

FROM BLACK MALES TO BLACKMAIL: HOW THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976 (42 U.S.C. § 1988) HAS PERVERTED ONE OF AMERICA'S MOST HISTORIC CIVIL RIGHTS STATUTES

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I. INTRODUCTION

It is customary for many law review articles to open with one or more quotations that set the tone for the article. Occurring as they do before the Introduction, these quotations are often never mentioned again. This article will also—momentarily—open with several quotations. However, these quotations do more than merely set the tone. Rather, they serve to document the central thesis of the article: The Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988 (2002)), which, as will be shown, was passed to encourage lawsuits under the Ku Klux Act of 1871 (now codified in 42 U.S.C. § 1983 (2002)) has instead become a tool to “blackmail” governments in Establishment Clause cases. Serving as they do to encapsulate the article's thesis, each of these introductory quotations will be revisited in due course:

Mr. President, today I am introducing a bill which would allow a court, in its discretion, to award attorney's fees to a prevailing party in suits brought to enforce the civil rights acts which Congress has passed since 1866.

.....

The purpose and effect of this bill is simple--it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. . . .¹

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¹ 121 CONG. REC. 26,806 (1975) (introduction of S. 2278 by Senator Tunney), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S. 2278), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, at 3 (Comm. Print 1976) [hereinafter, SOURCE BOOK].

* * *

Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it. If, in addition to all this, the State should fail to ask the aid of the General Government in putting down the existing outlawry, would not a more complete and perfect case of denial of protection be made out? Indeed, it would be difficult to conceive of a more glaring instance of the denial of protection.

It may be safely said, then, that there is a denial of the equal protection of the law by many of these States.²

* * *

The yuletide work of the American Civil Liberties Union is never done. While others frolic, the grinchers of the ACLU tirelessly trudge out each year on yet another creche patrol, snatching Nativity scenes from public parks and rubbing out religious symbols. Sometimes, on school property, they catch a rabbi or a minister mentioning God or carolers singing "Silent Night" instead of just songs about snowmen. Then they have to turn everybody in to a judge. Otherwise, our liberties would be threatened.

Last year, for instance, the creche squad hit Vienna, Va., arguing that a Nativity scene on town property violated the Supreme Court's so-called plastic reindeer rule. In a notably tortured 1984 decision, the court said that a creche on private land in Pawtucket, R.I., was permissible because it was part of a predominantly secular display including candy canes and plastic reindeer. In an attempt to ward off the creche patrollers, the creche in Vienna was surrounded with two plastic Santas, one reindeer and one snowperson. No good. The ACLU found a judge to strike it down. Presumably a future Supreme Court decision will

² CONG. GLOBE, 42nd Cong., 1st Sess. 459 (1871) (statement by Senator Coburn).

determine the precise number of reindeer needed to excuse the presence of one baby Jesus in a Christmas display.

This year, *mindful of the legal fees it would have to pay if the ACLU struck again*, the town ordered the Vienna Choral Society to ban all religious carols (including a Hanuka [sic] song) from its performance at the annual Christmas pageant and stick to songs like "Jingle Bells." To its credit, the choral society was unwilling to accept the town's pre-emptive censorship and quit the pageant. Now the town has a Christmas pageant that contains no hint of Christmas, at least as traditionally understood to refer to Jesus. But an ACLU grinch in Richmond, Stephen Pershing, is apparently still not satisfied. According to the Washington Post, he thinks Vienna may be violating the Constitution by having any kind of Christmas program at all.

Frosty, yes. Jesus, no. How did we reach the point where running off to the judges to get every trace of religion extinguished from public life seems normal? The Founding Fathers would certainly be aghast at the ACLU's fundamentalist version of what separation of church and state requires. . . .³

* * *

"If we prevail, we get fees, and they're going to pay the [Indiana Civil Liberties Union] an enormous amount of fees."⁴

What, one may ask, is wrong with bringing Establishment Clause cases under § 1983? Isn't it done all the time? The answer to the second question is "yes," it is done all the time—nowadays.⁵ The answer to the first question is what this article is all about. Along the way the article will also demonstrate that Establishment Clause claims previously were not brought under § 1983.

Following the lead of the quotations above, this article will first show that the purpose of 42 U.S.C. § 1988 is to allow attorney's fees in civil rights cases, including under 42 U.S.C. 1983. The article will then show, however, that Establishment Clause cases should not be included within the "civil right" rubric under either § 1988 or § 1983. The article will also show that

³ John Leo, *A Secular Christmas to All*, U.S. NEWS & WORLD REPORT, Dec. 28, 1992, at 31 (emphasis added).

⁴ Rick Thackeray, *All Eyes Poised on the 7th Circuit Outcome; 'Commandments' Decision Seen as Key to Glut of Cases*, THE IND. LAWYER, Nov. 22, 2000, at 1.

⁵ See *infra* notes 187-88 and accompanying text.

rather than protecting “black males,”⁶ § 1988 is now being used by strict separationists to “blackmail” state and local governments all across the country.⁷ A statute, the very purpose of which is to ensure the enforcement of one of our nation’s most historic civil rights laws should not be perverted in this manner.

I begin by noting that at least one federal court has questioned whether § 1983 is a valid vehicle under which to bring an Establishment Clause claim. In *Cammack v. Waihee*,⁸ an resident taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution and the co-extensive Establishment Clause of the Hawaii Constitution.⁹ The Ninth Circuit upheld the district court’s granting of summary judgement in favor of the government defendants.¹⁰

However, along the way, the Ninth Circuit questioned, without further addressing, the “efficacy” of bringing the Establishment Clause claim under § 1983:

Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under § 1983. We note that this route has been traveled before without exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983) (simply noting that establishment clause challenge was brought under § 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573, 109 S. Ct. 3086,

⁶ The term “Black males” is being used synecdochically here. Much of the debate was couched in terms of the rights of Black men as the second introductory quote demonstrates. However, the Act certainly has and has always had a broader application. For example, the debate over the Ku Klux Act acknowledged that the Act would have application to other people of color. CONG. GLOBE, 42nd Cong., 1st Sess. ?? (1871). Furthermore, the debates over the Civil Rights Attorney’s Fee Award Act dealt extensively with discrimination against women. *See, e.g.,* 122 CONG. REC. 31,472, 31,851 (1976), *reprinted in* SOURCE BOOK at 22, 92 (Kennedy); *id.* at 31,488, SOURCE BOOK at 56-58 (Allen); *id.* at 35,122, SOURCE BOOK at 254 (Drinan); *id.* at 35,127, SOURCE BOOK at 267 (Holtzman).

⁷ *See infra* Section VI.

⁸ 932 F.2d 765 (9th Cir. 1991).

⁹ Also challenged were state and city collective bargaining agreements regarding paid leave on Good Friday. *Id.* at 767-68.

¹⁰ *Id.* at 768, 782.

106 L. Ed. 2d 472 (1989).¹¹

Since *Cammack*, additional cases, such as *Sante Fe Independent School District v. Doe*,¹² have reached the Supreme Court in a similar posture to *Allegheny*, that is, the Establishment Clause claim has been brought under § 1983 without the Court acknowledging that fact. However, to date, *Marsh* remains the only case brought under § 1983 in which the Court has both acknowledged that fact and decided the claim.¹³ Thus, no great body of Supreme Court case law stands for the proposition that Establishment Clause cases *should* or *can* be brought under § 1983. Furthermore, the Court will often allow certain types of claims to come before it on multiple occasions without comment and then when a party squarely raises the issue, will decide the issue. In fact, the court has done this on several occasions in the 1983 context.¹⁴

Having said that, one of the main points of this article is that more and more Establishment Clause cases are being brought under § 1983 that should not be. To date,

¹¹ *Id.* at 767 n.3.

¹² 168 F.3d 806 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

¹³ In only three other cases to date has the Court even acknowledged an Establishment Clause claim being brought under § 1983. In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), the Court acknowledged that all the claims, including the Establishment Clause claim, had been brought under § 1983. *Id.* at 389. However, the Court decided the case on the Free speech claim and did not reach the Establishment Clause claim. *Id.* at 390. In *Karcher v. May*, 484 U.S. 72 (1987), after the Third Circuit affirmed the district court's holding that a New Jersey statute violated the Establishment Clause "for lack of a valid secular purpose," *id.* at 76, the Supreme Court once again did not reach the Establishment Clause issue but instead dismissed the appeal, brought under 28 U.S.C. § 1254(2), for want of jurisdiction because the two defendants that represented the legislature's position in the matter were no longer legislative officers and the new representatives of the legislature did not wish to appeal, *id.* at 81, 83. Finally, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), a Christian school sought an injunction to prevent the Civil Rights Commission from investigating an employment discrimination complaint, claiming it would violate the Free Exercise and Establishment Clauses. *Id.* at 621. The merits of neither First Amendment claim were reached when the Court held that the district court, under *Younger v. Harris*, 401 U.S. 37 (1971), should have abstained from deciding the case, adding that the constitutional issues could be addressed in the state proceedings. *Id.* at 625, 628.

¹⁴ *E.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961). (?? right one?, more ??)

approximately 300 cases, not including those dismissed for failure to state a claim, mootness, and ripeness; or which were decided for the defendant at the summary judgment stage, have been brought under § 1983.¹⁵

II. THE CIVIL RIGHTS ATTORNEY'S FEE AWARD ACT OF 1976 (42 U.S.C. § 1988(2002)) WAS DESIGNED TO AID CIVIL RIGHTS LITIGANTS ONLY

The purposes for which § 1988 was enacted are not hard to discover.¹⁶ The legislative history of the Act is unambiguous. However, the majority and minority opinions of the Supreme Court in *Maine v. Thiboutot*¹⁷ came to opposite conclusions about § 1988's purpose. Therefore, it is necessary to examine the conclusions of the two factions of the Court after examining the legislative history of § 1988¹⁸ in light of the facts of *Thiboutot*.

In *Thiboutot*, the Thiboutots challenged The Maine Department of Human Services' determination that they would no longer receive certain benefits based upon the Department's interpretation of the governing federal statute.¹⁹ The Thiboutots, in addition to seeking review of administrative determinations, filed a claim under § 1983. The Supreme Court faced two questions: "(1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing

¹⁵ GIVE ALL CITES, SOME CITES AND/OR DESCRIBE RESEARCH PROCESS FOR FINDING THESE CASES ??

¹⁶ Similar statements regarding the purposes of § 1988 can be found in many law review articles. See, e.g., Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1018 n.122 (1991); Stanley M. Grossman, *Statutory Fees Shifting in Civil Rights Class Actions: Incentive or Liability?*, 39 ARIZ. L. REV. 587, 589, 592 (1997); Edward A. Morse, *Taxing Plaintiffs: A Look at Tax Accounting for Attorney's Fees and Litigation Costs*, 107 DICK. L. REV. 405, 420-21 (2003). However, few do anything more than baldly assert the proposition or give a few brief fragmentary quotations (and these are often relegated to footnotes). This article will give more extensive quotations. See also statement at text following note 21 (??cite or statement??).

¹⁷ 448 U.S. 1 (1980).

¹⁸ repeat part of note 11 ???

¹⁹ 448 U.S. 1 at 2.

party”²⁰ While the fight in *Thiboutot* was over what *laws* should be reached by § 1988, this debate has important implications for the question of Establishment Clause claims brought under § 1988.

When a majority and minority of the Court disagree on a matter of legislative history, one of the best ways to determine who had the better of the argument is to see whose survey of the available material is more complete.²¹ In a similar spirit, the examination of the legislative history of the Civil Rights Attorney’s Fee Award Act will be fairly thorough here (especially on the House side) even when some of that history does not shed much light.

As introduced, The Civil Rights Attorney’s Fee Act of 1976 was designed to do one thing. This single purpose was noted in the first of our introductory quotations, to which we now return. Senator John V. Tunney, as Chairman of the Senate Judiciary Subcommittee on Constitutional Rights²² noted when he introduced the original version of the bill that became the Act that

[t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court’s recent *Alyeska* decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of “fee-shifting” provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.²³

Senator Tunney went on to emphasize that Court, in *Alyeska Pipeline Service Corp. v. Wilderness Society*,²⁴ was dealing with “an environmental case not a civil rights case.”²⁵ Indeed,

²⁰ *Id.*

²¹ See, e.g., Keith A. Fournier, *In the Wake of Weisman: The Lemon Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still*, 2 REGENT U. L. REV. 1, 18-19 (1992).

²² SOURCE BOOK at II.

²³ 121 CONG. REC. 26,806 (1975), reprinted in SOURCE BOOK at 3.

²⁴ 421 U.S. 240 (1975).

²⁵ 121 CONG. REC. 26,806 (1975), reprinted in SOURCE BOOK at 4.

Alyeska, withdrew the availability of attorney’s fees in all cases—not just civil rights—for which Congress had not specifically authorized such fees.²⁶ However, as the Senator Tunney’s remarks quoted above indicate, his purpose in introducing his bill was to restore attorney’s fees only in civil rights cases, not in all cases.

Senator Tunney noted that civil rights litigants often have no funds with which to hire an attorney and that often no damages are awarded from which the attorneys could draw a fee.²⁷ According to Senator Tunney, “Congress recognized this need when it made specific provision for such fee-shifting in titles II and VII of the Civil Rights Act of 1964, which apply to discrimination in public accommodations and employment.”²⁸ Tunney added that attorney’s fees provisions were “equally appropriate in other civil rights statutes, because, there, as in employment and public accommodations cases, Congress depends heavily on private enforcement.”²⁹

We pause here to note . . . [EXPLAIN PRIVATE ATTORNEY GENERAL CONCEPT]

Returning to Tunney’s introductory statement, just two more examples out of the many available will suffice to show that his sole concern was with civil rights litigation. Tunney explained that

[T]he reason why this legislation specifically authorizing fees awards under all our civil rights laws was not introduced years ago is simply that, until very recently [in *Alyeska*], it was widely believed and held that the courts already had the power to award counsel fees in all civil rights cases as part of their inherent equity power.³⁰

Finally, it is profitable to note the specific examples that Tunney used to illustrate his

²⁶ See 421 U.S. at 269.

²⁷ 121 CONG. REC. 26,806 (1975), reprinted in SOURCE BOOK at 3.

²⁸ *Id.* at 26,806, SOURCE BOOK at 3-4.

²⁹ *Id.* at 26,806, SOURCE BOOK at 4 (referring to the private attorney general concept).

³⁰ *Id.*

concern:

[*Alyeska*'s] effect was to create an unexpected and anomalous gap in our civil rights laws whereby awards of fees are suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit brought under title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a suit under title II of the 1964 act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.³¹

In making these remarks, Tunney often used language contained in the Report from the Committee on the Judiciary, which he presented to the Senate.³² So, for example, the Committee Report stated that the purpose of the bill “is to remedy anomalous gaps in our civil rights laws created by [*Alyeska*].”³³ Similarly, the Report expressed concern that attorney’s fees were now “unavailable in the most fundamental civil rights cases”³⁴ and demonstrated the anomaly with the same examples quoted above from Senator Tunney.³⁵

However, the Report was more explicit, indeed emphatic, that the attorney’s fees were not to be available in all cases impacted by *Alyeska*:

This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.³⁶

Furthermore, the Report was explicit that the bill was designed to remedy defects in the Reconstruction-era laws: “The Court expressed the view, in dictum, that the Reconstruction

³¹ *Id.*

³² See generally S. REP. NO. 94-1011 (1976), reprinted in SOURCE BOOK at 7-13.

³³ *Id.* at 1, SOURCE BOOK at 7.

³⁴ *Id.* at 4, SOURCE BOOK at 10.

³⁵ *Id.*

³⁶ *Id.*

Acts did not contain the necessary congressional authorization”³⁷ for attorney’s fees.

Only two Senators, Senator Hugh Scott and Senator Mathias spoke during the debate of the bill prior to its amendment. Both reiterated the familiar themes: this bill was a direct response to *Aleyska* but it was intended to reach only civil rights cases.³⁸

At this point in the debate, Senator Edward Kennedy, introduced “an amendment in the nature of a substitute.”³⁹ The original bill, as introduced by Senator Tunney, read in its entirety:

*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, Revised Statutes § 722 (42 U.S.C. Sec. 1988) is amended by adding the following: “In any action or proceeding to enforce a provision of § 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title Vi of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”*⁴⁰

Senator Kennedy’s substitute did two things. First, it provided for the citation of the act as The Civil Rights Attorney’s Fee Awards Act of 1976.⁴¹ Second, it added the words “title IX of Public law 92-318,” *i.e.*, the Education Amendments of 1972, between “sections 1977, 1978, 1979, 1980, and 1981 of the Revised statutes” and “title VI of the civil rights Act of 1964.”⁴²

Kennedy stated that the purpose of the amendment was to “expedite final enactment of [the] bill” by conforming it to the version pending in the House of Representatives.”⁴³

Senator Kennedy then commented upon his amendment. He started by reiterating what Senators Tunney, Scott, and Mathias had previously stated: The bill was a reaction to *Alyeska*

³⁷ *Id.*

³⁸ 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK at 19-20.

³⁹ *Id.* at 31,471-72, SOURCE BOOK at 21-22.

⁴⁰ 121 CONG. REC. 26,806 (1975), *reprinted in* SOURCE BOOK at 5. (?Explain how Revised Statute numbers translate into U.S.C. numbers. [1979=1983] ?)

⁴¹ 122 CONG. REC. 31,471 (1976), *reprinted in* SOURCE BOOK at 21.

⁴² *Id.*

⁴³ *Id.* at 31,472, SOURCE BOOK at 21-22 (referring to H.R. 15460).

and was intended to apply only to civil rights case.⁴⁴

Senator Kennedy then explained why the House had added title IX to its version of the bill: “inclusion of cases brought under title IX would mean that where educational programs which receive Federal assistance discriminate on the basis of sex or blindness, courts would be able to make discretionary awards of attorney’s fees”⁴⁵

Senator Kennedy was careful to fit the title IX provision squarely under the civil rights rubric, and indeed, within the Fourteenth Amendment rubric, thus implicitly harkening back to the Reconstruction-era legacy:

In recent years, there has been a growing recognition that discrimination on the basis of sex is both pervasive and persistent. For that reason Congress has banned sex discrimination in such areas as employment, housing, credit, and, in title IX of the Emergency School Aid Act, education programs or activities which receive Federal assistance. The title is the analog, in the field of education, of title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or sex, they [sic, read “which”?] violate fundamental rights which are at the bedrock of our society’s notion of fair play and human decency. It is Congress’ obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 have been included. As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing attorneys’ fees in this essential area of the law.

. . . .
Title IX also reaches another pernicious form of discrimination—that against blind people and those who are visually impaired—and in these circumstances the same fundamental principles apply.⁴⁶

Senator Kennedy repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight “discrimination”⁴⁷ in areas such as “jobs, housing, credit, or education”⁴⁸

⁴⁴ *Id.* at 31,472, SOURCE BOOK at 21.

⁴⁵ *Id.* at 31,472, SOURCE BOOK at 22.

⁴⁶ *Id.*

⁴⁷ *Id.* at 31,472, SOURCE BOOK at 22-23.

⁴⁸ *Id.* at 31,472, SOURCE BOOK at 23.

using the “civil rights laws.”⁴⁹ He noted that fee-shifting was currently used in other areas of the law⁵⁰ and that fee-shifting in other areas of the law was pending at the moment.⁵¹ Clearly, Senator Kennedy conceived of the amended bill as extending Reconstruction-era protection to women and blind people⁵² and no further.

The remainder of the Senate debate was marked by only a handful of notable components. First, numerous Senators who favored the bill reiterated the points discussed above.⁵³ Second, those Senators who opposed the bill filibustered and offered various amendments, the purpose of which was merely to delay the vote.⁵⁴ Third, one amendment was offered by those who supported the bill.⁵⁵ Fourth, some substantive discussion of the content of the final bill occurred.⁵⁶

Numerous amendments (not including Kennedy’s) were offered. None had a serious

⁴⁹ *Id.*

⁵⁰ *Id.* Also see SOURCE BOOK app. E, listing 90 laws with fee-shifting provision to which many speakers referred. *E.g.*, 122 Cong. Rec. 31,472, 31,851 (1976), *reprinted in* SOURCE BOOK at 23, 92 (Kennedy); *id.* at 32,185, SOURCE BOOK at 138 (Tunney); *id.* at 35,114, 35,117, SOURCE BOOK at 236, 242 (Anderson); *id.* at 35,116, 35,122, SOURCE BOOK at 240, 252 (Drinan); *id.* at 35,124, SOURCE BOOK at 259 (Railsback); *id.* at 35,126, SOURCE BOOK at 263 (Kastenmeier).

⁵¹ 122 CONG. REC. 31,472 (1976), *reprinted in* SOURCE BOOK at 23. The pending bill to which Senator Kennedy referred was introduced early in the year 1976 as S. 2715 “which would authorize, among other things, awards of attorneys’ fees in judicial actions for review of certain Federal administrative decisions.” *Id.* The bill was an amendment to the Administrative Procedure Act found in title 5, chapter 5 of the U.S. Code, S. REP. NO. 94-863, at 1 (1976), but spent the next four years in both House and Senate Committees until finally enacted in 1980 and codified in 5 U.S.C. §504. Equal Access to Justice Act, Pub. L. No. 96-481, Title II, sec. 203(a)(1), §504, 94 Stat. 2325 (1980).

⁵² Recall how the term “Black males” is being used synecdochically in this article. *See supra* note 6.

⁵³ *See, e.g.*, 122 CONG. REC. 31,832 (1976), *reprinted in* SOURCE BOOK at 74-75 (Hathaway); *id.* at 31,850-51, SOURCE BOOK at 91-92 (Kennedy); *id.* at 32,185, SOURCE BOOK at 138-39 (Tunney); *see generally id.* at ??, SOURCE BOOK at 24-205. (??too broad for cong. Rec. cite??)

⁵⁴ *See infra* notes 56-69 and accompanying text; *see generally* 122 CONG. REC. ?? (1976), *reprinted in* SOURCE BOOK at 24-205. (??broad like n.53??)

⁵⁵ Bumpers & Goldwater?? (wait)

⁵⁶ *See generally* 122 CONG. REC. 32,396, 33,311-15 (1976), *reprinted in* SOURCE BOOK at 169-70, 193-205.

chance of passage until Senator Allen agreed to “trade” an amendment for ending the filibuster,⁵⁷ as will be discussed below. The first amendment was offered by Senator Jesse Helms (R, NC). It would have added six more sections to the bill, running 120 lines long,⁵⁸ that would have, in Senator Helm’s words “grant[ed] successful litigants in civil cases or agency hearings against the Federal Government, and acquitted criminal defendants, the right to an award of legal fees and other expenses [such as expert witness fees and costs of studies, reports, test, and similar items] incurred in preparing and pursuing the litigation or the defense against prosecution for a Federal crime.”⁵⁹ The amendment was tabled by a vote of 54 to 27.⁶⁰

[add re: difference between this and limit to civil rights—another bill actually pending]????????

Immediately after this vote, Senator Allen (____) offered an amendment adding the title IX provision to Senator Tunney’s original bill because he did not want Senator Kennedy’s “substitute . . . [to] cut off all other amendments.”⁶¹ This amendment was tabled by a vote of 54 to 24.⁶² Thereafter, amendments continued to be offered to both the original and the substitute bills.⁶³

After these first two votes, it was obvious to those opposing the bill that they did not have nearly enough votes to defeat it. Indeed, Senator Allen explicitly admitted as much on the Senate floor.⁶⁴ Nevertheless, the fight went on.

First of all, numerous amendments were introduced, the content of which has been lost to

⁵⁷ *Id.* at 33,311, SOURCE BOOK at 194.

⁵⁸ *Id.* at 31,477-78, SOURCE BOOK at 34-36.

⁵⁹ *Id.* at 31,478, SOURCE BOOK at 36.

⁶⁰ *Id.* at 31,480-81, SOURCE BOOK at 43-45.

⁶¹ *Id.* at 31,481, SOURCE BOOK at 45.

⁶² *Id.* at 31,483, SOURCE BOOK at 51-53.

⁶³ SOURCE BOOK app. C.

⁶⁴ 122 CONG. REC. 31,488 (1976), *reprinted in* SOURCE BOOK at 58.

the legislative history. The Senate Debates simply record that they were introduced and were ordered to be printed and to lie on the table.⁶⁵ These amendments were obviously dilatory in nature as evidenced, for example, by Senator Thurmond's introduction of twenty-two [CHECK NUMBER] amendments at once, none of which were ever acted upon.⁶⁶

A few other amendments contain enough information to discuss. Of the remaining seventeen amendments considered significant enough to be included in the legislative history appendices,⁶⁷ sixteen were offered by those opposing the bill. Of these, thirteen were tabled.⁶⁸ These included five by Senator Helms of North Carolina, six by Senator Allen of Alabama, and two by Senator Thurmond of South Carolina.⁶⁹ One might assume that because they were offered as delaying tactics by opponents and were quickly tabled, they grant us no insight into the purpose of the Act. And indeed, for some of the amendments that is the case.⁷⁰

However, some of the other amendments do tell us something. The hallmark of these amendments was to make attorney's fees available in a wide range of cases.⁷¹ Had those

⁶⁵ *E.g.*, *id.* at 31,500, SOURCE BOOK at 63 (two amendments); *id.* at 31,792, SOURCE BOOK at 64 (fifteen amendments besides Bumpers'); *id.* at 32,326, SOURCE BOOK at 146 (thirty-four amendments).

⁶⁶ *Id.* at 32,326, SOURCE BOOK at 146.

⁶⁷ (Criteria are : _____ BUT Bumpers amendment?) (wait)

⁶⁸ 122 CONG. REC. ?? (ref. SB pgs. 84, 93, 108, 136, 151, 164, 169, 175, 177, 182, 186, 187, 191) (1976); *see also* SOURCE BOOK app. C. (maybe only app. C??)

⁶⁹ *Id.*

⁷⁰ However, they do tell us something about Senator Allen's sense of humor. He proposed, in amendment No. 475, "[t]hat this act [S. 2278] may be cited as the Tunney-Kennedy Civil Rights Attorneys Relief Act of 1976," giving proper recognition to "the authors of this landmark legislation providing additional benefits for attorneys." *E.g.*, 122 CONG. REC. 31,850 (1976), *reprinted in* SOURCE BOOK at 89. Emphasis on attorney relief act was prophetic. *See infra* note 188 and accompanying text.

⁷¹ *See supra* note 58 and accompanying text; amendment No. 2378 awarded reasonable attorneys fees, at the court's discretion, to a prevailing defendant even if they could not show the plaintiff brought the action in bad faith, 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 64; amendment No. 473 awarded attorneys fees to the prevailing party upon a showing of bad faith of the losing party, *id.* at 31,834, SOURCE BOOK at 81; amendment No. 2350 reimbursed taxpayer's expenses in certain cases, *id.* at 31,846-47, SOURCE BOOK at 84-85; amendment No.

favoring the bill had no problem with throwing the door wide open they could have agreed to such amendments rather than fight them.⁷²

Instead, the only idea that had any traction was the idea of adding attorney's fees in proceedings involving the Internal Revenue Service. Thus, an amendment to the original proposed by Senator Goldwater providing certain remedies in the case of a taxpayer being audited for a second time was adopted.⁷³ Since Senator Kennedy's substitute was eventually passed in lieu of the original bill, Senator Goldwater's amendment came to naught. Of course, Senator Allen's much simpler amendment addressing IRS proceedings eventually became part of the final bill⁷⁴. As mentioned previously, this was what he "traded" for ending the filibuster.⁷⁵

However, Senator Goldwater's amendment was debated. In this context, Senator Muskie (___) made a point, also raised by other Senators during the debate, that the Civil Rights Attorney's Fee Award Act was narrow, applying to civil rights only.⁷⁶

Only one amendment was offered by anyone supporting the bill. Senator Bumpers introduced an amendment, which was never voted upon, that would have allowed prevailing defendants to be awarded attorneys' fees without having to show that the lawsuit had been

2409 awarded reasonable attorneys fees, at the court's discretion, for frivolous action, *id.* at 32,394, SOURCE BOOK at 163; amendment No. 2392 awarded reasonable attorneys fees as part of the costs awarded a prevailing defendant, other than the United States, when the plaintiff acted in bad faith in bringing certain actions, *id.* at 32,394-95, SOURCE BOOK at 165-66.

⁷² Admittedly they were worried about getting the legislation passed in both houses prior to adjournment, but again, this shows that they were aware that there was not sufficient support for the idea in one or both house.

⁷³ *Id.* at 32,175-76, SOURCE BOOK at 131-32.

⁷⁴ *Id.* at 33,311, 33,315, SOURCE BOOK at 194, 204.

⁷⁵ See *supra* note 56 and accompanying text.

⁷⁶ Senator Muskie was concerned that the bill would die in the House if it was broadened by Senator Goldwater's IRS amendment, so he introduced a letter addressed to Senator Kennedy from the Chairman of the House Judiciary Committee stating, among other things, that "S. 2278 presently is a very narrow bill intended to enable private enforcement of civil rights acts." 122 CONG. REC. 32,184 (1976), *reprinted in* SOURCE BOOK at 136-37.

brought “in bad faith, frivolously, vexatiously, or for the purpose of harassing such defendant.”⁷⁷

Senator Bumpers thought it necessary to add this provision because the Judiciary Committee Report had stated that defendant attorneys’ fees would be awarded only when such motivations could be shown.⁷⁸ The most important implication for this article is Senator Bumpers’ statement that he believed that the courts would interpret the new legislation consistently with the Report.⁷⁹

Thus, in summary, what little can be gleaned by examining the many proffered amendments comports completely with the introductory comments, the Judiciary committee report and the floor debate that occurred up to and including the time at which Senator Kennedy offered his substitute.

Finally, the floor debate viewed as a whole is also instructive. That portion not dedicated to dealing with the amendments discussed above is remarkable for its consistent theme—this bill is about civil rights only. Statements similar to those already quoted in this article were made repeatedly.⁸⁰ In fact very few of the remarks shed any additional insight since the majority of them were so redundant.

One of the few additional insights can be gleaned from comments by Senator Long (____) who was worried about the “slippery slope.” However, even his “slippery slope” was

⁷⁷ *Id.* at 31,792, SOURCE BOOK at 64.

⁷⁸ *Id.* at 31,792, SOURCE BOOK at 63-64 (quoting Report, *supra* note 31).

⁷⁹ *See* 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 64. The Report stated that “[s]imilar standards [requiring proof of bad faith] have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys’ fees. *Id.* So, even though the plain language of S. 2278 provided for awarding attorney’s fees to the prevailing party without explicitly mentioning any “bad faith” exceptions, canons of statutory construction presume that a new statute is enacted in light of previous judicial decisions or the judicial construction of previous statutes regarding the same subject. 73 AM JUR. 2D *Statutes* § 79 (2001) (citations omitted).

⁸⁰ *See id.* at 31,832, SOURCE BOOK at 74-75 (Hathaway); *id.* at 32,185, 33,313-14, SOURCE BOOK at 138, 199-200 (Tunney); *id.* at 33,314, SOURCE BOOK at 200-02 (Kennedy); *id.* at 33,314, SOURCE BOOK at 202-03 (Abourezk).

limited to discrimination cases: “When you start out with this, you cannot decline to pay the lawyer’s fee for those who sue because of sex discrimination, because of disability discrimination, because of any type of discrimination whatever, with respect to those who have a meritorious lawsuit.”⁸¹

Another insightful exchange occurred between Senators Helms and Kennedy:

Mr. Helms. . . . As author of the provision adding title IX to the bill, does the Senator anticipate that it will apply to cases where the question of abortion is involved?

Mr. Kennedy. I believe the answer to that would be “No.”

Mr. Helms. In other words, the Senator is saying that even in an employment case where a woman is dismissed for having an abortion: and while there is an allegation of a constitutional right, her suit also alleges sex discrimination since only women have abortions. The answer is “No”?

Mr. Kennedy. Title IX cases are brought solely to remedy discrimination on the basis of sex.

Mr. Helms. So the Senator does not intend that this provision apply in cases where abortion is an issue?

Mr. Kennedy. I do not see the point the Senator is making, quite frankly. I do not see the relevancy of the argument. The question of abortion would not generally arise under title IX

From there, Senator Kennedy’s response was based upon the legislative history of title IX.⁸²

However, the instructive point here is that Senator Kennedy *could* have responded that the constitutional right to an abortion was already implicated under § 1983 without the inclusion of title IX. Such an answer would have indicated a belief that constitutional rights other than those protecting civil rights were intended to be covered by the bill. While Senator Kennedy’s choice of answer could have been motivated by any number of reasons, it is at least worth noting that it was consistent with his own prior statements and those of many other Senators that the bill was only intended to reach civil rights.

Finally, after the Allen amendment adding fees for IRS actions was adopted, Senator

⁸¹ *Id.* at 32,187, SOURCE BOOK at 140.

⁸² *Id.* at 32,396, SOURCE BOOK at 169.

Kennedy yet again emphasized that there had been one original purpose of the bill and that Senator Allen's amendment was the sole deviation from that purpose:

I welcome the Allen amendment. While the original purpose of this bill was to authorize awards of fees in court actions brought to enforce our civil rights laws, there is no question that there are numerous other situations where fees are justified.

One such situation is indeed where taxpayers suffer harassment from the Internal Revenue Service. . . .

. . . .

It should be clear, then, that a provision authorizing fee awards in tax cases has a fundamentally different purpose from one authorizing awards in lawsuits brought by private citizens to enforce the protections of our civil rights laws. In enacting the basic civil rights attorneys fees wards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws. By authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, however, Congress merely intends to protect citizens from becoming victims of frivolous or otherwise unwarranted lawsuits.⁸³

Senator Kennedy also gave examples of the type of cases in which attorney's fees had been awarded prior to *Alyeska*. He cited cases in which a Black veteran had been denied burial in a local cemetery, Blacks had been kept off of juries, a Black man had been harassed by the police, doctors rendering assistance to Blacks had been denied privileges at a local hospital, a highway was put through a black rather than a white neighborhood, blacks were charged higher rents in a housing project, in which housing projects were segregated, in which officials accepted Social Security Act funds and failed to provide services, [ADD REST OF CASES FROM LIST ON PAGE I LEFT IN LIBRARY ON SATURDAY]⁸⁴ Senator Kennedy's reference to the cases involving Social Security funds and highway construction was of great significance to the Supreme Court majority in *Thiboutot*,⁸⁵ and we shall return to this fact shortly [GIVE

⁸³ *Id.* at 33,312-13, SOURCE BOOK at 196-98.

⁸⁴ *Id.* at 33,314, SOURCE BOOK at 201.

⁸⁵ The Court identified the cases, *Bond v. Stanton*, 528 F.2d 688 (7th Cir. 1976) (regarding Social Security funds) and *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D.Cal. 1972) (regarding highway construction), as "an example of the cases 'enforc[ing] the rights promised by Congress

SECTION].

[ADD LAST THREE OR SO COMMENTS BY KENNEDY AND OTHERS FROM LEGISLATIVE HISTORY PAGES I LEFT IN LIBRARY SAT. MOSTLY ABOUT CONSTITUTION—SEE NEXT PARAGRAPH]

Thus, the record is clear—the entire debate in the Senate centered on guaranteeing attorneys’ fees in the civil rights context—whether statutorily or constitutionally based.

Next we turn to the record from the House of Representatives. The House debate was much shorter than the Senate debate—obviously, the House was feeling even more time pressure than the Senate.⁸⁶ Indeed, no amendments were offered.⁸⁷ A motion to re-commit was easily defeated by a vote of _____,⁸⁸ and the bill quickly passed by a vote of 306 to 68.⁸⁹

Furthermore, much of the same sentiment—that the bill was all about civil rights—was repeated in the House.⁹⁰ So for example, Representative Kastenmaier noted, “We held 3 days of hearings, and determined, consistent with the Justice Department suggestions, that our initial approach to the problem would be to respond with narrowly drawn legislation: such as, to authorize attorney’s fees in those specific situations where private enforcement of civil and constitutional rights was anticipated and to be supported.”⁹¹ Representative Kastenmaier went on to give examples of the types of case that would be covered. Interestingly he chose four of

or the Constitution’ which the Act [§ 1988] would embrace.” *Maine v. Thiboutot*, 448 U.S. 1, 10 (1980) (quoting Senator Kennedy, 122 CONG. REC. 33,314 (1976) [SOURCE BOOK at 202]).

⁸⁶ 122 CONG. REC. 35,115 (1976), *reprinted in* SOURCE BOOK at 238 (statements by Representatives Rousselot and Anderson respectively, indicating that “the hour is late” and they were “in the last day of [the] session.”).

⁸⁷ *See* SOURCE BOOK app. C (listing no amendments in the summary table); *see generally id.* at 35,114-18, 35,121-30, SOURCE BOOK at 235-278 (record of the House debate).

⁸⁸ 122 CONG. REC. 35,129 (1976), *reprinted in* SOURCE BOOK at 272.

⁸⁹ *Id.* at 35,130, SOURCE BOOK at 276.

⁹⁰ *See generally id.* at 35,114-16, 35,122, 35,124, 35,126-28, SOURCE BOOK at 236-39, 252-53, 259-60, 263-69.

⁹¹ *Id.* at 35,126, SOURCE BOOK at 263.

the same case that Senator Kennedy had given, but did *not* include the Social Security case.⁹²

Similarly, Representative Fish gave examples of the type of case that would be impacted. All of them involved civil rights, including the three that he specifically stated were filed under 1983.⁹³

However, a few additional insights can be gained here too.⁹⁴ First, the House was much more explicit that the legislation was in direct response to the financial impact of the *Alyeska* case on the public interest movement. For example, in the Report of the House Judiciary Committee one reads the following:

In the hearings conducted by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses in the field testified to the devastating impact of the case on litigation in the civil rights area. Surveys disclosed that such plaintiffs were the hardest hit by the decision. The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.

It should be noted that the United States Code presently contains over fifty provisions for attorney fees in a variety of statutes. In the past few years, the Congress has approved such allowances in the areas of antitrust, equal credit, freedom of information, voting rights, and consumer product safety. Although the recently enacted civil rights statutes contain provisions permitting the award of counsel fees, a number of the older statutes do not. It is to these provisions that much of the testimony was directed.⁹⁵

⁹² *Id.* at 35,126, SOURCE BOOK at 263-64. *See also supra* note 83 and accompanying text (statements by Kennedy).

⁹³ *Id.* at 35,126, SOURCE BOOK at 265. *See also Id.* at 35,127, SOURCE BOOK at 267 (Holtzman regarding inclusion of title IX).

⁹⁴ Some not germane to this article, e.g., whether the bill creates new private rights of action. *Id.* at 35,124, SOURCE BOOK at 259.

⁹⁵ H.R. REP. NO. 94-1558, at 2-3 (1976), *reprinted in* SOURCE BOOK at 210-211 (citations omitted). The same discussion took place in the Senate.

Thus, from a different angle—that of the financial impact on the public interest law movement—one can clearly see that the House was aware that *Alyeska*'s impact went beyond the issue of civil rights, but that Congress intended to limit its response to that category of cases.

Another insight can be gained from the House Report. Under a section entitled “Scope of the Bill,” the Report notes that the “affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas”⁹⁶ It goes on to address each section individually.⁹⁷ In its description of § 1983, the Report notes that § 1983 is utilized to challenge “official discrimination, such as racial segregation imposed by law,”⁹⁸ and cites *Brown v. Board of Education*.⁹⁹ The report also notes that § 1983 is used in non-racial situations. The examples include poll taxes, unconstitutional searches, political affiliation discrimination, and unlawful terms and conditions of confinement.¹⁰⁰

[EXPLAIN WHY THESE ARE OK]

The House debate also highlighted the fact that references to constitutional rights were references to those constitutional rights that are related to civil rights, not references to any and every constitutional rights. For example, Representative Seiberling stated:

If the law does not authorize the awarding of attorneys' fees in meritorious civil rights cases, many potential plaintiffs will be deterred from bringing deserving cases to remedy violations of the Constitution

Mr. Speaker, neither the Constitution nor the civil rights laws are self-executing. In stead, they both rely on public or governmental and on private enforcement. The government obviously does not have the resources to investigate and prosecute all possible violations of the Constitution, so a great burden falls directly on the victims to enforce their own rights. Our laws should

⁹⁶ *Id.* at 4, SOURCE BOOK at 212.

⁹⁷ *Id.* at 4-5, SOURCE BOOK at 212-213.

⁹⁸ *Id.* at 4, SOURCE BOOK at 212.

⁹⁹ 347 U.S. 483 (1954).

¹⁰⁰ H.R. REP. NO. 94-1558, at 5, SOURCE BOOK at 213, citing *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (poll taxes); *Monroe v. Pape*, 365 U.S. 167 (1961) (unconstitutional search); *Elrod v. Burns*, 427 U.S. 347 (1976) (employment discrimination); *O'Conner v. Donaldson*, 422 U.S. 563 (1975) (institutional confinement).

facilitate that private enforcement and should—within reasonable limits—encourage potential civil rights plaintiffs to bring meritorious cases.¹⁰¹

Thus, the record is clear once again. The House Report and debate are in complete accord with the Senate Report and debate: the Civil Rights Attorney’s Fee Award Act of 1976 is about exactly what its title indicates—civil rights.

However, once again, the Court in *Thiboutot* did not think so. This time the Court latched onto Representative Drinan’s statement that “[u]nder applicable judicial decisions, § 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, *Blue* against Craig, 505 F.2d 830 (4th Cir. 1974).”¹⁰² Noting that *Blue* involved a claim that “North Carolina’s Medicaid plan was inconsistent with the [Social Security Act],”¹⁰³ the *Thiboutot* Court used Drinan’s citation of *Blue* as authority for the proposition that *all* statutory rights are covered by § 1983.

However, this assertion cannot be sustained based upon Representative Drinan’s citation of *Blue*. First, Drinan cited *Blue* for a simple proposition, namely that once again § 1983 allows for suits based upon statutory rights. He never even indicated that *Blue* involved anything other than civil rights. Drinan’s remarks give no indication as to whether he knew the case was about Medicaid and the Social Security Act.

Even assuming for the sake of argument that Drinan did know what *Blue* was about, the *Thiboutot* Court’s assertion cannot stand. The *Blue* court itself pointed out that the case before it could be categorized as an equal protection case since the plaintiffs were representative of a class that claimed to be deprived of a federal right solely on the basis of membership in that class.¹⁰⁴

¹⁰¹ 122 CONG. REC. 35,128 (1976), *reprinted in* SOURCE BOOK at 269-270.

¹⁰² 448 U.S. 1, 10 (1980) (quoting Representative Drinan, 122 CONG. REC. 35,122 (1976) [SOURCE BOOK at 253]).

¹⁰³ *Id.* at 10 n. 8.

¹⁰⁴ 505 F.2d 830, 844-45 (4th Cir. 1974).

This characterization of *Blue* brings it squarely under the civil rights rubric.

Having eliminated Drinan's citation of *Blue* as a valid reason for claiming that §§ 1988 and 1983 are applicable outside the civil rights context, we are left with the Court's use of Senator Kennedy's list of cases.¹⁰⁵ As mentioned earlier, the Court pointed out Kennedy's mention of a Social Security case and a case in which a highway was constructed through a Black neighborhood.¹⁰⁶

Even this is a flimsy reed upon which to rest the Court's argument. First of all, the Court postured the highway case as one involving the Department of Transportation Act of 1966 and related statutes.¹⁰⁷ However, as we have seen above, Senator Kennedy saw this case as another type of racial discrimination. Thus, this case, too, is validly included under the civil rights rubric.

That leaves the Social Security Act case, *Bond v. Stanton*,¹⁰⁸ to be explained. Several possible reasons for Senator Kennedy's use of this case present themselves. First, this case involved welfare benefits and several of the plaintiffs were welfare rights advocacy groups.¹⁰⁹ In the minds of many, the battle for welfare rights was part and parcel of the civil rights movement.¹¹⁰ A second possible reason, although one that from the context of Senator Kennedy's comments is not as likely, is that this case was used as an example of attorney's fees

¹⁰⁵ 448 U.S. at 10.

¹⁰⁶ *See supra* note 84 and accompanying text.

¹⁰⁷ 448 U.S. at 10.

¹⁰⁸ 528 F.2d 688 (7th Cir. 1976).

¹⁰⁹ Plaintiff groups included New Day Welfare Rights Organization, Gary AFDC Mothers' Organization Welfare Rights Organization, and East Chicago Welfare Rights Organization.

¹¹⁰ Ruling in favor of welfare recipients on the authority of *Van Lare v. Hurley*, 421 U.S. 338 (1975), the Fifth Circuit "reasoned that statutory rights concerning food and shelter [from the Social Security Act] are 'rights of an essentially personal nature,' [citation omitted]; that 42 U.S.C. § 1983 provides a remedy which may be invoked to protect such rights; and that § 1983 is an act of Congress providing for the protection of civil rights within the meaning of that jurisdictional grant." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

being granted on the basis of bad faith. This was the basis of the fee award in the case and bad faith fees had been discussed both in the Senate Report,¹¹¹ and debate.¹¹²

Of course, the possibility exists that Senator Kennedy mentioned the case for neither of these reasons. If that is true, it is one lone comment about a non-civil rights case that would benefit from enactment of the bill.

Based on this examination of the legislative history of the Act, we can now decide whether the *Thiboutot* majority or minority was correct in its reading of the legislative intent. The majority held that § 1988 applies to *any* § 1983 action.¹¹³ In the face of everything else in the legislative history of the bill, the *Thiboutot* minority is surely correct: “The few references to [non-civil rights] statutory claims cited by the Court fall far short of demonstrating that Congress considered or intended the consequences of the Court’s interpretation of § 1983.”¹¹⁴

We have spent so much time looking at *Thiboutot*’s use of the Act’s legislative history because of what it said about whether §§ 1983 and 1988 should be limited to the civil rights context. Ironically, the battle in *Thiboutot* was over the phrase “and laws,” something not at issue in an Establishment Clause case. Thus, we can pass over the 1874 amendment of § 1983 to include that phrase.¹¹⁵ We pause long enough to note that the debate over the legislative intent of this amendment, and the variations of language in the jurisdictional counter-parts have been

¹¹¹ S. REP. NO. 94-1011, at 5 (1976), *reprinted in* SOURCE BOOK at 11.

¹¹² *E.g.*, 122 CONG. REC. 31,792 (1976), *reprinted in* SOURCE BOOK at 63-64 (Bumpers); *id.* at 31,832, SOURCE BOOK at 75 (Abourezk/Hathaway exchange); *id.* at 31,833, SOURCE BOOK at 77 (Helms regarding amendment 473); *id.* at 32,185, SOURCE BOOK at 139 (Tunney).

¹¹³ 448 U.S. 1, 9 (1980).

¹¹⁴ *Id.* at 25 n.14 (Powell, J.,dissenting).

¹¹⁵ Amended by § 1979 of the Revised Statutes. Revised Statutes of the United States, Title XXIV, § 1979, 18 pt.1 Stat. 347 (1873-74). Even less important are the subsequent amendments of 1979 and 1996. The 1979 amendment related to Acts of Congress exclusively applicable to the District of Columbia. Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284. The 1996 amendment provided immunity for judicial officers under certain circumstances, Federal

discussed in *Thiboutot*¹¹⁶ and *Chapman v. Houston Welfare Rights Organization*¹¹⁷ as well as in the literature¹¹⁸

III. THE KU KLUX ACT OF 1871 (42 U.S.C. § 1983 (2002)) WAS DESIGNED TO PROTECT “RIGHTS PRIVILEGES AND IMMUNITIES” ONLY

We come next to the original enactment of § 1983. It is one of the surviving provisions of the Ku Klux Act of 1871.¹¹⁹ Section 1983 started out as § 1 of that act. As numerous courts and commentators have documented, § 1 was one of the least debated provisions.¹²⁰ However, for our purposes, we are interested in determining what “rights, privileges and immunities” means and for that we can examine the debate over the entire act.

We note first that the bill was entitled “A Bill to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States , and for other purposes.”¹²¹ Immediately after Representative Shellabarger (R., Ohio) reported the bill on behalf of the Select Committee, Representative Stoughton (R., Michigan) spoke to set the stage.¹²² He started with the activity of the Ku Klux Klan in the North Carolina.¹²³ He noted “murders, whippings, intimidation, and

Courts Improvement Act of 1996, Pub. L. No. 104-317, Title III, sec. 309(c), 110 Stat. 3847, 3853.

¹¹⁶ See generally 448 U.S. at 6-8.

¹¹⁷ See generally 441 U.S.600, 608-20 (1979).

¹¹⁸ See, e.g., George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 Va. L. Rev. 925, 947-49 (2003); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 401-08 (1982). See generally Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's “Laws”*, 67 Geo. Wash. L. Rev. 51 (1998).

¹¹⁹ Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Also known as Ku Klux Klan Act of 1871 and Civil Rights Act of 1871. U.S.C.A. POPULAR NAME TABLE (West 2004).

¹²⁰ E.g., 441 U.S. at 610, 617 n.34; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 164-65 (1970); *Developments in the Law -- Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1155 (1977).

¹²¹ CONG. GLOBE, 42nd Cong., 1st Sess. 317 (1871).

¹²² *Id.* at 319-22.

¹²³ *Id.* at 320.

violence.”¹²⁴ He also discussed the Klan’s ability to protect its members from conviction for their crimes because other members would commit perjury as witnesses or refuse to vote to convict when serving on juries.¹²⁵ Representative Stoughton’s remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee.¹²⁶ He read testimony from Blacks who had been victims of violence¹²⁷ and he read testimony from Whites who knew the inner workings of the Klan,¹²⁸ as well as of judges who knew of incidents of perjury.¹²⁹ Near the end of his remarks, he summarized the need for the act:

When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to § five [of the Fourteenth Amendment], which declares that “Congress shall have power to enforce by appropriate legislation the provisions of this article.”¹³⁰

If we look at Representative Stoughton’s remarks in juxtaposition to those of the next speaker, Representative George Morgan (Democrat, Ohio), we see the tenor of the entire debate. Representative Morgan disagreed strenuously with Representative Stoughton that the Fourteenth Amendment provided a valid constitutional basis for the many of the sections of the bill. In particular, he objected to the third and fourth sections, which authorized the use of military force by the President to deal with the Klan.¹³¹ While other speakers discussed various sections,¹³² the

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See generally, Id.* at 320-21.

¹²⁷ *Id.* at 321.

¹²⁸ *Id.* at 320-21.

¹²⁹ *Id.* at 320.

¹³⁰ *Id.* at 322.

¹³¹ *Id.* at 331-32.

points raised were entirely the same: the outrages of the Klan and the constitutionality *vel non* of the act. Again, for our purposes, we are interested in what light the legislative history sheds on the term “rights privileges and immunities” and I turn now to that.

Various comments are helpful in determining what the representatives and senators understood the phrase to encompass. The first of these is a statement by Representative Benjamin Butler (Republican, Massachusetts), addressing an earlier attempt by Congress to protect rights, privileges, and immunities: “The bill further provided that the wrongs committed against the citizens of the United States, for the purpose of depriving such citizens of enjoyment of life, liberty, and property, guaranteed to him by the Constitution, be made crimes against the laws of the United States and cognizable by its courts. The bill further provided that every citizen should have remedy in the Federal courts against the party depriving him of such rights, immunities, and privileges . . . ¹³³ We see here an equating of “rights, privileges, and immunities” with life, liberty, and property.¹³⁴

Other articulations followed. First, we return to the statement of Representative John Coburn (Republican, Indiana), which was used as one of our introductory quotations at the outset of this article:

Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety,

¹³² For example, over the next few days of debate, the following representatives spoke in opposition to the bill while commenting on specific sections: Whitthorne, sections one through five, *id.* at 337-38; Beck, sections three and four, *id.* at 351-52; Blair, sections two through four, *id.* at app.71-74; and Swann, sections one through three, *id.* at 361. In response, Representatives Kelly, *id.* at 338-41, and Bingham, *id.* at app.81-86, spoke generally in support of the bill.

¹³³ *Id.* at 449.

¹³⁴ Explain significance?—or delete footnote (Prof. F.??)

liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it. If, in addition to all this, the State should fail to ask the aid of the General Government in putting down the existing outlawry, would not a more complete and perfect case of denial of protection be made out? Indeed, it would be difficult to conceive of a more glaring instance of the denial of protection.

It may be safely said, then, that there is a denial of the equal protection of the law by many of these States. It is therefore the plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution.¹³⁵

This quotation, typical of many others, reminds us that we must never stray far from the historical context of Klan abuses if we want to understand what § 1983 was intended to do. Here, we also see a close connection between the concepts of equal protection and of rights, privileges, and immunities. Moreover, we also see some specific rights mentioned, *i.e.*, “the right[s] to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms.”¹³⁶

A few helpful comments can also be found in the Senate debates. Senator John Edmunds (Republican, Vermont) passed quickly over § 1, showing that in this chamber, too, it was not overly controversial:

The first § is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which have since become a part of the

¹³⁵ *Id.* at 459.

¹³⁶ *Id.*

Constitution.¹³⁷

That is not to say it attracted no attention¹³⁸

It is also clear that the opponents of the bill understood what the phrase “rights, privileges, and immunities” meant to the advocates of the bill. For example, Senator John Stockton (Democrat, New Jersey) summarized the view to which he objected:

It is insisted that when the fourteenth amendment declares that “all persons born or naturalized in the United States shall be citizens of the United States” the privileges of that citizenship attach to every individual, and the United States Government is bound to protect them. These privileges are alleged to be such as are asserted in the Declaration of Independence, namely, “the enjoyment of life and liberty, with the right to acquire and possess property.”¹³⁹

We also note with particular interest, an exchange between Senators Lyman Trumbull (Republican, Illinois), Edmunds, and Matthew Carpenter (Republican, Wisconsin):

Senator Trumbull started out by stating his belief that the Privileges and Immunities Clause of the Fourteenth Amendment simply reiterated the Privileges and Immunities Clause of the “old Constitution.”¹⁴⁰ He was challenged on that point by Senator Edmunds who understood the original Clause to protect the citizens of each state *qua* citizens of states when they traveled to states not heir own.¹⁴¹ He understood the new Clause, on the other hand, to extend “universal citizenship” to United States citizens *qua* United States citizens.¹⁴² At this point Senator Matthew Carpenter, interestingly a Republican from Wisconsin, jumped in and reiterated the position of Edmunds, a Democrat.¹⁴³ After an excursus, to which we will return momentarily,

¹³⁷ *Id.* at 568.

¹³⁸ There was some debate over the meaning of “citizens of the United States” and “privileges and immunities,” *see infra* notes 140-44 and accompanying text.

¹³⁹ *Id.* at 573.

¹⁴⁰ *Id.* at 576.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

Trumbull admitted that the other position was correct, but went on to articulate a position that would later be adopted by the Supreme Court in the *Slaughter-House Cases*.¹⁴⁴ This is of particular interest because most commentators have viewed the *Slaughter-House Cases* as gutting the Fourteenth Amendment’s Privileges and Immunities Clause.¹⁴⁵ Thus, it is of particular interest that Senator Lyman held this view since he was the Chairman of the Senate Judiciary Committee when the Fourteenth Amendment was passed.¹⁴⁶

After acknowledging that the new Clause does protect the privileges and immunities of United States citizens, he added, “but we have not advanced one step by that admission. The fourteenth amendment does not define the privileges and immunities of a citizen of the United States any more than the Constitution originally did.”¹⁴⁷ Later in this exchange, Trumbull would get no more specific than to say that the states, not the national government, were to defend citizens in their individual rights of person and property; and that the rights, privileges, and immunities of national citizenship were national in character.¹⁴⁸ To this tautology he added nothing more helpful than that they would be the kind of rights that the national government would protect from foreign aggression.¹⁴⁹

The excursus mentioned above provides some insight if one is careful not to confuse Senator Trumbull’s terminology with the terminology used by others quoted in the Civil Rights Attorney’s Fees Award Act debate. Senator Carpenter had used an illustration involving voting

¹⁴⁴ 83 U.S. (16 Wall.) 36, 74-79 (1873).

¹⁴⁵ *E.g.*, CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 62 (1997); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1119 (1953); 1 LAURANCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §7-2, at 1302, §7-3, at 1303 (3d ed. 2000).

¹⁴⁶ ANTIEAU, *supra* note 145 at 81.

¹⁴⁷ CONG. GLOBE, 42nd Cong., 1st Sess. 576 (1871).

¹⁴⁸ *Id.* at 577.

¹⁴⁹ *Id.*

rights.¹⁵⁰ Senator Trumbull replied that “[t]he words ‘privileges and immunities’ . . . have nothing to do with voting. They revere to civil rights. His illustration about the right to vote has no application. Women do not vote.”¹⁵¹ After a brief response by Senator Carpenter acknowledging the point, Senator Trumbull added, “the ‘privileges and immunities referred to in the Constitution are of a civil character, applying to civil rights, and not to political rights, and were never so understood.”¹⁵²

It is clear that Senator Trumbull was using the term in a very narrow sense. The following black letter summary will help dispel any confuse over the two uses and allow us to concentrate on the import of Senator Trumbull’s comment:

It has been said that political rights are included within the more comprehensive term "civil rights," but that they are differentiated in that a political right is a right exercisable in the administration of government, or a right to participate, directly or indirectly, in the establishment or management of government, while civil rights have no relation to the establishment or management of government. Political rights have also been distinguished on the ground that a civil right is a right accorded to every member of a distinct community or nation, which is not necessarily true with regard to political rights.¹⁵³

Even in Trumbull’s day there was a dispute as to whether suffrage was a civil or a political right.¹⁵⁴ All of this may give some small insight into what “privileges and immunities” meant to the drafters of the Ku Klux Act and some insight into why the word “rights” was added to 1983. Certainly many of the speakers addressed rights that Senator Trumbull would not have considered “civil.”

Finally, a few remarks that may seem to bear most directly upon the Establishment

¹⁵⁰ *Id.* at 576.

¹⁵¹ *Id.* Synecdoche. ??

¹⁵² *Id.*

¹⁵³ 15 AM. JUR. 2D *Civil Rights* § 2 (2000) (citations omitted).

¹⁵⁴ ANTIEAU, *supra* note 145, at 22-30, 52-54.

Clause issue can be found. For example, in the context of answering a question as to whether obstructing justice would apply to obstructing justice in a state court, Senator Edmunds replied,

We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this § could reach it.¹⁵⁵

This is a direct mention of religion that, assuming *arguendo*, is a correct understanding of the reach of the Act, has nothing to do with preventing an establishment of religion.

Finally, there is a direct reference to the First Amendment. Senator Stockton, just prior to his comments quoted earlier disparaged the arguments of his opponents in the following words:

[T]he construction of the fourteenth amendment necessary to make this bill constitutional is simply this: that as the amendment provided that no State should deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, therefore Congress can, whenever it pleases, interfere with all these rights, restrict and deny them in despite of all the express reservations and prohibitions contained in the amendments, articles one, four, five, nine, and ten; . . . Nay, more: you claim the power to subordinate the whole Bill of Rights to the absolute and uncontrolled will of one man [the President]¹⁵⁶

This ambiguous remark at least mentions the First Amendment. However, there is no way to determine whether the Establishment Clause is even in view here. For that we will have to look at the Fourteenth Amendment itself and judicial interpretations of it.

Before doing so however, we pause to summarize the other possible views of “rights privileges and immunities” that the legislative history reveals as possible interpretations of that phrase. These include [BRIEFLY SUMMARIZE].¹⁵⁷ None of

¹⁵⁵ CONG. GLOBE, 42nd Cong., 1st Sess. 567 (1871).

¹⁵⁶ *Id.* at 572.

¹⁵⁷ *Supra*, notes ___ and accompanying text. (Prof. F. ??)

these can include freedom from establishment of religion. If this is not clear enough already, the discussion below of the Fourteenth Amendment’s definition of the phrase will provide additional support for this assertion.

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

In turning to the Fourteenth Amendment, we need not avail ourselves of as lengthy nor as many quotations. It is well documented that all of the views represented during the debate over the Ku Klux Act were also expressed during the debates over the Fourteenth Amendment. So for example, the view that the Privileges and Immunities Clause meant the same thing in the Fourteenth Amendment as it did in Article Four was represented by Senator Bingham.¹⁵⁸ This view was very closely linked to some of the others, such as the view that privileges and immunities are synonymous with natural or fundamental rights, *i.e.*, with those rights “which belong, of right to the citizens of all free governments,” such as the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety.”¹⁵⁹

Clearly, this subsumes the Declaration of Independence approach.

Similarly, and to return to our last quotation from the Ku Klux Act debates, many Senators and Congressmen did make statements during the debates over the Fourteenth Amendment that the privileges and immunities protected by the Clause were those contained in the first eight amendments. Of particular importance are the views of Congressman John Bingham of Ohio, a principal drafter and manager of the

¹⁵⁸ ANTIEAU, *supra* note 145, at 53, 56.

¹⁵⁹ *Id.* at 56 (quoting Corfield’s famous formulation).

Amendment.¹⁶⁰ He flatly stated that “the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.”¹⁶¹ Numerous others echoed this sentiment including [ADD NAMES].¹⁶² The phraseology of Senator Jacob M Howard of Michigan, the amendment’s main manager on the Senate side, is particularly noteworthy. According to him, privileges and immunities included fundamental rights and “the personal rights guaranteed and secured by the first eight Amendments to the Constitution.”¹⁶³

And this at last brings us squarely to the question: Since the framers of the Civil Rights Attorney’s Fee Award Act and the Ku Klux Act ignored the Establishment Clause, is there anything in the history of the Fourteenth Amendment that indicates that its framers did or did not believe that the Establishment Clause implicates any personal rights?

A complete answer is two-fold. It recognizes that the framers of the Fourteenth Amendment did believe that the *free exercise* of religion was fundamental, *i.e.*, was among the privileges and immunities to be protected. It also recognizes the “right to be free from Establishment” was *not*.

Chester Antieau, one of the great § 1983 experts¹⁶⁴ has collected writings and statements from various Congressmen during the debates over the Civil Rights Bill of

¹⁶⁰ *Id.* at 85.

¹⁶¹ *Id.* at 85-86.

¹⁶² *Id.* at 86-87 (Senator Jacob Howard, R-MI; Senator Allen Thurman, D-OH; Representative Thad Stevens, R-PA; and Representative Henry Dawes, R-MA)

¹⁶³ *Id.* at 86. Add discussion of personal rights from Thiboutot minority [MOVE TO TEXT?]

¹⁶⁴ His book, *Federal Civil Rights Acts: Civil Practice*, was one of the earliest treatises. This work is now continued by Rodney Smolla in a two volume treatise entitled *Federal Civil Rights Acts*.

1866 (which served as the model for the Fourteenth Amendment and which the Fourteenth Amendment was designed to “constitutionalize”¹⁶⁵) and from Congressmen looking back on the passage of the Fourteenth Amendment. These statements clearly demonstrate that the free exercise of religion was intended to be covered by the term privileges and immunities. Antieau cites Representative Ralph Buckland’s statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect it.¹⁶⁶

By contrast, Antieau could find no evidence of any Senator or Representative mentioning “freedom from establishment.”¹⁶⁷ There is more than mere silence to the argument however. At least three important commentators, Senator Howard, Representative H. L. Dawes (___ Massachusetts) and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause.

Additionally, Antieau examined other evidence of the practice of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity.¹⁶⁸ This evidence includes state statutes, constitutions, and court decisions. Some states still had vestiges of true establishment. For example, both New Hampshire and Massachusetts still provided constitutional preferences for Protestant

¹⁶⁵ ANTIEAU, *supra* note 146, at 7.

¹⁶⁶ *Id.* at 91.

¹⁶⁷ *Id.* at 109

¹⁶⁸ *Id.* at 109-12. *See also id.* at 282-84 (discussing the Establishment Clause under Equal Protection).

Christianity.¹⁶⁹ Incidentally, but importantly, this same evidence indicates that the view of privileges and immunities encompassing those rights “which belong, of right to the citizens of all free governments,”¹⁷⁰ cannot be embrace the Establishment Clause. Just as some states still had vestiges of state establishment, so many others had explicit establishment earlier in their histories. Surely neither Justice Washington who coined the Corfield articulation [EXPLAIN] nor the framers of the Fourteenth Amendment would have considered these states to be un-free governments.

In summary, those references to the first eight amendments of the Bill of Rights, were concerned with “personal rights.” The drafters of the Fourteenth Amendment, saw the personal right of religious liberty as being protected by the Free Exercise Clause. The Establishment Clause was simply not implicated.

Because no view of the privileges and immunities clause saw the Establishment Clause as creating such privileges or immunities, we need not decide which of the views of the Privileges and Immunities Clause expressed in the *Slaughter House Cases* is correct.

In the *Slaughter-House Cases*, Justice Miller, writing for the majority believed that the privileges and immunities protected by the Clause were of national citizenship as had been stated by Senator Trumbull.¹⁷¹ [EXPAND] Justice Filed adopted the fundamental rights approach,¹⁷² as did Justice Bradley.¹⁷³ These two justices disagreed

¹⁶⁹ *Id.* at 110. [Other exx. from Ant.??]

¹⁷⁰ Quote from Corfield. *See supra* note 159 and accompanying text.

¹⁷¹ 83 U.S. (16 Wall.) 36, at 74-79 (1873). *See also supra* note 148 and accompanying text (Statements by Trumbull).

¹⁷² 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).

¹⁷³ *Id.* at 114-22 (Bradley, J., dissenting).

only as to the degree of abridgment to which these rights were subject.¹⁷⁴ Finally, Justice Swayne emphasized that the protections applied to all persons, not just Blacks.¹⁷⁵

V. DOUBLE AND TRIPLE INCORPORATION [FIX HEADING]

One could argue that since the United States Supreme Court has incorporated the Establishment Clause against the states that this article has been much ado about nothing. However, this would be to miss the point. The point of this article has not been that the Establishment Clause has not been nor should not be incorporated against the states. Obviously, the incorporation of the Establishment Clause became a *fiat accompli* in *Everson*¹⁷⁶ if not *Cantwell*¹⁷⁷. Certainly there have been those who have argued against the current Due Process Incorporation Doctrine.¹⁷⁸ However, given the history recounted in this article, the case can be, and has been, made that Congress intended to incorporate the first eight article of the Bill of Rights through the Privileges and Immunities Clause rather than through the Due Process Clause.¹⁷⁹

However, under any of these scenarios, the Establishment Clause should not be covered by §§ 1988 and 1983. First, should the incorporation doctrine be rejected, then, under the analysis contained in this article, it is beyond peradventure that a putative violation of the Establishment Clause does not implicate the privileges and immunities as

¹⁷⁴ I don't see it.??

¹⁷⁵ *Id.* at 129 (Swayne, J. dissenting). *See also id.* at 123 (Bradley, J. dissenting). Synecdoche again.

¹⁷⁶ 330 U.S. 1 (1947).

¹⁷⁷ 310 U.S. 296 (1940).

¹⁷⁸ *E.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2 (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22 (1980); TRIBE, *supra* note 145, §7-5 at 1317-20.

¹⁷⁹ *E.g.*, ANTIEAU, *supra* note 145, at 59, 85-88; CROSSKEY, *supra* note 145, at 1089-1118; Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 647 (2000).

that phrase was used by the drafters of 1988, 1983, or the Fourteenth Amendment. Similarly, if one embraces incorporation through the Privileges and Immunities Clause rather than through the Due Process Clause, the analysis described above demonstrates that the Establishment Clause does not contain any privileges or immunities. Rather it was seen as protecting *personal* rights. This certainly makes sense in that it is worded as a limitation on the power of government.

However, one need not deviate from the contemporary conventional wisdom on incorporation to see that there is an analytical difference between deciding whether the Establishment Clause has been incorporated against the states and deciding whether the Establishment Clause contains any privileges or immunities. Furthermore, the way in which violations of the provisions of the Bill of rights have been thought to be validly brought under 1983 has been dubbed the “double incorporation doctrine.”¹⁸⁰ In other words, “§ 1983 incorporates the Fourteenth Amendment which in turn incorporates various provisions of the Bill of Rights and applies them to the states.”¹⁸¹

It certainly makes sense to believe that if the incorporation doctrine is one of selective incorporation, the double incorporation doctrine should be as well. The theory behind selective incorporation teaches that one looks to history to determine whether a particular provision of the Bill of Rights should be incorporated against the states. Similarly, one should look to history to determine selectively whether the provision incorporated against the states should be “incorporated” the second time. In other words, simply because a provision is now binding upon the states does not mean that it

¹⁸⁰ 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 2:3 (4th ed. 2004) (citing Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and The Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965)).

¹⁸¹ *Id.*

constitutes a civil rights violation as understood by the framers of the Ku Klux Act. As has been shown, the Establishment Clause does not pass that test.¹⁸²J

Indeed, in light of the history canvassed in this article and the dispute between the majority and minority in *Thiboutot*, this article posits a theory of triple incorporation.¹⁸³ In other words, assuming *arguendo* that the Establishment Clause passed the § 1983 hurdle, it cannot pass the § 1988 hurdle. The Establishment Clause simply is not the kind of provision the drafters of § 1988 were contemplating. To follow the double incorporation reasoning one would say that triple incorporation occurs where § 1988 incorporates § 1983 which in turn incorporates the Fourteenth Amendment which in turn incorporates the Bill of Rights; however at each stage the incorporation is selective.

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

Supreme Court cases such as *Lynch v. Household Finance Corp.*¹⁸⁴ and *United States v. Price*,¹⁸⁵ which are sometimes cited for the proposition that all of the Constitution is applicable under § 1983¹⁸⁶ would not, in reality, be any obstacle to double

¹⁸² Supra notes ____ and text accompanying. (See generally supra sec. IV??)

¹⁸³ Obviously since *Thiboutot* dealt with statutory rights, not provisions of the Bill of Rights, triple incorporation would not apply there. However, *Thiboutot* suggests the basis for triple incorporation in a Bill of Rights context.

¹⁸⁴ 405 U.S. 538 (1972).

¹⁸⁵ 383 U.S. 787 (1966).

¹⁸⁶ E.g., Michael G. Collins, 'Economic Rights,' *Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1541 (1989); Daniel J. Neppel, *The Dormant Commerce Clause Secures Rights Within the Meaning of 42 U.S.C. § 1983: Dennis v. Higgins*, 25 Creighton L.

or triple selective incorporation. A careful reading of these cases shows that the Court is merely saying that the *privileges and immunities* of the entire Constitution are applicable under § 1983. However, as we have already seen, the Establishment Clause contains no privileges or immunities at all.

VI. THE CIVIL RIGHTS ATTORNEY'S FEE AWARD ACT OF 1976 (42 U.S.C. § 1988(2002)) MUST NOT BE PERVERTED BY BEING USED AS A TOOL FOR "BLACKMAIL"

Until recently there seemed to be an inherent sense that Establishment Clause claims should be brought quit simply under the Establishment Clause. Indeed, the first stand alone Establishment Clause claim brought under § 1983 was _____ in 19__ [GET FROM NOTES AT OFFICE].¹⁸⁷

Why then this sudden use of § 1983 to bring Establishment Clause claims? The answer is almost certainly the availability of 1988 fees. Justice Powell suggested the answer in his *Thiboutot* dissent: “[i]ngenious pleaders may find ways to recover attorney’s fees in almost any suit against a state defendant.”¹⁸⁸ This was one of the main complaints of the opponents of the Act who wanted to dub it a attorney’s relief act.¹⁸⁹

Certainly, numerous commentators have documented the astronomical increase in § 1983 cases since the passage of the Civil Rights Attorney’s Fee Award Act of 1976.¹⁹⁰

Rev. 153, 168-69 (1991); Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 429 n.239 (1984).

¹⁸⁷ Cite. Prior to that ___ cases containing Establishment Clause claims *and other claims* were also brought under § 1983. ??

¹⁸⁸ 448 U.S. 1, 24 (1980).

¹⁸⁹ 122 CONG. REC. 31,489, 31,850 (1976), *reprinted in* SOURCE BOOK at 62, 89 (statements by Senators Long and Allen)

¹⁹⁰ 68 Iowa L. Rev. 1, 33 (suggesting § 1988 is responsible for at least some of the increase); Schwartz, Section 1983 Litigation: Claims and Defenses (listing § 1988 as one of five reasons for increase); 103 Colum. L. Rev. 316, 320 (claiming § 1988 helped make § 1983 a “useful tool”) (?? best could find but weak support ??)

However, in Establishment Clause cases, the problem is especially severe and unique. In most cases in which § 1988 fees are available, litigation proceeds along normal lines.

[REWORD] However, when a state or locality is sued for a putative Establishment Clause violation, public interest law firms will often volunteer to defend that government for free.

I can illustrate this from my own practice as President of the National Legal Foundation. At the National Legal Foundation, one of our concerns is that America not be stripped of every vestige of our religious heritage. Therefore, when a practice is challenged as an establishment of religion, and in our judgment it is merely an acknowledgement, accommodation, or encouragement of religion,¹⁹¹ we will offer to defend the state or locality for free.

However, that is where the last two quotations from the Introduction come in:

The yuletide work of the American Civil Liberties Union is never done. While others frolic, the grinchers of the ACLU tirelessly trudge out each year on yet another creche patrol, snatching Nativity scenes from public parks and rubbing out religious symbols. Sometimes, on school property, they catch a rabbi or a minister mentioning God or carolers singing "Silent Night" instead of just songs about snowmen. Then they have to turn everybody in to a judge. Otherwise, our liberties would be threatened.

Last year, for instance, the creche squad hit Vienna, Va., arguing that a Nativity scene on town property violated the Supreme Court's so-called plastic reindeer rule. In a notably tortured 1984 decision, the court said that a creche on private land in Pawtucket, R.I., was permissible because it was part of a predominantly secular display including candy canes and plastic reindeer. In an attempt to ward off the creche patrollers, the creche in Vienna was surrounded with two plastic Santas, one reindeer and one snowperson. No good. The ACLU found a judge to strike it down. Presumably a future Supreme Court decision will determine the precise number of reindeer needed to excuse the presence of one baby Jesus in a Christmas display.

This year, *mindful of the legal fees it would have to pay if the ACLU struck again*, the town ordered the Vienna Choral Society to ban all religious carols (including a Hanuka [sic] song) from its performance at the annual Christmas

¹⁹¹ Steven W. Fitschen, *Religion in the Public Schools After Santa Fe Independent School District v. Doe: Time for a New Strategy*, 9 WM. & MARY BILL RTS. J. 433 (2001).

pageant and stick to songs like "Jingle Bells." To its credit, the choral society was unwilling to accept the town's pre-emptive censorship and quit the pageant. Now the town has a Christmas pageant that contains no hint of Christmas, at least as traditionally understood to refer to Jesus. But an ACLU grinch in Richmond, Stephen Pershing, is apparently still not satisfied. According to the Washington Post, he thinks Vienna may be violating the Constitution by having any kind of Christmas program at all.

Frosty, yes. Jesus, no. How did we reach the point where running off to the judges to get every trace of religion extinguished from public life seems normal? The Founding Fathers would certainly be aghast at the ACLU's fundamentalist version of what separation of church and state requires. . . .¹⁹²

* * *

“If we prevail, we get fees, and they’re going to pay the [Indiana Civil Liberties Union] an enormous amount of fees.”¹⁹³

These reports comport exactly with stories we have heard from many clients or would-be clients, who report the following scenario to us: A separationist group will contact (typically) a small town or county and threaten a lawsuit over some practice they object to as violative of the Establishment Clause. The town or county will contact us to see if free legal defense is available. When we tell them we are available, they usually tell the separationist group that they do not intend to back down. These groups then reply with a statement to the effect of “that’s fine if you win, but if you lose you will have to pay us, even though your lawyers are free.” Sometimes the threat of § 1988 fees is even mentioned at the same time that the lawsuit is threatened.

[ADD RALPH NEAS STORY?]

And the threat is real. The fee awards sought and sometimes granted can be astronomical. For example, the American Civil Liberties Union accepted nearly a quarter of a million dollars to settle a case with San Diego County involving a large cross located

¹⁹² Leo, *supra* note 3.

¹⁹³ Thackeray, *supra* note 4.

on public property.¹⁹⁴ The Attorney who litigated *Sante Fe* turned in a fee request of one half of a million dollars.¹⁹⁵ And just recently the attorneys opposing the Ten Commandments display erected by Alabama Chief Justice Roy Moore, requested over seven hundred thousand dollars for the trial stage of the litigation alone.¹⁹⁶ These stories are used as ammunition by the separationists. It is no wonder some people call this blackmail. In many cases, the small town or county (with a small tax base) “folds” without a fight.

VII. CONCLUSION

Thus, we see that the enactment of the Civil Rights Attorney’s Fee Award Act of 1976, which was designed to serve an admirable purpose has been perverted. Starting as a statute to protect Blacks, it has now become a tool for “blackmail” in the Establishment Clause context, a context that, under any analysis, should not even be eligible for a § 1988 fee award.

The answer is simple. Lawyers defending § 1983 Establishment Clause actions must begin to argue that such claims cannot be brought under § 1983.¹⁹⁷ *Cammack v. Waihee*,¹⁹⁸ and this article can serve as a springboard for their arguments.

Any plaintiff—and any lawyer—who believes that a real Establishment Clause violation exists can still file suit. They would simply do so directly under the

¹⁹⁴ *County to Pay ACLU in Mount Helix Case*, THE SAN DIEGO UNION-TRIBUNE, Apr. 19, 2002, Local.

¹⁹⁵ Bill Jeffreys, *Impact Players; Anthony Griffen; Law Firm of Anthony Griffen; Galveston; Rookie Victory*, TEXAS LAWYER, Dec. 18, 2000, at 70.

¹⁹⁶ Stan Bailey, “*Damned to Hell*” *Houston: Moore Said no Redemption for “Covering God”*, THE BIRMINGHAM NEWS, Jul. 14, 2004, News. (850K??)

¹⁹⁷ Add note re: procedure?

¹⁹⁸ 932 F.2d 765 (9th Cir. 1991). *See supra* note 8 and accompanying text.

Establishment Clause as was previously done. I am perfectly willing to litigate against any separationist group on the opposite side of the Establishment Clause divide. There is no acceptable reason to tarnish the rich history of § 1983. Bankrolling organizations that are engaged in litigate a category of cases that were never intended to be covered by § 1983 is not acceptable reason. “Blackmailing” states and localities is not an acceptable reason.

DRAFT