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## NOTES

### REDEFINING THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT: *BUCKHANNON* *BOARD AND CARE HOME* AND THE END OF THE CATALYST THEORY

*Richard L. Gibson*<sup>+</sup>

Justice Antonin Scalia, delivering the opinion of the Supreme Court in *Hewitt v. Helms*,<sup>1</sup> wrote in dicta:

It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment — *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.<sup>2</sup>

Fourteen years later, Justice Scalia abandoned this broad model of “prevailing party” status under Section 1988 to concur with the limited and formalistic majority opinion of *Buckhannon Board and Care Home v. West Virginia Health and Human Resources*.<sup>3</sup> The Supreme Court's rigid definition of “prevailing party” and its firm denial of the catalyst theory of recovery under the fee-shifting clauses of the Fair Housing Amendments of 1988<sup>4</sup> and the Americans with Disabilities Act of 1990<sup>5</sup> sharply restrict the ability of plaintiffs' attorneys to bring future civil rights enforcement actions.<sup>6</sup>

The judicial struggle over the proper definition of “prevailing party,” exemplified in *Buckhannon*, stems from the conflict between the ideal of preserving the ability of parties to bring suits without the inherent risks

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1. 482 U.S. 755 (1987).

2. *Id.* at 760-61.

3. See 532 U.S. 598, 610-22 (2001) (Scalia, J., concurring).

4. 42 U.S.C. § 12205 (2000).

5. 42 U.S.C. § 3613(c)(2) (2000).

6. See *Buckhannon*, 532 U.S. at 601-10.

of a “loser pays all” system and the societal need of ensuring the legal protection of indigent and disadvantaged plaintiffs.<sup>7</sup> The American judicial preference against fee shifting purports to give parties in a lawsuit equal standing and to eliminate barriers to poor persons who initiate lawsuits to protect their rights.<sup>8</sup>

The Supreme Court, however, has consistently recognized several exceptions to the preference against fee shifting that give judges the power to shift fees.<sup>9</sup> The Court unanimously endorsed shifting fees in actions where a losing party acts “in bad faith, vexatiously, wantonly, or for oppressive reasons.”<sup>10</sup> Closely related to this sanction, the Court has

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7. See Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1121 (1993) (arguing that enabling prevailing plaintiffs to recover legal fees from defendants provides an incentive to follow legal rules). But cf. Michael J. McNamara, Note, *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 FORDHAM L. REV. 320, 321-22 (1982) (asserting that federal courts do not uniformly award attorney's fees to prevailing plaintiffs unless special circumstances render the award unjust).

8. See, e.g., *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) (overturning the inclusion of attorney's fees as damages by holding that the general practice of the United States was “in opposition to it”). The American Rule provides that each party must bear its own attorney's fees. See, e.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967). As a result of this practice, most U.S. courts ordinarily do not award attorney's fees to the prevailing party. See McNamara, *supra* note 7, at 321-22. On the other hand, the “loser pays” rule is in effect not only in the English system but also in most European civil law countries. See Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639-40 (1974). The European rule arguably acts as a disincentive to litigation because a defeated plaintiff must pay for a victorious defendant's defense. See *Fleischmann*, 386 U.S. at 718. The historical intent behind the adoption of the American Rule was to allow all parties equal access to the legal system. See Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 297 (1990). The purpose of the American Rule is to encourage the resolution of disputes through litigation by allowing the opposing parties to provide for the fees charged by their choice of legal representation. See *Court Awarded Attorney's Fees*, *supra* note 8, at 642-44 (presenting the argument that the American Rule is fair because it does not place on the plaintiff the possibility of paying legal fees for a successful defendant).

9. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-263 (1975) (affirming that the Court grants exceptions in four instances: 1) when allowed by statute; 2) when a losing party willfully disobeys a court order; 3) when a losing party acts in bad faith; and 4) when the “historic power of equity” would allow the recovery of attorney's fees). *Alyeska Pipeline*, however, explicitly limited the power of federal courts to protect and enforce the private attorney general doctrine. *Id.* at 263.

10. See *F.D. Rich Co. v. United States ex rel Indus. Lumber Co.*, 417 U.S. 116, 129-30 (1974) (arguing that the American Rule is not an absolute bar to fee shifting); see also *Vaughn v. Atkinson*, 369 U.S. 527, 530-31 (1962) (holding that a seaman was entitled to reasonable attorney's fees as damages when he was forced to hire an attorney).

consistently supported assessing fees against a party who acts in willful disobedience of a court order.<sup>11</sup>

The next exception concerns the rights of individuals and the general public. Historically, the Supreme Court supported awarding fees to a plaintiff who brings an action as a “private attorney general” that preserves or recovers a benefit on behalf of the general public.<sup>12</sup> As a result, federal courts had the authority to justify these awards.<sup>13</sup> However, as a result of the holding in *Alyeska Pipeline Service v. Wilderness Society*,<sup>14</sup> this doctrine is simply not allowed in federal suits without prior statutory grant.<sup>15</sup>

In the federal courts, explicit fee-shifting statutes provide the final and most important exception as a result of *Alyeska*.<sup>16</sup> Subsequently, the Court has ruled that Congress must dictate both “the circumstances under which attorney’s fees are to be awarded and the range of discretion of the courts.”<sup>17</sup>

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11. *Fleischmann*, 386 U.S. at 718; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923).

12. See generally *Hall v. Cole*, 412 U.S. 1, 4 (1973) (awarding fees under the Labor Management Reporting Disclosure Act of 1959); *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 (1939) (awarding fees in litigation regarding a bank failure); *Harrison v. Perea*, 168 U.S. 311, 325-326 (1897) (awarding attorney’s fees in a bankruptcy proceeding); *Cent. Banking & R.R. v. Pettus*, 113 U.S. 116, 122-24 (same) (1885); see also Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929 (1985). The private attorney general doctrine is a primary vehicle by which most individual civil rights are defended and affirmed; as a result, individuals will almost universally be seen to have standing in such cases to vindicate civil rights provisions. Cheng, *supra* at 1938-44.

13. See *Alyeska*, 421 U.S. at 257-58. Judge Skelly Wright expressed the rationale in support of the private attorney general doctrine in *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), when he wrote that by “acting as private attorneys general, not only have [plaintiffs] ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests . . . . Denying fees might well have deterred [plaintiffs] from undertaking the heavy burden of this litigation.” *Id.* at 1036. However, the Supreme Court overruled Judge Wright in 1975. *Alyeska*, 421 U.S. at 241.

14. 421 U.S. 240 (1975).

15. *Id.* at 260-61.

16. *Id.* at 249-250 (finding that “attorney’s fees are not ordinarily recoverable in absence of a statute”); see also *F.D. Rich Co. v. United States ex rel Indus. Lumber Co.*, 417 U.S. 116, 126 (1974) (same); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-718 (1967) (same); *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450, 452 (1873) (holding in favor of the American Rule); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) (holding that the American Rule may only be modified by statute).

17. See *Alyeska*, 421 U.S. at 262; see also *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (stating that the Congress provided for recovery of counsel fees “to encourage individuals injured by racial discrimination to seek judicial relief under Title II [of the Civil Rights Act of 1964]”).

One of the most important federal laws providing for the award of attorney's fees to prevailing parties is the Civil Rights Attorney's Fees Award Act of 1976 (hereinafter Section 1988).<sup>18</sup> Section 1988 restores the private attorney general doctrine for enforcement actions under numerous civil rights statutes by allowing courts the discretion to allow the prevailing party an award of reasonable attorney's fees as part of the costs.<sup>19</sup> The FHAA<sup>20</sup> and the ADA<sup>21</sup> adopt language similar to Section 1988 concerning prevailing parties.<sup>22</sup> These provisions are the focus of the *Buckhannon* case.<sup>23</sup>

The central problem of Section 1988 and all fee-shifting statutes that follow its language concerns the meaning of "prevailing party" under Section 1988. A key issue that arose was whether a party may be considered a "prevailing party" when the action is dismissed due to mootness.<sup>24</sup> Prior to *Buckhannon*, nearly every circuit adopted the "catalyst theory" as a baseline for prevailing party status.<sup>25</sup> The catalyst

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18. 42 U.S.C. § 1988(b). This provision was passed quickly after the ruling in *Alyeska* to restore the rights of individuals to vindicate individual rights in federal court. The provision, as amended, states:

In any action or proceeding to enforce a provision of [numerous civil rights laws], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

19. *Id.* The Act allows an award of attorney's fees for enforcement actions under provision of sections 42 U.S.C. §§ 1981-83, 1985, 1986, Title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, or Title VI of the Civil Rights Act of 1964. *Id.*

20. 42 U.S.C. § 3613(c)(2) (2000).

21. 42 U.S.C. § 12205 (2000).

22. Compare 42 U.S.C. § 12205 ("In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual."), and 42 U.S.C. § 3613(c)(2) (2000) ("In a civil action under subsection (a) of this Section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person."), with 42 U.S.C. § 1988(b) (2000) ("[T]he court, in its discretion, may also allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .").

23. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 601 (2001).

24. *Id.* at 600-01.

25. See generally *Hendrickson v. Branstad*, 934 F.2d 158, 161 (8th Cir. 1991) (holding that for the catalyst test to succeed, the lawsuit must be: "1) a necessary element in achieving a state's compliance with a statute, and 2) that compliance must be legally

theory asserts that plaintiffs are entitled to attorney's fees if the lawsuit alone brings about the desired change in the defendant's conduct.<sup>26</sup>

The courts that used the catalyst theory to shift fees to defendants usually required the plaintiff's lawsuit to meet three basic tests.<sup>27</sup> First, the claim had to be colorable and not frivolous.<sup>28</sup> Second, the lawsuit had to be a substantial factor in changing the defendant's behavior.<sup>29</sup> Finally, the change in behavior must have provided the plaintiff with some relief on at least one issue that was litigated.<sup>30</sup>

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required as opposed to gratuitous or voluntary"); *Langton v. Johnston*, 928 F.2d 1206, 1224-25 (1st Cir. 1991) (stating that the essential question in determining if the catalyst test applies is whether the suit caused the defendants to take action); *Libby v. Ill. High Sch. Ass'n.*, 921 F.2d 96, 99 (7th Cir. 1990) (applying the catalyst test to provisional relief when the relief granted was determined "on the merits or acted as a catalyst to obtain concessions" from the opposing party); *Associated Builders and Contractors v. Orleans Parrish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (stating that the catalyst test is met when "1) the suit achieves its goals, and 2) the suit is the cause of the defendant's corrective action"); *Clark v. Township of Falls*, 890 F.2d 625, 627 (3rd Cir. 1989) (stating that one is a prevailing party if the party is victorious on any material issue that achieved some kind of relief); *Dunn v. Fla. Bar*, 889 F.2d 1010, 1013-14 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990) (stating that one is a prevailing party if the defendant engages in remedial action that moots the dispute after the filing of the suit); *Haskell v. Wash. Township*, 864 F.2d 1266, 1279 (6th Cir. 1988) (stating that an award of attorney's fees is proper when a party is victorious on a material issue or achieves a substantial amount of relief through a consent decree or settlement). *But see Buckhannon*, 532 U.S. at 627 (Ginsburg, J., dissenting). The *Buckhannon* Court believed that the circuit courts had embraced the catalyst theory on the basis of ambiguous Supreme Court dicta. *See id.* at 605. Consequently, it moved to reduce all nuance or doubt from the meaning of certain phrases in the statute. *See id.* at 605-06.

26. *Buckhannon*, 532 U.S. at 601-02. The *Buckhannon* Court overturned this practice and held that prevailing party status requires a judicially mandated change in the relationship of the parties either by a judgment on the merits, court-ordered consent decree, or court-supervised settlement. *See id.* at 600.

27. *See* Matthew D. Slater, Comment, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. CHI. L. REV. 819, 828-32 (1982).

28. *See id.*

29. *See id.*

30. *Id.* The catalyst theory originated in *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), where the court awarded attorney's fees under a Title VII fee statute because the plaintiff's lawsuit "acted as a catalyst" to force the defendant to alter its discriminatory hiring practices. *Id.* at 429-30. The catalyst theory served as a gap-filler to justify fee awards in cases where actual or injunctive relief is not offered by the courts, but the courts find that the plaintiff's lawsuit has legal merit and that the defendant's change in behavior offers the plaintiff some of the relief sought in the lawsuit. *See* Slater, *supra* note 27, at 820-28 (describing the standards of granting fee awards in moot cases); *see also* *Luethje v. Peavine Sch. Dist. of Adair County*, 872 F.2d 352, 354 (10th Cir. 1989) (stating that a plaintiff may prevail if the suit is "causally linked to securing the relief obtained and . . . the defendant's conduct in response to the lawsuit was required by law") (quoting *J & J Anderson v. Town of Erie*, 767 F.2d 1469, 1473, 1475 (10th Cir. 1985)). The central question in any catalyst theory case is what constitutes "relief on the merits" in the

The Supreme Court's ruling in *Buckhannon* settled a dispute that began as a claim for reasonable accommodations and ended as a debate over the meaning of prevailing party.<sup>31</sup> Shortly after receiving the orders to cease operation, Buckhannon Board and Care Home filed suit against the West Virginia Department of Health and Human Resources claiming that the self-preservation rule violated both the ADA and the FHAA, as well as seeking declaratory relief, injunctive relief, damages, and attorney's fees.<sup>32</sup>

After nearly a year and a half of discovery, the United States District Court for the Northern District of West Virginia ruled against four motions to dismiss filed by the defendants.<sup>33</sup> One month later, the West Virginia legislature repealed the self-preservation rule, and the district court granted defendants' motion to dismiss for mootness.<sup>34</sup> Plaintiffs then sought the award of approximately \$200,000 in attorney's fees

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absence of a formal determination. See *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.* 489 U.S. 782, 792-93 (1989) (stating that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute").

31. On October 18, 1996, the West Virginia Department of Health and Human Services issued three orders to the Buckhannon Board and Care Home, an assisted living facility, to cease operation. *Buckhannon*, 532 U.S. at 623. West Virginia proceeded against Buckhannon Board and Care Home for violating a "self-preservation" rule that prohibited assisted care homes from admitting persons who were unable to exit without assistance in an emergency. *Id.*; see also W. VA. CODE ANN. § 16-5H-2 (Michie 1998) (superceded). Three Buckhannon residents, including 102-year-old Dorsey Pierce, could not walk without assistance to an emergency exit. See *Buckhannon*, 532 U.S. at 623.

32. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 19 F. Supp. 2d 567 (N.D. W. Va. 1998), *cert. granted*, 530 U.S. 1304 (2000), *motion granted*, 531 U.S. 1122 (2001), *aff'd*, 532 U.S. 598 (2001).

33. *Id.* at 577. The court's determinations on the defendant's motions were as follows:

[T]his Court finds that plaintiffs have stated a claim for facial discrimination under the FHAA and for discrimination under the ADA, defendants' motion to dismiss for failure to sufficiently allege these claims is DENIED. Second, because this Court finds that plaintiffs cannot consistently maintain a claim for facial discrimination and discriminatory impact, defendants' motion to dismiss the discriminatory impact claim is GRANTED. Third, defendants' motion to dismiss for lack of capacity to sue is DENIED and plaintiffs are DIRECTED to substitute the real parties in interest in lieu of the inappropriately named next friends within ten (10) days following the entry of this order. Fourth, because this Court finds that the West Virginia Residential Board and Care Home Association has associational standing, defendants' motion to dismiss for lack of standing is DENIED. Next, because this Court finds no reason to dismiss for failure to exhaust administrative remedies, defendants' motion to dismiss on that ground is DENIED.

*Id.*

34. See *id.*; see also *Buckhannon*, 532 U.S. at 601.

accrued over the sixteen-month period of the lawsuit.<sup>35</sup> However, the district court denied plaintiffs' efforts to recover attorney's fees under the fee-shifting provisions of the FHAA and ADA.<sup>36</sup>

Plaintiffs appealed the denial of fees to the Fourth Circuit and asked the court to overrule its six-to-five en banc holding in *S-1 and S-2 v. State Board of Education of North Carolina*.<sup>37</sup> A three-judge panel affirmed the denial of attorney's fees.<sup>38</sup> The holding reiterated the Fourth Circuit's stance that the party's receipt of a judgment on the merits, a consent decree, or a settlement is necessary to qualify for prevailing party status.<sup>39</sup> As a result, Buckhannon Board and Care Home appealed, and the Supreme Court granted certiorari to resolve a split between the Fourth Circuit and all other circuits regarding the use of the catalyst theory as a basis for awarding fees.<sup>40</sup>

In a five-four decision, delivered by Chief Justice Rehnquist, the Court affirmed the Fourth Circuit's decision, holding that the catalyst theory was an unacceptable basis for the award of attorney's fees under the FHAA and ADA.<sup>41</sup> The Court reached this conclusion by closely following the reasoning offered in *S-1 and S-2* as well as restricting the definition of "prevailing party."<sup>42</sup>

This Note traces the end of the catalyst theory as a means for fee shifting in claims of equity under the FHAA and ADA. Part I of this

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35. See Marcia Coyle, *Fee Change Is a Sea-Change*, NAT'L L.J., June 11, 2001, at A1.

36. *Buckhannon*, 532 U.S. at 602 (citing *S-1 & S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49 (4th Cir. 1994)).

37. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, No. 99-1424, 2000 WL 42250, at \*1 (4th Cir. Jan. 20, 2000) (unpublished) (citing *S-1 & S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49 (4th Cir. 1994)).

38. *Id.*

39. *Id.* at \*2.

40. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 530 U.S. 1304 (2000); see also *Buckhannon*, 532 U.S. at 602 (stating that the Court granted certiorari to resolve a disagreement in the courts of appeals regarding the application of the catalyst test).

41. *Buckhannon*, 532 U.S. at 610.

42. See *id.* at 602; see also BLACK'S LAW DICTIONARY 1145 (7th ed. 1999) (defining prevailing party as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded. . ."). Justice Scalia, joined by Justice Thomas, concurred with the formal definition from *Black's Law Dictionary* and suggested that prior Supreme Court holdings support the insistence upon a judgment, a consent decree, or a settlement as prerequisites for any prevailing party. See *Buckhannon*, 532 U.S. at 618-19 (Scalia, J., concurring). In her dissent, Justice Ginsburg sharply challenged the narrow construction of the majority definition of "prevailing party," its abdication of case precedent, and its denial of congressional intent. See *id.* at 643-44 (Ginsburg, J., dissenting). Justice Ginsburg challenged the holding as an impediment to the enforcement of federal law under the private attorney general doctrine. See *id.* at 623.



Note discusses the evolving definitions of “prevailing party” and the emergence of the catalyst theory in Supreme Court and Circuit Court jurisprudence after the Civil Rights Attorney’s Fees Awards Act was enacted. Next, Part II of this Note describes the recent Supreme Court opinion in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources* and analyzes the strengths and weaknesses of the majority, concurring, and dissenting opinions. Finally, Part III of this Note demonstrates how the narrow reasoning of the majority opinion affects many significant pieces of civil rights legislation, fails to resolve the key policy issues in a satisfactory manner, and avoids a nuanced solution that would have better protected the private attorney general doctrine as well as innocent defendants. This Note agrees with the dissent that the Court unreasonably departed from a practice of fee shifting that protected the rights of disadvantaged clients. Accordingly, the Court should have rejected the Fourth Circuit’s narrow formulation of “prevailing party” and used the “causal link” catalyst theory analysis, while distributing the risk between the plaintiff and defendant in future cases (mooted by defendants) under civil rights legislation.

#### I. THE TACIT EMBRACE OF CATALYST THEORY: THE COURT’S DEVELOPMENT OF THE MEANING OF PREVAILING PARTY

The Supreme Court’s treatment of Section 1988(b) over the last twenty-five years focused upon two catalyst theory issues that are disputed in *Buckhannon*: first, defining the meaning of “prevailing” without a formal judgment under Section 1988 and second, defining “relief on the merits.”<sup>43</sup> Two cases, *Hanrahan v. Hampton*<sup>44</sup> and *Maher v. Gagne*,<sup>45</sup> refine the term “prevailing party” by answering the procedural question of when in the legal process a party prevails under the federal fee-shifting provisions.<sup>46</sup> These cases lay a foundation for the first premise of the catalyst theory—that fees may be awarded to plaintiffs who prevail without any formal, final judgments on the merits.<sup>47</sup> The Court contemporaneously built upon this foundation with a series of

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43. *Buckhannon*, 532 U.S. at 604-05 (explaining that certain kinds of judgments, settlements, and decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees, but deciding that “the ‘catalyst theory’ falls on the other side of the line from these examples”).

44. 446 U.S. 754, 756-58 (1980).

45. 448 U.S. 122, 124, 129 (1980).

46. See *Maher*, 448 U.S. at 129; *Hanrahan*, 446 U.S. at 756-58.

47. See Slater, *supra* note 27, at 828-32.

cases that formulate how a party qualifies for prevailing party status under Section 1988.<sup>48</sup> These cases develop the second major premise of the catalyst theory — that plaintiffs may be considered a prevailing party when there is a “material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute” even when the alteration of the relationship moots the lawsuit itself.<sup>49</sup>

*A. When Does a Party Prevail? The Court Refines the Definition*

*1. Prevailing Without a Final Judgment: Introduction of the Important Matter Analysis*

In *Hanrahan v. Hampton*,<sup>50</sup> the Court considered at what point in the litigation a party may claim prevailing status and stated that “a person may in some circumstances be a ‘prevailing party’ without having obtained a ‘favorable final judgment following a full trial on the merits.’”<sup>51</sup> By arguing that “it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims,” the Court accepted the initial premise of the catalyst theory: that a party may prevail under Section 1988 by prevailing only on significant issues.<sup>52</sup> However, in a per curiam decision, the Court held that plaintiffs did not qualify as prevailing parties for merely winning interlocutory orders affecting discovery or winning reversal and remand of the prior directed verdicts against them.<sup>53</sup> The Court stated that Congress had obviously contemplated award offers before a final judgment on the merits in some

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48. See, e.g., *Farrar v. Hobby*, 506 U.S. 103, 121 (1992); *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988); *Evans v. Jeff D.*, 475 U.S. 717, 720 (1987); *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987).

49. See *Garland*, 489 U.S. at 792-93 (arguing that “to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant”). See generally *Slater*, *supra* note 27, at 823 (describing the standards of granting fee awards in moot cases).

50. 446 U.S. 754 (1980).

51. *Id.* at 756-757 (quoting H.R. REP. NO. 94-1558 at 7 (1976) and citing S. REP. NO. 94-1011 at 5 (1976)).

52. See *id.* at 757 (“The Congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases — *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696 (1974) and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) . . . . In each of those cases the party to whom fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered.”).

53. *Id.* at 759; see also *Bly v. McLeod*, 605 F.2d 134, 137 (4th Cir. 1979).

cases, but that a party must prevail on an "important matter" in the course of litigation to be eligible for an award of attorney's fees.<sup>54</sup>

## 2. Parties Prevailing Through Settlement May Claim Attorney's Fees

In *Mahe v. Gagne*, the Court further clarified when a party was procedurally eligible as a prevailing party for an award of attorney's fees.<sup>55</sup> Significantly, *Mahe* delineated what was only inferred by *Hanrahan*: that fees may be awarded to plaintiffs who prevail via private settlements, consent decrees, or formal judgments on the merits.<sup>56</sup> In an

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54. *Hanrahan*, 446 U.S. at 757-58 (quoting S. REP. NO. 94-1011 at 5 (1976)). For other cases contemplating award offers before the final judgment on the merits, see *Citizens Against Tax Waste v. Westerville City Sch. Bd. of Educ.*, 985 F.2d 255, 257-58 (6th Cir. 1993) (citing *Tex. Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-91 (1988) for the proposition that Congress meant to permit fee awards where a party prevails on an "important matter" even if it does not prevail on all issues); *Grano v. Barry*, 783 F.2d 1104, 1108-10 (D.C. Cir. 1986) (stating that, under Section 1988, the party may be the "prevailing party before completion of the legal action"); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474-75 (10th Cir. 1985) (observing that a party may receive attorney's fees even without a final merits determination); *Institutionalized Juveniles v. Sec. of Public Welfare*, 758 F.2d 897, 910-17 (3d Cir. 1985) (noting that a party may be the "prevailing party" for the purposes of Section 1988 without prevailing on every legal theory); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984) (explaining that it is sufficient for the purposes of Section 1988 that the "prevailing party" merely shows a causal connection between the relief obtained and the litigation for which fees are sought); *Doe v. Busbee*, 684 F.2d 1375, 1379 (11th Cir. 1982) (declaring that, to be a "prevailing party under [S]ection 1988, it is unnecessary for the party to prevail on every claim or theory asserted); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982) (stating that the statute does not require the party to win a judicial determination on the merits to be the "prevailing party"); *Robinson v. Kimbrough*, 652 F.2d 458, 465-67 (5th Cir. 1981) (observing that the legislative history of Section 1988 indicates a congressional intent to permit attorney fee awards even though a party does not obtain a final judicial determination); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981) (noting that formal relief is not a prerequisite to obtaining attorney's fees under the statute); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980) (indicating that a party may be a "prevailing party" without obtaining complete judicial relief); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979) (discerning from Section 1988 a congressional intent to permit an award of attorney's fees when a party obtains its "objective"); *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978) (finding it "abundantly clear" that Congress intended to permit an attorney's fee award when a party vindicates rights but does not necessarily obtain formal relief).

55. See *Mahe v. Gagne*, 448 U.S. 122, 128-30 (1980).

56. *Id.* at 129.

The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."

opinion joined in part by all of the Justices, the Court held that a party that prevails through settlement rather than through litigation may still claim an award of attorney's fees as the "prevailing party" within the meaning of Section 1988.<sup>57</sup> The *Maher* majority, like the *Hanrahan* decision before it, raised the second premise of the catalyst theory by stating that it could not "accept [the] petitioner's contention that respondent did not gain sufficient relief through the consent decree to be considered the prevailing party."<sup>58</sup> On the second crucial issue of sufficient relief, though, the Court declined further analysis and simply upheld the findings of the lower courts.<sup>59</sup>

*B. How a Party May Prevail: The Court Develops Theories Based  
Around a Requirement of Relief*

The *Hanrahan* and *Maher* cases clarified the principle that a party may be considered a prevailing party for fee-shifting purposes without a final judgment on the merits.<sup>60</sup> However, neither of these cases analyzed the relationship between the competing parties or considered whether a change in the behavior of the defendant met the equitable purposes of Section 1988 and justified shifting fees. The following cases focused squarely on the second prong of what qualifies as sufficient relief and closely analyzed the behavior of the parties.

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*Id.* (quoting S. REP. NO. 94-1011, at 5 (1976)).

57. *Id.* at 129. *But see* *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-05 (2001) (arguing that the court's enforcement of a consent decree gives the party the prevailing status required under fee-shifting statutes like Section 1988). It was not accepted law that private settlements or other mediated arrangements would impart prevailing party status even before the holding in *Buckhannon*. *Id.* at 604 n.7. Obviously, as a result of *Buckhannon*, only court-ordered settlements and court-approved consent decrees may qualify under prevailing party statutes. *See id.* at 604-05.

58. *Maher*, 448 U.S. at 129-30. Both decisions during this period assiduously defer to the judgment of Congress and carefully analyze the legislative histories and particularly the congressional reports. *See id.*; *Hanrahan*, 446 U.S. at 757-58. The current Court is not so deferential to Congress and, at times, is simply dismissive of legislative intent. *See generally* Brand, *supra* note 8, at 307-09 (discussing the Supreme Court's recent shift to increased reliance on statutory text instead of legislative history); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (1990) (same).

59. *Maher*, 448 U.S. at 130 (explaining that "the District Court's contrary finding [of sufficient relief] was based on its familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation stages").

60. *See supra* notes 52-55 and accompanying text.

### 1. Requirement of Relief: Focus on the Behavior of the Parties

In *Hewitt v. Helms*,<sup>61</sup> Justice Scalia ruled that a judicial declaration of a violation of an inmate's constitutional rights did not qualify as sufficient relief on the merits to grant the plaintiff prevailing party status under Section 1988.<sup>62</sup> The Court accepted the scope of the definition of prevailing party status provided by the earlier cases (*Hanrahan* and *Maher*) and concentrated on the definition of "relief on the merits."<sup>63</sup> Consistent with the prior jurisprudence, Justice Scalia held that a plaintiff must receive "at least some relief on the merits of his claim before he can be said to prevail."<sup>64</sup> However, in dicta, Scalia added that "[a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought. . . when that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor."<sup>65</sup> Consequently, this decision tacitly introduced the central issue of the catalyst theory in mooted cases: whether a voluntary change in the defendant's behavior (presumably brought on by the legal process) that provides the plaintiff with the relief sought through the lawsuit is sufficient to justify the award of attorney's fees.<sup>66</sup>

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61. 482 U.S. 755 (1987).

62. *Id.* at 761 ("In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces — the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court but *from* the defendant.").

63. *Id.* at 759-61 (citing *Hanrahan*, 446 U.S. at 757) ("In order to be eligible for attorney's fees under § 1988, a litigant must be a 'prevailing party'. . . . Respect for ordinary language requires that a plaintiff receive at least some *relief on the merits* of his claim before he can be said to prevail.").

64. *Id.* at 760.

65. *Id.* at 760-61. In this case, however, Justice Scalia set forth a litany of reasons why the plaintiff did not qualify by arguing that the plaintiff received nothing from the defendant's action:

As a consequence of the present lawsuit, Helms obtained nothing from the defendants. The only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law in an otherwise unfavorable opinion. There would be no conceivable claim that the plaintiff had 'prevailed,' for instance, if the District Court in this case had first decided the question of immunity, and the Court of Appeals affirmed. . . .

*Id.* at 761-62.

66. See *id.*; *Luethje v. Peavine Sch. Dist. of Adair County*, 872 F.2d 352, 354 (10th Cir. 1989) (stating that a plaintiff may prevail if the suit was "causally linked to securing the relief obtained and. . . the defendant's conduct in response to the lawsuit was required by law") (quoting *J & J Anderson v. Town of Erie*, 767 F.2d 1469, 1473, 1475 (10th Cir. 1985). *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970). See generally *Slater*, *supra* note 27, at 828 (describing the standards of granting fee awards in

In this case, unlike *Buckhannon*, Justice Scalia appeared to acknowledge that the voluntary change in behavior is enough to qualify as sufficient relief on the merits.<sup>67</sup>

## 2. *Behavior of the Defendant Toward the Plaintiff*

Although *Rhodes v. Stewart*<sup>68</sup> appeared to restrict the award of fees under Section 1988, its focus on defendant's behavior tacitly embraced the second prong of the catalyst theory analysis.<sup>69</sup> The question before the Court was whether a declaratory judgment in favor of an inmate plaintiff alleging that his First and Fourteenth Amendment rights were violated by guards was sufficient relief to grant the plaintiff prevailing party status under Section 1988.<sup>70</sup> In its per curiam opinion, the *Rhodes* Court concentrated almost exclusively on the behavior of the defendant toward the plaintiff as an indicator of relief on the merits.<sup>71</sup> The Court held that a declaratory judgment "constitute[s] relief, for purposes of Section 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff."<sup>72</sup> In this case, the declaratory judgment did not

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moot cases). The catalyst theory is used in cases where the courts find that the plaintiff's lawsuit has legal merit and that the defendant's change in behavior offers the plaintiff some of the relief sought in the lawsuit.

67. Compare *Hewitt*, 482 U.S. at 760-61 (stating that "relief need not be judicially decreed in order to justify a fee award under [S]ection 1988"), with *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 618 (2001) (Scalia, J., concurring) (stating that "our decision that the statute makes plaintiff a 'prevailing party' . . . was based entirely on language in a House Report . . . and if this issue were to arise for the first time today, I doubt that I would agree with that result").

68. 488 U.S. 1 (1988).

69. *Id.* at 3-4 (stating that a declaratory judgment "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff").

70. *Id.* at 2.

71. *Id.* at 4 ("The case was moot before judgment issued and the judgment therefore afforded the plaintiffs no relief whatsoever. In the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees."). The central issue in *Rhodes* was whether a declaratory judgment that failed to affect the behavior of the defendants toward the plaintiffs constituted relief on the merits under Section 1988. *Id.* at 1-4. The District Court and the Court of Appeals in the *Rhodes* case granted the former inmates attorney's fees under Section 1988 because they won a declaratory judgment against the prison. *Id.* at 2-3. The Supreme Court reversed and found that a declaratory judgment constituted relief for the purposes of Section 1988 if, and only if, it affects the behavior of the specific defendants toward the specific plaintiffs. *Id.* at 4.

72. *Id.*

constitute such relief.<sup>73</sup> To reach this determination, the opinion relied heavily on theory of sufficient relief found in *Hewitt*.<sup>74</sup>

### 3. Degree of Success: The Balancing Test of the Significant Issues Approach

As the Supreme Court began to weigh carefully the relationship of the parties in determining relief, it also began to seek a definitive test to determine how a party (plaintiff or defendant) prevails under Section 1988.<sup>75</sup> In *Texas State Teachers Association v. Garland Independent School District*, the Court fused strands of the important matter analysis briefly explored in cases like *Hanrahan* with the emphasis placed upon the parties' behavior and expectations found in *Hewitt* and *Rhodes*.<sup>76</sup> In a unanimous opinion written by Justice O'Connor, the Court overturned the Fifth Circuit's holding that a party must prevail on the "central issue" and held that the test for determining "prevailing party" status requires that parties "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."<sup>77</sup> Justice

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73. *Id.* at 3 (stating that "nothing in our opinion [in *Hewitt v. Helms*, 482 U.S. 755 (1987)] suggested that the entry of such a judgment in a party's favor automatically renders that party prevailing under § 1988").

74. *See id.* at 3-4 (quoting *Hewitt*, 482 U.S. at 761) ("The real value of the judicial pronouncement — what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion — is the settling of some dispute *which affects the behavior of the defendant toward the plaintiff*.").

75. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court defined defendants' rights of recovery under Section 1988 and found that the degree of a plaintiff's success is the crucial factor in determining prevailing party status. *See id.* at 429-31, 440. On the issue concerning defendants' right of recovery, Justice Powell cited the legislative history to limit fee shifting for the benefit of prevailing defendants to situations where "the [plaintiff's] suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Id.* at 429 n.2 (citing H.R. REP. NO. 94-1558, at 7 (1976)). With respect to the definition of prevailing party, the majority opinion insisted that district courts must weigh the level of the plaintiff's success on a significant issue before granting a fee award. *Id.* at 440. This approach furthers the idea of judicial discretion and places emphasis on a nascent significant issues test, which is developed much further in *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 788-92 (1989).

76. *See Garland*, 489 U.S. at 788-93.

77. *Id.* at 789 (emphasis added). Citing the Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983), the Court stated:

[N]o fee award is permissible until the plaintiff has crossed the "statutory threshold" of prevailing party status. In this regard the [*Hensley*] Court indicated that "[a] typical formulation is that the 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation that achieves some of the benefit the parties sought in bringing the suit.'" The Court then went on to establish certain principles to

O'Connor's opinion traced an effective two-part test for determining prevailing parties under the meaning of Section 1988.<sup>78</sup> First, a plaintiff must be able to describe a resolution that effectively changes the legal relationship between the parties.<sup>79</sup> Second, the plaintiff must succeed in "any significant issue in litigation which achieve[s] some of the benefit the parties sought in bringing the suit."<sup>80</sup> As a result, the *Garland* opinion supports a catalyst theory of recovery as a proper function of congressional intent as long as the plaintiff can show both a material alteration in the relationship with the defendant and a benefit conferred by this material alteration.<sup>81</sup>

### C. Challenging the Catalyst Theory

Although the Supreme Court never directly confronted the catalyst theory squarely until *Buckhannon*, the Court had refined and tacitly accepted its three basic tenets: a colorable, non-frivolous lawsuit, a link between the defendant's change in behavior and the lawsuit, and the requirement that the plaintiff receive sufficient relief as a result of the defendant's voluntary change in behavior.<sup>82</sup> Until the decision in *Farrar*

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guide the discretion of the lower courts in setting fee awards in cases where plaintiffs have not achieved complete success.

*Id.* (citations omitted); *see also* *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989); *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978).

78. *Garland*, 489 U.S. at 791-92. The Court explained:

If the plaintiff has succeeded on "any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind. . . . Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes* as to be insufficient to support prevailing party status.

*Id.* (citations omitted).

79. *See id.* at 792-93.

80. *Id.* at 791-792 (citing *Nadeau*, 581 F.2d at 278-79.). The *Garland* Court also argued that district courts would have the clear discretion to determine that the tests adopted have not been satisfied. *Id.* at 792; *see also* *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d 718, 724 n.4 (2d Cir. 1984); *Chicano Police Officers Ass'n v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980); *Nadeau*, 581 F.2d at 279.

81. *Garland*, 489 U.S. at 790.

82. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 110-12 (1992) (holding that nominal damages are enough to justify fee shifting under Section 1988 so long as the suit is colorable); *Garland*, 489 U.S. at 789-90 (stating that "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant"); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (holding that a declaratory judgment alone is not enough if it does not affect the relationship of the parties).



*v. Hobby*,<sup>83</sup> the lower courts adopted the two-part requirement described in *Garland* and followed the reasoning of *Hewitt* to justify catalyst theory fee awards.<sup>84</sup> The *Farrar* decision cast doubt on the legitimacy of this approach.<sup>85</sup>

In *Farrar v. Hobby*, the Court confronted the issue of whether a party who had received nominal damages could be considered a prevailing party for the purposes of Section 1988.<sup>86</sup> In a five-four opinion, the Court held that a plaintiff who wins nominal damages is a prevailing party under Section 1988 because a judgment for damages in any amount modifies the defendant's behavior.<sup>87</sup> However, when a plaintiff recovers nominal damages only because of a failure to prove an essential element of the claim for monetary relief, the Court argued that the only reasonable fee is no fee at all.<sup>88</sup>

The Court's opinion seemingly restricted the broad scope of the catalyst theory by arguing that the legislative purpose of Section 1988 allows the refusal of fees to a party who technically prevails.<sup>89</sup> The Court

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83. 506 U.S. 103 (1992).

84. The *Garland* test was subsequently followed by the Supreme Court and the majority of the circuit courts. See, e.g., *Sullivan v. Hudson*, 490 U.S. 877, 887 (1989); *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293-94 (1st Cir. 2001); *Kerin v. USPS*, 218 F.3d 185, 189 (2d Cir. 2000); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 544-46 (3d Cir. 1994); *W. Virginians for Life, Inc. v. Smith*, 952 F. Supp. 342, 344 (S.D. W. Va. 1996).

85. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 194-95 (2000) (citing disagreement among the circuits as to the validity of the catalyst theory following *Farrar*).

86. See *Farrar*, 506 U.S. at 109-14. The plaintiffs sued defendant Hobby and the State of Texas under Sections 1983 and 1985 of The Civil Rights Act for seventeen million dollars alleging that the defendants illegally closed a school operated by Farrar and his son. *Id.* at 106. The district court awarded only nominal damages and subsequently attorney's fees as a prevailing party under Section 1988. *Id.* at 107-09.

87. *Id.* at 112-13 ("When a court awards nominal damages, it neither enters judgment for defendant on the merits nor declares the defendant's legal immunity to suit. . . . No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce judgment, a consent decree, or settlement against the defendant.").

88. *Id.* at 118 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)) ("We have explained that even the prevailing plaintiff may be denied fees if 'special circumstances would render [the] award unjust.'").

89. See *id.* at 118-20. See generally Laura E. Flenniken, Comment, *No More Plain Meaning: Farrar v. Hobby*, 71 DENV. U.L. REV. 477, 478 (1994) (stating that in *Farrar*, the Court found it "usually unreasonable to award any attorney's fees where only nominal damages are awarded"); Joel H. Trotter, Note, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 VA. L. REV. 1429, 1443 (1994) (stating that "under *Farrar* a technical victory renders a plaintiff a prevailing party but will not necessarily entitle the plaintiff to fees").

also required a judicial act to compel a material alteration of the legal relationship.<sup>90</sup> However, the Court's decision did not directly affect the amount of discretion afforded to lower court judges in determining whether fee shifting was warranted.<sup>91</sup>

Consequently, every circuit court except the Fourth Circuit continued to award fees to plaintiffs' attorneys based upon the catalyst theory.<sup>92</sup> Though the Fourth Circuit relied upon *Farrar v. Hobby* to reject the catalyst theory, the Supreme Court later ruled in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*<sup>93</sup> that *Farrar* "involved no catalytic effect."<sup>94</sup> In *Laidlaw*, though, the Court declined to address directly the "continuing validity of the catalyst theory."<sup>95</sup>

The Court's prior holdings allowed the lower courts a great deal of latitude in their discretion to award fees where appropriate.<sup>96</sup> The *Buckhannon* decision altered the ability of courts to exercise such discretion and injured plaintiffs' chances of recovering fees in the absence of a final decision on the merits or a court-ordered settlement.<sup>97</sup>

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90. See *Farrar*, 506 U.S. at 113 (stating that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant").

91. See *id.* at 115. See generally Trotter, *supra* note 89, at 1429 (noting that "it is possible for courts [to] continue to award attorney's fees under [S]ection 1988 in meritorious catalytic cases").

92. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602, 602 n.3 (2001) (noting that the Fourth Circuit had explicitly rejected the catalyst theory and citing cases from the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits recognizing the catalyst theory). The Court did not choose to cite opinions from the Fifth or D.C. Circuits, but both jurisdictions continued to apply some form of the catalyst theory after the holding in *Farrar*. See, e.g., *Foreman v. Dallas County*, 193 F.3d 314, 320 (5th Cir. 1999).

93. 528 U.S. 167 (2000).

94. *Id.* at 194.

95. *Id.* at 195 (stating that the continuing validity of the catalyst theory was not a ripe issue because the District Court "stayed the time for a petition for attorney's fees until the time for appeal had expired or, if either party appealed, until the appeal was resolved").

96. See Brand, *supra* note 8, at 300. See generally Hylton, *supra* note 7, at 1109.

97. See Brand, *supra* note 8.

II. *BUCKHANNON BOARD AND CARE HOME V. WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN SERVICES: ARGUING THAT  
PREVAILING PARTY HAS A PLAIN MEANING*

A. *The Majority Opinion: Holding That the Catalyst Theory Is  
Impermissible Grounds for Recovery Under a Prevailing Party Argument*

In upholding the Fourth Circuit Court of Appeals, the Court emphasized that the term “prevailing party” had a plain meaning that excluded parties gaining relief through the catalyst theory.<sup>98</sup> The Court stated that “prevailing party” was a legal term of art and necessarily had a narrow meaning.<sup>99</sup> As a result, the Court concluded that “prevailing party” had a clear meaning for the purposes of Section 1988, this meaning excluded the catalyst theory, and the various policy arguments behind the use of the catalyst theory were inapplicable.<sup>100</sup>

1. *Applying the Plain Meaning Argument to Restrict the Broad  
Definition of Prevailing Party Status*

The majority noted that *Buckhannon* presented the first opportunity to examine whether the term “prevailing party” allowed an award of fees under the catalyst theory.<sup>101</sup> The majority opinion briefly described the development of the law since Section 1988 was enacted and characterized the relief described in these cases as court-ordered.<sup>102</sup> The Court argued

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98. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 602-04, 610 (2001) (emphasizing that the term “prevailing party” had a plain meaning that excluded parties gaining relief through the catalyst theory and concluding that “prevailing party” had a clear meaning for the purposes of Section 1988 that excluded the catalyst theory).

99. *See id.* at 603. The Court introduced its definition of “prevailing party” and stated that Congress adopted a legal term of art with a fixed meaning. *Id.* Chief Justice Rehnquist explained that *Black’s Law Dictionary* defines a prevailing party as a “party in whose favor a judgment is rendered, regardless of the amount of damages awarded.” *Id.* (quoting *BLACK’S LAW DICTIONARY* 1145 (7th ed. 1999)). This definition bolstered the majority’s insistence on a judicial act to assure prevailing status. *See id.*

100. *See id.* at 610 (“To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a ‘roving authority.’”); *see also* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 260 (1975) (arguing that Congress had not “extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted”).

101. *Buckhannon*, 532 U.S. at 603 n.5 (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Farrar v. Hobby*, 506 U.S. 103 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 194 (2000)) (stating that “there is language in our cases supporting both petitioners and respondents, and last Term we observed that it was an open question here”).

102. *Id.* at 605-06. The Court explained:

that the catalyst theory, on the other hand, “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.”<sup>103</sup> Furthermore, the Rehnquist opinion concluded that a voluntary change in conduct alone “lacks the necessary judicial *imprimatur*” to justify fee shifting.<sup>104</sup>

To enforce this rejection of the catalyst theory and overcome the legislative intent of Section 1988, the Court determined that the “plain language of the statutes” must be reconciled with the Court’s previous holdings.<sup>105</sup> By employing this variation of the plain meaning argument,<sup>106</sup> the *Buckhannon* Court argued that attorney’s fees had never been awarded “for a nonjudicial alteration of actual circumstances.”<sup>107</sup> As a result, the majority stated that an acceptance of the catalyst theory would expand the reach of “prevailing party” beyond Court precedent and thus “abrogate the ‘merit’ requirement of [the] prior cases.”<sup>108</sup>

## 2. *Avoiding the Policy Arguments and Denying Legislative Intent*

The *Buckhannon* majority next addressed the question of the legislative intent of Section 1988 and whether Congress anticipated recovery based upon the catalyst theory.<sup>109</sup> The Court immediately

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We have only awarded attorney’s fees where the plaintiff has received a judgment on the merits, or obtained a court-ordered consent decree,— we have not awarded attorney’s fees where the plaintiff has secured the reversal of a directed verdict, or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by “judicial relief”. Never have we awarded attorney’s fees for a nonjudicial “alteration of actual circumstances”.

*Id.* (citations omitted). *But see id.* at 634 (Ginsburg, J., dissenting) (disagreeing with the majority’s opinion that relief must be granted by a judgment).

103. *Id.* at 605. The Court also noted that the catalyst theory fell below the baseline test for recovery set forth in *Maher*, *Garland*, *Rhodes*, and *Farrar* and the statutory requirements. *Id.* at 604-05. The Court then used the legislative reports to explain that “Congress’ intent to adopt the ‘catalyst theory’ . . . is at best ambiguous as to the availability of the ‘catalyst theory’ for awarding attorney’s fees”. *Id.* at 607-08.

104. *Id.* at 605 (noting that a legal alteration in the relationship of the parties carried out by the court was required by precedent).

105. *Id.* (agreeing with Justice Scalia’s concurrence that the courts of appeals had “relied upon dicta in . . . approving the ‘catalyst theory’” as a theory of recovery).

106. *See id.* at 603 (“This view that a ‘prevailing party’ is one who has been awarded some relief by the court can be distilled from our prior cases.”). *But see* Flenniken, *supra* note 89, at 502-04 (arguing that the Court’s interpretation of Section 1988 betrays the plain meaning of the statute and congressional intent).

107. *Id.* at 606 (countering the dissent’s catalytic argument and asserting that an expansion upon precedent would lead to unjustified fee awards where the plaintiffs’ case was colorable and nothing more).

108. *Id.*

109. *Id.* at 607.

dismissed the legislative history argument by stating flatly that any analysis of the legislative history could not outweigh the clear meaning of “prevailing party.”<sup>110</sup> Next, the Court briefly analyzed key portions of the House and Senate reports and determined that the legislative history was too ambiguous to be used to alter the definition of prevailing party.<sup>111</sup>

The Court then analyzed three of the key policy issues raised by the petitioners: whether defendants would intentionally moot cases to avoid fee awards; whether plaintiffs would be discouraged from bringing suits for equitable relief because of expense; and whether a catalyst theory hearing would be burdensome.<sup>112</sup> First, the *Buckhannon* majority dismissed without much consideration the concerns that defendants would moot cases or plaintiffs would be prevented from bringing cases because these concerns were “entirely speculative and unsupported by any empirical evidence.”<sup>113</sup> Next, the Court entertained the notion that district courts could perform “catalyst theory hearing[s]” but rejected this notion as too burdensome and not readily administered.<sup>114</sup> Finally, the majority opinion returned to its bedrock argument that the term “prevailing party” was so clear and incontrovertible that these policy considerations did not need to be decided in this case.<sup>115</sup>

### *B. The Concurrence: Confronting the Policy Arguments Directly*

Justice Scalia wrote his concurring opinion to support the majority’s definition of “prevailing party” and to refute directly the policy arguments of the dissenting opinion.<sup>116</sup> Scalia’s argument addressed three primary issues and further developed the arguments of the majority opinion: the historical constancy of the meaning of “prevailing party,”

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110. *See id.* The Court reluctantly presented the argument that the legislative history of Section 1988 supports the catalyst theory by noting that “[w]e doubt that legislative history could overcome what we think is the rather clear meaning of ‘prevailing party’ — the term actually used in the statute.” *See id.* However, because the Court resorted to the legislative history of Section 1988 in *Garland*, 489 U.S. at 790, and *Hanrahan*, 446 U.S. at 756-57, it analyzed it here. *See id.*

111. *Id.* (stating that “the legislative history cited by petitioners is at best ambiguous as to the availability of the ‘catalyst theory’ for awarding attorney’s fees”). *See generally* Stock, *supra* note 58.

112. *Id.* at 608.

113. *Id.*

114. *Id.* at 609-10 (stating that the district courts are capable of handling such review but that such an interpretation of the fee-shifting statutes would spawn a second litigation).

115. *Id.* at 610 (arguing that disregarding the clear meaning would extend to the judiciary a “roving authority”).

116. *See id.* at 610-22 (Scalia, J., concurring).

the unreliability of his own dicta in *Hewitt*, and the policy interests of defendants sued under these statutes.<sup>117</sup> The concurring opinion devoted the first part of its argument to demonstrating the consistent meaning of “prevailing party” under the American Rule.<sup>118</sup> According to Justice Scalia, the traditional meaning of prevailing party was reasonably clear because “prevailing party” has always “meant the party that wins the suit or obtains a finding (or an admission) of liability.”<sup>119</sup>

The opinion continued with an analysis of the policy considerations behind allowing plaintiffs to recover under the catalyst theory.<sup>120</sup> Justice Scalia strongly disagreed that the legislative history cited by the dissent supported the idea that Congress was aware of the catalyst theory as early as 1970.<sup>121</sup> The concurring opinion then argued that awarding fees to plaintiffs under the catalyst theory “causes the law to be the very instrument of wrong,” which is more reprehensible than denying fees to worthy plaintiffs because it would likely harm innocent defendants.<sup>122</sup> The concurring opinion concluded with a renunciation of Justice Scalia’s own dicta in *Hewitt v. Helms*.<sup>123</sup> Justice Scalia now argued that his

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117. *See id.*

118. *See id.* at 610-16 (Scalia, J., concurring) (citing cases using the term “prevailing party” dating as far back as 1884).

119. *Id.* at 615 (Scalia, J., concurring). Justice Scalia opened by discussing the history of using “prevailing party” in the context of awarding costs rather than attorney’s fees. *Id.* at 611 (Scalia, J., concurring). He stated that, prior to the enactment of the federal fee shifting statutes, there were no cases that “[regarded] as the prevailing party a litigant who left the courthouse empty-handed.” *Id.* at 613-14 (Scalia, J., concurring). Furthermore, he asserted that, prior to the enactment of the fee-shifting statutes, prevailing party was “[n]ot the party that ultimately gets his way because his adversary dies before the suit comes to judgment; not the party that gets his way because circumstances so change that a victory on the legal point for the other side turns out to be a practical victory for him; and not the party that gets his way because the other side ceases (for whatever reason) its offensive conduct.” *Id.* at 615 (Scalia, J., concurring). Justice Scalia concluded that when words have “acquired a specialized meaning in the legal context,” they must be construed by their legal meaning. *Id.* at 615 (Scalia, J., concurring).

120. *Id.* at 616-20 (Scalia, J., concurring) (criticizing the dissent’s interpretation of “prevailing party” by stating that it produces “an award of attorney’s fees when the merits of the plaintiff’s case remain unresolved — when, for all one knows, the defendant only ‘abandon[s] the fray’ because the cost of litigation — either financial or in terms of public relations — would be too great”).

121. *See id.* at 617 n.3 (Scalia, J., concurring) (stating that “legislative history from only one legislative chamber — and consisting of the citation of Courts of Appeals cases, that surely few if any Members of Congress read — is virtually worthless”).

122. *See id.* at 618 (Scalia, J., concurring).

123. *Id.* at 621-22 (Scalia, J., concurring) (“Deferring to our colleagues’ own error is bad enough; but enshrining the error that we ourselves have improvidently suggested and blaming it on the near-unanimous judgment of our colleagues would surely be unworthy. Informing the Courts of Appeals that our ill-considered dicta have misled them displays, it

argument was both misplaced and misinterpreted by the circuit courts and that the Supreme Court has an affirmative duty to correct this error.<sup>124</sup> Unlike Chief Justice Rehnquist's succinct dismissal of the policy issues behind the catalyst theory, Justice Scalia's concurring opinion centered squarely on policy arguments that promoted the defendant's interests in the course of civil rights litigation.<sup>125</sup>

*C. The Dissent: Rejecting the Plain Meaning Argument and Emphasizing the Policy Considerations of Prevailing Party Status*

Justice Ginsburg, joined by Justice Stevens, Justice Souter, and Justice Breyer, argued in the dissenting opinion that the Court's definition of "prevailing party" allows defendants to escape the statutory obligation to pay fees, damages the prospects of indigent plaintiffs, hinders the private attorney general doctrine in federal cases, and shrinks the enforcement mechanisms of federal civil rights legislation.<sup>126</sup> Ginsburg's argument repudiated the "anemic" definition of "prevailing party" supported by the majority, demonstrated the links between clear legislative purpose and congressional acceptance of the catalyst theory of recovery, and promoted the policies in favor of plaintiffs who experience hardship under the American Rule.<sup>127</sup>

The dissenting opinion strongly questioned the efficacy of such a narrow definition of "prevailing party," particularly in light of prior Supreme Court holdings like *Maher v. Gagne* that vary from the *Buckhannon* majority's conception of court-ordered relief.<sup>128</sup> Justice Ginsburg asserted that plain meaning is found in the legislative history of Section 1988, which grants prevailing party status to parties who

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seems to me, not 'disrespect', but a most becoming (and well-deserved) humility.'"). Scalia essentially washes his hands of *Hewitt*. *Hewitt v. Helms*, 482 U.S. 755, 761 ("In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant.").

124. See *Buckhannon*, 532 U.S. at 621 (Scalia, J., concurring).

125. See *id.* at 620 (Scalia, J., concurring) (arguing that the catalyst theory in actuality "harms the less well-heeled" [by] putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation").

126. See *id.* at 622-23 (Ginsburg, J., dissenting).

127. See *id.*

128. See *id.* at 629 (Ginsburg, J., dissenting) (citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)) (stating that "[n]othing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated").

“vindicate rights through . . . judgment or without formally obtaining relief.”<sup>129</sup> Ginsburg challenged the concurring opinion’s policy arguments by maintaining that the catalyst rule not only aids poorer plaintiffs but also encourages defendants to negotiate settlements.<sup>130</sup> Finally, the dissent concluded that the Court failed to provide “a cogent explanation” for overturning the prevailing judgment in nearly every circuit court.<sup>131</sup>

### III. A DEPARTURE FROM PRAGMATISM: THE OUTCOME OF *BUCKHANNON BOARD AND CARE HOME V. WEST VIRGINIA* *DEPARTMENT OF HEALTH AND HUMAN RESOURCES*

In *Buckhannon*, the Supreme Court asserted its power to define acts of Congress and restrained the ability of the circuit courts to award fees to worthy plaintiffs.<sup>132</sup> By embracing the analysis of the Fourth Circuit, the Court renounced the discretion given to courts by the holdings of its prior cases.<sup>133</sup> The majority opinion neglected to confront the crucial policy issues and diminished the ability of indigent plaintiffs to bring actions as private attorneys general and recover fees in federal courts.<sup>134</sup> The *Buckhannon* opinion unquestionably protects innocent defendants from absorbing fees in cases with legal merit where a plaintiff may not have prevailed under a final judgment.<sup>135</sup> However, this formalist requirement of a “judicial imprimatur” completely hinders pragmatic, reasonable analyses of the behavior of the parties in mooted cases and

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129. *Id.* at 637 (Ginsburg, J., dissenting) (quoting S. REP. NO. 94-1011, at 5).

130. *Id.* at 639 (Ginsburg, J., dissenting) (arguing that “one could urge that the catalyst rule may lead defendants promptly to comply with the law’s requirements: the longer the litigation, the larger the fees”); *see also* Hylton, *supra* note 7, at 1121 (arguing that “fee shifting in favor of prevailing plaintiffs enhances both incentives to comply with legal rules and incentives to settle disputes”).

131. *Buckhannon*, 532 U.S. at 643-44 (stating that the majority’s narrow construction is “unsupported by precedent and unaided by history or logic”). To refute Justice Scalia’s insistence that the catalyst theory was a rare aberration and that his dicta unfairly misled the circuits, the dissent offered twelve cases that employed the catalyst theory before *Hewitt*. *Id.* at 626 n.4 (Ginsburg, J., dissenting). In addition, Justice Ginsburg cited nine courts of appeals that “reaffirmed their own consistently held interpretation of the term ‘prevail’” after “the Fourth Circuit, en banc, dividing six-to-five, broke ranks with its sister courts” to declare that “a plaintiff could not become a ‘prevailing party’ without an enforceable judgment, consent decree, or settlement.” *Id.* at 626-27 (Ginsburg, J., dissenting) (quoting S-1 & S-2 v. State Bd. of Educ. of N.C., 21 F. 3d 49, 57 (1994)).

132. *Id.* at 605-06 (stating that the use of catalyst theory under prevailing party statutes must be reconciled with prior Supreme Court holdings).

133. *See supra* note 131 and accompanying text.

134. *See Buckhannon*, 532 U.S. at 622-23 (Ginsburg, J., dissenting).

135. *Id.* at 605.



will likely serve as a deterrent to suits in equity under civil rights acts.<sup>136</sup> By refusing to confront this question, opting instead to cancel the catalyst theory, the majority merely erased all intended benefits for plaintiffs, provided defendants with the incentive to deliberately moot cases to avoid fee awards, and removed equitable remedies from the hands of highly qualified judges.<sup>137</sup>

*A. The Majority Should Have Confronted the Crucial Policy Issue  
Expressed in the Legislative History*

The *Buckhannon* Court argued that the legislative intent of Section 1988 was ambiguous and not useful in resolving whether Congress meant to endorse plaintiff-friendly fee awards under a catalyst theory.<sup>138</sup> The struggle to pass Section 1988 generally centered on the policy argument of whether the benefit to disadvantaged plaintiffs of upholding the private attorney general principle outweighed the likely injury to innocent defendants under a catalyst theory of recovery.<sup>139</sup>

Both the House and Senate reports indicated a fairly clear vision of restoring the private attorney general doctrine to federal lawsuits.<sup>140</sup> In particular, the House report strongly favored both the needs of indigent plaintiffs and the importance of vindicating individual civil rights over the potentiality of harm to innocent defendants.<sup>141</sup> At the same time, the legislative histories concerning Section 1988 were silent as to whether Congress explicitly intended to permit fee awards under the catalyst theory.<sup>142</sup> The House Report clearly indicated that fees may be awarded

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136. *Id.* at 634-38 (Ginsburg, J., dissenting).

137. *See id.* at 640 (Ginsburg, J., dissenting) ("And Congress assigned responsibility for awarding fees not to automatons unable to recognize extortionists, but to judges expected and authorized to exercise discretion.").

138. *Id.* at 639 (Ginsburg, J., dissenting) (stating that "[p]articularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority' such legislative history is clearly insufficient to alter the accepted meaning of the statutory term").

139. *See* 122 CONG. REC. 16251 (1976) (stating the need for the bill due to the "staggering costs of litigation"); *see also* 122 CONG. REC. 16429 (1976) (arguing that the bill takes care of a "small group of activist attorneys"). *See generally* 122 CONG. REC. 32,394-32,397 (1976) (discussing the bill's application to other civil rights laws and the relative importance of speedy passage of the bill); 122 CONG. REC. 31,829-31,831 (1976) (discussing the bill's potential to further enrich plaintiffs' attorneys at the expense of defendants).

140. *See* H.R. REP. NO. 94-1558, at 3 (1976); *see also* 121 CONG. REC. 26,806 (1975) (arguing that the bill remedies the harm caused by the decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)).

141. *See* H.R. REP. NO. 94-1558, at 1-7 (1976).

142. *See id.* at 3.

if a defendant changed his behavior.<sup>143</sup> Furthermore, as the dissenting opinion in *Buckhannon* pointed out, both the House and Senate Reports cited to *Parham v. Southwestern Bell Telephone Co.*,<sup>144</sup> suggesting that both chambers had at least a nascent awareness of the catalyst theory.<sup>145</sup>

In dismissing the legislative history as ambiguous, both the majority and the concurrence implicitly relied on the fact that the catalyst theory was not a widespread means of fee shifting while Section 1988 was being debated and approved by Congress.<sup>146</sup> However, both of these opinions failed to examine the common law background of the passage of the fee-shifting provisions of the ADA and FHAA.<sup>147</sup> At this point in time, courts did use the catalyst theory to support fee shifting under civil rights provisions.<sup>148</sup> Therefore, it is possible that Congress embraced these tests when it adopted the newer fee-shifting provisions.<sup>149</sup>

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143. See H.R. REP. NO. 94-1558, at 7 (1976) (stating that even if the defendant voluntarily stops the unlawful activity, “[a] court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed”).

144. 433 F.2d 421 (8th Cir. 1970).

145. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 637 n.11 (2001) (Ginsburg, J., dissenting). Justice Scalia took issue with Justice Ginsburg’s reading of *Parham* and argued that the dissent incorrectly characterized *Parham*, and, in fact, the majority opinion in *Buckhannon* approved the result in *Parham*. *Id.* at 616, 617 n.3 (Scalia, J., concurring).

146. See *id.* at 602, 618-19; see also Trotter, *supra* note 89, at 1433-34 (explaining that *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), was the first case to employ the catalyst theory of recovery, and its decision was cited by Congress in reports concerning Section 1988).

147. See H.R. REP. NO. 94-1558, at 1-7 (1976).

148. See, e.g., *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128, 131 (3d Cir. 1991) (declaring that a party prevails when the relief sought is achieved or when there is a causal link between the lawsuit and the extra-judicial relief obtained); see also *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (explaining that a party prevails when “its ends are accomplished”); *Grano v. Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986) (stating that a party prevails even if the action halts due to mootness); *Institutionalized Juveniles v. Sec’y of Pub. Welfare*, 758 F.2d 897, 910-17 (3d Cir. 1985) (asserting that a party prevails when a portion of the benefit sought is achieved).

149. In deciding whether Section 1988 applied in this instance, the *Buckhannon* Court examined the plain language of the statute along with the legislative intent of the act. *Buckhannon*, 532 U.S. at 605-08. The majority chose to disregard legislative histories and instead relied primarily on a plain meaning argument to determine that the catalyst theory was an inappropriate means of recovery under the fee-shifting provisions of the ADA and FHAA. *Id.* See generally Stock, *supra* note 58 (discussing Justice Scalia’s dismissal of the importance of legislative history). The majority’s reliance on a plain meaning argument provided the Court with the legal rationale to overturn the practices of the circuits and to limit the scope of congressional civil rights enforcement measures. See *Buckhannon*, 532 U.S. at 598-99, 607.

*B. The Majority Should Have Adopted a Per Se Test To Allow a Limited Use of the Catalyst Theory*

By defining “prevailing party” in such a narrow way, the majority opinion removed the need for fact-based judicial discretion, important matters tests, or detailed analyses of the behavior of the parties.<sup>150</sup> The dissent powerfully argued that the Court failed to establish principled and compelling reasons for overturning the reliable practice of nearly every circuit court.<sup>151</sup> The majority opinion should have established an objective test for introducing a catalytic theory of recovery in cases that are mooted by the actions of either party.

The *Buckhannon* Court rejected the consideration of per se rules to provide a framework for catalyst theory issues.<sup>152</sup> The appellants in the case offered three basic requirements that followed the *Garland* test and, with additional procedural modifications, would potentially allow courts to reach fair solutions while limiting purely discretionary awards through a broad application of the catalyst theory.<sup>153</sup> The first requirement demanded that the suit have “legal merit” based on the ability of the plaintiff to survive a motion to dismiss for failure to state a claim upon which relief may be granted.<sup>154</sup> The majority opinion argued that this requirement was “not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary.”<sup>155</sup> However, it is almost certain that a determination of the kind of legal merit described by the majority opinion would require a

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150. See McNamara, *supra* note 7, at 323 (discussing a number of tests used to apply the catalyst theory); see also *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-94 (1989) (looking for a material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute before applying the catalyst theory); *Hewitt v. Helms*, 482 U.S. 755, 767 (1987) (retaining the discretionary powers of lower court judges in fee-shifting matters).

151. *Buckhannon*, 532 U.S. at 627, 643-44 (Ginsburg, J., dissenting).

152. *Id.* at 609 (quoting Brief for the United States as Amicus Curiae, at 28); see also Slater, *supra* note 27, at 828. Slater offers a rather permissive three-part test that demands that the plaintiff “demonstrate that he actually obtained relief; the relief must in some way have been the result of the lawsuit; and the suit must have concerned a legally cognizable civil rights claim.” Slater, *supra* note 27, at 828 (footnote omitted).

153. See Brief for the United States as Amicus Curiae at 26-29, *Buckhannon Board & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001) (No. 99-1848).

154. See *id.* at 27 (arguing that the case must be able to survive a directed verdict or a motion to dismiss for lack of jurisdiction or failure to state a claim).

155. *Buckhannon*, 532 U.S. at 605. The majority believed that “[e]ven under a limited form of the ‘catalyst theory,’ a plaintiff could recover attorney’s fees” if the legal merit test was based upon the FED. R. CIV. P. 12(b)(6) test. *Id.*

burdensome mini-hearing.<sup>156</sup> Consequently, it is more sensible to use a simple, uniform standard, such as the Fed. R. Civ. P. 12(b)(6) standard, as a prerequisite or baseline and provide defendants with other procedural protections, such as those described in Part III.C., to prevent a broad application of the catalyst theory.<sup>157</sup>

Second, the plaintiff must show that some grievance has been redressed by the defendant's actions.<sup>158</sup> This requirement would focus upon a material alteration of the parties' legal relationship that provides the plaintiff with some of the relief sought.<sup>159</sup> The majority opinion supported this requirement, but only in the sense that enforceable judgments and consent decrees create the material alteration and relief.<sup>160</sup> The majority's insistence on a judicial imprimatur here is misguided for the reason set forth by Justice Scalia in *Hewitt*: that actual relief means getting something from the other party rather than winning formal legal pronouncements.<sup>161</sup>

Finally, the plaintiff must show a causal link between the plaintiff's suit and the defendant's actions.<sup>162</sup> This test was untenable to the majority of the Court who argued that this was "clearly not a formula for 'ready

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156. *Buckhannon*, 532 U.S. at 609 (quoting Brief for the United States as Amicus Curiae, at 28) (stating that "[a]mong other things a 'catalyst theory' hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that 'will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct'").

157. FED. R. CIV. P. 12(b)(6) (stating that the defense of failure to state a claim upon which relief can be granted may be made at motion at the option of the pleader); *see also infra* Part III.C.

158. *See* Brief for the United States as Amicus Curiae, at 28 (suggesting a significant issues test).

159. *See, e.g., Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-93 (1989).

160. *See Buckhannon*, 532 U.S. 598, 603-05 (2001).

161. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). In defining "prevailing party", Justice Scalia stated in *Hewitt*:

Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement. . . is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff. The "equivalency" doctrine is simply an acknowledgment of the primacy of the redress over the means by which it is obtained. If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has "prevailed" in his suit, because he has obtained the substance of what he sought.

*Id.*

162. Brief for the United States as Amicus Curiae, at 28 (asserting both a significant issues test and the pragmatic vision of recovery set forth in dicta by Justice Scalia in *Hewitt*).

administrability.”<sup>163</sup> In almost the same sentence, though, the Court expressed its confidence in “the ability of district courts to perform the nuanced ‘three thresholds’ tests.”<sup>164</sup> The Court should have continued to trust the ability of the lower courts to fashion fair solutions.

*C. Protecting Innocent Defendants Procedurally - Distributing the Risk*

Justice Scalia’s concurring opinion stated that because the harm caused to innocent defendants was a greater evil than the deterrence of indigent plaintiffs, denying a catalyst theory of fee recovery was entirely justified.<sup>165</sup> However, distributing the procedural risks between plaintiffs and defendants could have allayed this potential harm without destroying the benefit provided by Congress to indigent plaintiffs and allowed the lower courts to continue using the catalyst theory.<sup>166</sup>

The first procedural modification proposed to catalyst theory recovery is a fairly mechanical timing requirement. In this scenario, the courts should require defendants to bear the risk of catalyst theory analysis in cases where the defendant pursues the case for more than a year and then moots the case through voluntary action. The solution would effectively combat the strategy of mooting a case to avoid paying fees and costs and encourage quicker settlements.<sup>167</sup>

The use of catalyst theory to recover fees in mooted cases is not a common situation, but denying the catalyst theory in full will remove incentives for plaintiffs’ attorneys to bring these cases on behalf of indigent clients. Thus, the second procedural requirement should be a fees mini-hearing pursuant to the clear intent of Congress to preserve the private attorney general doctrine under Section 1988.<sup>168</sup> On the

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163. *Buckhannon*, 532 U.S. 598, 610 (2001) (citation omitted).

164. *Id.*

165. *See id.* at 618 (Scalia, J., concurring) (arguing that “[t]here is all the difference in the world between a rule that denies the extraordinary boon of attorney’s fees to some plaintiffs... [and] exacting the payment of attorney’s fees to the extortionist”).

166. Even sworn opponents of the proposed Section 1988, such as Senator Helms, sought to propose procedural remedies that would allow defendants to be considered prevailing parties rather than prohibiting any possibility of fee shifting. *See* 122 CONG. REC. 32,394 (1976) (discussing amendments that would allow defendants to recover as prevailing parties for bad faith, vexatious, or frivolous lawsuits).

167. *Buckhannon*, 532 U.S. at 636 n.10 (Ginsburg, J., dissenting) (stating that “[g]iven the protection furnished by the catalyst rule, aggrieved individuals were not left to worry, and wrongdoers were not led to believe, that strategic maneuvers by defendants might succeed in averting a fee award”).

168. *See id.* at 640 (Ginsburg, J., dissenting) (quoting *Morris v. W. Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999)) (arguing that this procedural requirement might save

defendant's behalf, the Court should allow a defendant to recover reasonable attorney's fees if a plaintiff pursues a fee award under the catalyst theory and fails in such a hearing. Thus, if a plaintiff is not able to prove that the claim had legal merit, that some grievance had been redressed by actions of the defendant, and that the defendant's action was causally linked to the plaintiff's lawsuit, then the plaintiff would have to pay for all fees incurred by the defendant as a result of preparing for this mini-hearing procedure.<sup>169</sup>

#### IV. CONCLUSION

The Court in *Buckhannon* required a “*judicial imprimatur*,” which effectively ended the practice of awarding fees under the catalyst theory.<sup>170</sup> As a result, the catalyst theory is no longer a viable tool for attorneys suing under civil rights statutes that use “prevailing party” language. By upholding a functional and fair test and distributing risks between the plaintiff and defendant, the Court could have provided equitable restrictions on the use of the catalyst theory. Instead, the Court's rigid definition of “prevailing party” makes it far more difficult for future plaintiffs and their attorneys to enforce individual freedoms under federal civil rights legislation.

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judicial resources by encouraging “plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought”).

169. See generally McNamara, *supra* note 7; Hylton, *supra* note 7.

170. *Buckhannon*, 532 U.S. at 641.

