

# The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for the Private Attorney General

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*In 2001, in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, the Supreme Court rejected the catalyst theory for recovery of attorneys' fees in civil rights enforcement actions. In doing so, the Court dismissed concerns that plaintiffs with meritorious but expensive claims would be discouraged from bringing suit, finding these concerns "entirely speculative and unsupported by any empirical evidence." This article presents original data from a national survey of more than 200 public interest organizations that call into question the Court's empirical assumptions. These data indicate that organizations that take on paradigmatic public interest cases, such as class actions seeking injunctive relief against government actors, are the most likely to be negatively affected by Buckhannon. In addition, our respondents report that Buckhannon encourages "strategic capitulation," makes settlement more difficult, and discourages attorneys from representing civil rights plaintiffs. We argue that these far reaching effects herald a shift away from private rights enforcement and toward more government power, both to resist rights claims and to control the meaning of civil rights.*

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## I. INTRODUCTION

In 2001, the Supreme Court issued an opinion that changed the American system of civil rights enforcement. At issue in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,<sup>1</sup> was whether plaintiffs could qualify as “prevailing parties” entitled to attorneys’ fees if they achieved their desired result because their lawsuit was a catalyst for voluntary change in the defendant’s conduct. Although nearly every circuit court in the country had adopted the “catalyst theory” for fee recovery at the time that *Buckhannon* was decided,<sup>2</sup> the Court rejected it. Instead, the Court held that to qualify as a “prevailing party” under the fee shifting statutes at issue the plaintiffs must obtain a “material alteration of the legal relationship of the parties” such as a favorable judgment on the merits or a consent decree.<sup>3</sup> Simply acting as a catalyst for the defendant’s change in position was not sufficient to support a fee award, even if the defendant’s action gave the plaintiffs the relief they sought.<sup>4</sup>

*Buckhannon* is about much more than whether plaintiffs’ attorneys will be paid when the defendant voluntarily changes its conduct in response to a lawsuit. Fee shifting statutes support an extensive system of civil rights enforcement through “private attorneys general”: private litigants who bring enforcement actions that benefit not only the litigant but also the broader public interest. More than 150 important statutory policies, including civil rights and environmental protections, provide statutory fees to encourage private litigants to mobilize a private right of action.<sup>5</sup> Although federal and state governments also engage in some enforcement activities, private parties bring more than ninety percent of actions under these statutes.<sup>6</sup> This private enforcement system decentralizes

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<sup>1</sup> 532 U.S. 598 (2001).

<sup>2</sup> *Id.* at 625-26 & n.4 (Ginsburg, J. dissenting) (collecting cases).

<sup>3</sup> *Id.* at 604.

<sup>4</sup> *Id.* at 605.

<sup>5</sup> *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 684 (1983); *see also* *Marek v. Chesny*, 473 U.S. 1, 43-51 (Brennan, J. dissenting) (Appendix) (collecting federal statutory fee shifting provisions); *Coulter v. Tennessee*, 805 F.3d 146, 152-55 (1986) (Appendix A) (collecting federal statutes authorizing the award of attorneys fees).

<sup>6</sup> *See, e.g.*, Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1021-23 (2000) (indicating that the United States rarely brings enforcement actions under the Fair Labor Standard Act); Catherine R. Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC’Y REV. 869, 896 (1999) (reporting that only a handful of federal Family and Medical Leave Act actions that produced reported opinions involved government representation of plaintiffs); Paul Burstein and Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 LAW & SOC’Y REV. 355, 359-367 (1986) (reviewing statistics on EEOC and *amicus* participation in employment rights enforcement suits from 1965 to

enforcement decisions, allows disenfranchised interests access to policy making, and helps insulate enforcement from capture by established interests. It is also, from the perspective of taxpayers, cheap: it does not place the cost of enforcement solely upon government actors. Little empirical evidence exists, however, about how *Buckhannon* has affected this system.

Answering this empirical question is important because fee shifting statutes are an integral part of civil rights enforcement. Fee shifting statutes are needed to encourage private enforcement because unlike other tort actions, many meritorious civil rights claims lack financial incentives sufficient to interest private attorneys. In some instances, the plaintiff seeks non-monetary relief, such as institutional reform or a change in policy, relief that would benefit many but will not pay a lawyer. In others, the plaintiff's monetary damages are relatively small; for example, low-wage discrimination victims may have economic damages that are far less than the cost of litigating their claim. Yet when successful, these actions confer broad benefits. Injunctive relief and policy changes have effects far beyond the individual litigant, and vigorous enforcement of civil rights serves important deterrence interests. Fee shifting statutes help civil rights claimants find lawyers willing to take on these often expensive and time consuming claims; without these statutes, access to the judicial process would be much more difficult to obtain.

Congress enacted fee shifting statutes to encourage private enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to represent them. Congress intended these statutes to "ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as 'private attorneys general,' vindicating the

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1983 and concluding that most litigants involved in employment actions are proceeding on their own). Data from the Administrative Office of the United States Courts indicate that the federal government is seldom the plaintiff in civil rights and other statutory enforcement actions that implicate the public interest. The following table was compiled from the Report of the Administrative Office of the United States Courts on the Judicial Business of the United States Courts for 2005, Table C-2 <<http://www.uscourts.gov/judbus2005/appendices/c2.pdf>> (last visited March 20, 2006).

Select Civil Cases Commenced in U.S. District Courts				
Type of Action	US as Plaintiff	Other Plaintiff	Total Cases	Percent Brought by US as Plaintiff
Civil Rights	534	35,562	36,096	1.5%
Prisoner Civil Rights	0	16,005	16,005	--
FLSA& LMRA	155	5558	5713	2.7%

public interest.”<sup>7</sup> Congress saw the need for fee shifting statutes based in part on evidence that most civil rights plaintiffs could not afford legal counsel, and that the limited potential for compensation meant private attorneys were refusing to take civil rights cases.<sup>8</sup> Congress explicitly noted that civil rights enforcement depends heavily on private enforcement, and that fee awards are essential “if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.”<sup>9</sup> And, significantly, Congress seems to have specifically considered the prospect that defendants would voluntarily change their conduct in response to litigation. For example, the legislative history to the CFRAA notes:

[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. 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.<sup>10</sup>

Congress made clear that “[t]he phrase ‘prevailing party’ is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits.”<sup>11</sup> Instead, “parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief.*”<sup>12</sup>

Because *Buckhannon* undermines incentives for bringing enforcement actions, it threatens to weaken this system of private enforcement of civil rights. The catalyst theory was an important part of this enforcement system because it prevented a litigation maneuver that we term “strategic capitulation.” By strategic capitulation, we mean situations where defendants faced with likely adverse judgments provide the requested relief in order to moot the case and defeat the plaintiff’s fee petition. So, for example, when a challenge to a policy prompts a government entity to change the policy, or when the government grudgingly produces documents requested under the Freedom of Information Act only after protracted litigation, courts were reluctant to deny fee petitions simply because the defendant mooted the case by providing the relief sought in the lawsuit. To do so might deter attorneys from taking such actions in the future and encourage defendants to stall to drain their opponent’s resources. Such an approach would be

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<sup>7</sup> *Evans v. Jeff D.*, 475 U.S. 717, 745 (Brennan, J. dissenting) (discussing legislative history of fee shifting provisions); *see also* S.Rep. No. 94-1011 pp. 1-5 (1976)(discussing the role of private attorneys general in vindicating rights of the highest priority through private enforcement).

<sup>8</sup> H.R. Rep. No. 94-1558, at 3 (1976).

<sup>9</sup> S. Rep. No. 94-1011, at 2 (1976).

<sup>10</sup> H.R. Rep. No. 94-1558, at 7 (1976).

<sup>11</sup> H.R. Rep. No. 94-1558, at 7 (1976).

<sup>12</sup> S. Rep. No. 94-1011, at 5 (1976) (emphasis added).

contrary to the intent behind fee shifting provisions: promoting vigorous enforcement of important public policies.

Although the Court rejected the catalyst theory in *Buckhannon*, it did not back away from the purposes and values behind the private attorney general enforcement system. Instead, the Court emphasized how its decision would encourage settlement, taking a static, ex post approach focused on how the catalyst theory affects incentives once an enforcement action is commenced. Rejecting the catalyst theory, the majority reasoned, would minimize satellite litigation over fees and also encourage settlement because defendants willing to provide relief voluntarily would not longer be deterred from acting by the cost of the fee award.<sup>13</sup> The dissent took a more dynamic, ex ante view, focusing on how rejecting the catalyst theory would likely affect the system of private enforcement as a whole. Doing away with the catalyst theory, the dissent argued, would “impede access to court for the less well-heeled”<sup>14</sup> and discourage plaintiffs with meritorious but expensive claims from bringing suit. In other words, encouraging settlement in the short run will mean little if over time, opportunities for defendants to comply in response to a legal challenges decline because plaintiffs bring fewer enforcement actions in the first place.

In response, the majority recognized the trade-off between encouraging settlement and preserving access to the judicial process, but minimized these concerns through two empirical assumptions. First, the majority claimed that strategic capitulation was unlikely to be much of a problem.<sup>15</sup> Second, the majority dismissed the argument that restricting fee recovery will discourage plaintiffs with meritorious cases from filing suit, finding these “assertions” to be “entirely speculative and unsupported by any empirical evidence.”<sup>16</sup>

This article presents data that call into question the Court’s empirical assumptions. Based on these data, we argue that *Buckhannon* has had a chilling effect on the very forms of public interest litigation that Congress intended to encourage through fee shifting provisions. First, through an analysis of post-*Buckhannon* decisions, we illustrate how public interest litigation seeking broad social change involves certain structural features that render it particularly vulnerable to strategic capitulation. Then, drawing on data from our national representative survey of more than 200 public interest organizations, we show that the public interest organizations that take on paradigmatic public interest cases, such as class actions seeking injunctive relief against government actors, are the most likely to be affected by *Buckhannon*. We also present qualitative

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<sup>13</sup> 532 U.S. at 608-10.

<sup>14</sup> *Id.* at 623.

<sup>15</sup> *Id.* at 608-09.

<sup>16</sup> *Id.* at 608.

survey data that indicate that *Buckhannon* encourages strategic capitulation, makes settlement more difficult, and discourages both public interest organizations and private counsel from taking on enforcement actions. These far reaching effects, we argue, herald a shift away from private right enforcement toward more government power to both resist rights mandates and control the enforcement, and ultimately the meaning, of civil rights.

In the following sections we present data from our study situated in the context of legal developments before and after *Buckhannon*. Section II discusses how courts interpreted the role of fee shifting statutes in civil rights enforcement in the period before *Buckhannon*, the *Buckhannon* decision itself, and the aftermath of *Buckhannon* for public interest litigation. Section III presents our survey methodology, as well as our predictions and empirical data regarding how *Buckhannon* affects public interest organizations. Section IV offers some conclusions about the implications of *Buckhannon* for rights enforcement and government power.

## II. *BUCKHANNON* AND THE PRIVATE ATTORNEY GENERAL

### A. *Fee Shifting and Civil Rights Enforcement Prior to Buckhannon*

For a short period of time during the civil rights era federal courts relied upon their equitable powers to create a “private attorney general” exception to the American rule that each party pays its own lawyer.<sup>17</sup> That exception allowed fee shifting when plaintiffs acted to vindicate rights that were in the public interest.<sup>18</sup> In *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>19</sup> however, the Supreme Court held that it is “inappropriate for the Judiciary,

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<sup>17</sup> For a history of the American rule, see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984). For a short history of the common law private attorney general doctrine that developed in the 1960s and 1970s, see *id.* at 313- 318; Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries*, 1986 DUKE L.J. 435, 439-440 (1986); C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 215 n.1 (1983); Comment, *Court Awarded Attorney’s Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 666-70 (1974).

<sup>18</sup> *Wilderness Soc’y et al. v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) (collecting cases). The common law private attorney general exception to the American rule grew out of, in part, a series of school desegregation cases in the 1960s in which courts held awarding fees to the plaintiffs was appropriate given concerted resistance to desegregation on the part of certain school boards. See Walter B. Russell III & Paul Thomas Gregory, *Awards of Attorney’s Fees in Environmental Litigation: Citizen Suits and the “Appropriate” Standard*, 18 GA. L. REV. 307, 313-314 & n.35 (1984).

<sup>19</sup> 421 U.S. 240 (1975).

without legislative guidance, to reallocate the burdens of litigation.”<sup>20</sup> Only Congress could authorize exceptions to the American rule, and therefore fee shifting was not permissible absent specific statutory authorization.<sup>21</sup> In this way, the Court essentially shut down the equitable powers of the courts to award attorney’s fees, and consequently increased the emphasis on statutes that authorize fee awards.<sup>22</sup>

Congress responded to *Alyeska* by enacting new statutes authorizing fee shifting. Although the largest growth in these statutes has been in the civil rights area, fee shifting statutes authorize fees in many other fields involving important public policies.<sup>23</sup> In the legislative history to the Civil Rights Attorneys’ Fee Awards Act (CRAFAA),<sup>24</sup> one of the first of these statutes, Congress noted that *Alyeska* had a “devastating” impact on civil rights litigation, and concluded that the need for legislation restoring fee shifting polices was “compelling.”<sup>25</sup> Congress was reacting to evidence that public interest organizations could no longer afford to take many enforcement actions, and private attorneys were refusing civil rights cases.<sup>26</sup> Recognizing that “a vast majority” of civil rights victims cannot afford legal counsel and were suffering “very severe hardships” as a result of the *Alyeska* decision,<sup>27</sup> Congress made clear that “fee awards are an integral part of the remedies necessary to obtain . . . compliance” with civil rights laws.<sup>28</sup> It also noted that civil rights enforcement depended heavily on private suits, given the limited authority and resources of federal enforcement agencies,<sup>29</sup> and therefore fee provisions were needed “so that these

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<sup>20</sup> *Id.* at 247.

<sup>21</sup> *Id.*

<sup>22</sup> 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2675.2.

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

<sup>24</sup> 42 U.S.C. § 1988 (2006). The CRAFAA authorizes award of attorneys’ fees to the “prevailing party” and became the model for many other fee shifting provisions. Courts generally interpret “prevailing party” fee shifting statutes to permit asymmetrical recovery: prevailing plaintiffs generally recover fees as a matter of course, but prevailing defendants recover their fees only when the plaintiff’s action was “frivolous, unreasonable, or groundless.” *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). This interpretation avoids deterring plaintiffs from bringing good faith civil rights claims when success is uncertain. *Christianburg*, 434 U.S. at 422; *see also* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 241 (1984).

<sup>25</sup> H.R. Rep. No. 94-1558, at 3 (1976).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1-2.

<sup>28</sup> S. Rep. No. 94-1011, at 5 (1976).

<sup>29</sup> H.R. Rep. No. 94-1558, at 1 (1976).

plaintiffs could fulfill their role in the federal enforcement scheme as ‘private attorneys general,’ vindicating the public interest.’<sup>30</sup>

As this legislative history makes clear, Congress intended fee shifting statutes to promote enforcement of important public policies through a federal enforcement scheme that relies on private parties.<sup>31</sup> This system of private enforcement is said to have several advantages. Private rights of action democratize and decentralize enforcement, allowing individual parties to decide whether to pursue rights claims rather than vesting this authority solely with government actors.<sup>32</sup> In addition, private enforcement avoids the need for a large governmental enforcement apparatus,<sup>33</sup> insulates enforcement from political pressure and capture by established interests,<sup>34</sup> and promotes more efficient detection of violations.<sup>35</sup> Fee shifting statutes enable plaintiffs with meritorious claims to find representation and to bring enforcement actions, which in turn encourage compliance. Fee shifting statutes also make successful plaintiffs whole by not reducing their recovery by the cost of their attorneys’ fees.<sup>36</sup> Although plaintiffs in these cases assert private claims, fee shifting statutes recognize that these plaintiffs serve the public interest by vindicating important public policies.<sup>37</sup>

Fee shifting statutes also address structural disincentives inherent in decentralized enforcement that might otherwise discourage public interest litigation. First, they help mitigate power disparities between individual claimants and more sophisticated and

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<sup>30</sup> *Evans v. Jeff D.*, 475 U.S. 717, 745 (1986) (Brennan, J. dissenting) (discussing the legislative history of 42 U.S.C. § 1988).

<sup>31</sup> *Id.*

<sup>32</sup> THOMAS BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 14 (Univ. of Cal. Press 2004); Coffee, *supra* note 17 at 227; Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of Law in the Political System*, 77 *AMERICAN POLITICAL SCIENCE REVIEW* 690, 692 (1983).

<sup>33</sup> Burke, *supra* note 32, at 15-16.

<sup>34</sup> Burke, *supra* note 32, at 14; Coffee, *supra* note 17, at 227; Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 *U. ILL. L. REV.* 188, 191 (2000).

<sup>35</sup> William B. Rubenstein, *On What A “Private Attorney General” Is—And Why it Matters*, 57 *VAND. L. REV.* 2129, 2149 (2004); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 *COLUM. L. REV.* 1384, 1387 (2000).

<sup>36</sup> Edward F. Sherman, *From “Loser Pays” to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 *TEX. L. REV.* 1863, 1866 (1998). Although of course the “make whole” argument could apply to any claim, it seems particularly salient in the context of civil rights claims that frequently involve both monetary and dignitary harms to plaintiffs who belong to socially or economically disadvantaged communities.

<sup>37</sup> *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-02 (1968).



resourceful institutional defendants.<sup>38</sup> Reflecting this function, fee shifting provisions historically emerged in the context of individual claims against government or corporate defendants who were better able to absorb litigation costs, and thus resist or deter claims against them.<sup>39</sup> Second, fee shifting statutes solve the “public good” problem that arises when no one individual has sufficient incentive to enforce rights that nevertheless would significantly benefit society as a whole.<sup>40</sup> For example, voting rights claims, school desegregation cases, or environmental enforcement actions can involve complex issues, require time-consuming and costly litigation, and require class actions against government entities or corporations. Absent fee shifting provisions, there are few resources for private attorneys or public interest organizations to take on these expensive cases, even though these claims may be essential to enforcing important public policies. By overcoming these structural challenges, fee shifting provisions help preserve a decentralized enforcement scheme without undermining incentives to enforce statutes that benefit the public interest.<sup>41</sup>

Despite (or perhaps because of) their central role in federal enforcement, post-*Alyeska* fee shifting statutes came under attack almost from their inception. In 1981, the Reagan Administration proposed legislation to reduce the amount of fee awards in various ways and also to prohibit fee recovery by attorneys providing *pro bono* services or by staff attorneys of public interest organizations.<sup>42</sup> Although this particular legislative proposal did not succeed, similar restrictions were proposed again in different form, and some ultimately were enacted.<sup>43</sup> For example, legislation now prohibits

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<sup>38</sup> For an excellent discussion of the issues raised by power disparity in litigation, see Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

<sup>39</sup> See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recover*, 47 LAW & CONTEMP. PROBS. 9, 25-27 (1984).

<sup>40</sup> Percival & Miller, *supra* note 24, at 237-39.

<sup>41</sup> Although some critics have raised concerns about enforcement excesses through the private attorney general model, these critiques have been confined primarily to class action litigation in the securities and antitrust areas, rather than public interest litigation driven by social reform goals. See Coffee, *supra* note 17, at 235 (indicating his critique of private enforcement did not apply to public interest law firms or litigation directed at social causes); William B. Rubenstein, *On What A “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2152 (2004) (noting that critiques of private attorney general enforcement focus almost exclusively in the areas of securities and antitrust class actions).

<sup>42</sup> For a detailed discussion of this and other proposed legislation limiting fee recovery see Percival & Miller, *supra* note 24, at 242.

<sup>43</sup> See *id.* at 242-44; Marc C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 367 &

fee recovery for services provided by an attorney from a Legal Services Corporation funded organization, even for fees incurred in litigation commenced before the restrictions were in place.<sup>44</sup> Indeed, much of the legislation limiting fee recovery seemed to be directed toward eliminating fees as a source of support for the public interest organizations that began to flourish in the 1970s.<sup>45</sup>

Since *Alyeska*, a second, more subtle erosion of fee shifting provisions has come from the courts under the guise of promoting settlement, foreshadowing the trade off between promoting settlement and access to the judicial process that is central in *Buckhannon*. For example, in *Marek v. Chesny*,<sup>46</sup> the Court held that a plaintiff could not recover attorneys fees incurred after a defendant's Rule 68 offer of settlement if the judgment is less than the offer, even though the plaintiff ultimately prevailed in the underlying suit.<sup>47</sup> The Court emphasized the need to encourage settlement by providing "a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer."<sup>48</sup> Prior to *Marek*, Rule 68 settlement offers cut off only accrual of costs, but not fees, when the judgment was for less than the offer.<sup>49</sup> Because attorneys' fees typically are much more than costs, *Marek* significantly increased the financial risk of pursuing a claim after a Rule 68 offer. *Marek* also effectively did away with any fee recovery for plaintiffs whose primary objective was a favorable interpretation of a statute of public concern rather than a monetary remedy.

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n.65 (2004) (describing an unsuccessful legislative attempt by Senators Strom Thurmond and Orrin Hatch to do away with the catalyst theory in 1985).

<sup>44</sup> For a general discussion of this legislation, see *Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation – Omnibus Consolidated Rescissions and Appropriates Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321, 110 HARV. L. REV. 1346 (1997); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s to the 1990s*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998).

<sup>45</sup> See generally Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, in THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 9 (Francis Regan, Alan Paterson, Tamara Goriely, and Don Fleming eds., Oxford University Press, 1999); John Kilwein, *The Decline of the Legal Services Corporation: 'It's Ideological, stupid!' in THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 41 (Francis Regan, Alan Paterson, Tamara Goriely, and Don Fleming eds., Oxford University Press, 1999); see also Richard Viguerie, *Defund the Left*, NY Times, August 11, 1982, at A23.*

<sup>46</sup> 473 U.S. 1 (1985).

<sup>47</sup> A similar proposal was part of 1983 draft legislation developed by the U.S. Department of Justice during the Reagan Administration. Percival & Miller, *supra* note 24, at 243 & n.64.

<sup>48</sup> *Marek*, 473 U.S. at 10.

<sup>49</sup> Costs are an allowance made to the successful party for expenses (such as filing fees) in litigating an action. Generally, costs do not include attorney's fees unless defined as such by statute. BLACK'S LAW DICTIONARY 346 (6th ed. 1990).

*Evans v. Jeff D.*<sup>50</sup> further undermined fee shifting provisions in public interest litigation by enforcing settlements that require plaintiffs to waive their fees in return for relief. In *Jeff D.*, one week before the trial, the defendant offered to settle a class action seeking better treatment of disabled children who were institutionalized by the state by providing virtually all of the injunctive relief that the plaintiffs requested provided they waive recovery of fees and costs.<sup>51</sup> The legal aid attorneys representing the plaintiffs concluded they had no ethical alternative but to accept, but later moved to set aside the fee waiver, arguing that the defendant's offer undermined congressional intent behind the fee shifting statute.<sup>52</sup> The Court declined to set aside the waiver, holding that plaintiff's counsel could satisfy their ethical obligations simply by forgoing their statutorily authorized fees.<sup>53</sup> The Court dismissed the argument that this decision would undermine incentives to represent civil rights clients, stating:

We are cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the long run, diminish lawyers' expectation of statutory fees in civil rights cases. If this occurred, the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the "effective access to the judicial process" for persons with civil rights grievances which the Fees Act was intended to provide. [citation omitted] That the "tyranny of small decisions" may operate in this fashion is not to say that there is any reason or documentation to support such a concern at the present time. Comment on this issue is therefore premature at this juncture. We believe, however, that as a practical matter the likelihood of this circumstance arising is remote.<sup>54</sup>

Through this empirical assumption, the majority minimized threats to access to the judicial process and came down squarely in favor of promoting settlement.<sup>55</sup> After *Jeff D.*, public interest organizations, particularly those that take on complex litigation seeking injunctive relief, risked recovering no fees at all.

Both *Marek* and *Jeff D.* justified limiting fee recovery by emphasizing the interest of promoting settlement and minimizing concerns over restricting access to courts. Although these decisions significantly undermined plaintiffs' leverage in settlement negotiations, plaintiffs still retained the power to refuse settlements

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<sup>50</sup> 475 U.S. 717 (1986).

<sup>51</sup> *Id.* at 722.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 723-24.

<sup>54</sup> *Id.* at 741 n.34.

<sup>55</sup> *Id.* at 734-38 (discussing the need to allow fee waivers to encourage settlement). For a thoughtful discussion of whether encouraging settlement should be the primary interest in litigation, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

they felt were inadequate and take their claims to trial. Then, in 2001, *Buckhannon* dramatically changed the incentives for settlement, litigation, and future enforcement in public interest cases.

### **B. *Reallocating the Burdens of Litigation***

*Buckhannon* involved a classic strategic capitulation scenario. The plaintiffs, an assisted-living home and one of its residents, challenged a state law that required elderly residents to be capable of “self-preservation,” meaning in part that residents could reach fire exits on their own.<sup>56</sup> Faced with a citation for noncompliance with the law, the plaintiffs challenged the statute arguing that this requirement violated the Americans with Disabilities Act and the Fair Housing Act.<sup>57</sup> Shortly after the court ruled that the plaintiffs were entitled to take their claims to trial, the West Virginia legislature eliminated the “self-preservation” requirement.<sup>58</sup> The defendant then successfully moved to dismiss the case as moot and the plaintiffs sought attorney’s fees as the “prevailing party” under the fee shifting provisions of the Fair Housing Act and the ADA.<sup>59</sup>

Although the trial court dismissed the case as moot before judgment, the plaintiffs had reason to believe they were entitled to recover fees under the catalyst doctrine. The catalyst doctrine defined plaintiffs as “prevailing parties” if they achieved their desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.<sup>60</sup> Courts noted that by acting as a catalyst, plaintiffs provided a “valuable public service” in producing the defendant’s compliance with the law,<sup>61</sup> and that awarding fees

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<sup>56</sup> *Buckhannon v. W. Virg. Dep’t of Health & Human Servs.*, 532 U.S. 598, 600 (2001).

<sup>57</sup> *Id.* at 600-01.

<sup>58</sup> *Id.* at 601

<sup>59</sup> FHAA, 42 U.S.C. § 3613(c)(2) (“[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs”); ADA, 42 U.S.C. § 12205 (“[T]he court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs”).

<sup>60</sup> 532 U.S. at 601.

<sup>61</sup> *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970) (“Although we find no injunction warranted here, we believe Parham’s lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action.”); *Fogg v. New England Telephone and Telegraph Co.*, 346 F.Supp. 645, 651 (D.C.N.H. 1972) (“While Ms. Fogg was not denied promotion because she was a woman, she did perform a valuable public service by instituting the complaint with the EEOC and bringing this law suit. The sharp increase in the number of female promotions . . . may possibly have been due to a sudden awakening of the Company of its responsibilities under the Equal Opportunities Employment Act, but it is more probable that Mrs. Fogg’s forceful actions opened

ensured that private attorneys general would not be deterred from bringing enforcement actions.<sup>62</sup> The catalyst doctrine did *not* provide automatic fee recovery whenever the defendant changed its conduct, however. Plaintiffs seeking recover under this theory were required to demonstrate that (1) the defendant provided some of the benefit sought by the lawsuit; (2) the suit stated a genuine claim, one that was at least colorable and not frivolous, unreasonable, or groundless; and (3) the plaintiff's suit was a substantial or significant cause of defendant's action providing relief.<sup>63</sup> Almost every Federal Court of Appeals to consider the issue had adopted the catalyst theory,<sup>64</sup> but the Fourth Circuit had rejected it,<sup>65</sup> and on that basis denied fee recovery to the *Buckhannon* plaintiffs. The Supreme Court granted certiorari to resolve the split in the circuits, and language in the Court's prior decisions suggested that the Fourth Circuit's anomalous position would be overruled.<sup>66</sup>

Instead, the Court rejected the catalyst theory and held that to qualify as a prevailing party a plaintiff must obtain a "material alteration of the legal relationship of the parties" such as a favorable

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the eyes of the defendant to the male oriented promotion policy that it had been following.").

<sup>62</sup> See, e.g., *LeBlanc v. Southern Bell Telephone and Telegraph Co.*, 333 F.Supp. 602, 611 (D.C. La. 1971).

<sup>63</sup> *Id.* at 627-28 (Ginsburg, J. dissenting) (synthesizing requirements for recovery under the catalyst theory among the Federal Courts of Appeals). Some Circuits also required that the plaintiff demonstrate that the suit achieved results by threat of victory rather than by dint of nuisance and threat of expense. *Id.* at 628.

<sup>64</sup> *Id.* at 625-26 & n.4 (collecting cases).

<sup>65</sup> S-1 and S-2 v. State Bd. of Ed. of North Carolina., 21 F.3d 49, 51 (4<sup>th</sup> Cir. 1994) (en banc).

<sup>66</sup> For example, in *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987), Justice Scalia wrote:

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 even despite the absence of a formal judgment in his favor.

This statement, however, was dicta because the Court determined that the plaintiff could not meet the catalyst theory standard necessary to recover fees. *Id.* at 763. See also *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (indicating that to be a prevailing party, a "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement"); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (stating that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees"); *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980) (noting that the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 indicates that a person may in some circumstances be a prevailing party without a final judgment).

judicial decision or a consent decree.<sup>67</sup> In the Court's view, the defendant's voluntary change of position in response to the plaintiff's action was not enough to qualify the plaintiff for fee recovery as a prevailing party.<sup>68</sup> To reach this conclusion, the majority relied on Black's Law Dictionary to find that the "clear meaning" of "prevailing party" was a party who obtained a favorable judgment.<sup>69</sup>

Although the majority based its decision on this "clear meaning" interpretation, the majority and the dissent also debated the policy implications of the decision for encouraging settlement and limiting access to the judicial process. The majority reasoned that doing away with the catalyst theory would reduce satellite litigation over fees,<sup>70</sup> and that "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct."<sup>71</sup> The dissent responded that eliminating the catalyst theory could instead discourage settlement by removing incentives for defendants to settle early to avoid a large fee award.<sup>72</sup> In addition, the dissent argued, until the Court rejected the catalyst rule, plaintiffs "with limited resources were not impelled to 'wage total law' in order to assure their counsel fees would be paid" but instead could accept relief short of a judgment, encouraging earlier resolution of disputes.<sup>73</sup> The dissent also expressed concern that making fee recovery more uncertain would deter plaintiffs with meritorious but expensive cases from bringing suit, "impede access to court" and "shrink the incentive Congress created for the enforcement of law by private attorneys general."<sup>74</sup>

By allowing strategic capitulation, *Buckhannon* could significantly change litigation incentives. Where strategic capitulation is a risk, *Buckhannon* reduces plaintiffs' leverage in settlement negotiations, as their "bargaining endowments" are no longer determined solely by the legal merits of their case.<sup>75</sup> In fact, ironically, it is in those instances in which plaintiffs have relatively strong claims that defendants have the greatest incentive to delay until recovery is certain (to save the costs of compliance in the short term) and then change position at the last minute to avoid both an adverse judgment and a large fee award. The damage is

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<sup>67</sup> 532 U.S. at 604.

<sup>68</sup> *Id.* at 605.

<sup>69</sup> *Id.* at 603.

<sup>70</sup> *Id.* at 609.

<sup>71</sup> *Id.* at 608.

<sup>72</sup> *Id.* at 623 (Ginsburg, J. dissenting).

<sup>73</sup> *Id.* at 636.

<sup>74</sup> *Id.* at 623.

<sup>75</sup> See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-969 (1979) (discussing how legal rules create bargaining endowments in negotiation).

compounded where, as was the case in *Buckhannon*, the plaintiffs expend further resources unaware that the defendants intend to capitulate. Indeed, citing Rule 11, the *Buckhannon* plaintiffs unsuccessfully sought to recover \$62,459 of litigation expenses they incurred after defendants became aware, but did not disclose, that the legislature was likely to repeal the challenged rule.<sup>76</sup>

The majority minimized concerns over strategic capitulation by labeling them “entirely speculative and unsupported by any empirical evidence.”<sup>77</sup> Whether strategic capitulation will be a problem is an empirical question with no obvious answer. It is true, as the majority points out, that the voluntary cessation doctrine protects plaintiffs from insincere changes in position because a case cannot be mooted unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur.”<sup>78</sup> Even a last minute “sincere” change in conduct, however, may still eliminate fee awards for plaintiffs who bring meritorious claims that would have succeeded if the case had gone to trial, giving these defendants one free bite at the apple without liability for fees so long as they mend their ways before judgment.

The majority also argues that strategic capitulation will only be a threat when the plaintiff seeks equitable relief, “for so long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case.”<sup>79</sup> While it is true that damages claims may insure against mootness, equitable relief is a significant part of the public interest arsenal,<sup>80</sup> and there is reason to believe that equitable claims, particularly against states, may be fairly common. After the Court’s recent federalism decisions, private actions against states, including actions for institutional reform that clearly fit within the private attorney general model, may *only* seek

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<sup>76</sup> 532 U.S. at 625 n.2 (Ginsburg, J. dissenting).

<sup>77</sup> *Id.* at 608.

<sup>78</sup> *Id.* at 609 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)). This argument undercuts somewhat the majority’s reasoning that its decision will reduce satellite litigation, however, as the voluntary cessation doctrine requires its own inquiry into the motives of the defendant. See Michael Ashton, *Recovery Attorney’s Fees with the Voluntary Cessation Exception to Mootness Doctrine After Buckhannon* Board and Care Home, *Inc. v. West Virginia Department of Health and Human Services*, 2002 WIS. L. REV. 965, 968 (2002) (predicting an increase in mootness litigation after *Buckhannon*). In addition, at least one commentator has noted that *Buckhannon* itself has produced a new generation of litigation to test the limits of its holding and the circumstances under which it applies. Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 60 (2004).

<sup>79</sup> 532 U.S. at 608-09.

<sup>80</sup> See Owen Fiss, *THE CIVIL RIGHTS INJUNCTION* 4-12 (Indiana University Press 1978) (discussing the role of the injunction in civil rights litigation and institutional reform).

prospective relief.<sup>81</sup> Many of those federalism decisions involve civil rights claims under statutes that authorize fee awards to “prevailing parties.”<sup>82</sup> Plaintiffs in actions such as these cannot choose to include a damages claim to avoid strategic capitulation; in fact, they are prevented from doing so. All this suggests that, as an empirical matter, the threat of strategic capitulation may be more than minimal, and be particularly significant for public interest litigation against state entities that increasingly must take the form of solely equitable relief.

At bottom, the majority’s position in this policy debate largely rests on two empirical assumptions. First, the majority claims last minute changes of position by defendants to avoid fees are unlikely to be much of a problem. Second, the majority discounts the idea that this decision will deter plaintiffs from bringing enforcement actions as unsupported by any empirical evidence. We examine these empirical questions below. As an initial matter, we draw on recent decisions applying *Buckhannon* as preliminary “data points” to understand what structural types of federal litigation have been affected by this decision. We then go on to analyze data from a national, representative survey of public interest organizations to assess how *Buckhannon* has affected

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<sup>81</sup> See, e.g., *Kimmel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (ADEA) (holding states have sovereign immunity against private claims under the ADEA); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of the ADA) (same with respect to the ADA). More recent Court decisions have refused to extend this line of reasoning to family leave claims under the FMLA, and to an ADA claim regarding access to courthouses that was brought under Title II of that Act. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (FMLA); *Tennessee v. Lane*, 541 U.S. 509 (2004) (Title II of the ADA). The distinction between *Kimmel* and *Garrett* on the one hand, and *Hibbs* and *Lane*, on the other, seems to be that *Hibbs* and *Lane* involved claims that invoked gender discrimination and due process claims, both of which are entitled to some form of heightened scrutiny in constitutional analyses. See *Hibbs*, 538 U.S. at 736; *Lane*, 541 U.S. at 524-29. Legislation directed at non-suspect classifications may not fare as well in future litigation. For example, the court left open the question in *Hibbs* of whether Congress could abrogate sovereign immunity through the medical leave rights enacted in the FMLA. *Hibbs*, 538 U.S. at 734. Although the Court rejected private suits for damages claims in these cases, private suits against state officers for injunctive relief are, for the moment, still permissible under *Ex parte Young*, 209 U.S. 123 (1908). See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.14 (1996). In addition, actions brought by the United States to enforce federal law against the states are not subject to sovereign immunity. *Seminole*, 517 U.S. at 71 n.14.; *Alden v. Maine*, 527 U.S. 706, 755-56 (1999). But of course the federal government brings only a very small percentage of enforcement actions under civil rights laws. See *supra* note 6.

<sup>82</sup> In fact, the *Buckhannon* plaintiffs faced exactly this problem. When presented with the defendant’s sovereign immunity claims, the plaintiffs stipulated to the dismissal of their demands for damages, leaving them vulnerable to the strategic capitulation that followed. 532 U.S. at 624 (Ginsburg, J. dissenting).



organizations that represent private attorneys general, including its effect on access to the judicial process more generally.

### C. *The Aftermath of Buckhannon*

To begin to address the empirical realities of *Buckhannon*, in this section we present three recent cases as preliminary “data points” that represent a trend we see emerging in the enforcement actions that have been affected by this decision. These illustrative cases share at least three common features: First, these actions sought to enforce important constitutional or statutory rights, and therefore at least arguably further the public policy interests behind the private attorney general doctrine. Second, these were claims against government defendants seeking a change in policy or a judicial mandate to government actors to comply with the law; if there were no private enforcement in claims such as these, it would be hard to imagine government actors stepping into the breach. Third, the plaintiffs in these cases were limited to injunctive relief or other equitable relief, and therefore could not rely on a claim for monetary relief to avoid mootness. Together, these cases present a set of structural conditions not uncommon in public interest cases that render claims vulnerable to fee loss as a result of defendants’ strategic behavior.

*Smyth ex rel. Smyth v. Rivero*<sup>83</sup> illustrates the structural problems built in to certain kinds of public interest litigation. *Smyth* involved a constitutional and statutory challenge by AFDC recipients to a Virginia welfare policy that required welfare applicants to identify the father of any child for whom they requested aid, or to provide the names of all persons who might be the father.<sup>84</sup> Finding that the state’s decision to deny benefits despite plaintiffs’ statement that they were unable to identify the fathers of their children violated federal regulations, the district court preliminarily enjoined enforcement of the policy against the plaintiffs, and the plaintiffs moved for summary judgment.<sup>85</sup> One day before the summary judgment hearing, the Virginia Poverty Law Center, which represented the plaintiffs, agreed to continue the hearing on the condition that the state would not seek repayment of benefits paid to its clients.<sup>86</sup> The state then modified the policy to be prospective only so that it no longer applied to the plaintiffs.<sup>87</sup> As a result, the district court dismissed the claim as moot, but granted

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<sup>83</sup> *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4<sup>th</sup> Cir. 2002).

<sup>84</sup> *Id.* at 271.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 273

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

plaintiffs' motion for attorneys' fees under the CRAFAA.<sup>88</sup> The Fourth Circuit subsequently reversed the fee award, finding that there was no court order retaining jurisdiction over any agreement between the parties and therefore *Buckhannon* defeated the fee request.<sup>89</sup>

This was not the first time the Virginia Poverty Law Center had brought such an action against the state of Virginia, nor was it the first time the action was rendered moot by the defendant's conduct.<sup>90</sup> Still, despite repeated litigation over nearly a decade, the underlying policy remained in force without any adjudication on the merits because the defendant repeatedly changed its policy to moot the claim *only with respect to these particular plaintiffs*. Perhaps Virginia sought to avoid final adjudication of this challenge because Virginia Poverty Law Center had successfully obtained a preliminary injunction prohibiting enforcement of the policy in an earlier, similar action.<sup>91</sup> By mooting the case as it applied to these plaintiffs, the state avoided changing its policy while simultaneously destroying any possible fee recovery, all for the price of a promise not to seek repayment of welfare benefits already paid. Short of bringing a class action on behalf of all current and future welfare applicants subject to the policy (which, incidentally, most legal aid attorneys are now prohibited by statute from doing<sup>92</sup>) any attorney in a structurally similar case would face the same strategy for defeating both policy change and the fee petition.<sup>93</sup> And, of course, such a

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 284-85.

<sup>90</sup> See *Smyth v. Carter*, 88 F. Supp. 2d 567 (W.D. Va. 2000) (finding action moot after defendants amended the policy so that it no longer applied to the plaintiffs); *Smyth v. Carter*, 168 F.R.D. 28 (W.D. Va. 1996).

<sup>91</sup> *Smyth v. Carter*, 168 F.R.D. 28 (W.D. Virginia 1996) (granting preliminary injunction against denying benefits based solely on recipients' inability to provide paternity information).

<sup>92</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134; 504(a)(1), 110 Stat. 1321-53.

<sup>93</sup> In fact, the Virginia Poverty Law Center sought class certification in the earlier action, but certification was denied based in part on the court's judgment that the named plaintiff "revealed an unwillingness to take on responsibility" because she "quit a job because the home in which she worked was filthy and smelled." *Smyth v. Carter*, 168 F.R.D. at 33. Another possible route for avoiding mootness in cases like this is to argue the claim is "capable of repetition yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). One potential stumbling block for such an argument is the often-imposed requirement that the plaintiff make a reasonable showing that she will again be subject to the alleged illegal conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 108-09 (1983); *but see Roe v. Wade*, 410 U.S. 113, 125 (1973) (suggesting that mootness should be denied when others will wish to bring the same challenge in circumstances that also threaten to evade review). Nevertheless, at least one court has found a dispute capable of repetition yet evading review in circumstances where the defendant attempted to moot the case by giving full relief to the plaintiff; in that case, the court, emphasized how the challenged policy threatened

class action would likely be time consuming and expensive, and would still risk non-recovery of fees if Virginia rescinded the policy before judgment.<sup>94</sup> In short, these kinds of challenges to state policies are now vulnerable to strategic capitulation. There is no obvious way to preserve such a claim against mootness because the sovereign immunity doctrine has all but done away with private claims for monetary damages against states.

Freedom of Information Act (FOIA) enforcement actions present a second set of circumstances that are structurally vulnerable to strategic capitulation after *Buckhannon*. FOIA requests do not seek monetary relief or even ongoing injunctive relief, only production of information and documents.<sup>95</sup> As a result, post-*Buckhannon* FOIA actions invite stonewalling on the part of defendants. One commentator has summarized the problem well:

Without the risk of paying catalyst fees, government defendants will be able to withhold documents unlawfully and litigate with impunity until an adverse judgment appears imminent. Then, facing likely defeat, agencies could moot actions against them by ceding the disputed documents, giving plaintiffs the relief they desire but denying them compensation for their meritorious efforts. Attorneys would be deterred from litigating FOIA claims, and individuals, researchers, and interest groups who cannot afford to risk litigating without compensation would find their right—and thus the public’s right—to government information severely diminished.<sup>96</sup>

Indeed, the incentives created by *Buckhannon* are particularly troubling for FOIA given the potential effect on citizen access to government information in a democratic society.

*UNITE AFL-CIO v. U.S. INS*<sup>97</sup> illustrates this dynamic. This case involved a union with many immigrant members.<sup>98</sup> After a series of INS raids against UNITE-organized factories seeking undocumented aliens, UNITE became concerned that employers were using INS raids to retaliate against workers engaged in union-organizing activities.<sup>99</sup> UNITE was also concerned that the INS

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future injury to others. *Sims v. Florida Dept. of Highway Safety*, 862 F.2d 1449, 1459-1460 (11th Cir. 1989). Like other questions of justiciability, mootness is notoriously messy, and it remains to be seen whether claims of “capable of repetition yet evading review” can ameliorate *Buckhannon*’s effects.

<sup>94</sup> Class actions are particularly problematic post-*Buckhannon* because they create greater exposure if plaintiffs cannot recover fees and greater incentives to defendants to act strategically to avoid a large fee award.

<sup>95</sup> See, e.g., David Arkush, *Preserving “Catalyst” Attorneys’ Fees Under the Freedom of Information Act in the Wake of Buckhannon* Board and Care Home v. West Virginia Department of Health and Human Resources, 37 HARV. C.R.-C.L. L. REV. 131, 137-38 (2002).

<sup>96</sup> Arkush, *supra* note 95, at 132.

<sup>97</sup> 336 F.3d 200 (2d Cir. 2003).

<sup>98</sup> *Id.* at 201.

<sup>99</sup> *Id.* at 201-02.

officers involved in the raids were engaging in race-based selective prosecution.<sup>100</sup> To investigate these concerns, UNITE submitted FOIA requests to the INS regarding the workplace raids at UNITE-organized factories.<sup>101</sup>

When the INS refused to produce the documents, UNITE filed an action in federal district court seeking an order compelling disclosure.<sup>102</sup> Five months after commencement of this action, the INS produced most of the requested documents, and after further negotiations, produced the remaining materials.<sup>103</sup> The parties informed the court that they had resolved the substantive issues in the case and the plaintiffs sought a fee award.<sup>104</sup> The district court denied the fee request and the Second Circuit affirmed, noting that the district court never rendered a judgment on the merits or endorsed a consent decree and therefore the plaintiff was not entitled to fees under *Buckhannon*.<sup>105</sup> Although UNITE obtained these documents only after initiating litigation, the INS relied on *Buckhannon* to deprive plaintiffs of compensation for their fees despite the fee shift provision in FOIA.<sup>106</sup>

FOIA has been a potent tool for public interest organizations and has produced important disclosures regarding both government and private party activities.<sup>107</sup> Yet after *Buckhannon*, government actors have less incentive to respond to FOIA requests even in the face of threatened litigation, and less incentive to settle quickly when actual litigation occurs. In addition, the potential for strategic capitulation is likely to significantly narrow the pool of potential parties willing to enforce FOIA, as only those able to risk litigating without compensation for their fees will be able to bring these actions.<sup>108</sup> Although there is a strong argument that *Buckhannon* should not be extended to FOIA actions because the language of FOIA's fee shifting provision differs from the provision construed in

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<sup>100</sup> *Id.* at 202.

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

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 203.

<sup>105</sup> *Id.* at 206.

<sup>106</sup> Fee recovery under FOIA is not automatic; courts consider, *inter alia*, the public benefit derived from the case and whether the government had a reasonable basis for withholding the requested information. *See* *Burka v. U.S. Dep't of Health & Human Servs.*, 142 F.3d 1286, 1288 (D.C. Cir. 1998).

<sup>107</sup> For an analysis of the benefits and weaknesses of FOIA, and some examples of such disclosures, see Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 660-61 (1984).

<sup>108</sup> *See* Arkush, *supra* note 95, at 139-145.

*Buckhannon*,<sup>109</sup> some courts have nevertheless done so,<sup>110</sup> a development that threatens to have a chilling effect on these claims.

A third set of claims affected by *Buckhannon* involve parents seeking appropriate educational services for their disabled children under the Individuals with Disabilities Education Act (IDEA).<sup>111</sup> Although these cases tend to seek individualized remedies, rather than systemic reforms, their structural features leave plaintiffs particularly vulnerable to strategic capitulation. IDEA actions primarily seek equitable relief: provision of specific educational services, or an appropriate individualized educational program (IEP).<sup>112</sup> Although compensatory damages or reimbursement for tuition for private educational services are theoretically possible,<sup>113</sup> in at least some states sovereign immunity under the Eleventh Amendment limits recovery to only prospective relief.<sup>114</sup> So, like other actions for equitable relief, these kinds of cases are subject to last minute capitulation as a strategy to defeat fees.

Ironically, given the pro-settlement interests emphasized in *Buckhannon*, applying this decision to IDEA cases may undermine incentives to resolve cases early in the IDEA's administrative process. Special education cases under the IDEA are subject to a mandatory administrative process which resolves many disputes.<sup>115</sup> Parents must receive notice of programs and placements for their children and may use an administrative hearing procedure to challenge decisions with which they disagree.<sup>116</sup> Hearing officers have the power to order changes in the educational programs for children and to require school districts to provide appropriate

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<sup>109</sup> In contrast to the "prevailing party" language at issue in *Buckhannon*, FOIA permits fee awards to any plaintiff who has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E). For a discussion of why *Buckhannon* should not apply to FOIA, see Arkush, *supra* note 95, at 138.

<sup>110</sup> *Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 454-57 (D.C. Cir. 2002); *UNITE*, 336 F.3d at 206.

<sup>111</sup> 20 U.S.C. § 1400 *et seq.* Congress enacted the IDEA in 1975 to ensure that children with disabilities have available to them a "free appropriate public education." *Id.* § 1400(d)(1)(A).

<sup>112</sup> Weber, *supra* note 43, at 369-370 (describing the kinds of recovery plaintiffs typically seek in administrative hearings under the IDEA).

<sup>113</sup> See Weber, *supra* note 43, at 370 & n.84; see also *id.* at 403-04 (discussing conflicting authority about whether compensatory damages other than tuition reimbursement can be recovered in special education cases).

<sup>114</sup> See, e.g., *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 254 (9th Cir. 1992) (holding California school districts are immune to suit under the Eleventh Amendment).

<sup>115</sup> See Weber, *supra* note 43, at 368-370 (describing the administrative process requirements).

<sup>116</sup> *Id.* at 369.

educational services.<sup>117</sup> The administrative record then becomes the basis for appeal to federal court should that become necessary.<sup>118</sup>

Special education disputes often settle through the administrative process when, in response to a parent's request for a due process hearing, the district reexamines a placement or provides additional services. At this point, the parties can compromise, either informally when the district changes its position or through a formal settlement agreement.<sup>119</sup> Federal law permits fee awards to parents who prevail in administrative as well as judicial proceedings under the IDEA,<sup>120</sup> and prior to *Buckhannon*, a parent "was entitled to fees in all those instances of informal or formal settlement as long as the hearing request was the catalyst for more than de minimis success."<sup>121</sup> Post-*Buckhannon*, however, some courts have rejected fee awards in IDEA cases when the parties reach agreement in administrative proceedings by a change in position on the part of the district,<sup>122</sup> by the grant of the individualized education program (IEP) sought by the parents,<sup>123</sup> or in a few instances, even where there was a formal settlement agreement.<sup>124</sup>

As at least one commentator has noted, these decisions put parents and children in a difficult bind.<sup>125</sup> When a school district provides inadequate educational services, speedy resolution of the problem is essential to ensure that the child develops her full educational potential.<sup>126</sup> Nevertheless, if *Buckhannon* applies to the IDEA administrative process, this creates some complex incentives that run counter to early settlement. Defendants may wish to delay providing expensive educational services as long as possible, as they no longer risk paying a large fee award so long as they provide the services before judgment. Parents, in turn, face difficult choices about trading off timely access to services and recovery of fees. Parents can delay settlement until mediation in the hope that the mediation officer will memorialize the settlement in writing and thus perhaps preserve the fee award,<sup>127</sup> or perhaps insist on court litigation to preserve access to fees, but this may delay obtaining important services for the child. Alternatively, parents can forgo the

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<sup>117</sup> *Id.* at 369-70.

<sup>118</sup> *Id.* at 370.

<sup>119</sup> *Id.* at 371-372.

<sup>120</sup> 20 U.S.C. § 1415(i)(3)(B); *see also* Weber, *supra* note 43, at 371 & n.92.

<sup>121</sup> Weber, *supra* note 43, at 372. Although hearing officers in most states lack the power to award fees, parents could recover fees incurred during the administrative process by filing suit in federal or state court even without requesting any other relief. *Id.*

<sup>122</sup> *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119 (2d Cir. 2002).

<sup>123</sup> *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545 (3d Cir. 2003).

<sup>124</sup> *See* Weber, *supra* note 43, at 375-376 for a discussion of these cases.

<sup>125</sup> *Id.* at 380.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 399.

fee award altogether in order to gain timely access to services, defeating the purpose of the fee shifting provision. In addition, the risk of loss of fees through strategic capitulation may reduce the pool of attorneys willing to take IDEA cases, leaving parents who cannot afford a lawyer on their own struggling to find representation.

*John T. v. Delaware County*<sup>128</sup> illustrates these dynamics at work in an IDEA case. In this case, the parents of a twelve-year-old boy with Down Syndrome sought appropriate educational programs and services from his local public school district. Although the parents attempted to resolve the dispute through the administrative process, the defendant refused to provide these services or to provide the statutorily required due process hearing and other procedural safeguards required by the IDEA.<sup>129</sup> The district court issued a preliminary injunction requiring the defendant to provide the plaintiff with a range of appropriate services during the pending lawsuit, but the defendant refused and was eventually held in contempt of court for violating the injunction.<sup>130</sup> After almost three years of litigation, the parties developed a mutually agreeable IEP for the plaintiff, which was his primary objective in the litigation.<sup>131</sup> The plaintiff then moved for voluntary dismissal of his complaint and for attorney's fees of \$136,172 under the fee shifting provision of the IDEA.<sup>132</sup>

The district court granted the motion for voluntary dismissal but denied the fee award, citing *Buckhannon*, and the Third Circuit affirmed.<sup>133</sup> Although the plaintiff had obtained a preliminary injunction, a contempt order for the defendant's refusal to comply with the injunction, and ultimately the acceptable IEP that was the primary objective of the litigation, the court found that he did not qualify as a prevailing party under the statute. In particular, the court held that the acceptable IEP was not judicially sanctioned, as required by *Buckhannon*, because it was not included in an order that provided for judicial enforcement.<sup>134</sup> In so holding, the Third Circuit rejected contrary Ninth Circuit authority that settlement could confer prevailing party status even absent judicial sanction.<sup>135</sup> Thus, even though the district violated a preliminary injunction that required it to provide educational services and delayed for more than

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<sup>128</sup> 318 F.3d 545 (3d Cir. 2003).

<sup>129</sup> *Id.* at 549.

<sup>130</sup> *Id.* at 551.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 555.

<sup>134</sup> *Id.* at 560.

<sup>135</sup> See *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128 (9th Cir.), *cert. denied* 537 U.S. 820 (2002).

three years before complying, the plaintiff recovered none of his considerable attorney's fees.

Cases like *John T.* suggest that *Buckhannon* may do little to encourage early settlement on the part of defendants; early or late, *John T.* suggests that eventual capitulation will defeat a fee award. This holding encourages stonewalling to wear down parents who are paying the costs of educating their children while litigation is pending so that they accept a program that is less than ideal, contrary to the public policy objectives of the statute. This situation also presents parents of disabled children with a choice between a settlement that provides educational services their child needs but sacrifices fee recovery or continuing to litigate, perhaps for years, in an uncertain attempt to protect their fees knowing that the defendant could defeat fee recovery at any time by changing position. Such a dilemma effectively eviscerates the fee shifting provisions of the IDEA, and places a significant financial burden on parents seeking statutorily mandated educational accommodations for their children.<sup>136</sup> Indeed, after three years of litigation, it seems at least possible that the parents of *John T.* sought "voluntary" dismissal of their claims as a condition of a settlement that provided their son with some of the services he needed before he aged out of the public school system altogether.

*Smyth*, *UNITE*, and *John T.* present structural conditions familiar to public interest litigation. They involve claims that enforce constitutional principles or important statutory policies. They press the kind of citizen claims against government defendants that government enforcers have little incentive to pursue. They seek primarily injunctive relief, or, in the case of the FOIA action, production of documents, so that the plaintiff had no claim for monetary relief to ward off mootness. And their structural features present some unique challenges: in *Smyth* and *UNITE AFL-CIO*, despite the broad policy concerns at stake, the defendant managed to craft an individualized response that both mooted the case and rendered the voluntary cessation doctrine useless for keeping the claim going. As a practical matter, *Buckhannon* may have eviscerated any fee recovery in cases structurally similar to these.

While these cases are troubling, they may be only the tip of the iceberg; as courts grapple with *Buckhannon*, its far reaching effects are becoming more apparent. For example, a circuit split has developed on whether a preliminary injunction is sufficient to support a fee award should the defendant subsequently change its

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<sup>136</sup> There have been a number of such cases since *Buckhannon*. See, e.g., *Doe v. Boston Pub. Schs.*, 358 F.3d 20 (1st Cir. 2004); *J.C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119 (2d Cir. 2002); *T.D. v. La Grange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003); *Alegria v. District of Columbia*, 391 F.3d 262 (D.C. Cir. 2004).



position in accordance with this injunctive relief.<sup>137</sup> This question is important because preliminary relief may be the primary form of success in complex actions seeking significant institutional reform, and it is an important signal about the likely outcome of the litigation. If an injunction is not sufficient to support a fee award, a plaintiff who obtains preliminary injunctive relief is especially vulnerable to strategic capitulation because the court's order may simply prompt wise defendants to alter their conduct voluntarily to avoid a fee award. There is also a circuit split on the question of whether *Buckhannon* extends beyond strategic capitulation to also include settlement agreements,<sup>138</sup> even though *Buckhannon* did not involve a settlement.<sup>139</sup> Courts generally agree, however, that

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<sup>137</sup> The Ninth Circuit has held that a plaintiff who obtains a preliminary injunction is a prevailing party for purposes of a fee award under 42 U.S.C. § 1988. *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002); *see also* *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 946 (D.C. Cir. 2005) (holding that a preliminary injunction could support a fee award after *Buckhannon*); *cf.* *Edmonds v. F.B.I.*, 417 F.3d 1319, 1326 (D.C. Cir. 2005) (holding that plaintiff qualified as a prevailing party entitled to fees by obtaining a court-ordered, expedited processing of her FOIA request that required the defendant to produce all documents to which no exemption was claimed). In contrast, the Fourth Circuit has held that prevailing party status cannot be based on a successful motion for preliminary relief. *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4<sup>th</sup> Cir. 2002).

<sup>138</sup> The Ninth Circuit has held that a plaintiff who settles “does not claim to be a ‘prevailing party’ simply by virtue of his being a catalyst of policy change; rather, his settlement agreement affords him a legally enforceable instrument” which entitles him to fee recovery. *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134 (9th Cir. 2002); *see also* *Richard S. v. Dep’t of Developmental Servs.*, 317 F.3d 1080, 1087-88 (9th Cir. 2003) (allowing fee recovery where the claim was resolved by private settlement and the court retained jurisdiction to enforce the settlement); *Davy v. C.I.A.*, \_\_\_ F.3d \_\_\_, 2006 WL 1887141 (D.C. Cir. 2006) (holding that plaintiff qualified as a prevailing party entitled to fees by obtaining a stipulation for production of documents that was approved by the court and memorialized in a court order, even though the court dismissed the action after the defendant complied with the order and produced the documents). Other appellate courts, however, have relied on dicta in *Buckhannon* to hold to the contrary, at least where the court did not retain jurisdiction to enforce the settlement. *Doe v. Boston Public Schools*, 358 F.3d 20, 25 (1st Cir. 2004) (denying fee recovery where the claims were resolved by private settlement); *J.C. v. Regional School District 10, Bd. of Educ.*, 278 F.3d 119, 123 (2d Cir. 2002) (same); *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 560-61 (3d Cir. 2003) (same); *T.D. v. La Grange Sch. Dist. No. 102*, 349 F.3d 469, 479 (7th Cir. 2003) (same).

<sup>139</sup> The *Buckhannon* majority did not expressly hold that a private settlement is insufficient to support a fee award. The Court made clear that enforceable judgments and consent decrees constituted a material alteration of the legal relationship of the parties sufficient to support a fee award, but stated that the catalyst theory fell “on the other side of the line from these examples.” 532 U.S. at 604-05. In a footnote, the majority opinion also noted that private settlements did not involve the judicial approval and oversight involved in consent decrees, and pointed out that federal jurisdiction to enforce a private settlement will often

settlements that allow the court to retain jurisdiction provide sufficient judicial imprimatur to support a fee award under *Buckhannon*.<sup>140</sup> As a result, plaintiffs must be very careful to structure settlement agreements in a way that preserves their right to recover fees, assuming defendants will agree to such a settlement after *Buckhannon*.

To be sure, not all statutory fee provisions have been undercut by *Buckhannon*. Courts have held that the catalyst theory still applies to environmental statutes that authorize fee awards “whenever the court determines such award is appropriate” because this statutory language differs from the “prevailing party” provision interpreted in *Buckhannon*.<sup>141</sup> In addition, the California Supreme Court has held that California courts may continue to award attorneys’ fees to prevailing plaintiffs under state fee-shifting statutes based on the catalyst theory despite the U.S. Supreme Court’s decision in *Buckhannon*.<sup>142</sup> Nevertheless, these are exceptions, not the rule. *Buckhannon* still undermines the potential for fee awards for many

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be lacking if the agreement is not incorporated into an order of dismissal. *Id.* at n.7. The Court never expressly held, however, that a private settlement is insufficient to demonstrate a material alteration in the legal relationship of the parties, and because *Buckhannon* did not involve a settlement, this language regarding settlements is dicta. See *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134 n.5 (9<sup>th</sup> Cir.), *cert. denied* 537 U.S. 820 (2002).

<sup>140</sup> See, e.g., *American Disability Association, Inc. v. Chmielarz*, 289 F.3d 1315 (11<sup>th</sup> Cir. 2002); *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003); *Smalbein ex rel Smalbein v. City of Daytona Beach*, 353 F.3d 901 (11<sup>th</sup> Cir. 2003); *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 560-61 (3d Cir. 2003); *Richard S. v. Dep’t of Developmental Servs.*, 317 F.3d 1080, 1087-88 (9<sup>th</sup> Cir. 2003) (allowing fee recovery where the claim was resolved by private settlement and the court retained jurisdiction to enforce the settlement); *but see Christina A. v. Bloomberg*, 315 F.3d 990 (8<sup>th</sup> Cir. 2003).

<sup>141</sup> See, e.g., *Ass’n of Cal. Water Agencies v. Evans*, 386 F.3d 879 (9<sup>th</sup> Cir. 2004) (allowing recovery of fees under the catalyst theory for action brought under the *Endangered Species Act*); *Loggerhead Turtle v. County Council of Volusia County*, 307 F.3d 1318, 1327 (11<sup>th</sup> Cir. 2002) (same); *Sierra Club v. EPA*, 322 F.3d 718, 728 (D.C. Cir. 2003) (allowing recovery of fees under the catalyst theory in an action brought under the Clean Air Act). For a discussion of *Buckhannon* in the context of environmental litigation, see Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1 (2004); Adam Babich, *Fee Shifting After Buckhannon*, 32 ENVTL. L. REP. 10,137 (January 2002); Marisa Ugalde, *The Future of Environmental Citizen Suits After Buckhannon* *Board & Home, Inc. v. West Virginia Department of Health and Human Resources*, 8 ENVTL. LAW. 589 (2002).

<sup>142</sup> *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 148-49 (Cal. 2005) (interpreting Cal. Code Civ. P. § 1021.5). The California Supreme Court justified its decision in terms of preserving access to courts, noting that the catalyst theory rewards attorneys “who successfully prosecute cases in the public interest” and prevents silencing claimants with meritorious claims who lack legal resources. *Id.* at 149.

fee shifting provisions, and legislative attempts to override *Buckhannon* have not fared well.<sup>143</sup>

### III. THE EMPIRICAL REALITY OF *BUCKHANNON*

Although judicial interpretations of *Buckhannon* give some sense of what is happening in federal litigation already underway, questions about the dynamic effects of *Buckhannon* remain. Does limiting the potential for fee recovery restrict access to the judicial process? Has *Buckhannon* stifled enforcement actions by reducing the pool of lawyers willing to take on these cases? We begin to answer these questions by examining empirically how *Buckhannon* has affected public interest organizations. For how many public interest organizations has *Buckhannon* made a difference? What organizational characteristics predict whether *Buckhannon* impedes an organization's ability to pursue its goals? How have organizations been affected by this decision? What are the implications for social change litigation brought by private attorneys general? We turn to these empirical questions in the remaining sections of this paper by drawing on data from a national survey of public interest organizations in the United States.

#### A. A National Survey of Public Interest Organizations

The data reported below come from a survey of 221 public interest organizations that we conducted in 2004.<sup>144</sup> This survey is

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<sup>143</sup> Senator Feingold (D-Wis.) has twice proposed legislation to change the definition of "prevailing party" in all federal legislation and restore recovery under the catalyst theory, but both bills died in committee. 107<sup>th</sup> Congress (2001-2002), Settlement Encouragement and Fairness Act, S.3161, which died in the judiciary committee; 108<sup>th</sup> Congress (2003-2004), Settlement Encouragement and Fairness Act, S.1117, incorporated into the Civil Rights Act of 2004 (S. 2088), which died in the Committee on Health, Education, Labor, and Pensions. The proposed "OPEN Government Act of 2005" (S. 394) would resurrect the catalyst theory for fee awards under the FOIA. The Committee on the Judiciary's Subcommittee on Terrorism, Technology and Homeland Security held a hearing on the bill on March 15, 2005. At that hearing, federal FOIA litigators pointed out the perverse structural incentives in FOIA actions after *Buckhannon*:

[I]t has been clear from time to time that the government has withheld requested information to keep it out of the public domain for as long as possible, knowing full well that the law would not ultimately support withholding. There is no recourse in such situations for requesters other than to file suit, and these cases unfortunately do not move rapidly on the courts' dockets. So when the government sees the end of the road near, it need only hand over the information to the requester and the case is moot, with no consequences to the government.

Testimony of Thomas M. Susman on behalf of Ropes & Gray, LLP, available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1417&wit\\_id=2081](http://judiciary.senate.gov/print_testimony.cfm?id=1417&wit_id=2081) (last visited March 31, 2005).

part of a larger study with several objectives, including documenting variation in strategy, structure, and mission among public interest organizations, investigating how these organizations respond to their organizational environment, and examining how they integrate traditional adjudicatory strategies with other strategies for social change. Part of this inquiry involves understanding how institutions, such as doctrinal developments, funding structures, and ethical obligations, shape public interest practice.

Our study focuses on private organizations that use law, at least in part, as a strategy to pursue their goals. Accordingly, for purposes of this study, we define “public interest law organization” to include organizations in the voluntary sector that employ at least one lawyer at least part time, and whose activities (1) seek to produce significant benefits for those who are external to the organization’s participants, and (2) involve at least one adjudicatory strategy.<sup>145</sup> We hasten to acknowledge that defining public interest law is a notoriously difficult enterprise;<sup>146</sup> we do not claim that ours is the only acceptable approach to this question. We chose this definition in part to replicate earlier studies of public interest organizations, and to focus the inquiry on the voluntary, private sector organizations that are central to the field.<sup>147</sup>

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<sup>144</sup> For more detail about the study’s methodology see [names omitted], *The Organization of Public Interest Practice: 1975-2004*, 84 NORTH CAROLINA LAW REVIEW 1591, 1601-1605 (2006).

<sup>145</sup> This definition is a modified version of the definition adopted in an early study of public interest law firms. Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 4, 20 (Burton A. Weisbrod, Joel F. Handler, & Neil K. Komesar, eds. 1978). Our definition is broader than just traditional public interest firms, and might better be labeled “public interest law organizations” or “public interest litigating entities.” At the same time, it is narrower than “cause lawyering” more generally, as it excludes individual pro bono work in private firm settings, and work done by government organizations. By studying lawyers who work in public interest law organizations, we do not mean to discount the important work of lawyers who provide pro bono legal services in other contexts. For a discussion of pro bono work conducted in other settings, see Rebecca L. Sandefur, *Lawyers Pro Bono Service and American-Style Civil Legal Assistance for the Poor*, LAW & SOCIETY REVIEW (forthcoming, manuscript on file with author); Scott Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

<sup>146</sup> See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 33-37 (Austin Sarat and Stuart Scheingold, eds. 1998) (discussing the difficulty of defining “cause lawyer”).

<sup>147</sup> For earlier studies of public interest organizations, see Joel F. Handler, Betsy Ginsberg, & Arthur Snow, *The Public Interest Law Industry*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 42 (Burton A. Weisbrod, Joel F. Handler, & Neil K. Komesar, eds. 1978); Joel Handler, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE

To produce a random sample of public interest organizations that meet this definition, we first developed a sampling frame of organizations that potentially fit our definition using a variety of sources.<sup>148</sup> Our strategy was to err on the side of inclusion and leave the final determination of whether an organization met our criteria until a later stage of the process. Through this approach we constructed a sampling frame of 4,588 organizations, not all of which ultimately fit our definition. We then drew a random sample of 1,200 organizations from the sampling frame, and focused our efforts on narrowing this group to only those organizations that met our criteria.<sup>149</sup> This yielded a sample of 327 organizations.

We then surveyed these organizations utilizing a telephone survey consisting of primarily closed-ended questions and a few open-ended questions that could be answered with a short response.<sup>150</sup> This approach gave us much richer data than quantitative measures alone; the qualitative data allow us to interpret our quantitative findings in light of the nuances and meaning provided in these open-ended responses. Organizations were asked about their history and mission, budget and structure, goals and activities, and strategies for pursuing those goals. The survey

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(Academic Press 1978); Nan Aron, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* (Westview Press 1989).

<sup>148</sup> These included records of amicus briefs filed by public interest organizations before the Supreme Court; scholarly books and articles that list public interest legal organizations; directories of public interest organizations; lists of providers of free legal services obtained from state bar associations and internet web sites; lists of organizations receiving funding from Interest on Lawyer Trust Accounts (IOLTA) obtained from state IOLTA programs; and internet searches to identify potential public interest organizations. This strategy was designed to capture public interest organizations in all their diversity. For example, our amicus brief strategy helps to capture organizations seeking to influence policy by participating in high-profile litigation. In contrast, the information from IOLTA programs and free legal service providers ensures that smaller organizations that provide direct legal services are also represented. We also searched lists and national directories that spanned the political spectrum.

<sup>149</sup> We accomplished this narrowing process through information available from publicly available sources such as web sites or literature published by the organization. In some instances we contacted the organization directly by telephone to clarify its status, or, where only a mailing address was available, by sending a short questionnaire that asked about adjudicatory strategies and employment of lawyers in order to clarify the organization's status.

<sup>150</sup> We contracted with the University of Wisconsin Survey Center to field the telephone survey. Respondents were mailed an advance letter regarding the nature of the study, and returned letters were traced to find accurate information for each organization. Organization representatives were then contacted by phone to complete the survey. In an attempt to improve the response rate after exhaustive attempts to reach some organizations, the survey was converted from a CATI instrument to a paper and pencil form and mailed to all non-respondents and refusals. Two organizations completed the mail survey rather than the telephone format.

included screening questions to ensure that the organization met our criteria for inclusion in the study; fifty-seven organizations were excluded from the study because they did not meet these criteria. Of the remaining 270 organizations, 221 completed the survey yielding a response rate of 82 percent, which is quite good for an organizational survey such as this.

### **B. The Likely Effects of *Buckhannon* on Public Interest Organizations**

To begin our empirical analysis, we considered which factors might predict whether an organization was negatively affected by *Buckhannon*. Some organizational characteristics seem to invite strategic capitulation, such as the extent to which an organization brings class actions or litigates claims against state governments. We also considered other factors, such as structural relations with outside counsel, the organization's topical area of practice, the degree to which an organization focuses on impact litigation rather than direct services, and the political orientation of the organization. Table 1 summarizes our predictions about how these factors would affect an organization's vulnerability to *Buckhannon*; we also discuss each of these factors in detail below.

Table 1: Predicted Relationship of Organizational Characteristics to Negative Effects from *Buckhannon*

Organizational Characteristic	Likelihood of Negative Effects from <i>Buckhannon</i>
Organization Engages in Class Action Litigation	+
Percent Organizational Effort Dedicated to Impact Litigation	+
Sovereign Immunity Decisions Negatively Affected Organization	+
Organization Co-counsel's Cases with Outside Attorneys	?
Organization Practices in Environmental, Poverty, or Civil Rights	+
Organization's Political Orientation is Conservative	-

First, we considered whether organizations that pursue class actions might be negatively affected by *Buckhannon*. We suspected that organizations that litigate class actions would be more likely to experience fallout from *Buckhannon* because these cases require a significant investment of time and resources, and therefore carry the potential for a large fee award. The liability for a large fee award in turn creates both an incentive for strategic capitulation and a significant loss to the organization if capitulation occurs.

Second, we anticipated that organizations that invest significant efforts into impact litigation would be more vulnerable to *Buckhannon* than those that put most of their efforts into direct services. Impact litigation typically involves claims for broad injunctive relief, such as a change in policy, rather than individual damages claims that insulate the organization against strategic

capitulation. In addition, the interplay between the Court's recent federalism decisions and *Buckhannon* creates special concerns for institutional reform claims against states. Organizations that litigate against state entities generally cannot bring damages claims due to sovereign immunity, leaving these organizations exposed to strategic capitulation. Consequently, we predicted that organizations that have been affected by the Court's recent sovereign immunity decisions would also be more likely to be negatively affected by *Buckhannon*.

We were also interested in whether organizations that work in certain practice areas were more likely than others to be affected by *Buckhannon*. For example, environmental and civil liberties claims may be more likely than other kinds of actions to involve solely injunctive relief, rendering the organizations that practice in these areas more vulnerable to strategic capitulation. The effect of *Buckhannon* on organizations that focus on poverty concerns is less clear: in some instances, *Buckhannon* may be irrelevant because the organization's client is the defendant, as in debt collection or unlawful detainer actions. In other situations, like the circumstances presented in *Smyth*, the organization may seek a policy change rather than monetary relief on behalf of low-income clients, and as a result find itself vulnerable to strategic capitulation.

We also considered the effect that co-counseling cases might have on the organization's vulnerability to *Buckhannon*. From an ex post, static perspective, working with outside attorneys could insulate the organization from *Buckhannon*'s effects by essentially transferring the risk of fee loss in a given case, perhaps to a large private firm that is better able to absorb these costs. From an ex ante, dynamic perspective, however, after *Buckhannon*, organizations that work with outside attorneys may have more difficulty finding lawyers willing to take on their clients now that fee recovery has become more uncertain. This latter dynamic suggests that organizations that co-counsel cases will be more likely to be affected by *Buckhannon* than those that do not. Because both theories seem plausible, we did not venture a prediction about the effects of *Buckhannon* on organizations that co-counsel cases.

Finally, we wondered whether political orientation made a difference: were conservative organizations similar to other organizations in terms of their vulnerability to *Buckhannon*? One could argue that conservative organizations are generously funded by private interests and ideological organizations, while progressive organizations increasingly scramble for support. To the extent that conservative organizations can rely on funding other than attorney's fees, they may be less affected by this decision. On the other hand, conservative organizations which bring civil rights claims, particularly against government actors as is often the case in

religious freedom cases, may be just as affected as progressive organizations by this decision. In the sections that follow, we use data from our survey to examine these questions.

### C. *Buckhannon's Impact on Social Change Litigation*

The central finding that emerges from our survey data is two-fold. First, organizations that engage in litigation directed at systemic social change are more likely than others to be negatively affected by the *Buckhannon* decision. Organizations that engage in impact litigation, litigate against government actors, bring class actions, and work in the environmental, civil rights, and poverty areas were the most likely to be affected. Second, qualitative data from our survey indicate that *Buckhannon* affects far more than fee recovery. These data indicate that *Buckhannon* both discourages early settlement *and* discourages lawyers from representing plaintiffs in enforcement actions. We discuss these findings in detail below, and then offer some brief conclusions about what these findings might mean for the system of rights enforcement by private attorneys general.

#### 1. *Multivariate Analysis*

In the analyses that follow, our primary dependent variable is whether an organization reported that *Buckhannon* made it more difficult to pursue its goals.<sup>151</sup> *Buckhannon* had a negative impact on just over a third of the organizations we surveyed: thirty-five percent said that *Buckhannon* made it harder to pursue their objectives.<sup>152</sup> It is not surprising that public interest organizations

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<sup>151</sup> We asked our respondents whether the Court's decision in *Buckhannon* had made it easier, harder, or made no difference in the organization's ability to pursue its goals. Only one organization reported that *Buckhannon* made it easier to pursue its goals; in order to create the dichotomous dependent variable, that organization is excluded from the analysis that follows.

<sup>152</sup> Of course, like all surveys, our survey involves self-report data, which raises the potential for response bias in the organization's report that *Buckhannon* has been a problem. The fact that not every organization reported negative effects from *Buckhannon*, and, as we report below, that variation in organizational responses seems to follow theoretically predicted patterns gives us some confidence that our respondents are not providing unthinking, blanket responses that are uninformed by their actual experience. Moreover, only survey methodologies can tell us how these advocates perceive *Buckhannon*'s effects, and perceptions matter. To the extent that advocates believe that *Buckhannon* puts fee recovery at serious risk, this will likely affect their litigation strategy and their decisions about taking enforcement actions in the future. Finally, it should be noted that other sources of data about the effects of *Buckhannon* may be just as problematic. For example, one could argue that a decrease in the number of enforcement actions following *Buckhannon* would be evidence that this opinion



vary in the degree to which they are affected by *Buckhannon*. For example, some organizations take on everyday civil matters that seldom present opportunities for strategic capitulation, either because the claim involves monetary damages, like a consumer complaint, or because their client is the defendant, as in unlawful detainer cases. Other organizations obtain little or none of their budget from attorney's fees.<sup>153</sup> Larger organizations may be insulated from the effects of *Buckhannon* by other sources of funding, such as membership dues or charitable contributions. And, of course, the various factors we discussed above are likely to affect the probability that an organization would be affected by *Buckhannon*.

We used logistic regression techniques to investigate further which factors affect the likelihood that the *Buckhannon* decision made it more difficult for an organization to pursue its goals. Logistic regression techniques are used to model the effects of independent variables on a dichotomous dependent variable, here the organization's report of whether it was negatively affected by the *Buckhannon* decision. Our dependent measure, then, is the log odds that an organization would find it more difficult to pursue its goals after *Buckhannon*.<sup>154</sup> Our independent variables include controls for organizational size and whether the organization took cases with the potential to generate fee awards.<sup>155</sup> We also examined several other independent variables, including the percent of organizational legal activities dedicated to impact litigation, and dummy variables<sup>156</sup> for

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constrained access to courts, but isolating *Buckhannon* as the cause of this change would be very difficult.

<sup>153</sup> Of those organizations that said *Buckhannon* did *not* affect their activity, twenty-five percent obtained no portion of their budget from attorneys' fees, and therefore would not have been affected by the decision.

<sup>154</sup> Technically, logistic regression is used to predict the logit, sometimes termed the "log odds", which is calculated as  $\ln(p/1-p)$ , where  $p$  is the proportion of organizations reporting negative effects from *Buckhannon*. For a basic discussion of logistic regression, see Alan Agresti & Barbara Finlay, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 482-484 (Dellen 2d ed. 1986).

<sup>155</sup> The "fee potential" variable is a dichotomous variable coded "1" if any of the organization's cases have the potential to generate fees, and "0" if not. To create a control for organizational size, we constructed a variable that is the natural log of the number of people employed by the organization. We used this transformation to address the skewed distribution of organizational size, in the sense that the mean organizational size is much larger than the median. The mean organizational size in our sample is 53 employees, whereas the median is only 20 employees. This logarithmic transformation helps ensure that the larger organizations do not disproportionately influence the estimate of the effect for organizational size.

<sup>156</sup> A dummy variable is a dichotomous variable having two values, 1 and 0, that represent categories to be compared for purposes of numerical analysis. For example, gender categories can be represented by a value 1 if the respondent is female and a value of 0 if a respondent is male for the purposes of determining whether being female is related to a dependent measure of interest in a regression

engaging in class actions, co-counseling cases, and reporting negative consequences from the Court's recent sovereign immunity decisions.<sup>157</sup> In addition, using the organization's self report of its political orientation, we created a dummy variable indicating whether the organization was conservative.<sup>158</sup> We also measured whether the organization's practice was in environmental, civil rights, poverty, consumer rights, economic liberalism, or miscellaneous "other" areas such as legal services for the arts. We then created a dummy variable indicating that the organization practiced in the environmental, civil rights, or poverty areas,<sup>159</sup> areas which we suspect may present more of a risk of strategic capitulation.

Table 2 reports the correlations among these variables, including the dependent variable. These correlations show that experiencing negative effects from the Court's recent sovereign immunity decisions, engaging in class actions, relying on outside co-counsel, and practicing in an at risk practice area all were significantly, positively correlated with the likelihood that *Buckhannon* impeded an organization's ability to pursue its goals. The degree to which an organization engaged in impact litigation was also positively correlated with fallout from *Buckhannon*. Note, however, the lack of any significant negative correlation between conservative political orientation and the dependent variable; this result is inconsistent with our expectation that conservative organizations would be insulated from the effects of *Buckhannon* by other sources of funding. Not surprisingly, our control for whether the organization took fee-generating cases was positively correlated with the *Buckhannon* measure, but the control for organizational size was not.<sup>160</sup>

Table 3 reports results from a series of logistic regression models based on the variables discussed above. Logistic regression coefficients in this table can be understood as the change (either increase or decrease) in the log odds of an organization reporting

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analysis. See Royce A. Singleton, Jr. & Bruce C Straits, *APPROACHES TO SOCIAL RESEARCH* 557 (Oxford 3d ed. 1999).

<sup>157</sup> For each of these characteristics, the dummy variable is coded "1" if the characteristic is present and "0" if it is not.

<sup>158</sup> Again, this variable was coded "1" for conservative organizations and "0" for all others.

<sup>159</sup> This variable was coded "1" for organizations that practice in these three areas, and "0" for all others. Before constructing this variable, we confirmed that each of these practice areas was positively related to the likelihood of negative fallout from *Buckhannon*. We then combined these three practice areas into one dichotomous variable indicating "at risk" practices in order to ensure sufficient cell size for our multivariate analysis.

<sup>160</sup> We emphasize, of course, that correlations do not provide information about any potential causal relationships, but they provide useful initial information about the relationships among these variables.

that *Buckhannon* negatively affected its ability to pursue its goals.<sup>161</sup> For ease of interpretation, in addition to the coefficients (B) and standard error (S.E.), we have also included the odds ratios in the table. The odds ratio indicates how the odds of negative effects from *Buckhannon* change with each unit change in a given independent variable. For dummy variables, the odds ratio is easily interpreted as the odds relative to the omitted category.<sup>162</sup>

The models we report in Table 3 confirm that, for the most part, our independent variables are strongly related to whether an organization reports a negative impact from *Buckhannon*, even when we control for the potential for fee recovery and the organization's size. For example, Model A indicates that engaging in class action litigation significantly increases the likelihood of fallout from *Buckhannon* even when controls are included in the model. Organizations that engage in class actions are more than twice as likely to report that *Buckhannon* made it more difficult for them to pursue their goals.

Model B includes a set of variables that we think of as "social change litigation" variables: the sovereign immunity variable (a proxy for litigating against state entities), the percent impact litigation variable, and the class action variable, in addition to controls for taking fee generating cases and organizational size. Note that the significant effects for the sovereign immunity and percent impact litigation variables persist, but engaging in class action litigation is no longer significant. The effect of sovereign immunity is striking: organizations that reported negative effects from the Court's sovereign immunity decisions were more than *seven times* more likely than others to say that *Buckhannon* impedes their ability to pursue their goals. The absence of any significant effect for the class action variable in this model suggests that the vulnerability to *Buckhannon* created by engaging in class actions is mediated by two other variables: (1) the percentage of legal activities the organization dedicates to impact litigation, and (2) whether the organization litigates against state entities (represented by the sovereign immunity variable).

Model C adds an additional variable regarding whether the organization practices in the civil rights, environmental, or poverty areas. Again, the effects for sovereign immunity and percent impact litigation are robust and continue to be highly significant. To illustrate how investing in impact litigation increases the likelihood of fallout from *Buckhannon* in this model, consider an example: an organization that invested 80 percent of its legal activities into impact litigation would be nearly three times as likely as an

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<sup>161</sup> Agresti and Finlay, *supra* note 154, at 482.

<sup>162</sup> That is, the odds of the category coded "1" compared to the category coded "0".

organization that invested only 20 percent of its legal activities into impact litigation to report negative effects from *Buckhannon*.<sup>163</sup> Practicing in an at-risk practice area also strongly predicts negative effects from *Buckhannon*; organizations that practice in these areas are more than ten times as likely as those that do not to report problems from *Buckhannon*.

Model D includes all of the previous variables and adds the co-counsel variable. Again, the impact litigation and the sovereign immunity effects continue to be significant, as do the practice area effects. Co-counsel relationships also have significant effects, but in the opposite direction from our prediction. It may be that in some instances co-counsel relationships insulate the organization from exposure to fee loss due to *Buckhannon*, as when the co-counsel does the bulk of the legal work and thus takes on the primary exposure for fees. That may be less likely, however, in the civil rights, poverty, and environmental areas where the public interest organization may be taking the lead in litigation, and thus have greater exposure to fees. Our data do not allow us to tease out these relationships, so we can only speculate as to how to interpret this unexpected relationship.<sup>164</sup> What Model D does confirm, however, is that factors that are strongly related to social reform litigation—litigating against state defendants, engaging in impact litigation, and working in the environmental, civil rights, and poverty areas—all are strong, robust predictors of an organization's vulnerability to *Buckhannon*.<sup>165</sup>

## 2. *Qualitative Data*

Our multivariate analysis indicates that public interest organizations have indeed suffered fallout from *Buckhannon*, and

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<sup>163</sup> We chose these two levels of investment in impact litigation for this example to approximate, roughly, the bimodal distribution of percent of legal activities invested in impact litigation that we see in our sample. The odds ratio in this example was calculated as follows: If  $b$  is the logistic regression coefficient for impact litigation (which, from Table 3, Model C is .017), then  $\exp(b)$  is the odds ratio corresponding to a one unit change in percent impact litigation. The odds for the comparison given in the text, which involves a 60 percent difference in percent investment in impact litigation, can be calculated as  $\exp(.017)^{60} = 2.77$ .

<sup>164</sup> We attempted to investigate this finding further by including an interaction term in the model interacting at risk practice area with co-counsel relationships. Relative high standard errors indicated sparse data and multicollinearity issues, so we removed the offending interaction term from the final model.

<sup>165</sup> We acknowledge that although these data show significant effects of *Buckhannon* on these organizations, due to the time and space constraints of our larger survey, we did not collect detailed data quantifying the effects of *Buckhannon* in terms of lost revenue, turned away clients and the like. Accordingly, we make no claim about the magnitude of these effects, but instead leave this question to future studies.

that organizations that engage in classic social reform litigation are more likely than others to be affected. To obtain a more nuanced understanding of not only whether, but also *how* *Buckhannon* affects public interest organizations, we turned to our qualitative data. In our survey, we asked those respondents who reported fallout from *Buckhannon* to explain how the decision affected their activities.<sup>166</sup> Their responses indicate that this decision not only limits fee recovery, but also discourages settlement, facilitates strategic capitulation, and discourages these organizations from taking on public interest cases.

First, strategic capitulation was a serious concern for these organizations. For example, one respondent noted:

[*Buckhannon*] allows the federal defendants, who we frequently litigate against, to make strategic decisions to moot out cases before a final judgment has been entered and as a result we are often unable to recover attorney's fees in cases that we've made substantial investments in. [2316]

In addition, respondents noted that, contrary to the policy argument that rejecting the catalyst theory would encourage early resolution of litigation, *Buckhannon* has made it more difficult to settle cases. Settlement became more difficult, in part, because requiring a formal judgment takes away the potential for face-saving out of court settlements in which defendants do not admit to wrongdoing.

[I]t means that you have to often litigate to judgment as oppose to settle because of the way in which the *Buckhannon* [decision] defined prevailing party so narrowly as to require actually a judicial order that changes the status, the legal status between the parties. As opposed to the way in which settlement agreements often used to be constructed that allowed the defendants to save face by saying, "Well we didn't do anything wrong but you know we're going to settle this lawsuit." So it's made it harder to collect attorney's fees. And if it's harder to collect attorney's fees for the work that you've done, it's harder in the long run going forward to, to continue the level of work that you've been doing. [2268]

Prior to *Buckhannon*, the parties could agree on relief, not admit to wrongdoing, and leave the determination of fees up to the court. Taking that that option off the table made it more difficult and time consuming to resolve cases.

Prior to *Buckhannon* we were much more likely to agree with opposing counsel, especially government counsel, to try to resolve issues prior to having to get a court decision on the issue. Now because we need attorney's fees to be able to maintain our staffing, we are less likely to

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<sup>166</sup> Numbers in brackets following each quote are the observation identification numbers for the organization in our dataset.

come to an agreement without a court judgment. .... So it's lengthening the process and causing more work. [2237]

These responses seem to confirm the concern that rather than encouraging early settlement as the Court predicted, *Buckhannon* may reduce opportunities for negotiating private settlements and therefore prolong litigation.<sup>167</sup>

Respondents also reported that by giving defendants unilateral power to avoid fee awards, *Buckhannon* reduced plaintiffs' leverage in litigation.

[I]t takes away leverage for attorney's fees in bringing some, in bringing some of our cases it takes away some of our leverage in litigating. [2146]

Again, the whole issue of attorney's fees because we're restricted anyway, I mean so that's just sort of an extension of it. I mean it's just, we can't get those fees and they were leverage in cases. [2058]

These responses suggest that *Buckhannon* undercuts plaintiffs' bargaining endowments in settlement negotiations and creates unintended incentives to engage in time consuming and costly litigation to protect statutorily authorized fee awards.

*Buckhannon* also seems to affect access to the judicial process. Respondents reported that they are less likely to take certain cases now that fee recovery is more doubtful.

*Buckhannon* makes us less likely to do cases because we can't get attorney's fees. [2115]

[I]n case selection it affects when we're mapping out where are we going to get the resources from or how many resources or what percentage of our litigation budget that's going to affect us. [2181]

In addition, organizations which refer cases to outside attorneys report trouble finding counsel willing to take cases now that fee recovery is uncertain.

[N]ow with that hurdle it just means that it's harder for us to refer cases to attorneys who may in the past have taken attorneys cases that they thought may get attorney fees. But now says, "Hey, I got one more hurdle to take. I'm not, I'm not willing to invest the time and energy in it." [2191]

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<sup>167</sup> Ugalde, *supra* note 141, at 614 (increased litigation and crowding dockets); Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 521 (2003) (neither party has incentive to settle); Babich, *supra* note 141, at 10,137.

Similarly, organizations that rely on co-counsel to assist with litigation report that after *Buckhannon*, outside lawyers are less willing to take on cases with the organization. These are perhaps the most disturbing implications of *Buckhannon*, for they suggest that this decision undermines the incentives for private attorneys general to bring future enforcement actions.

In short, our quantitative analysis, informed by these qualitative responses, provides little support for the Court's assertion that *Buckhannon* will promote early settlement without limiting access to the judicial process or public interest litigation more generally. Not only does strategic capitulation occur, but, as we suspected, it seems to be a particular problem for organizations that litigate against states, and therefore find themselves limited to only injunctive relief claims by sovereign immunity doctrines. These organizations were seven times more likely than others to report fallout from *Buckhannon*. *Buckhannon* also seems to be particularly problematic for organizations that engage in classic social change litigation: class actions, actions against states, and impact litigation claims. What is more, our qualitative data suggest that rather than promoting settlement at minimal cost to enforcement efforts, *Buckhannon* both prolongs existing litigation *and* discourages public interest organizations from taking on future enforcement actions. If, as these data suggest, *Buckhannon* reduces litigation not by promoting settlement, but by discouraging plaintiffs from bringing meritorious but expensive claims in the first place, any efficiency gains come at the expense of access to the judicial process.

With these conclusions in mind, we wish to emphasize that ours is a study of public interest organizations, rather than potential plaintiffs more generally. Although these organizations often bring landmark public interest cases that affect many people, they represent only a small part of the private attorney general enforcement system. We do not think, however, that this undermines our findings; quite the contrary. The dynamics suggested by our data also apply to litigants represented by private counsel who bring class actions or claims for solely injunctive relief. The implications of *Buckhannon* may be far worse for these litigants because unlike public interest organizations, they cannot rely on government funding, foundation grants, or charitable contributions to support their activities when fee awards are no longer available.

### III. CONCLUSION

What conclusions can we draw from these data about the implications of *Buckhannon* for the federal system of civil rights enforcement? One possible interpretation is that *Buckhannon* is part of a larger trend directed at undermining the ability of advocates to

harness the power of courts for social change. Along these lines, some commentators argue that a procedural attack on civil rights is underway.<sup>168</sup> This attack includes doctrinal developments regarding sovereign immunity,<sup>169</sup> legal challenges to the constitutionality of IOLTA funds,<sup>170</sup> legislative restrictions on the activities of legal services lawyers,<sup>171</sup> and political campaigns to limit the ability of law school clinics to represent clients who challenge established interests.<sup>172</sup> What these developments have in common is that they are collateral, not frontal, attacks on civil rights. They do not directly attempt to challenge the normative public policies that support civil rights protections. Instead, they rely on technical legal strategies to erode the procedural and practical mechanisms through which those rights are enforced. As a result, these attacks are less visible than a direct assault on civil rights, and therefore less likely to arouse public opposition or protest. *Buckhannon* fits this pattern. As one commentator put it, *Buckhannon* is like the neutron bomb: it leaves the infrastructure still standing but kills the heart of civil rights statutes that rely on fee shifting to encourage enforcement.<sup>173</sup>

For public interest organizations, this interpretation is likely to ring true. Many public interest organizations that emerged in the 1960s and 1970s were modeled after progressive civil rights organizations that viewed the courts as the only access to policy making for disenfranchised groups or unpopular causes.<sup>174</sup> The substantive successes of these organizations have made them targets for political campaigns to undermine their financial support.<sup>175</sup> *Buckhannon* may seem like one more installment in this campaign, and to be sure, to the extent that progressive movements rely on impact litigation strategies more than conservative movements do,

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<sup>168</sup> See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L. J. 1141 (2002); David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209 (2003).

<sup>169</sup> Rubenfeld, *supra* note 168, at 148-152.

<sup>170</sup> See *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2002); Luban, *supra* note 168, at 227-236.

<sup>171</sup> See William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s through the 1990s*, 17 ST. LOUIS PUBLIC LAW REVIEW 241 (1998); Luban, *supra* note 168, at 220-226.

<sup>172</sup> Luban, *supra* note 168, at 236-240.

<sup>173</sup> Margaret Graham Tebo, *Fee Shifting Fallout*, ABA JOURNAL, July 2003, at 54.

<sup>174</sup> Joel F. Handler, Betsy Ginsberg, & Arthur Snow, *The Public Interest Law Industry*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 42, 44-45 (Burton A. Weisbrod, Joel F. Handler, & Neil K. Komesar, eds. 1978).

<sup>175</sup> Nan Aron, LIBERTY AND JUSTICE FOR ALL 14-21 (1989) (discussing the Reagan Administration campaign to defund progressive public interest activities).



the procedural attack on civil rights enforcement is likely to have a particular political valence.

Nevertheless, our data indicate that at least *among* public interest organizations, there is no statistical difference between progressive and conservative organizations in their reports of whether *Buckhannon* has made it more difficult for them to pursue their goals. Of course, there are far more progressive than conservative public interest law organizations, yet at least among organizations that meet our definition, *Buckhannon* affects organizations across the political spectrum. This finding makes sense when one considers that conservative public interest organizations have been very successful in recent years in adopting impact litigation as a social change strategy. For example, conservative organizations have represented plaintiffs before the Supreme Court in religious freedom cases seeking access to public facilities for religious groups,<sup>176</sup> and in challenges seeking to prohibit implementation of affirmative action programs.<sup>177</sup> These cases, which seek policy changes or injunctive relief, are the kind of actions that are now structurally vulnerable to *Buckhannon*.

To us, the political neutrality of *Buckhannon*'s effects indicates that the consequences of this decision extend far beyond the political struggles between left and right. A second interpretation of *Buckhannon* and the larger attack on rights enforcement is that it signals a shift of power away from private enforcement of civil rights and toward government power, both to resist civil rights mandates and to control the enforcement, and ultimately the meaning, of these rights. First, even before *Buckhannon*, the sovereign immunity doctrine insulated states from civil rights challenges; *Buckhannon*'s implications for suits seeking solely injunctive relief extend that insulation even further. Challenges to prison conditions, welfare policies, or decisions to deny access to facilities to religious groups all will be harder to mount because *Buckhannon* renders fee recovery so uncertain in these actions. In addition, *Buckhannon* is likely to change the state's litigation strategy in these cases because it removes a significant incentive for early settlement. Instead, states may feel free to allow litigation to drag on and on, confident that strategic capitulation will protect it against an adverse judgment and fee award. In short, the

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<sup>176</sup> See Hans J. Hacker, *THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION* (Rowman & Littlefield 2005) (discussing the role of conservative Christian public interest law firms in religious freedom litigation).

<sup>177</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Mountain States Legal Foundation); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Center for Individual Rights); see also Jean Stefancic & Richard Delgado, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 47-51 (Temple University Press 1996) (discussing the role of conservative public interest organizations in challenges to affirmative action).

symbiosis between *Buckhannon* and the sovereign immunity doctrine leaves little incentive to bring equitable claims against states: why engage in protracted litigation with scant prospect for recovering the costs of that litigation, or even a favorable judicial ruling, in the end?

Second, to the extent that *Buckhannon* hamstring the private attorney general, enforcement decisions increasingly will fall to government actors such as underfunded administrative agencies. As a result, at the very least these discretionary decisions will be driven by a different set of incentives than those of the private attorney general. The decision to pursue a claim may become vulnerable to the political whims of changing administrations, and one can imagine circumstances, such as environmental actions or institutional reform claims, in which state and federal interests would align against enforcing rights that might nevertheless be in the public interest.

Even apart from shifting structure of incentives for enforcement, the sheer magnitude of the task is daunting. If *Buckhannon* reduces private enforcement efforts, and our data suggest that it will, it would require a significant increase in government enforcement to replace the more diffuse and decentralized system of private attorneys general. It seems unlikely that there will be an infusion of funds into state and federal enforcement to fill the breach, particularly given other governmental priorities and likely political opposition from repeat players. And, even if this infusion occurred, such a change would have the practical effect of shifting the costs of enforcement to taxpayers and away from defendants who failed to comply with the law, because, of course, government enforcement actions can be “Buckhannoned” too. In short, such a retooling of civil rights enforcement would lose many of the structural advantages of private attorneys general, and give significantly more power to governmental actors to decide whether to enforce rights, and to choose which rights are worth enforcing at all.

Whether this shift is desirable is a normative question that we leave to others to debate, although we note that the Court’s fee shifting decisions generally have not questioned the desirability or importance of the private attorney general. Instead, the Court has minimized the threat its interpretations pose to private enforcement and emphasized the lack of any empirical evidence that limiting fee recovery would discourage claims by private parties. Our empirical findings suggest that this optimism may have been misplaced. Now that the negative implications of limiting fee recovery have begun to emerge, Congress and the courts should reconsider how *Buckhannon* can best be reconciled with the federal system of rights enforcement through the private attorney general.

**Table 2: Correlations Among Variables**

	<i>Buckhannon Made Harder</i>	<i>Potential for Fee Award</i>	<i>Log Organization Size</i>	<i>Sovereign Immunity</i>	<i>Ever Had Class Action</i>	<i>Percent Impact Litigation</i>	<i>At Risk Practice Area</i>	<i>Co- Counsel</i>	<i>Conservative</i>
<i>Buckhannon Made Harder</i>	1 N=210								
<i>Potential for Fee Award</i>	.261** N=209	1 N=219							
<i>Log Organization Size</i>	-0.023 N=208	0.119 N=217	1 N=219						
<i>Sovereign Immunity</i>	.169* N=177	0.091 N=184	.232** N=184	1 N=185					
<i>Ever Had Class Action</i>	.498** N=198	.224** N=203	0.129 N=202	.419** N=172	1 N=204				
<i>Percent Impact Litigation</i>	.282** N=183	0.137 N=189	-.204** N=189	.147* N=181	.225** N=178	1 N=190			
<i>At Risk Practice Area</i>	.297** N=210	.161* N=219	0.069 N=219	0.079 N=185	.224** N=204	-0.027 N=190	1 N=221		
<i>CoCounsel</i>	.177* N=208	.307** N=217	.181** N=216	.402** N=183	.273** N=203	.255** N=189	.269** N=218	1 N=218	
<i>Conservative</i>	-0.034 N=193	-0.085 N=202	-.202** N=201	-0.027 N=169	-0.135 N=189	.324** N=175	-.306** N=203	-0.123 N=201	1 N=203

\*\* Correlation is significant at p<.01 level (2-tailed).

\* Correlation is significant at p<.05 level (2-tailed).

**Table 3: Logistic Regression Coefficients Predicting Negative Effects from *Buckhannon***

INDEPENDENT VARIABLES	MODEL A			MODEL B			MODEL C			MODEL D		
	<i>B</i>	<i>S.E.</i>	<i>Odds Ratio</i>	<i>B</i>	<i>S.E.</i>	<i>Odds Ratio</i>	<i>B</i>	<i>S.E.</i>	<i>Odds Ratio</i>	<i>B</i>	<i>S.E.</i>	<i>Odds Ratio</i>
<i>Potential for Fee Award</i>	<b>1.755**</b>	<b>0.649</b>	<b>5.785</b>	1.048	0.700	2.851	1.266	0.716	3.548	1.554	0.741	4.731
<i>log Organization Size</i>	-0.201	0.146	0.818	-0.085	0.175	0.918	-0.178	0.180	0.837	-0.099	0.191	0.906
<i>Ever had Class Action</i>	<b>0.816*</b>	<b>0.353</b>	<b>2.261</b>	-0.085	0.451	0.919	-0.066	0.461	0.936	0.370	0.513	1.448
<i>Sovereign Immunity</i>				<b>2.038**</b>	<b>0.427</b>	<b>7.677</b>	<b>1.910***</b>	<b>0.439</b>	<b>6.756</b>	<b>1.896***</b>	<b>0.449</b>	<b>6.661</b>
<i>Percent Impact Litigation</i>				<b>0.015*</b>	<b>0.006</b>	<b>1.015</b>	<b>0.017**</b>	<b>0.006</b>	<b>1.017</b>	<b>0.022**</b>	<b>0.007</b>	<b>1.022</b>
<i>At Risk Practice Area</i>							<b>2.343**</b>	<b>0.897</b>	<b>10.414</b>	<b>2.850**</b>	<b>0.980</b>	<b>17.282</b>
<i>CoCounsel Cases</i>										<b>-1.387*</b>	<b>0.652</b>	<b>0.250</b>
<i>Constant</i>	<b>-1.870*</b>	<b>0.736</b>	<b>0.154</b>	<b>-2.345**</b>	<b>0.827</b>	<b>0.096</b>	<b>-4.382***</b>	<b>1.188</b>	<b>0.013</b>	<b>-4.678***</b>	<b>1.255</b>	<b>0.009</b>
N		<b>175</b>			<b>164</b>			<b>164</b>			<b>163</b>	
Chi-square (degrees of freedom)		<b>16.826***</b> (3)			<b>54.347***</b> (5)			<b>64.084***</b> (6)			<b>68.044***</b> (7)	
-2 log likelihood		<b>219.515</b>			<b>168.201</b>			<b>158.464</b>			<b>152.735</b>	
Cox & Snell R-square		<b>.092</b>			<b>.282</b>			<b>.323</b>			<b>.341</b>	
Nagelkerke R-square		<b>.124</b>			<b>.380</b>			<b>.436</b>			<b>.460</b>	

† p<.10, \* p<.05, \*\* p<.01, \*\*\*p<.001