknowledge their religious heritage through a courthouse display of the Ten Commandments on a bronze plaque,¹⁶⁰ invocations at a county board meeting,¹⁶¹ the maintenance of a prayer room in a state capitol building,¹⁶² and a cross adorning a city's insignia adapted from its founder's coat of

156. The Court does not use the Coercion Test or the Neutrality Test to evaluate religious displays.

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

158. *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring); see also *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part) (explaining that “history and ubiquity” are relevant under the Endorsement Test).

159. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

160. *Freethought Soc'y v. Chester County*, 334 F.3d 247, 270 (3d Cir. 2003).

161. *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 278 (4th Cir. 2005).

162. *Van Zandt v. Thompson*, 839 F.2d 1215, 1217-18 (7th Cir. 1988).

arms.¹⁶³ However, the most notable reliance on *Marsh* came in the plurality opinion of *Van Orden*.¹⁶⁴

2. *Van Orden* and *McCreary County* Revisited

Revisiting *Van Orden* and *McCreary County*, the two Ten Commandments cases often cited as exemplifying the muddled state of Establishment Clause jurisprudence, shows that the cases may not be as inexplicable as many commentators claim.¹⁶⁵ In *Van Orden*, the Court held that the Establishment Clause permitted a stone monolith of the Ten Commandments to be displayed on the grounds of the Texas State Capitol.¹⁶⁶ In contrast, the Court held in *McCreary County* that framed copies of the Ten Commandments hanging in two Kentucky courthouses violated the Establishment Clause.¹⁶⁷ Because Justice Breyer was the only Justice to vote differently in the two cases, with his apparent switch producing the difference in holdings, it is especially enlightening to examine his reasoning.¹⁶⁸ In *Van Orden*, Breyer did not use a specific Establishment Clause test, but said that Justices should use their “legal judgment” in cases such as this.¹⁶⁹ It appears that Breyer’s “legal judgment” focuses on whether the government’s display acknowledges the community’s heritage or has a more overtly religious function. Breyer reasoned that the monument at the Texas Capitol was “used as a part of a display that communicates not simply a religious message, but a secular message as well,” and he emphasized the 40-year history of the particular monument.¹⁷⁰ He explained:

This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments’ displays demonstrates the substantially religious objectives of those who mounted them That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document.¹⁷¹

Thus, the reason why the Court found the Ten Commandments monument in *Van Orden* acceptable under the Establishment Clause,

163. *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991).

164. See *supra* text accompanying note 72.

165. See *supra* Part II.A.3.

166. 545 U.S. 677, 692 (2005).

167. 545 U.S. 844 (2005).

168. He voted that the display in *Van Orden* was permitted by the Establishment Clause, 545 U.S. at 699-706 (Breyer, J., concurring), but that the display in *McCreary County* violated it, 545 U.S. at 849.

169. 545 U.S. at 700, 703-04 (Breyer, J., concurring).

170. *Id.* at 701.

171. *Id.* at 703.

while the framed depictions in *McCreary County* were not, is that the Texas monument's main function was to acknowledge the role the Ten Commandments played in the history, culture, and politics of the state, not to advance a particular set of religious beliefs.¹⁷² This distinction could only be made after detailed inspections of the facts surrounding the cases and the particular histories of the individual displays.

Upon closer inspection, it appears that the different holdings in *Van Orden* and *McCreary County* are not simply the product of confused jurisprudence. They are better viewed as products of the complex analysis and inherent conflict involved in Establishment Clause cases, which often cause outcomes to be unpredictable. This inherent conflict is why the Establishment Clause does not lend itself well to strict tests or bright line rules. The subtle analysis involved requires courts to examine closely the facts of each particular case. Though this type of decisionmaking can be advantageous and may be necessary in order for courts to stay true to a general mandate such as the Establishment Clause, it creates great uncertainty for governments as to what particular acknowledgments of religion are permissible under the clause.

3. Why the Acknowledgment of Religious Heritage Needs Protection

The reason that governments' acknowledgment of religious heritage is vulnerable is not that the Supreme Court's Establishment Clause jurisprudence forbids it; it is because many governments do not have the ability or incentive to defend such acknowledgments in the courts of law. This Note has outlined the main factors contributing to this inability or unwillingness to defend such challenges.¹⁷³ First, §§ 1983 and 1988 ensure that the defendant government will have to pay the plaintiff's attorneys' fees if it loses in court.¹⁷⁴ Although these fee-shifting provisions perform a valuable function in many cases, they are not appropriate in cases challenging a government's acknowledgment of its religious heritage. As one First Amendment scholar and attorney noted, "Sections 1983 and 1988 are particularly suited for those cases in which the plaintiffs are ill-financed and where the law is relatively predictable."¹⁷⁵ Neither of these conditions

172. *Id.*

173. See *supra* Part II.

174. See *supra* Part II.B.

175. *Public Expression of Religion: Hearing on H.R. 2679 Before the H. Comm. on the Judiciary*, 109th Cong. 1-2 (2006) (statement of Mathew D. Staver, Founder & Chairman, Liberty Counsel).

is present in most suits challenging a government's acknowledgment of its religious heritage. Many of these suits are brought by well-financed interest groups like the ACLU, who have conceded that an inability to be awarded attorneys' fees would not deter them from bringing claims.¹⁷⁶ Additionally, the unpredictability of current Establishment Clause jurisprudence has been well documented.¹⁷⁷ With the Establishment Clause jurisprudence so unpredictable, even at the Supreme Court level, there is always a substantial risk that the government will lose in court and be forced to pay the plaintiff's attorneys' fees.

Under this state of affairs, plaintiffs who bring an Establishment Clause claim, or even potential plaintiffs who threaten to do so, have an inordinate amount of leverage over the defendant government. Section 1988 provides governments with a very strong incentive to accede to the demands of the plaintiff and not defend the acknowledgment of its religious heritage in court. Another, more subtle factor detracting from the government's incentives to defend such suits is the cost of the government's own attorneys' fees and litigation expenses. When calculating these costs, the virtual certainty of several rounds of appeals, even if the government wins at the district court level, must be factored in to the equation. The combination of these factors makes it very difficult for a government to justify financially the decision to defend its religious heritage. The financial factors, which are often the factors that speak loudest to local governments, all point to settling with the plaintiff rather than allowing the dispute to go to court.¹⁷⁸ The main incentives to defend the lawsuit are often only the desires to preserve the heritage of the municipality, state, or country, and to represent the will of the majority of citizens. While choosing this course may be possible for some large and wealthy governments, many localities do not have the luxury to pursue this option.¹⁷⁹ Even if a government has the

176. See, e.g., 152 CONG. REC. H7389, H7394 (daily ed. Sept. 26, 2006) (statement of Rep. Smith) (quoting an ACLU staff attorney who stated that an inability to receive attorneys' fees in Establishment Clause cases "wouldn't stop us from bringing lawsuits"); 152 CONG. REC. H7356, H7359 (daily ed. Sept. 26, 2006) (statement of Rep. Gingrey) (noting that the ACLU has said clearly that it would continue to bring lawsuits even if receiving attorneys' fees was not an option).

177. *See supra* Part II.A.2-3.

178. Although it may be expensive to remove religious imagery or words from government property, a government risks having to pay for this removal in addition to all the legal fees if it loses in court.

179. The City of Redlands is an example of a government that could not afford to defend an Establishment Clause claim. *See supra* text accompanying notes 1-5.

necessary funds, the financial incentives of settlement may win out.¹⁸⁰ Therefore, governments are incentivized to settle even when they have a strong case that their acknowledgment of religious heritage is permitted under the Establishment Clause.

This state of affairs also creates a self-censorship problem. With the prevalence of Establishment Clause claims being brought by powerful groups like the ACLU and Americans United for Separation of Church and State and the risks that accompany these lawsuits, governments are likely to steer clear of actions that may draw the attention of these groups. Even in the absence of a lawsuit, a government may feel pressured to avoid acknowledging its religious heritage. Therefore, if the ability of governments to defend the acknowledgment of their religious heritage remains unprotected, they will be forced to sweep all references that could be construed as religious under the proverbial doormat. An integral part of the history, culture, and mores of this country will become taboo.

C. All or Nothing: PERA's Extreme Approach

While the goal of protecting the ability of governments to acknowledge their religious heritage is a legitimate and worthy one, the manner in which PERA would accomplish this goal is flawed. PERA applies not only to Establishment Clause claims challenging government actions acknowledging a religious heritage or claims where the law is unclear, but to *all* Establishment Clause claims.¹⁸¹ Its solution cuts too wide a swath. As the bill's critics have pointed out, PERA would take away a successful plaintiff's right to be awarded attorney's fees even in cases concerning government action that clearly violates the Establishment Clause.¹⁸² While it is debatable whether this would insulate such violations from judicial review as PERA's opponents have argued, it almost certainly would reduce the incentive for governments to settle these obvious cases as early as possible. This is an especially great concern when a government is

180. Los Angeles County is an example of the financial incentives winning out. See *supra* text accompanying notes 6-10.

181. Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2006, H.R. 2679, 109th Cong. § 2(b) (as passed by House, Sept. 26, 2006). PERA lists certain forms of government expression that are included in the bill's scope, but does not limit itself to these enumerated forms. *Id.*

182. See, e.g., 152 CONG. REC. H7389, H7398 (daily ed. Sept. 26, 2006) (letter from Americans United for Separation of Church and State) (noting that PERA applies "even in cases where the law is most clearly on the plaintiffs side"); Chemerinsky, *supra* note 143 ("[PERA] applies even to cases involving illegal religious coercion of public school children or blatant discrimination against particular religions.").

represented on a pro bono basis by a faith-based law firm, as is increasingly the case.¹⁸³

Therefore, PERA presents an all-or-nothing solution. Under current litigation rules, governments are encouraged to settle all Establishment Clause claims concerning religious expression, even those in which the government has the legitimate purpose of acknowledging its religious heritage. However, under PERA's solution, an important incentive for governments to settle—the threat of attorneys' fees—would be absent in all Establishment Clause claims, even those challenging blatantly unconstitutional action. This Note advocates a solution that occupies the middle ground between these two extremes.

V. AN ALTERNATIVE TO PERA: A CLEARLY ESTABLISHED LAW STANDARD

A. *The Advantages of a Clearly Established Law Standard*

This Note advocates exempting Establishment Clause claims from the applicable federal fee-shifting statutes (§§ 1983 and 1988), *unless the challenged government conduct violates clearly established law*. This solution protects governments' ability to defend acknowledgments of their religious heritage, but unlike PERA, it does so without reducing deterrents to behavior that blatantly violates the Establishment Clause. The major advantages of this solution are twofold. First, plaintiffs no longer would be able to use the threat of attorneys' fees to coerce governments into settling cases in which they have the legitimate purpose of acknowledging their religious heritage. Second, the threat of attorneys' fees still would encourage governments to settle cases in which their action is clearly unconstitutional.

Under this solution, the pressure on governments to settle cases in which they have a legitimate interest in honoring and preserving their religious heritage would be lessened. Governments would be more likely to defend claims calling for the removal of religious imagery from veterans' memorials, public seals, public buildings, and other displays. The courtroom would become more accessible to governments. The courts, rather than special interest groups, would decide which forms of government action are

183. See, e.g., 152 CONG. REC. H7389, H7398 (daily ed. Sept. 26, 2006) (letter from Americans United for Separation of Church and State).

constitutional acknowledgments of religious heritage and which are prohibited. Allowing more of the cases occupying the gray areas of Establishment Clause jurisprudence to go to court also would provide federal courts with the opportunity to establish clear doctrine and bring stability to these unsettled areas of the law.

While the courts would become more accessible to governments with a legitimate defense, the incentives for governments to settle when they do not have a legitimate defense would remain in place. Continuing to require governments to pay a successful plaintiff's attorneys' fees when the law is clearly established avoids many of the concerns of PERA's critics. Potential plaintiffs still could rely on receiving attorneys' fees if they challenged a government action that clearly violated the Establishment Clause. Therefore, this solution would not discourage potential plaintiffs with strong claims from bringing them; it only would encourage potential plaintiffs with weak claims to think more carefully before suing the government. Nor would it insulate violations of the Establishment Clause from judicial review. This exemption would not apply in situations where the government is blatantly or purposely violating the Establishment Clause. The incentives for governments to cease their violation as soon as possible still would be in place. Another advantage of this solution is that there is precedent for a "clearly established law" standard in the constitutional law context.

B. Precedent: The Qualified Immunity Standard

The qualified immunity doctrine offers a workable standard for courts to apply in Establishment Clause cases. This common law doctrine exempts government actors from personal liability stemming from acts performed in their official capacity unless their conduct violates clearly established law.¹⁸⁴ The Supreme Court introduced the current version of the standard in the 1982 case *Harlow v. Fitzgerald*: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known*."¹⁸⁵ The "clearly established" requirement serves to protect government officials that

184. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982).

185. *Id.* at 818 (emphasis added).

truly and reasonably believed that their conduct was proper under the law.¹⁸⁶

Subsequent cases have attempted to clarify when law is “clearly established.” Generally, factually similar case law is required to give the government official fair notice that certain conduct clearly violates the Constitution.¹⁸⁷ Precedent from the Supreme Court or the Court of Appeals in the circuit in which the conduct took place would satisfy this requirement, as would a “consensus” of precedent in other jurisdictions.¹⁸⁸ However, the facts of the prior case law do not have to be nearly identical or “materially similar” to satisfy the requirement.¹⁸⁹ Also, factually similar case law is not required in cases where the conduct so obviously violates the Constitution that a reasonable official could not have thought otherwise.¹⁹⁰

C. Applying the Standard to Establishment Clause Cases

The qualified immunity standard is well suited to the issue of when to award attorneys’ fees in Establishment Clause cases. Under the standard, defendant governments would be exempt from having to pay a successful plaintiff’s attorneys’ fees unless the conduct at issue violates “clearly established” law. The “clearly established” requirement would ensure that governments had fair notice that particular conduct violated the Establishment Clause before they faced the threat of attorneys’ fees. This requirement is particularly appropriate considering the unpredictable state of Establishment Clause jurisprudence. It would alter the present situation in which governments are punished for a misstep in a field where even federal judges are unclear on what the law is. The government still may lose the case, but it would not be punished with having to pay the plaintiff’s attorneys’ fees unless factually similar precedent existed or its conduct blatantly violated the Establishment Clause.

In the qualified immunity context, the clearly established law standard was intended to be applied by the court at the summary judgment stage of the proceedings, so the issue of whether a government official was exempt from liability could be resolved

186. See *Anderson v. Creighton*, 483 U.S. 635, 638-41 (1987) (discussing traditional extension of qualified immunity to government actors in their official duties).

187. *Id.* at 640.

188. *Wilson v. Layne*, 526 U.S. 603, 615-17 (1999).

189. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

190. See *United States v. Lanier*, 520 U.S. 259, 271 (1997) (holding that qualified immunity does not apply to a state judge who solicited sexual favors from a party in a suit before his court, even though there was no factually similar case law).

quickly and up-front.¹⁹¹ However, in the attorneys' fees context, the standard would not need to be applied until a final judgment was rendered, and then only if the plaintiff was successful. Therefore, the test could be easier to apply in the attorneys' fees context, because the court would have heard arguments regarding the applicable law during the full trial and would be well situated to make the determination of whether the law was clearly established.

The objective nature of the standard is also conducive to Establishment Clause cases. The inquiry asks whether a "reasonable person" would have known that the conduct at issue violated clearly established law. Because most of the conduct challenged under the Establishment Clause cannot be traced to a single government actor, a subjective standard would not be workable. However, if a reasonable person would have known that the conduct clearly violated the Establishment Clause, it is appropriate to assume that the government as a whole should have known as well.

A particular advantage of this standard is that it evolves with the jurisprudence. In areas where Establishment Clause jurisprudence is unsettled, governments do not have to face the threat of attorneys' fees because they could not be expected to know that their conduct was unconstitutional. However, as federal courts hand down decisions concerning specific Establishment Clause issues, the jurisprudence may become more clearly established, and governments would be put on notice that they may have to pay attorneys' fees if they repeat the same violations.

Although Establishment Clause jurisprudence as a whole is unsettled compared to other areas of constitutional law, the law concerning many important issues has been clearly established. Therefore, this solution would not eliminate the possibility of an attorneys' fee award in Establishment Clause cases across-the-board. Clear precedent exists holding that many government actions violate the Establishment Clause. For example, establishment issues regarding public schools have been litigated heavily, and much of the law in this area is clearly established.¹⁹² In these areas of

191. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

192. For examples of Supreme Court precedent regarding public schools, see, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (holding that a school district's allowing student-led prayer at football games violated the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 585-86 (1992) (holding that a rabbi-led prayer at a public school graduation violated the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985) (holding that Alabama statutes allowing silent prayer and meditation in public schools violated the Establishment Clause); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225-27 (1963) (holding that mandatory Bible reading in public schools violated the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421,

Establishment Clause jurisprudence where the law is clearly established, governments would still face the threat of attorneys' fees. And even in the absence of clear precedent, governments would be forced to pay the plaintiff's attorneys' fees where their conduct so obviously violated the Establishment Clause that they could not have reasonably thought otherwise.

Admittedly, this solution would apply to some Establishment Clause claims outside of those challenging an acknowledgment of religious heritage. That area of Establishment Clause jurisprudence is not the only one that is unsettled. However, this is not necessarily an undesirable side effect. The same fairness concerns that exist in the context of acknowledging religious heritage are raised when governments are punished for other conduct that is not clearly unconstitutional. The "clearly established law" caveat ensures that the solution allows governments to defend conduct that is arguably constitutional, such as the acknowledgment of religious heritage, without sacrificing the protections the Establishment Clause provides citizens.

VI. CONCLUSION

The interpretation and application of the Establishment Clause requires the maintenance of a subtle balance, which the plurality in *Van Orden* vividly described:

Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom. . . . 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. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.¹⁹³

Currently, governments are being forced to ignore the integral role religion has played in our Nation's heritage. Federal fee-shifting statutes, which force governments to pay the attorneys' fees of plaintiffs who successfully challenge government conduct under the Establishment Clause, provide potential plaintiffs with an inordinate amount of leverage. The risk of having to pay the plaintiff's attorneys' fees is intensified by the unpredictable state of Establishment Clause

436 (1962) (holding that school prayer initiated by school officials violated the Establishment Clause).

193. *Van Orden v. Perry*, 545 U.S. 677, 683-84 (2005).

jurisprudence. Powerful interest groups such as the ACLU have been especially effective in utilizing this state of affairs to pressure governments to accede to their demands. The combination of these factors leaves many governments with little choice but to abandon all acknowledgment of their religious heritage and forego defending their conduct in court.

The Public Expression of Religion Act (“PERA”) was introduced in Congress to reduce the settlement pressure currently placed on governments that face Establishment Clause lawsuits. PERA would make it easier (and more likely) for governments to defend Establishment Clause claims by amending federal fee-shifting statutes to provide that plaintiffs who challenge government conduct under the Establishment Clause would never be able to recover attorneys’ fees. While PERA’s aim of making it practicable for governments to defend the acknowledgment of their religious heritage is a legitimate one, the bill goes too far. In taking away the right of plaintiffs to recover attorneys’ fees in *all* Establishment Clause cases, PERA reduces the deterrents for governments to avoid blatantly unconstitutional conduct. PERA’s solution focuses too intently on the importance of religion in our Nation’s heritage, while failing to recognize that there are circumstances in which citizens should be empowered to challenge the commingling of the religious and governmental spheres.

The course of action proposed by this Note strikes a balance between the current state of affairs and the one that PERA would create. This alternative to PERA would exempt Establishment Clause claims from the applicable federal fee-shifting statutes *unless* the challenged government conduct violated clearly established law. This “clearly established law” standard, for which the Qualified Immunity doctrine serves as precedent, would make it practicable for governments to defend conduct that arguably is permitted under Establishment Clause jurisprudence, such as the acknowledgment of religious heritage, without sacrificing deterrents to government conduct that is clearly prohibited. The standard would help strike the subtle balance required by Establishment Clause jurisprudence by “neither abdicat[ing] our responsibility to maintain a division between church and state nor evinc[ing] a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”¹⁹⁴

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194. *Id.* at 683-84.

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