

THE PROCEDURAL ATTACK ON CIVIL RIGHTS:
THE EMPIRICAL REALITY OF BUCKHANNON FOR THE
PRIVATE ATTORNEY GENERAL

Catherine R. Albiston^{*}

Laura Beth Nielsen^{**}

In 2001, in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, the U.S. Supreme Court rejected the catalyst theory for recovery of attorney's 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 two hundred 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 toward more government power both to resist rights claims and to control the meaning of civil rights.

* Assistant Professor of Law, Boalt Hall School of Law, University of California, Berkeley. Ph.D., University of California, Berkeley, 2001; J.D., Boalt Hall School of Law, University of California, Berkeley, 1993; M.A., Stanford University, 1989; B.A., Stanford University, 1987.

** Research Fellow, American Bar Foundation, and Assistant Professor of Sociology and Law, Northwestern University. Ph.D., University of California, Berkeley, 1999; J.D., Boalt Hall School of Law, University of California, Berkeley, 1996; B.A., University of California, Santa Cruz, 1992.

This research was generously supported by the American Bar Foundation, the Center for the Study of Law and Society, University of California, Berkeley, and the University of Wisconsin Law School. We wish to thank Kathryn Abrams, Samuel Bagenstos, Kenneth Bamberger, Eric Biber, Juliet Brodie, Stephen Bundy, Pam Coukos, Lauren Edelman, Scott Eliason, Linda Krieger, Goodwin Liu, Stewart Macaulay, Erin Murphy, Anne Joseph O'Connell, Deborah Rhode, Rebecca Sandefur, Jeff Selbin, and Molly Van Houweling, for their helpful comments on earlier drafts of this Article, and Sandy Levitsky and Lisa Montague for their able research assistance.

INTRODUCTION.....	2
I. BUCKHANNON AND THE PRIVATE ATTORNEY GENERAL.....	7
A. Fee Shifting and Civil Rights Enforcement Prior to <i>Buckhannon</i>	7
B. Reallocating the Burdens of Litigation.....	13
C. The Aftermath of <i>Buckhannon</i>	18
II. THE EMPIRICAL REALITY OF BUCKHANNON.....	30
A. A National Survey of Public Interest Organizations.....	30
B. The Likely Effects of <i>Buckhannon</i> on Public Interest Organizations	32
C. <i>Buckhannon</i> 's Impact on Social Change Litigation.....	34
1. Multivariate Analysis	35
2. Qualitative Data.....	42
CONCLUSION	45

INTRODUCTION

Fee-shifting statutes are an integral part of the civil rights enforcement system in the United States. The U.S. Congress enacted fee-shifting statutes to encourage private enforcement of civil rights laws 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.”¹ Congress saw the need for fee-shifting statutes based in part on evidence that the vast majority of civil rights victims could not afford representation, and that private attorneys were refusing to take civil rights cases because of the limited potential for compensation.² Congress explicitly noted that civil rights enforcement “depend[s] heavily upon 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.”³ Significantly, Congress also specifically considered the prospect that defendants would voluntarily change their conduct in response to litigation. For example, the legislative history to the Civil Rights Attorney’s Fees Awards Act (CRAFAA)⁴ notes that “after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude,

1. *Evans v. Jeff D.*, 475 U.S. 717, 745 (1986) (Brennan, J., dissenting) (discussing the legislative history of fee-shifting provisions); see also S. REP. NO. 94-1011, at 1–5 (1976) (discussing the role of private attorneys general in supporting rights of the highest priority through private enforcement).

2. See H.R. REP. NO. 94-1558, at 2–3 (1976).

3. S. REP. NO. 94-1011, at 2.

4. Pub. L. No. 94-556, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2003)).

as a matter of equity, that no formal relief, such as an injunction, is needed.”⁵ 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.”⁶ Instead, “parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*.”⁷

In 2001, the U.S. Supreme Court issued an opinion that changed the American system of private civil rights enforcement. At issue in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*⁸ was whether plaintiffs could qualify as “prevailing parties” entitled to attorney’s 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,⁹ 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.¹⁰ 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.¹¹

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 rights enforcement by encouraging private litigants to bring enforcement actions that benefit not only the litigant but also the broader public interest. These litigants are sometimes referred to as “private attorney[s] general.”¹² 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.¹³ Although federal and state governments also engage in some enforcement activities, private parties bring more than 90 percent of

5. H.R. REP. NO. 94-1558, at 7.

6. *Id.*

7. S. REP. NO. 94-1011, at 5 (emphasis added).

8. 532 U.S. 598 (2001).

9. *Id.* at 625–26, 626 & n.4 (Ginsburg, J., dissenting) (collecting cases).

10. *Id.* at 604 (majority opinion).

11. *See id.* at 605.

12. *See Newman v. Piggy Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

13. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983); *see also Marek v. Chesny*, 473 U.S. 1, app. at 43–51 (1984) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions); *Coulter v. Tennessee*, 805 F.2d 146 app. at 152–55 (6th Cir. 1986) (collecting federal statutes authorizing the award of attorney’s fees).

actions under these statutes.¹⁴ This private enforcement system decentralizes enforcement decisions, allows disenfranchised interests access to policymaking, and helps insulate enforcement from capture by established interests. It is also less expensive for taxpayers because 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. These 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 nonmonetary relief, such as institutional reform or a change in policy—relief that would benefit many but will not pay a lawyer. In others, low-income plaintiffs may have monetary damages that are significant to them but still far less than the cost of litigating their claims. Although the individual monetary relief for

14. See, e.g., Catherine 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 (FMLA) actions that produced reported opinions involved government representation of plaintiffs); Paul Burstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 LAW & SOC'Y REV. 355, 359–67 (1986) (reviewing statistics on Equal Employment Opportunity Commission (EEOC) and amicus participation in employment rights enforcement suits from 1965 to 1983, and concluding that most litigants involved in employment actions are proceeding on their own); 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 Standards Act).

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:

SELECT CIVIL CASES COMMENCED IN U.S. DISTRICT COURTS

Type of Action	U.S. as Plaintiff	Other Plaintiff	Total Cases	Percent Brought by U.S. as Plaintiff
Civil Rights	534	35,562	36,096	1.5%
Prisoner Civil Rights	0	16,005	16,005	—
Fair Labor Standards Act (FLSA) and Labor Management Relations Act (LMRA)	155	5558	5713	2.7%

ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2005, at tbl.C-2, available at <http://www.uscourts.gov/judbus2005/appendices/c2.pdf> (last visited Mar. 20, 2006).

these claims is small or nonexistent, these actions confer broad benefits when successful. 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.

Buckhannon threatens to weaken this system of private enforcement of civil rights because it undermines incentives for bringing enforcement actions. The catalyst theory was an important part of this enforcement system because it prevented a litigation maneuver that we call strategic capitulation. By strategic capitulation we mean situations in which defendants faced with likely adverse judgments attempt to moot the case and to defeat the plaintiff's fee petition by providing the requested relief before judgment. So, for example, when a challenge to a policy prompted a government entity to change the policy, or when the government grudgingly produced 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 might encourage defendants to stall to drain their opponents' resources. Such an approach would be 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 purpose and the values underlying 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 no longer be deterred from acting by the cost of the fee award.¹⁵ The dissent took a more dynamic, ex ante view that focused on how rejecting the catalyst theory would likely affect the system of private enforcement as a whole. Abolishing the catalyst theory, the dissent argued, would "impede access to court for the less well heeled,"¹⁶ which might discourage plaintiffs with meritorious but expensive claims from bringing suit. In other words, encouraging settlement in the short run will mean little if,

15. See *Buckhannon*, 532 U.S. at 608–10.

16. *Id.* at 623 (Ginsburg, J., dissenting).

over time, opportunities for defendants to comply in response to legal challenges decline because plaintiffs bring fewer enforcement actions in the first place.

In response, the majority recognized the tradeoff between encouraging settlement and preserving access to the judicial process, but minimized concerns about the latter through two empirical assumptions. First, the majority claimed that strategic capitulation was unlikely to be much of a problem.¹⁷ 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.”¹⁸

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 two hundred public interest organizations, we show that the public interest organizations that litigate 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 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 rights enforcement toward more government power both to resist rights mandates and to control the enforcement—and ultimately the meaning—of civil rights.

In the following Parts, we present data from our study situated in the context of legal developments before and after *Buckhannon*. In Part I, we discuss 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. In Part II, we present our survey methodology, as well as our predictions and empirical data regarding how *Buckhannon* affects public interest organizations. We conclude the Article by suggesting some implications of *Buckhannon* for rights enforcement and government power.

17. See *id.* at 608–09 (majority opinion).

18. *Id.* at 608.

I. 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.¹⁹ That exception allowed fee shifting when plaintiffs acted to vindicate rights that were in the public interest.²⁰ In *Alyeska Pipeline Service Co. v. Wilderness Society*,²¹ however, the Supreme Court held that it is “inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation.”²² Only Congress could authorize exceptions to the American rule, and therefore fee shifting was not permissible absent specific statutory authorization. In this way, the Court essentially shut down “the equitable powers of the courts to award attorney’s fees,” and “[c]onsequently, increased [the] emphasis . . . placed on statutes that authorize fee awards.”²³

Congress responded to *Alyeska* by enacting new statutes authorizing fee shifting. In the legislative history to the CRAFAA,²⁴ one of the first of these

19. For a history of the American rule, see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9. For a short history of the common law private attorney general doctrine that developed in the 1960s and 1970s, see *id.* at 27–31; John 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); Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 439–40; Comment, *Court Awarded Attorney’s Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 666–70 (1974).

20. See *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1029–30 (D.C. Cir. 1974) (collecting cases). The common law private attorney general exception to the American rule grew out of a series of school desegregation cases in the 1960s in which courts held that 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, Note, *Awards of Attorney’s Fees in Environmental Litigation: Citizen Suits and the “Appropriate” Standard*, 18 GA. L. REV. 307, 313–14, 313 & n.35 (1984).

21. 421 U.S. 240 (1975).

22. *Id.* at 247.

23. 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2675.2 (3d ed. 1998). 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. *Id.*

24. Pub. L. No. 94-556, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2003)). The Civil Rights Attorney’s Fees Awards Act (CRAFAA), which authorizes an award of attorney’s fees to the “prevailing party,” 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. *Id.*; see also Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 233, 241.

statutes, Congress noted that *Alyeska* had a “devastating impact” on civil rights litigation and concluded that the need for legislation to restore fee-shifting policies was “compelling.”²⁵ Congress was reacting to evidence that public interest organizations could no longer afford to take many enforcement actions, and that private attorneys were refusing civil rights cases.²⁶ Recognizing that “a vast majority of the victims of civil rights violations cannot afford legal counsel” and “were suffering very severe hardships because of the *Alyeska* decision,”²⁷ Congress made clear that “fee awards are an integral part of the remedies necessary to obtain . . . compliance” with civil rights laws.²⁸ It also noted that civil rights enforcement depended heavily on private suits, given the limited authority and resources of federal enforcement agencies,²⁹ and therefore fee provisions were needed “so that these plaintiffs could fulfill their role in the federal enforcement scheme as ‘private attorneys general.’”³⁰

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.³¹ 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.³² In addition, private enforcement avoids the need for a large governmental enforcement apparatus,³³ insulates enforcement from political pressure and capture by established interests,³⁴ and promotes more

25. H.R. REP. NO. 94-1558, at 2–3 (1976).

26. *See id.*

27. *Id.* at 1–2.

28. S. REP. NO. 94-1011, at 5 (1976).

29. *See* H.R. REP. NO. 94-1558, at 1.

30. *Evans v. Jeff D.*, 475 U.S. 717, 745 (1986) (Brennan, J., dissenting) (discussing the legislative history of the CRAFAA).

31. *See id.*

32. *See* THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 14 (2002); Coffee, *supra* note 19, at 227; Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of Law in the Political System*, 77 AM. POL. SCI. REV. 690, 692 (1983).

33. *See* BURKE, *supra* note 32, at 15–16; S. REP. NO. 94-1011, at 4 (noting that “fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy”).

34. *See* BURKE, *supra* note 32, at 14; *see also* Coffee, *supra* note 19, at 227; Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 191; Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, LAW & CONTEMP. PROBS., Winter 1984, at 187, 201–02.

efficient detection of violations.³⁵ 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 attorney's fees.³⁶ Although plaintiffs in these cases assert private claims, fee-shifting statutes recognize that these plaintiffs serve the public interest by enforcing important public policies.³⁷

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 resourceful institutional defendants.³⁸ 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.³⁹ 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.⁴⁰ 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

35. See William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2149–50 (2004); see also Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000).

36. See 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 this "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.

37. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968).

38. See Zemans, *supra* note 32, at 205–06 (noting that many fee-shifting statutes were intended to compensate for the unequal economic status of disputants). 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'Y REV. 95 (1974).

39. See Leubsdorf, *supra* note 19, at 25–27. Congress intended fee-shifting statutes to help balance the playing field between government actors and civil rights victims, finding that "government entities and officials have substantial resources available to them through funds in the common treasury." H.R. REP. NO. 94-1558, at 7 (1976).

40. Percival & Miller, *supra* note 24, at 237–39.

preserve a decentralized enforcement scheme without undermining incentives to enforce statutes that benefit the public interest.⁴¹

Despite (or perhaps because of) their central role in the private enforcement of federal law, 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.⁴² Although this particular legislative proposal did not succeed, similar restrictions were proposed again in different forms,⁴³ and some were ultimately enacted. For example, legislation now prohibits fee recovery for services provided by an attorney from an organization funded by the Legal Services Corporation, even for fees incurred in litigation commenced before the restrictions were in place.⁴⁴ 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.⁴⁵

Since *Alyeska*, a second, more subtle erosion of fee-shifting provisions has come from the courts under the guise of promoting settlement, foreshadowing the tradeoff between promoting settlement and access to the judicial process that is central in *Buckhannon*. For example, in *Marek v. Chesny*,⁴⁶ the Court

41. 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 19, at 235 (indicating his critique of private enforcement did not apply to public interest law firms or litigation directed at social causes); Rubenstein, *supra* note 35, at 2152 (noting that critiques of private attorney general enforcement focus almost exclusively in the areas of securities and antitrust class actions).

42. For a discussion of this and other proposed legislation limiting fee recovery, see Percival & Miller, *supra* note 24, at 242–43.

43. See *id.* at 242–44; Mark 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 & n.65 (2004) (describing an unsuccessful legislative attempt by Senators Strom Thurmond and Orrin Hatch to do away with the catalyst theory in 1985).

44. For a general discussion of this legislation, see *Constitutional Law—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); see also William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation From the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998).

45. 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 et al. eds., 1999) [hereinafter *TRANSFORMATION OF LEGAL AID*]; John Kilwein, *The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!'* in *TRANSFORMATION OF LEGAL AID*, *supra*, at 41; see also Richard A. Viguerie, *Defund the Left*, N.Y. TIMES, Aug. 11, 1982, at A23.

46. 473 U.S. 1 (1985).

interpreted Federal Rule of Civil Procedure (FRCP) 68 to mean that a plaintiff could not recover attorney's fees incurred after a defendant's offer of settlement if the judgment was less than the offer, even though the plaintiff ultimately prevailed in the underlying suit.⁴⁷ 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."⁴⁸ 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.⁴⁹ Because attorney's 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.

*Evans v. Jeff D.*⁵⁰ 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 giving virtually all the injunctive relief that the plaintiffs requested—provided they waive recovery of fees and costs.⁵¹ The legal aid attorneys representing the plaintiffs concluded they had no ethical alternative but to accept the offer, but later moved to set aside the fee waiver, arguing that the defendant's offer undermined the congressional intent behind the fee-shifting statute.⁵² 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.⁵³ 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 aggregate and in the long run, diminish lawyers' expectations 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

47. See *id.* at 10–11. A similar proposal was part of 1983 draft legislation developed by the U.S. Department of Justice during the Reagan Administration. See Percival & Miller, *supra* note 24, at 243 & n.64.

48. *Marek*, 473 U.S. at 10.

49. Costs are an allowance made to the successful party for expenses (such as filing fees) in litigating an action. In some (but not all) states, costs do not include attorney's fees. BLACK'S LAW DICTIONARY 372 (8th ed. 2004).

50. 475 U.S. 717 (1986).

51. See *id.* at 722.

52. See *id.* at 722–23.

53. See *id.* at 723–24.

process” for persons with civil rights grievances which the Fees Act was intended to provide. 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.⁵⁴

Through this empirical assumption, the majority discounted threats to access to the judicial process and came down squarely in favor of promoting settlement.⁵⁵

After *Jeff D.*, attorneys who represent civil rights plaintiffs, particularly those that take on complex litigation seeking injunctive relief, find themselves in a difficult situation. Prior to this decision, plaintiffs could credibly threaten to push for complete relief, knowing that the fee petition would allow them to recover the additional time and resources invested to obtain that outcome. This dynamic encouraged defendants to settle to avoid risking liability for a larger fee award later on. After *Jeff D.*, however, such a threat is less credible because of the costs involved plus the very real risk of not recovering *any* fees in the end. As defendants are well aware, as a practical matter, few attorneys are willing to take such a gamble. As a result, post-*Jeff D.* plaintiffs face difficult choices between accepting settlement offers midway through the litigation for less than complete relief, or investing significant, probably unrecoverable resources (if they have them) into obtaining full equitable relief. In addition, attorneys who see a likely conflict arising between fee recovery and a desirable outcome for their client may decline to take the case in the first place to avoid the financial costs of this divide-and-conquer strategy by defendants. One limit on this dynamic, of course, is the client who refuses to trade fee recovery for desirable equitable relief out of loyalty to her counsel.

Both *Marek* and *Jeff D.* justified limiting fee recovery by emphasizing the interest of promoting settlement and dismissing concerns over restricting access to courts. Although these decisions significantly undermined plaintiffs’ leverage in settlement negotiations, plaintiffs still retained the power to refuse settlements they felt were inadequate and to take their claims to trial. Then, in 2001, *Buckhannon* dramatically changed the incentives for settlement, litigation, and future enforcement in public interest cases.

54. *Id.* at 741 n.34 (citation omitted).

55. *See 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).

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,”⁵⁶ meaning, in part, that residents could reach fire exits on their own. Faced with a citation for noncompliance with the law, the plaintiffs challenged the statute, arguing that this requirement violated the Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA).⁵⁷ Shortly after the district court ruled that the plaintiffs were entitled to take their claims to trial, the West Virginia legislature eliminated the self-preservation requirement.⁵⁸ 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 FHA and the ADA.⁵⁹

Although the district 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 defendants voluntarily changed their conduct in response to the lawsuit.⁶⁰ Courts noted that by acting as a catalyst, plaintiffs provided a “valuable public service” in producing the defendants’ compliance with the law,⁶¹ and that awarding fees ensured that private attorneys general would not be deterred from bringing enforcement actions.⁶² The catalyst doctrine did *not* provide automatic fee

56. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 600 (2001).

57. *See id.* at 600–01.

58. *Id.* at 601.

59. *Id.*; *see also* Fair Housing Act, 42 U.S.C. § 3613(c)(2) (2003) (“[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs.”); Americans with Disabilities Act, 42 U.S.C. § 12205 (2003) (“[T]he court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs . . .”).

60. *Buckhannon*, 532 U.S. at 601.

61. *Parham v. Sw. 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 Eng. Tel. & Tel. Co.*, 346 F. Supp. 645, 651 (D.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 on the part of the Company of its responsibilities under the Equal Opportunities Employment Act, but it is more probable that Mrs. Fogg’s forceful actions opened the eyes of the defendant to the male oriented promotion policy that it had been following.”).

62. *See, e.g., LeBlanc v. S. Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 611 (E.D. La. 1971).

recovery in every case in which the defendant changed its conduct, however. Plaintiffs seeking recovery under this theory were required to demonstrate that: (1) “[T]he defendant provided ‘some of the benefit sought’ by the lawsuit”; (2) “the suit stated a genuine claim, i.e., one that was at least ‘colorable,’ not ‘frivolous, unreasonable, or groundless’”; and (3) the plaintiff’s suit “was a ‘substantial’ or ‘significant’ cause of defendant’s action providing relief.”⁶³ Almost every federal court of appeals to consider the issue had adopted the catalyst theory,⁶⁴ but the Fourth Circuit had rejected it,⁶⁵ 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.⁶⁶

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 judicial decision or a consent decree.⁶⁷ 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.⁶⁸ To reach this conclusion, the majority

63. *Buckhannon*, 532 U.S. at 627–28 (Ginsburg, J., dissenting) (citations omitted) (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, ‘not by dint of nuisance and threat of expense.’” *Id.* at 628 (quoting *Marbley v. Bane*, 57 F.3d 224, 234–35 (2d Cir. 1995)).

64. See *id.* at 625–26, 626 & n.4 (collecting cases).

65. See *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc).

66. For example, in *Hewitt v. Helms*, 482 U.S. 755 (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 despite the absence of a formal judgment in his favor.

Id. at 760–61. This statement, however, was dicta because the Court determined that the plaintiff could not meet the catalyst theory standard necessary to recover fees. See *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” (citation omitted)); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (“The 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 CRAFAA indicates that a person may, in some circumstances, be a prevailing party without a final judgment).

67. *Buckhannon*, 532 U.S. at 604 (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)).

68. See *Buckhannon*, 532 U.S. at 605.

relied on Black's Law Dictionary to find that the "clear meaning" of prevailing party was a party who obtained a favorable judgment.⁶⁹

Although the majority relied primarily on a clear meaning analysis, which implies no need to resort to legislative history or policy arguments, the majority and dissent also debated the policy implications of the decision for settlement and access to the judicial process. The majority reasoned that doing away with the catalyst theory would reduce satellite litigation over fees,⁷⁰ and that "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct."⁷¹ 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.⁷² 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 that their counsel fees would be paid," but instead could accept relief short of a judgment,⁷³ encouraging earlier resolution of disputes. The dissent also expressed concern that making fee recovery more uncertain would deter plaintiffs with meritorious but expensive cases from bringing suit, would "impede access to court," and would "shrink the incentive Congress created for the enforcement of federal law by private attorneys general."⁷⁴

By allowing strategic capitulation, *Buckhannon* could significantly change litigation incentives. When strategic capitulation is a risk, *Buckhannon* reduces plaintiffs' leverage in settlement negotiations, as their "bargaining endowments" regarding fees now depend not only on the legal merits of their case, but also on the defendants' unilateral power to defeat a fee award by capitulating.⁷⁵ In addition, when compliance costs are significant, defendants have an incentive to delay until recovery is certain (to save the costs of compliance in the short term) and then change their position at the last minute to avoid both an adverse judgment and a large fee award. The damage is compounded when, as was the case in *Buckhannon*, the plaintiffs expend further resources unaware that the defendants intend to capitulate. Indeed, citing FRCP 11, the *Buckhannon* plaintiffs unsuccessfully sought to recover

69. *Id.* at 603, 607.

70. *See id.* at 609.

71. *Id.* at 608.

72. *See id.* at 639 (Ginsburg, J., dissenting).

73. *Id.* at 636.

74. *Id.* at 622–23.

75. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979) (discussing how legal rules create bargaining endowments in negotiation).

\$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.⁷⁶

The majority made light of concerns over strategic capitulation by labeling them “entirely speculative and unsupported by any empirical evidence.”⁷⁷ 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 exception to mootness 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 recur.”⁷⁸ 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 argued 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.”⁷⁹ While it is true that damages claims may insure against mootness, equitable relief is a significant part of the public interest arsenal,⁸⁰ and there is reason to believe that equitable claims, particularly against states, may be fairly common. After the Supreme Court’s recent sovereign immunity decisions, private actions against states, including actions for institutional reform that clearly fit within the private attorney general model, may *only* seek prospective relief.⁸¹ Many of those decisions involve civil rights or other

76. *Buckhannon*, 532 U.S. at 625 n.2 (Ginsburg, J., dissenting).

77. *Id.* at 608 (majority opinion).

78. *Id.* at 609 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (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, Note, *Recovering 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 (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).

79. *Buckhannon*, 532 U.S. at 608–09.

80. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 4–12 (1978) (discussing the role of the injunction in civil rights litigation and institutional reform).

81. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000) (holding that states have sovereign immunity against private claims under the Age Discrimination in Employment Act (ADEA)); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding the same with respect to Title I of the Americans With Disabilities Act (ADA)). More recent Court

reform claims under statutes that authorize fee awards to prevailing parties.⁸² 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.⁸³ All this suggests that, as an empirical matter, the threat of strategic capitulation may be more than minimal, and may be particularly significant for public interest litigation against state entities that increasingly is limited to solely equitable relief.

At bottom, the majority's position in this policy debate largely rests on two empirical assumptions. First, the majority claims that 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, claiming it is unsupported by any empirical evidence. We examine these empirical questions below. As an initial matter, we draw on recent decisions applying *Buckhannon* to illustrate the structural features of federal cases that have been affected by this decision. We then analyze data from a national, representative survey of public interest organizations to assess how *Buckhannon* has affected organizations that represent private attorneys general, including how it has affected access to the judicial process more generally.

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. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726–35 (2003) (FMLA); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (Title II of the ADA). The distinction between *Kimel* 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 nonsuspect 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 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. *Id.*; see also *Alden v. Maine*, 527 U.S. 706, 755–56 (1999). Nevertheless, the federal government brings only a very small percentage of enforcement actions under civil rights laws. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 14, at tbl.C-2.

82. 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. *Buckhannon*, 532 U.S. at 624 (Ginsburg, J., dissenting).

83. Plaintiffs may still bring suits for damages against government defendants other than states, including municipalities and other political subdivisions. See *id.* at 609 n.10 (majority opinion).

C. The Aftermath of *Buckhannon*

In this Subpart, we discuss three recent cases to illustrate a trend we see emerging in the enforcement actions that have been affected by *Buckhannon*. These illustrative cases share at least three common features. First, these actions sought to enforce important constitutional or statutory rights, and therefore advance 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 thus 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*⁸⁴ illustrates the structural problems built into certain kinds of public interest litigation. *Smyth* involved a constitutional and statutory challenge by Aid to Families with Dependent Children (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.⁸⁵ Finding that the state's decision to deny benefits contradicted federal regulations, the district court preliminarily enjoined enforcement of the policy against the plaintiffs, and the plaintiffs moved for summary judgment.⁸⁶ One day before the summary judgment hearing, the Virginia Poverty Law Center, which represented the indigent plaintiffs, agreed to continue the hearing on the condition that the state would not seek repayment of benefits paid to its clients.⁸⁷ The state then modified the policy to be prospective only so that, in effect, it no longer applied to the plaintiffs.⁸⁸ This modification ensured that the plaintiffs could not be penalized for past violations of the policy, but left the policy in place with regard to other similarly situated recipients. In response, the district court dismissed the claim as moot, but granted plaintiffs' motion under the CRAFAA for attorney's fees totaling \$195,074.⁸⁹ The Fourth Circuit subsequently

84. 282 F.3d 268 (4th Cir. 2002).

85. *See id.* at 271.

86. *See id.* at 272.

87. *See id.* at 273.

88. *See id.*

89. *See id.* at 273–74.

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.⁹⁰

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.⁹¹ 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 *with respect to only these particular plaintiffs*. Perhaps Virginia sought to avoid final adjudication of this challenge because the Virginia Poverty Law Center had obtained a preliminary injunction prohibiting enforcement of the policy in an earlier, similar action.⁹² 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 doing⁹³), any attorney in a structurally similar case would face the same defense strategy for defeating both the policy change and the fee petition.⁹⁴ And, of course, such a class action would likely be time consuming and expensive, and would still risk nonrecovery of fees if

90. See *id.* at 284–85.

91. See *Smyth v. Carter*, 88 F. Supp. 2d 567, 572 (W.D. Va. 2000) (finding action moot after defendants amended the policy so that it no longer applied to the plaintiffs).

92. *Smyth v. Carter*, 168 F.R.D. 28, 34 (W.D. Va. 1996) (granting preliminary injunction against denying benefits based solely on recipients' inability to provide paternity information).

93. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321–53 (1996).

94. 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 house in which she worked was filthy and smelled." *Smyth*, 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." *S. Pac. 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. See *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 future injury to others. See *Sims v. Fla. Dep't of Highway Safety*, 862 F.2d 1449, 1459–60 (11th Cir. 1989). Like other questions of justiciability, mootness is notoriously messy, and it remains to be seen whether arguments that a claim is "capable of repetition yet evading review" can ameliorate *Buckhannon's* effects.

Virginia rescinded the policy before judgment.⁹⁵ 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)⁹⁶ 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.⁹⁷ 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.⁹⁸

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

*Union of Needletrades v. U.S. INS*⁹⁹ illustrates this dynamic. This case involved the Union of Needletrades, Industrial and Textile Employees (UNITE), which was comprised of many immigrant members.¹⁰⁰ After a series of raids by the Immigration and Naturalization Service (INS) seeking undocumented aliens in UNITE-organized factories, UNITE became concerned that employers were using INS raids to retaliate against workers engaged in union-organizing activities.¹⁰¹ UNITE was also concerned that the INS

95. 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.

96. 5 U.S.C. § 552 (2000).

97. See, e.g., David Arkush, *Preserving "Catalyst" Attorney's 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).

98. *Id.* at 132.

99. 336 F.3d 200 (2d Cir. 2003).

100. See *id.* at 201.

101. See *id.* at 201–02.

officers involved in the raids were engaging in race-based selective prosecution.¹⁰² To investigate these concerns, UNITE submitted FOIA requests to the INS regarding the workplace raids at UNITE-organized factories.¹⁰³

When the INS refused to produce the documents, UNITE filed an action in federal district court seeking an order compelling disclosure.¹⁰⁴ Five months after commencement of this action, the INS produced most of the requested documents, and after further negotiations produced the remaining materials.¹⁰⁵ The parties informed the court that they had resolved the substantive issues in the case, and the plaintiffs sought a fee award.¹⁰⁶ 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*.¹⁰⁷ 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-shifting provision in the FOIA.¹⁰⁸

The FOIA has been a potent tool for public interest organizations and has produced important disclosures regarding both governmental and private party activities.¹⁰⁹ 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 the FOIA, as only those able to risk litigating without compensation for their fees will be able to bring these actions.¹¹⁰ Although there is a strong argument that *Buckhannon* should not be extended to FOIA actions because the language in FOIA's fee-shifting provision differs from the provision construed

102. See *id.* at 202.

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.* at 203.

107. See *id.* at 206.

108. Fee recovery under the Freedom of Information Act (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.” *Burka v. U.S. Dep’t of Health & Human Servs.*, 142 F.3d 1286, 1288 (D.C. Cir. 1998) (quoting *Chesapeake Bay Found. Inc. v. U.S. Dep’t of Agric.*, 11 F.3d 211, 216 (D.C. Cir. 1993)); see also *Freedom of Information Act*, 5 U.S.C. § 552(a)(4)(E) (2000).

109. For an analysis of the benefits and weaknesses of the 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).

110. See Arkush, *supra* note 97, at 138.

in *Buckhannon*,¹¹¹ some courts have nevertheless done so,¹¹² a development that threatens to have a chilling effect on these claims.

A third set of claims affected by *Buckhannon* involves parents seeking appropriate educational services for their disabled children under the Individuals with Disabilities Education Act (IDEA).¹¹³ 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).¹¹⁴ So, like other actions for equitable relief, these kinds of cases are subject to last-minute capitulation as a strategy to defeat fee awards.¹¹⁵

Ironically, given the prosettlement 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.¹¹⁶ "[P]arents must receive notice of programs and placements [for their children] and may [use] an administrative hearing procedure . . . to challenge decisions with which they disagree."¹¹⁷ Hearing officers have the power to order changes in the educational programs for children and to require school districts to provide appropriate educational services.¹¹⁸ The administrative record then becomes the basis for appeal to federal court should that become necessary.¹¹⁹

Special education disputes often settle through the administrative process when, in response to a parent's request for a due process hearing, the

111. In contrast to the "prevailing party" language at issue in *Buckhannon*, the 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 the FOIA, see Arkush, *supra* note 97, at 139–45.

112. See, e.g., *Union of Needletrades v. U.S. INS*, 336 F.3d 200, 206 (2d Cir. 2003); *Oil Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 454–57 (D.C. Cir. 2002).

113. 20 U.S.C. § 1400 (2000). Congress enacted the Individuals With Disabilities Education Act (IDEA) in 1975 to ensure that children with disabilities have available to them a "free appropriate public education." *Id.* § 1400(d)(1)(A).

114. Weber, *supra* note 43, at 369–70 (describing the kinds of recovery plaintiffs typically seek in administrative hearings under the IDEA).

115. In some, but not all, jurisdictions, compensatory damages or reimbursement for private educational services are theoretically possible, which may help protect the claim against strategic capitulation. See Weber, *supra* note 43, at 370 & n.84. Damages recovery is far from certain, however, as there is conflicting authority about whether compensatory damages can be recovered in special education cases. See *id.* at 403–04.

116. See *id.* at 368–70 (describing the administrative process requirements).

117. *Id.* at 369.

118. See *id.* at 370.

119. See *id.* at 369–70.

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.¹²⁰ Federal law permits fee awards to parents who prevail in administrative as well as judicial proceedings under the IDEA,¹²¹ 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.”¹²² After *Buckhannon*, however, some courts have rejected fee awards in IDEA cases in which the parties reach agreement in administrative proceedings by a change in position on the part of the district,¹²³ by the grant of the IEP sought by the parents,¹²⁴ or, in a few instances, even by a formal settlement agreement.¹²⁵

As at least one commentator has noted, these decisions put parents and children in a difficult bind.¹²⁶ When a school district provides inadequate educational services, speedy resolution of the problem is essential to ensure that the child develops to her full educational potential.¹²⁷ 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 possibility of a fee award,¹²⁸ or perhaps insist on court litigation to preserve access to fees. Either of these options may delay obtaining important services for the child, however. Alternatively, parents can forgo the fee award altogether 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 struggling to find representation.

120. See *id.* at 371–72.

121. 20 U.S.C. § 1415(i)(3)(B) (2000); see also Weber, *supra* note 43, at 371 & n.92.

122. Weber, *supra* note 43, at 372 (“Hearing officers in most states lack the power to award fees, but the parent could file suit in federal or state court to obtain a fees award from the school district, even without requesting any other relief.”).

123. See *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002).

124. See *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 561 (3d Cir. 2003).

125. See Weber, *supra* note 43, at 375–76, for a discussion of these cases.

126. See *id.* at 380.

127. See *id.*

128. See *id.* at 399.

*John T. v. Delaware County Intermediate Unit*¹²⁹ illustrates these dynamics at work in an IDEA case. In this case, the parents of a twelve-year-old boy with Down syndrome unsuccessfully 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.¹³⁰ 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.¹³¹ After almost three years of litigation, the parties developed a mutually agreeable IEP for the plaintiff, which was his primary objective in the litigation.¹³² 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.¹³³

The district court granted the motion for voluntary dismissal but denied the fee award, citing *Buckhannon*, and the Third Circuit affirmed.¹³⁴ 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.¹³⁵ In so holding, the Third Circuit rejected contrary Ninth Circuit authority holding that settlement could confer prevailing party status even absent judicial sanction.¹³⁶ Thus, even though the school district violated a preliminary injunction that required it to provide educational services, and delayed more than 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

129. 318 F.3d 545 (3d Cir. 2003).

130. See *id.* at 549.

131. See *id.* at 551.

132. See *id.*

133. See *id.*

134. See *id.* at 555.

135. See *id.* at 560.

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

stonewalling to wear down parents who are paying the costs of educating their children while litigation is pending, eventually leading them to 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 its 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.¹³⁷ 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, *Union of Needletrades*, 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 actions under the FOIA, production of documents, so the plaintiff has no claim for monetary relief to ward off mootness. As a practical matter, *Buckhannon* may have eviscerated any fee recovery in cases structurally similar to these.

It remains to be seen whether the voluntary cessation doctrine will operate as a check on fee loss due to strategic capitulation in cases such as these. The Court reiterated in *Buckhannon* that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice’ unless it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”¹³⁸ Generally, the defendant bears a heavy burden to show that it will not return to its old ways,¹³⁹ suggesting that a plaintiff might avoid mootness and

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

138. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609 (2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); see also *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982).

139. See *Laidlaw*, 528 U.S. at 189; see also *United States v. W.T. Grant Co.*, 345 U.S. 629, 632–33 (1953).

preserve a fee award by arguing that the defendant's capitulation is strategic and temporary rather than sincere. However, courts evaluate voluntary cessation of allegedly illegal conduct by government officials with more deference and solicitude than similar actions by private actors.¹⁴⁰ Also, most courts have held that repeal of a contested ordinance moots a plaintiff's request for injunctive relief, absent evidence that the defendant plans to or has reenacted the contested law or one that is similar.¹⁴¹ Thus, some of the actions most vulnerable to strategic capitulation—actions for solely injunctive relief to change a state policy—also face a higher hurdle for avoiding mootness through the voluntary cessation exception.

In addition, whether the voluntary cessation doctrine will apply is a highly factually contingent question. For example, FOIA actions are by their nature somewhat impervious to voluntary cessation arguments as the government cannot take back documents once they are disclosed. In contrast, it is less clear why the plaintiffs in *Smyth* did not raise the voluntary cessation argument; perhaps there were thorny issues about whether the plaintiffs still had standing to do so once the policy became prospective only.¹⁴² Other post-*Buckhannon* decisions involving last-minute policy changes have turned on what the particular factual circumstances surrounding those changes suggest about the defendant's future intentions.¹⁴³

140. See, e.g., *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328–29 (11th Cir. 2004); *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929–30 (7th Cir. 2003); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1015, 1018–19 (M.D. Tenn. 2005).

141. See *Fed'n of Adver. Indus. Representatives*, 326 F.3d at 930 & n.7 (collecting cases).

142. Although the *Smyth* plaintiffs may no longer have had standing to bring a suit challenging the prospective-only policy, this may not have been fatal to a potential challenge to the mootness decision. In *Laidlaw*, the Court noted that “there are circumstances in which the prospect that the defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.” 528 U.S. at 190. Cases like *Smyth*, in which the plaintiff's claim simultaneously implicates both private remedy and public interest, present complex issues around whether the plaintiff can continue to assert the broader public interest (that is, repeal of the policy rather than just a promise not to apply it to the plaintiffs) once the claim for an individual remedy has been satisfied. Resolving these complex issues that *Buckhannon* raises around standing, mootness, and the private attorney general is beyond the scope of this Article.

143. See, e.g., *Palmetto Props., Inc. v. County of Dupage*, 375 F.3d 542, 550–51 (7th Cir. 2004) (holding that the plaintiff's victory on the motion for partial summary judgment was sufficient to support a fee award even though the case was properly dismissed as moot when the defendant county changed its policy after the plaintiff won its motion); *Ailor v. City of Maynardville*, 368 F.3d 587, 600 (6th Cir. 2004) (finding no likelihood of recurrence of alleged environmental violations when an outdated wastewater treatment plant had been replaced by the time the plaintiffs filed their suit); *Fed'n of Adver. Indus. Representatives*, 326 F.3d at 929–30 (finding the case moot after the city repealed a challenged ordinance restricting advertising even though the city had twice amended the ordinance before repealing it and had

This factual contingency creates significant uncertainty, which is a practical problem for plaintiffs who must make litigation decisions about investing further resources without a clear sense of whether their fee recovery might be protected. Pragmatic concerns also make it difficult to reach the voluntary cessation question in the first place. To reach this issue, plaintiffs must invest potentially unrecoverable attorney time and expenses, be subject to strategic capitulation, and only then be in a position to raise the voluntary cessation argument. The considerable financial exposure and risk involved to even raise this issue suggests that this area of law will develop slowly.

While cases like *Smyth*, *Union of Needletrades*, and *John T.* 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 position in accordance with this injunctive relief.¹⁴⁴ 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

already proposed another sign-advertising ordinance to the city council); *Nat'l Wildlife Fed'n*, 404 F. Supp. 2d at 1018–19 (finding no likelihood of recurrence after the Army Corps of Engineers declared the at-issue wetlands were “waters of the United States” under its jurisdiction—the relief sought by plaintiffs—even though the defendant also stated, consistent with regulatory requirements, that it retained the authority to revise its decision if presented with new information and that its determination was valid only for a period of five years); *Hooper v. Morkle*, 219 F.R.D. 120, 124–25 (S.D. Ohio 2003) (finding case moot and no likelihood of recurrence when the city repealed the challenged rule and the plaintiff presented no evidence that the city intended to reenact the rule once the case was dismissed); *Yassky v. Kings County Democratic County Comm.*, 259 F. Supp. 2d 210, 215 (E.D.N.Y. 2003) (refusing to dismiss the action for mootness after the defendants repealed the challenged rule but made no commitment not to reenact the rule or something equivalent).

144. 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. See *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002); see also *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945–46 (D.C. Cir. 2005) (holding that a preliminary injunction could support a fee award after *Buckhannon*); cf. *Edmonds v. FBI*, 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. See *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002). The Eighth Circuit has drawn a further distinction between preliminary injunctions that are “sufficiently akin to final relief” to justify prevailing party status, and those that merely preserve the status quo, which it held are usually not sufficient to support a fee award. See *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). As this article goes to press, the Supreme Court is considering the conditions under which preliminary injunctive relief may confer prevailing party status. See *Wyner v. Struhs*, 179 Fed. Appx. 566 (11th Cir. 2006), cert. granted sub nom. *Sole v. Wyner*, 75 U.S.L.W. 3366 (U.S. Jan. 12, 2007) (No. 06-531).

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 include settlement agreements,¹⁴⁵ even though *Buckhannon* did not involve a settlement.¹⁴⁶ Courts generally agree, however, that settlements that allow the court to retain jurisdiction provide sufficient judicial imprimatur to support a fee award under *Buckhannon*.¹⁴⁷ As a result, plaintiffs must be very careful to structure

145. 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 n.5 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002); *see also Davy v. CIA*, 456 F.3d 162 (D.C. Cir. 2006) (holding that the 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); *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 a private settlement and the court retained jurisdiction to enforce the settlement); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165–66 (3rd Cir. 2002) (holding that a judicial order representing parties' stipulated settlement was sufficient to confer prevailing party status). 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 enforcement of the settlement. *See, e.g., Doe v. Boston Pub. Sch.*, 358 F.3d 20, 25 (1st Cir. 2004) (denying fee recovery where the claims were resolved by private settlement); *T.D. v. Lagrange Sch. Dist. No. 102*, 349 F.3d 469, 479 (7th Cir. 2003) (same); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 560–61 (3d Cir. 2003) (same); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 123–25 (2d Cir. 2002) (same).

146. The *Buckhannon* majority did not expressly hold that a private settlement is insufficient to support a fee award. The Court reasoned 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." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604–05 (2001). 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 be lacking" if the agreement is not "incorporated into [an] order of dismissal." *Id.* at 605 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*, 277 F.3d at 1134 n.5.

147. *See, e.g., Smalbein ex rel. Smalbein v. City of Daytona Beach*, 353 F.3d 901 (11th Cir. 2003); *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003); *John T.*, 318 F.3d at 560–61; *Richard S.*, 317 F.3d at 1087–88 (allowing fee recovery where the claim was resolved by private settlement and the court retained jurisdiction to enforce the settlement); *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315 (11th Cir. 2002). *But see Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 992–93 (8th Cir. 2003) (holding that court approval of a class action settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure (FRCP) was not sufficient to create a consent decree and therefore could not support a fee award).

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*.¹⁴⁸ In addition, the California Supreme Court has held that California courts may continue to award attorney’s fees to prevailing plaintiffs under state fee-shifting statutes based on the catalyst theory despite the U.S. Supreme Court’s decision in *Buckhannon*.¹⁴⁹ Nevertheless, these are exceptions, not the rule. *Buckhannon* still undermines the potential for fee awards for many fee-shifting provisions, and legislative attempts to override *Buckhannon* have not fared well.¹⁵⁰

148. See, e.g., *Ass’n of Cal. Water Agencies v. Evans*, 386 F.3d 879 (9th Cir. 2004) (allowing recovery of fees under the catalyst theory for an action brought under the Endangered Species Act of 1973); *Loggerhead Turtle v. County Council of Volusia*, 307 F.3d 1318, 1327 (11th 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 Adam Babich, *Fee Shifting After Buckhannon*, 32 ENVTL. L. REP. 10137 (2002); Silecchia, *supra* note 78; Marisa L. Ugalde, *The Future of Environmental Citizen Suits After Buckhannon* Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 8 ENVTL. LAW. 589 (2002).

149. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 147–52 (Cal. 2004) (interpreting CAL. CODE CIV. PROC. § 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; see also *Teeters v. Div. of Youth and Family Servs.*, 904 A.2d 747 (N.J. Super. Ct. App. Div. 2006) (allowing application of the catalyst theory to New Jersey state law claims). Once it becomes clear which states will retain the catalyst theory even after *Buckhannon*, it would be interesting to investigate variation between catalyst theory and noncatalyst theory states in private enforcement behavior.

150. Senator Russ 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. See *Settlement Encouragement and Fairness Act*, S. 3161, 107th Cong. (2002) (died in the judiciary committee); *Settlement Encouragement and Fairness Act*, S. 1117, 108th Cong. (2003) (incorporated into the *Civil Rights Act of 2004*, S. 2088, 108th Cong. (2004), which died in the Committee on Health, Education, Labor, and Pensions). The proposed *OPEN Government Act of 2005*, S. 394, 109th Cong. § 4 (2006), would have resurrected 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.

Examining the OPEN Government Act of 2005: Hearing Before the S. Subcomm. on the Judiciary, 109th Cong. (2005) (statement of Thomas M. Susman on behalf of Ropes & Gray, LLP), available at http://judiciary.senate.gov/print_testimony.cfm?id=1417&wit_id=4081.

II. 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 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 this Part 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 2004.¹⁵¹ This survey is 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 doctrinal developments, funding structures, and ethical obligations shape public interest practice.

Our study focuses on private organizations that use litigation, 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;

151. For more detail about the study's methodology, see Laura Beth Nielsen & Catherine Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1601–05 (2006).

and (2) involve at least one adjudicatory strategy.¹⁵² We hasten to acknowledge that defining public interest law is a notoriously difficult enterprise;¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ 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 4588 organizations, not all of which ultimately fit our definition. We then drew a random sample of 1200 organizations from the sampling frame and

152. 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 et al. eds., 1978) [hereinafter PUBLIC INTEREST LAW]. 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 Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004); Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79 (2007).

153. 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 & Stuart Scheingold eds., 1998) (discussing the difficulty of defining “cause lawyer”).

154. For earlier studies of public interest organizations, see NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND (1989); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); Joel F. Handler et al., *The Public Interest Law Industry*, in PUBLIC INTEREST LAW, *supra* note 152, at 42.

155. 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 sites; lists of organizations receiving funding from state Interest on Lawyer Trust Account (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.

focused our efforts on narrowing this group to only those organizations that met our criteria.¹⁵⁶ 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.¹⁵⁷ 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 included screening questions to ensure that the organization met our criteria for inclusion in the study; 57 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.¹⁵⁸

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

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

157. 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 nonrespondents and refusals. Two organizations completed the mail survey rather than the telephone format.

158. See John R. Sutton et al., *The Legalization of the Workplace*, 99 AM. J. SOC. 944, 952-53 (1994) (reporting that response rates in organizational studies range from 36 percent to 54 percent).

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 That <i>Buckhannon</i> Impedes the Organization’s Ability to Pursue Its Goals
Engages in Class Action Litigation	+
Effort Dedicated to Impact Litigation	+
Affected by Sovereign Immunity Cases	+
At-risk Practice Area	+
Co-counsels Cases	?
Conservative Political Orientation	?

Class Action Litigation. 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.

Impact Litigation. 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 changes in policy, rather than individual damages claims that insulate the organization against strategic capitulation.

Sovereign Immunity. The interplay between the Supreme 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*.

At-risk Practice Areas. 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.¹⁵⁹ 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 ex rel. Smyth v. Rivero*,¹⁶⁰ 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.

Co-counsel Relationships. 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.

Political Orientation. 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 wealthy conservative foundations, 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 that 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 Subparts 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 twofold. First, organizations that engage in litigation directed at systemic social change are more likely than others to report that they were negatively affected by the *Buckhannon* decision. Organizations that engage in impact litigation, litigate against

159. Although courts have held that *Buckhannon* does not apply to fee-shifting provisions in some environmental statutes, *Buckhannon* still threatens fee recovery in many types of environmental litigation. See generally Silecchia, *supra* note 78; Ugalde, *supra* note 148.

160. 282 F.3d 268 (4th Cir. 2002).

government actors, bring class actions, and work in the environmental, civil rights, or poverty areas were the most likely to report negative effects from this decision. Second, qualitative data from our survey indicate that *Buckhannon* affects far more than fee recovery. These data indicate that *Buckhannon* both discourages 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.¹⁶¹ *Buckhannon* had a negative impact on just over one third of the organizations we surveyed: 35 percent said that *Buckhannon* made it harder to pursue their objectives.¹⁶² It is not surprising that public interest organizations 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.¹⁶³

161. We asked our respondents whether the Supreme 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; to create the dichotomous dependent variable, that organization is grouped with organizations that reported no difference as a result of *Buckhannon*.

162. 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 constrained access to courts. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608 (2001). However, isolating the *Buckhannon* decision as the primary cause of this change would be very difficult.

163. Of those organizations that said *Buckhannon* did not affect their activity, 25 percent obtained no portion of their budget from attorney's fees.

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*.¹⁶⁴ Our independent variables include controls for organizational size and whether the organization took cases with the potential to generate fee awards.¹⁶⁵ We also examined several other independent variables, including the percent of organizational legal activities dedicated to impact litigation, and dummy variables¹⁶⁶ for engaging in class actions, co-counseling cases, and reporting negative consequences from the Supreme Court’s recent sovereign immunity decisions.¹⁶⁷ In addition, using the organization’s self report of its political orientation, we created a dummy variable indicating whether the organization was conservative.¹⁶⁸ We also measured whether the organization’s practice was in environmental, civil rights, poverty, consumer rights, economic liberalism, or

164. Technically, logistic regression is used to predict the logit, sometimes termed the log odds, which is calculated as $\ln(p/1-p)$, where \ln is the natural log function and 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 482–84 (2d ed. 1986).

165. 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 fifty-three employees, whereas the median is only twenty employees. This logarithmic transformation helps ensure that the larger organizations do not disproportionately influence the estimate of the effect for organizational size.

166. A dummy variable is a dichotomous variable having two values, one and zero, which represent categories to be compared for purposes of numerical analysis. For example, gender categories can be represented by a value of one if the respondent is female and a value of zero if the respondent is male for the purposes of determining whether being female is related to a dependent measure of interest in a regression analysis. ROYCE A. SINGLETON, JR. & BRUCE C. STRAITS, APPROACHES TO SOCIAL RESEARCH 561 (4th ed. 2005).

167. For each of these characteristics, the dummy variable is coded “1” if the characteristic is present and “0” if it is not.

168. Again, this variable was coded “1” for conservative organizations and “0” for all others.

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,¹⁶⁹ areas that we suspect may present more of a risk of strategic capitulation.

Table 2 reports the correlations among these variables, including the dependent variable. We emphasize, of course, that these correlations do not provide information about any potential causal relationships, but they do provide useful initial information about the relationships among these variables. Table 2 shows 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 the prediction 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.¹⁷⁰

169. 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 correlated 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.

170. Phi, Cramer's V, and the contingency coefficient, which are three other commonly used tests of association between nominal variables, yield the same significant relationships between the dichotomous variables and the dependent variable as are reported in Table 2 (data not shown).

TABLE 2: CORRELATIONS AMONG VARIABLES

	Buckhannon Made Harder	Potential for Fee Award	Log Organization Size	Ever Had Class Action	Sovereign Immunity	Percent Impact Litigation	At-risk Practice Area	Co-counsel	Conservative
Buckhannon Made Harder	1								
Potential for Fee Award	N=211 0.259**	1							
Log Organization Size	N=210 -0.019	N=219 0.119	1						
Ever Had Class Action	N=209 0.174*	N=217 0.091	N=219 0.232**	1					
Sovereign Immunity	N=178 0.499**	N=184 0.224**	N=184 0.129	N=185 0.419**	1				
Percent Impact Litigation	N=199 0.284**	N=203 0.137	N=202 -0.204**	N=172 0.147*	N=204 0.225**	1			
At-risk Practice Area	N=184 0.295**	N=189 0.161*	N=189 0.069	N=181 0.079	N=178 0.224**	N=190 -0.027	1		
Co-counsel	N=211 0.175*	N=219 0.307**	N=219 0.181**	N=185 0.402**	N=204 0.273**	N=190 0.255**	N=221 0.269**	1	
Conservative	N=209 -0.033	N=217 -0.085	N=216 -0.202**	N=183 -0.027	N=203 -0.135	N=189 0.324**	N=218 -0.306**	N=218 -0.123	1
	N=194	N=202	N=201	N=169	N=189	N=175	N=203	N=201	N=203

* Correlation is significant at p < 0.05 level (2-tailed).

** Correlation is significant at p < 0.01 level (2-tailed).

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 that *Buckhannon* negatively affected its ability to pursue its goals.¹⁷¹ For ease of interpretation, in addition to the coefficient (B) and the standard error (SE), we have also included the odds ratio 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.¹⁷²

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* after controls for organizational size and fee potential 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, although Model B suggests that this effect is mediated by other factors.

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

171. AGRESTI & FINLAY, *supra* note 164, at 482.

172. That is, the odds of the category coded "1" compared to the category coded "0."

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 organization that invested only 20 percent of its legal activities into impact litigation to report negative effects from *Buckhannon*.¹⁷³ Practicing in an at-risk practice area also strongly predicts negative effects from *Buckhannon*; this model estimates that 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 have significant negative effects, suggesting that these relationships may mitigate *Buckhannon*'s harmful impact in some instances. It may be that in some instances co-counsel relationships insulate the organization from exposure to fee loss due to *Buckhannon*, such 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 finding.¹⁷⁴ 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—are all strong, robust predictors of an organization's perceived vulnerability to *Buckhannon*.¹⁷⁵

173. 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 (in 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 $\exp(.017)60 = 2.77$.

174. We attempted to investigate this finding further by including an interaction term in the model interacting at-risk practice area with co-counsel relationships. Relatively high standard errors indicated sparse data and multicollinearity issues, so we removed the offending interaction term from the final model. Multicollinearity refers to the situation in which there are strong intercorrelations among the independent variables.

175. 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.

TABLE 3: LOGISTIC REGRESSION COEFFICIENTS PREDICTING NEGATIVE EFFECTS FROM BUCKHANNON

INDEPENDENT VARIABLES	MODEL A			MODEL B			MODEL C			MODEL D		
	B	SE	Odds Ratio	B	SE	Odds Ratio	B	SE	Odds Ratio	B	SE	Odds Ratio
Potential for Fee Award	1.739**	0.649	5.691	1.033	0.700	2.811	1.247	0.716	3.478	1.550*	0.741	4.710
Log Organization Size	-0.192	0.146	0.826	-0.077	0.174	0.926	-0.167	0.179	0.846	-0.090	0.190	0.914
Ever Had Class Action	0.841*	0.353	2.319	-0.074	0.451	0.928	-0.052	0.461	0.949	0.390	0.512	1.477
Sovereign Immunity				2.046***	0.427	7.737	1.921***	0.439	6.828	1.904***	0.449	6.716
Percent Impact Litigation				0.015**	0.006	1.015	0.017**	0.006	1.017	0.022**	0.007	1.023
At-risk Practice Area							2.326**	0.896	10.240	2.857**	0.981	17.411
Co-counsel Cases										-1.423*	0.649	0.241
Constant	-1.909**	0.736	0.148	-2.378**	0.826	0.093	-4.413***	1.189	0.012	-4.711***	1.256	0.009
N		176			165			165			164	
Chi-square (Degrees of Freedom)		16.883** (3)			54.993*** (5)			64.568*** (6)			68.806*** (7)	
-2 Log Likelihood		220.495			168.622			159.047			153.028	
Cox & Snell R-square		0.091			0.283			0.324			0.343	
Nagelkerke R-square		0.124			0.382			0.436			0.462	

* p < 0.05
 ** p < 0.01
 *** p < 0.001

2. Qualitative Data

Our multivariate analysis indicates that public interest organizations in fact do report fallout from *Buckhannon*, and that organizations that engage in classic social reform litigation are more likely than others to report that they were 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.¹⁷⁶ 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.¹⁷⁷

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. One respondent described this difficulty:

[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.¹⁷⁸

176. The numbers cited after each quote are the observation identification numbers for the organizations in our dataset.

177. Organization No. 2316.

178. Organization No. 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 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 come to an agreement without a court judgment. . . . So it's lengthening the process and causing more work.¹⁷⁹

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.¹⁸⁰

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.¹⁸¹

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.¹⁸²

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.¹⁸³

[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.¹⁸⁴

179. Organization No. 2237.

180. See Babich, *supra* note 148; Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorney's Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 521 (neither party has the incentive to settle); Ugalde, *supra* note 148, at 614 (describing increased litigation and crowded dockets).

181. Organization No. 2146.

182. Organization No. 2058.

183. Organization No. 2115.

184. Organization No. 2181.

In addition, organizations that 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."¹⁸⁵

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*

185. Organization No. 2191.

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.

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.¹⁸⁶ This attack includes doctrinal developments regarding sovereign immunity,¹⁸⁷ legal challenges to the constitutionality of Interest on Lawyers Trust Account (IOLTA) funds,¹⁸⁸ legislative restrictions on the activities of legal services lawyers,¹⁸⁹ and political campaigns to limit the ability of law school clinics to represent clients who challenge established interests.¹⁹⁰ 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 behind 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 are therefore less likely to arouse public opposition or protest. *Buckhannon* fits this pattern.¹⁹¹ As one commentator put it, *Buckhannon* is like the neutron bomb: It leaves the infrastructure still standing but kills the heart of statutes that rely on fee shifting to encourage enforcement.¹⁹²

186. See, e.g., Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537 (2003); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003); Jed Rubenfeld, *The Anti-Discrimination Agenda*, 111 YALE L.J. 1141 (2002).

187. See Chemerinsky, *supra* note 186, at 540–41; Karlan, *supra* note 186, at 188–95; Rubenfeld, *supra* note 186, at 1148–52.

188. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2002); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998); Luban, *supra* note 186, at 226–36.

189. See Luban, *supra* note 186, at 220–26; Quigley, *supra* note 44.

190. See Luban, *supra* note 186, at 236–40.

191. See Chemerinsky, *supra* note 186, at 547; Karlan, *supra* note 186, at 205–08; Luban, *supra* note 186, at 243–45.

192. Margaret Graham Tebo, *Fee-Shifting Fallout*, ABA J., July 2003, at 54, 54.

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 policymaking for disenfranchised groups or unpopular causes.¹⁹³ The substantive successes of these organizations have made them targets for political campaigns to undermine their financial support.¹⁹⁴ *Buckhannon* seems 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, the procedural attack on civil rights enforcement is likely to have a particular political valence.

We believe this interpretation is definitely part of the story, but we also think *Buckhannon* has even broader implications. We note that 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, to the extent there are more progressive than conservative public interest law organizations, this decision weighs more heavily on progressive causes; nevertheless, 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,¹⁹⁵ and in challenges seeking to prohibit implementation of affirmative action programs.¹⁹⁶ These cases, which seek policy changes or injunctive relief, are the kind of actions that are now structurally vulnerable to *Buckhannon*.

To us, *Buckhannon's* broad effects across the political spectrum of rights litigation indicate that the consequences of this decision extend beyond the

193. See Handler, *supra* note 154, at 44–45.

194. See ARON, *supra* note 154, at 14–21 (discussing the Reagan Administration campaign to defund progressive public interest activities).

195. See HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION (2005) (discussing the role of conservative Christian public interest law firms in religious freedom litigation).

196. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003) (Center for Individual Rights); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Mountain States Legal Foundation); see also JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 47–52 (1996) (discussing the role of conservative public interest organizations in challenges to affirmative action).

political struggles between left and right. *Buckhannon* and the larger attack on rights enforcement also may signal an ominous shift of power away from private enforcement of rights toward government power both to resist civil rights mandates and to control the enforcement of these rights. 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 will all 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, a state may feel free to allow litigation to drag on and on, confident that strategic capitulation will protect it against an adverse judgment and a fee award. In short, the 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?

In addition, to the extent that *Buckhannon* hamstringing the private attorney general, enforcement decisions for a variety of statutes, not limited to civil rights statutes, 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 the structure of incentives for enforcement, the sheer magnitude of the task is daunting. If *Buckhannon* reduces private enforcement efforts, as 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. Thus, *Buckhannon* may represent a much broader deregulatory judicial policy despite its guise as a mundane application of mere statutory interpretation. Even if an infusion of funds did occur, such a change would have the practical effect of shifting the costs of

enforcement to taxpayers and away from private defendants who failed to comply with the law, because, of course, government enforcement actions can be “Buckhannoned” too.¹⁹⁷ In short, such a retooling of 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.

We view such a shift as normatively undesirable, and we note that the Supreme Court’s fee-shifting decisions generally have not questioned the desirability or importance of the private attorney general in enforcing the law. Instead, the Court has discounted 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 preserving the federal system of rights enforcement through the private attorney general.

197. Government officials, of course, can also be defendants who must then pay fee awards from public funds. Far from disapproving of this arrangement, Congress noted that government defendants “have substantial resources . . . including the taxes paid by the plaintiffs themselves” which “provide an ample base from which fees can be awarded” H.R. REP. NO. 94-1558, at 7 (1976).