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## VOTING RIGHTS ROLLBACK: THE EFFECT OF *BUCKHANNON* ON THE PRIVATE ENFORCEMENT OF VOTING RIGHTS

BRIAN J. SUTHERLAND\*

### I. INTRODUCTION

The effectiveness of the Voting Rights Act<sup>1</sup>—the law that Dr. Martin Luther King, Jr., saw the passage of as “a shining moment in the conscience of man”<sup>2</sup>—is in serious jeopardy. There has been a dramatic rollback in all areas of civil rights enforcement by the United States Department of Justice during the Bush administration,<sup>3</sup> but the Department’s record with respect to voting rights enforcement has been especially contentious.<sup>4</sup> Beyond the allegations of politicization, both in general<sup>5</sup> and with respect to the Section 5<sup>6</sup> preclearance pro-

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1. Elective Franchise Enforcement of Voting Rights, 42 U.S.C. § 1973 (2000).

2. NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR., AND THE LAWS THAT CHANGED AMERICA 324 (Houghton Mifflin 2005).

3. See generally, The Dep’t of Pub. Policy of the Leadership Conference on Civil Rights Educ. Fund, *The Bush Administration Takes Aim: Civil Rights Under Attack*, [http://www.civilrights.org/publications/reports/taking\\_aim/](http://www.civilrights.org/publications/reports/taking_aim/) (last visited Aug. 20, 2007); WILLIAM L. TAYLOR ET AL., *The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration*, [http://www.americanprogress.org/issues/2007/03/pdf/civil\\_rights\\_report.pdf](http://www.americanprogress.org/issues/2007/03/pdf/civil_rights_report.pdf) (last visited Aug. 20, 2007).

4. See, e.g., TAYLOR, *supra* note 3, at 32; Joseph D. Rich, Op-Ed., *Bush’s Long History of Tilting Justice*, L.A. TIMES, Mar. 29, 2007.

5. See, e.g., Karen Tumulty and Massimo Calabresi, *Inside the Scandal at Justice*, TIME MAGAZINE, May 21, 2007, at 44. The tumult over politicization at the Department of Justice appears to have contributed substantially to the resignation of Attorney General Alberto Gonzales and seriously damaged the DOJ’s reputation. See, e.g., Donna Leinwand, *Gonzales’ Successor to Inherit a Fractured Agency: High Vacancies, Low Morale Cited at Justice*, USA TODAY, Aug. 29, 2007, at 6A.

6. 42 U.S.C. § 1973(c). Section 5 provides that whenever certain covered jurisdictions “enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect” on the date that coverage began, the jurisdiction must first secure preclearance for that voting change. *Id.* Preclearance requires either a submission of the change to the United States Attorney General or the bringing of a declaratory judgment action in the United States District Court for the District Columbia, with a resultant determination by either that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or membership in a language minority group. *Id.*

cess,<sup>7</sup> one public interest organization has noted that the enforcement of minority voting rights under Section 2<sup>8</sup> of the Act has come to “a virtual standstill.”<sup>9</sup> During the Bush administration, the Department has brought fewer Section 2 cases and has brought them at a lower rate than any other administration since 1982.<sup>10</sup> This lack of enforcement has been at the expense of African-Americans and American Indians in particular.<sup>11</sup>

The government’s failure to adequately enforce the Voting Rights Act and other voting rights protections in general renders private enforcement by individuals imperative. Congress itself has been acutely aware of this reality for decades, recognizing the “sound policy” of authorizing private enforcement because “Congress depends heavily upon private citizens to enforce the fundamental rights involved.”<sup>12</sup> During the hearings on the latest reauthorization of the Voting Rights Act,<sup>13</sup> the House Committee on the Judiciary recognized again that private enforcement is crucial to safeguarding minority voting rights.<sup>14</sup> With respect to Section 5, for example, the Committee observed that “the Department of Justice has no ‘systematic way to monitor all such jurisdictions to ensure that all changes are submitted for preclearance.’”<sup>15</sup> For this reason, “much of the burden of enforcing Section 5 over the years has fallen to private citizens whose assistance

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7. TAYLOR, *supra* note 3, at 36-38; Dan Eggen, *Gonzalez Defends Approval of Texas Redistricting by Justice*, WASH. POST, Dec. 3, 2005 (reporting on allegations of politicization stemming from a decision by the leadership of the Justice Department to overrule the recommendation of career staff personnel that redistricting in Texas not be precleared under Section 5); Dan Eggen, *Justice Dep’t Staff Opinions Banned in Voting Rights Cases*, WASH. POST, Dec. 10, 2005 (reporting on a change in practice at the Department of Justice preventing staff attorneys from making recommendations regarding preclearance of voting changes).

8. 42 U.S.C. § 1973(a). (prohibits states and political subdivisions from imposing voting qualifications or prerequisites to voting, or standards, practices, or procedures in a manner that results in denial or abridgment of the right to vote on the basis of race, color, or membership in a language minority group). A violation is established if, “based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* at (b). See also *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986).

9. TAYLOR, *supra* note 3, at 40.

10. TAYLOR, *supra* note 3, at 40.

11. See *id.* at 40-42 (“whereas eight of the 22 Section 2 cases filed in the last six years of the Clinton administration were on behalf of African American citizens, and six were on behalf of American Indians, only two Section 2 cases of any type have been filed by this administration on behalf of African American citizens and none has been filed on behalf of American Indian citizens.”). *Id.*

12. S. REP. NO. 94-295, at 40 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 807.

13. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. Law 109-246, 120 Stat. 577 (2006).

14. H.R. REP. 109-478, at 41-42 (citing Protecting Minority Voters: The Voting Rights Act at Work 1982-2005 (The Nat’l Comm’n on the Voting Rights Act Feb. 2006)).

15. *Id.* at 41.

has been *critical* to ensuring that discriminatory changes are stopped before they negatively affect minority voters.”<sup>16</sup>

Private enforcement of voting rights is nearly impossible, though, unless attorney’s fees can be awarded to successful plaintiffs;<sup>17</sup> often, “the citizen who must sue to enforce the law has little or no money with which to hire a lawyer.”<sup>18</sup> Where there is no monetary recovery from which lawyers may earn a portion on contingency, there must be “fees which are adequate to attract competent counsel.”<sup>19</sup> However, the United States Supreme Court’s decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*<sup>20</sup> severely restricted the award of statutory attorney’s fees and caused a great deal of lamentation throughout the world of public interest litigation.<sup>21</sup>

This article contextualizes the crisis created by *Buckhannon* with reference to voting rights specifically. Part II briefly summarizes the background on attorney’s fees and the sea of change that *Buckhannon* brought about. Part III then builds on other valuable commentary to explain how voting rights cases, like other kinds of public interest litigation, are by their nature uniquely susceptible to *Buckhannon*. Next, Part IV illustrates these features by reference to some of the extant case law in order to concretely identify the obstacles to voting rights enforcement created by *Buckhannon*. Finally, Part V offers additional remarks on how *Buckhannon* poses a threat to voting rights and urges a congressional solution in order to avoid evisceration of the fundamental protections of the Voting Rights Act and other civil rights laws.<sup>22</sup>

## II. STATUTORY ATTORNEY’S FEES AND *BUCKHANNON*’S CRUSHING BLOW

The award of attorney’s fees to a successful litigant is itself a departure from the general “American Rule” that litigants must bear their

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16. *Id.* at 42 (emphasis added).

17. See, e.g., 1975 U.S.C.C.A.N. at 807 (“[F]ee awards are a necessary means of enabling private citizens to vindicate these Federal rights.”).

18. S. REP. NO. 94-1011, at 1 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5910.

19. *Id.* at 5913.

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

21. See Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 2-3, n.9 (setting forth dozens of articles dealing with various substantive contexts, the titles of which demonstrate “the range of fields in which *Buckhannon* triggered alarm”).

22. See also Silecchia, at 77, n.n. 426-27 (citing and discussing scholarship in support of legislative responses to *Buckhannon*).

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own costs of court.<sup>23</sup> However, although this general rule has endured for most purposes in American courts since the earliest days of the Republic,<sup>24</sup> several judicial exceptions were developed<sup>25</sup> by courts exercising their equitable powers to achieve justice in certain types of cases.<sup>26</sup> One such exception—the “private attorney general doctrine”—developed in the context of citizen suits to enforce civil rights laws,<sup>27</sup> and provided a basis upon which to award fees to private parties who enforced congressional policies of the utmost importance on their own behalf as well as on behalf of the public interest.<sup>28</sup> The award of reasonable attorney’s fees in such cases was sound policy because “[i]f successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.”<sup>29</sup>

However, in *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>30</sup> the Supreme Court invalidated the private attorney general doctrine as such, and severely restricted the authority of courts to fashion bases upon which to award fees.<sup>31</sup> In *Alyeska*, an environmental group

23. See generally Robin Stanley, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party Goes the Spoils . . . And the Attorney’s Fees!*, 36 AKRON L. REV. 363, 365-67 (2003). The American Rule is contrasted with the English, or “loser pays,” which is not actually as simple as it sounds but rather involves a somewhat complex institutional framework that has grown up around the need to spread the financial obligations of litigation imposed by the English Rule. See *id.* David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMP. L. REV. 583, 606-07 (2004).

24. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247-50 (1975) (citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), in which the Supreme Court “appears to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys’ fees in federal courts,” and describing early legislative exceptions to the rule).

25. See *id.* at 275 (Marshall, J., dissenting) (identifying the assessment of attorney’s fees for willful violation of a court order, for bad faith or oppressive litigation practices, and where the successful litigants have created a common fund for recovery or extended a substantial benefit to a class); Stanley, *supra* note 23, at n.26 and accompanying text (citing *Alyeska*, 421 U.S. at 241, 247, 257-59); Root, *supra* note 23, at 585-87 (identifying six categories of exceptions to the American Rule).

26. *Id.* at 274 (Marshall, J., dissenting) (“[A]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts”) (citing *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 164 (1939)).

27. See, e.g., Armand Derfner, *Background and Origin of the Civil Rights Attorney’s Fee Awards Act of 1976*, 37 URB. LAW. 653-55 (2005).

28. See, e.g., *Fairley v. Patterson*, 493 F.3d 598, 606 (5th Cir. 1974) (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968)).

29. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402 (1968).

30. 421 U.S. 240 (1975).

31. *Id.* at 263 (“[C]ongressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys’ fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.”). *Id.*

brought suit against the Secretary of the Interior, alleging that he was set to issue permits for the construction of an oil pipeline in Alaska in violation of the National Environmental Protection Act and the Mineral Leasing Act.<sup>32</sup> In the ensuing litigation, the State of Alaska and the company that planned to build the pipeline intervened, and injunctive relief against them was eventually obtained.<sup>33</sup> Congress then acted to amend the Mineral Leasing Act in order to allow the construction,<sup>34</sup> and the lower court awarded fees to the plaintiffs under the private attorney general doctrine.<sup>35</sup> The Supreme Court reversed and dispensed with any “roving authority”<sup>36</sup> for courts to award fees without congressional guidance. Proceeding from the history of the American Rule and various specific grants of statutory authority to award fees in certain types of cases,<sup>37</sup> the Court concluded that “under this scheme of things, it is apparent that the circumstances under which attorneys’ fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.”<sup>38</sup>

Congress responded to *Alyeska* by enacting the Civil Rights Attorney’s Fees Award Act of 1976 (CRAFFA).<sup>39</sup> Designed to remedy the “anomalous gaps” in the civil rights laws created by *Alyeska*,<sup>40</sup> the CRAFFA provided authority for courts to award reasonable attorney’s fees<sup>41</sup> to “prevailing parties”<sup>42</sup> in suits brought to enforce certain

32. *Id.* at 242-43 (citing 30 U.S.C. § 185, 82 Stat. 852, 42 U.S.C. § 4321 *et seq.* (NEPA)).

33. *Id.* at 243-44.

34. *Id.* at 244-45.

35. *Id.* at 245-46.

36. *Id.* at 260.

37. *Id.* at 247-261.

38. *Id.* at 261.

39. Pub. Law. No. 94-559, 90 Stat 2641, codified at 42 U.S.C. § 1988.

40. 1976 U.S.C.C.A.N. at 5911.

41. The determination of what is a “reasonable attorney’s fee” was derived from the section of the MODEL CODE OF PROF’L RESPONSIBILITY, R. 2-106, now MODEL CODE OF PROF’L RESPONSIBILITY R. 1.5 (2007). *See also* Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983):

The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Id.* (citing Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974), *cited in* S. REP. NO. 94-1011, at 4 (1976) *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5013).

42. S. REP. NO. 94-1011, at 1 (1976) *as reprinted in* 1976 U.S.C.C.A.N. 5908-09. However, because parties bringing suit to vindicate fundamental rights “should not be deterred from bringing good faith actions” to do so, “such a party, if unsuccessful, could be assessed his opponent’s fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes.” *Id.* at 5912. This rule, known as “one-way fee shifting,” is utilized in various fee-shifting statutes and is controversial in some contexts, for though it generally confers the benefits of added monitoring, deterrence and increased compensation, it may also risk over-

civil rights acts. Thus, the CRAFFA ensured that these protections would not become “mere hollow pronouncements,”<sup>43</sup> but instead would continue to have efficacy through private enforcement. The “prevailing party” language of the CRAFFA was the same as that included in many other important public justice mandates, including the Voting Rights Act,<sup>44</sup> and has been included in many others since.<sup>45</sup> Though some narrowing interpretations of the term “prevailing party” began to develop later,<sup>46</sup> courts generally adhered to the purpose and spirit of the provisions, which provided that parties should be considered “prevailing” when they “vindicate important rights,” sometimes “without formally obtaining relief.”<sup>47</sup> The most important example of

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deterrence and be inefficient at times. See generally Harold J. Krent, *Explaining One-Way Fee-Shifting*, 79 VA. L. REV. 2039 (1993).

43. *Id.* at 5913.

44. 42 U.S.C. § 1973l(e) (West Supp. 2007) (providing for reasonable attorney’s fees awards to prevailing parties in suits to enforce the fifth and fifteenth amendments to the United States Constitution). In fact, the CRAFFA grew out of hearings and testimony taken in 1973 and incorporated into an amendment that was passed as part of the Extension and Amendments of the Voting Rights Act in 1975. S. REP. 94-1011, at 2, 1976 U.S.C.C.A.N. 5908, 5909. “Because of the time pressure to pass the Voting Rights Amendments, the Senate took action on the House-passed version of the legislation. S. 1279 was not taken up on the Senate floor.” *Id.* Indeed, the identity of § 1973l and § 1988 are evidenced by the almost completely identical provisions in the Senate Reports accompanying them. Compare S. REP. NO. 94-1011 (1976) as reprinted in 1976 U.S.C.C.A.N. 5908 with S. REP. NO. 94-295 (1975) as reprinted in 1975 U.S.C.C.A.N. 774.

45. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (stating that there are over 150 federal fee-shifting statutes). See also *Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (Brennan, J., dissenting) (listing over 100 such statutes in an appendix). See generally J. Douglas Klein, *Does Buckhannon Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond*, 13 DUKE ENVTL. L. & POL’Y F. 99, 105-08 (2002) (noting, for example, that fees are awarded under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2) (2000), if the plaintiff “finally prevails,” and under the Clean Air Act, 42 U.S.C. § 7607(f) (2000), “whenever [the court] determines that such an award is appropriate”). Many fee-shifting provisions include the phrase “prevailing party,” but other formulations of what it means to be a successful litigant entitled to attorney’s fees have been employed as well. See generally *id.* The differing language has allowed different conclusions as to whether *Buckhannon* applies to fee awards under certain statutes, though of course that argument is difficult to make with respect to the fee provision applicable to the Voting Rights Act because of its provenance. See *id.* See also *supra* note 44.

46. See, e.g., *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (holding that civil rights plaintiffs who successfully appealed a directed verdict for defendants and won several discovery motions were not “prevailing parties” because they did not prevail on the merits of any of their claims); *Rhodes v. Stewart*, 488 U.S. 1, 203-04 (1988) (holding that a plaintiff is not a “prevailing party” for purposes of § 1988, even if she or he obtains a declaratory judgment, if it does not affect the behavior of the defendant toward the plaintiff). See also Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1096-98 (2007) (“Since *Alyeska*, a second, more subtle erosion of fee-shifting provisions has come from the courts under the guise of promoting settlement), (citing and discussing *Chesney*, 473 U.S. 1 (1985), and *Evans v. Jeff D.*, 475 U.S. 717 (1986)).

47. S. REP. NO. 94-1011, at 1 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5912 (emphasis added); S. REP. NO. 94-295, at 41 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 808 “In appropriate circumstances, counsel fees under sections 402 and 403 may be awarded pendente lite.” (citation omitted). *Id.* Such awards are especially appropriate where a party has prevailed on an

such adherence to this principle was the “catalyst theory,” whereby a plaintiff could be awarded attorney’s fees without obtaining a judgment, so long as she achieved the desired result of the suit by bringing about a voluntary change in the defendant’s behavior.<sup>48</sup> The theory recognized a plaintiff’s success if she proved that she had obtained “some of the benefit sought” in the litigation, that the claim was colorable and not frivolous, and that the lawsuit was a substantial or significant cause of the defendant’s change in conduct.<sup>49</sup> Thus, by acting as the “catalyst” for the defendant’s change and prompting compliance with important public policies, the plaintiff became a “prevailing party” entitled to reasonable attorney’s fees.<sup>50</sup>

Then came *Buckhannon*. The case involved a company that operated nursing homes and assisted living facilities in West Virginia.<sup>51</sup> Several such facilities failed fire inspections because state law prohibited them from housing persons who could not escape without assistance in the event of a fire.<sup>52</sup> After the State sent letters ordering the facilities to close, the company, one of the residents, and an organization brought suit against the State Department of Health and Human Services, alleging that the state law requirements violated the Fair Housing Amendments Act (FHAA)<sup>53</sup> and the Americans with Disabilities Act (ADA).<sup>54</sup> While the litigation was pending, the West Virginia Legislature passed bills that amended the state law and effectively mooted the controversy, and the defendant obtained a dismissal on that basis.<sup>55</sup> Reasoning that it had been a catalyst for enforcing West Virginia’s compliance with federal law,<sup>56</sup> the plaintiffs then sought attorney’s fees under the FHAA and ADA.<sup>57</sup> However,

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important matter in the course of litigation, even when he ultimately does not prevail on all issues (citation omitted). *Id.* Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief (emphasis added) *Id.*).

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

49. *See, e.g., Buckhannon*, 532 U.S. at 627-28 (Ginsburg, J., dissenting) (citing circuit court opinions for the rules). *See also id.* at 610 (Rehnquist, J.) (stating the catalyst theory as requiring the inquiries of “whether the claim was colorable rather than groundless; whether the lawsuit[*t*] was a substantial rather than an insubstantial cause of the defendant’s change in conduct; whether the defendant’s change in conduct was motivated by the plaintiff’s threat of victory rather than the threat of expense.”).

50. *Id.* at 628 (Ginsburg, J., dissenting).

51. *Buckhannon*, 532 U.S. at 600 (Rehnquist, J.).

52. *Id.*

53. *Id.* at 601 (citing Fair Housing Amendments Act of 1988, 102 Stat. 1619 (1988) (codified at 42 U.S.C. § 3601)).

54. *Id.* (citing Americans with Disabilities Act of 1990, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101)).

55. *Id.*

56. *See supra* notes 47-49 and accompanying text.

57. *Id.* at 601-02.



the Supreme Court unequivocally rejected the catalyst theory as a permissible basis for the award of attorney's fees under the Acts<sup>58</sup> and, in doing so, dramatically altered the landscape of private civil rights enforcement and public interest litigation.

Instead, the *Buckhannon* Court held that to be a prevailing party, a litigant must be awarded some relief on the merits by a court.<sup>59</sup> This could be a favorable judgment, or even a settlement enforced through a consent decree, so long as it is a "court-ordered change in the legal relationship between the plaintiff and the defendant"<sup>60</sup>—a "material change"<sup>61</sup> in that relationship that bears sufficient "judicial imprimatur."<sup>62</sup> The Court rejected the argument that without the catalyst theory, nothing would prevent defendants from unilaterally mooted litigation to avoid a judgment and fee award.<sup>63</sup> Instead, the catalyst theory itself, if retained, might deter legal conduct,<sup>64</sup> and in any event, the fear of "mischievous defendants" who would moot litigation to avoid fees "would only materialize in claims for equitable relief," because as long as there is a claim for damages, voluntary changes will not moot a case.<sup>65</sup> "Even then," the Court stated:

[I]t is not clear how often courts will find a case mooted [since] '[i]t is well-settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice,' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'<sup>66</sup>

After *Buckhannon*, commentators immediately echoed Justice Ginsburg's dissent,<sup>67</sup> observing that the majority's holding contradicted the congressional intent underlying fee-shifting statutes<sup>68</sup> and that the new rule had the potential to severely curtail the private enforcement of important public policies.<sup>69</sup> Yet, in the years since the

58. *Id.* at 605.

59. *Id.* at 601-02.

60. *Id.* at 604 (quoting *Texas State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

61. *Id.*

62. *Id.* at 605.

63. *Id.* at 608.

64. *Id.*

65. *Id.* at 608-09.

66. *Id.* at 609 (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.* 528 U.S. 167, 189 (2000)).

67. *See id.* at 622-43.

68. *See, e.g., Leading Case*, 115 HARV. L. REV. 457, 467 (2001); Stanley, *supra* note 23, at 392-93.

69. *See, e.g., Aimee McFerren, Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources: The Supreme Court's Latest Assault on Prevailing Plaintiffs Eliminates the Catalyst Theory of Fee-Shifting*, 41 BRANDEIS L.J. 155, 173-76 (2002). Kyle A. Loring, *The Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation*, 43 B.C. L. REV. 973, 999-1008 (2002).

Court's decision, additional commentary<sup>70</sup> and empirical evidence<sup>71</sup> have begun to emerge, demonstrating conclusively that these initial fears were well-founded.<sup>72</sup> One recent contribution in particular<sup>73</sup> has called into question the empirical assumptions made by the *Buckhannon* majority<sup>74</sup> and has identified several structural features of public interest litigation that place it at the mercy of *Buckhannon*'s brutal bright-line rule.<sup>75</sup>

*Buckhannon* comes down hardest on enforcement actions and complex impact litigation against government actors. While these cases may vindicate the rights of many people by reforming governmental policies and practices and thereby producing benefits distributed broadly throughout society, the costs often outweigh the potential gain for any single individual.<sup>76</sup> Likewise, these cases are brought against the government to change policies or procedures that will realistically only be addressed by private plaintiffs or government actors themselves, who for various reasons fail to engage in adequate enforcement activity.<sup>77</sup> Finally, recurring legal issues in these kinds of

70. See *id.* at notes 8 and 9 (citing several dozen articles).

71. See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1116-34 (2007). The authors conducted a national survey of 221 public interest organizations in 2004, inquiring into their mission, budget, structure, goals, and activities with the aim of assessing whether the organization was negatively affected by *Buckhannon*. See *id.* at 1116-1118.

72. See *id.* at 1120-21. On the basis of both qualitative and quantitative analyses, the authors report as their central findings that (1) "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," and (2) "qualitative data [ . . . ] indicate[s] that *Buckhannon* affects far more than fee recovery." *Id.*

73. See generally *id.*

74. *Id.* at 1103 (identifying the two empirical assumptions made by the *Buckhannon* majority as (1) that "last-minute changes of position by defendants to avoid fees are unlikely to be much of a problem," and (2) that doing away with the catalyst theory will not deter plaintiffs from bringing enforcement actions).

75. *Id.* at 1104, 1111.

76. *Id.* at 1095 (citing Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 237-39). See also Hensley v. Eckerhart, 461 U.S. 424, 445 n.5; Thomas D. Rowe, Jr., *The Legal Theory of Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662 (1982) (if there were no fee-shifting, "the cost to any private party of conducting the litigation may well exceed any gains he can expect, even though the total gain to all beneficiaries may greatly exceed the costs . . . potential plaintiffs may well refrain from bringing socially beneficial suits because the gains would not sufficiently further their private interests). See also Thomas D. Rowe, Jr., *The Legal Theory of Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662 (1982) (setting forth several specific rationales for fee-shifting).

77. Albiston & Nielson, *supra* note 71 at 1104, 1089-90 n.14 (noting that private parties bring more than 90% of suits under civil rights and environmental protection statutes). See, e.g., Michael Selmi, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1405 (1998) (demonstrating with empirical analysis that the government tends to focus on smaller, individual civil rights cases rather than cutting-edge issues, lacks clear enforcement priorities, and succumbs to political pressure, and suggesting that "the

cases play right into defendants' hands under *Buckhannon* and allow them to unilaterally moot the litigation to avoid fees—what one set of scholars calls “strategic capitulation.”<sup>78</sup> All of this seriously undermines the system of private enforcement of various public justice contexts,<sup>79</sup> and private voting rights enforcement is no exception, but rather an exemplar of just how disastrous a decision *Buckhannon* is.<sup>80</sup>

### III. THE SUSCEPTIBILITY OF VOTING RIGHTS LITIGATION TO *BUCKHANNON*

One of the significant ways in which *Buckhannon* impacts voting rights litigation stems from the thing that voting rights cases share with other kinds of public interest cases—the usual circumstance of the plaintiffs. Attorney's fees awards are generally necessary to facilitate the enforcement of public interest mandates for three reasons: (1) because individual enforcement is disincentivized when its benefits are collective,<sup>81</sup> (2) because economic incentives are necessary to maximize the quality of private enforcement,<sup>82</sup> and (3) because litigation of this kind is often cost-prohibitive for those who seek to vindicate these important rights and public policies.<sup>83</sup> However, this is incalculably more compelling in the voting rights context because deprivation of the right to vote is intricately linked with socio-economic disadvantage and discrimination.<sup>84</sup> Accordingly, victims of voting discrimination

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government is inherently a weak enforcer of civil rights, and that it may be time for it to cede its role as a primary enforcement agency”).

78. Albiston and Nielsen, *supra* note 71, at 1104.

79. *Id.* at 1091. And there is all the reason in the world to protect and enhance the system of private enforcement, given that it “decentralizes enforcement decisions, allows disenfranchised interests access to policymaking, . . . helps insulate enforcement from capture by established interests[, and] is also less expensive for taxpayers because it does not place the cost of enforcement solely upon government actors.” *Id.* at 1090.

80. See *supra* notes 3-11 and accompanying text.

81. See *supra* note 74 and accompanying text.

82. See, e.g., *City of Burlington v. Dague*, 505 U.S. 557, 568-69 (1992) (Blackmun, J., dissenting).

The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation. If federal fee-bearing litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation and public interest lawyers who, by any measure, are insufficiently numerous to handle all the cases for which other competent attorneys cannot be found.

*Id.*

83. See, e.g., *Rowe*, *supra* note 76, at 663-65; *Dague*, 505 U.S. at 568, (citing H.R. REP. NO. 94-1558, at 1 (1976) and S. REP. NO. 94-1011, at 2 (1976)).

84. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986) (“[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”); John S. Wills, *Statistical Pools and Electoral Success in Vote-Dilution Cases*, 1995 U. CHI. LEGAL F. 527,

are more likely to require attorney's fees to redress their rights and are thus impacted more by the strictures of *Buckhannon*.

Voting rights litigation is specifically susceptible to *Buckhannon* because of the kind of judicial relief that is sought and who it is sought against. Plaintiffs in voting rights cases do not seek monetary damages,<sup>85</sup> but they instead seek the equitable remedies of declaratory and prospective injunctive relief. For example, plaintiffs bringing a Section 5<sup>86</sup> claim will seek a declaration that a given change in voting practices or procedures is first a voting change, is second a "change affecting voting" within the meaning of the Voting Rights Act, and is third an injunction against the defendant's further implementation of that change in any election unless it is first precleared.<sup>87</sup> Likewise, in challenging a city council districting plan for malapportionment, a plaintiff will seek a declaration that the plan violates the "one person one vote" principle<sup>88</sup> and injunctive relief preventing the further use of that plan and ordering a new plan to be adopted.<sup>89</sup> Because voting rights plaintiffs seek these kinds of relief rather than damages, avoiding dismissal under the doctrine of mootness<sup>90</sup> can become an onerous burden to obtaining a judgment on the merits and thereby establishing "prevailing party" status. Defendants can simply change a challenged law or comply with one they have disregarded, and the case is over,

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536-37 (1995) ("Throughout history, 'institutions' of widespread socioeconomic discrimination and voting-rights violations have acted to perpetuate each other. Indeed, both these institutions might have died out sooner had each not provided such strong reinforcement for the other.").

85. Indeed, courts have held that the Voting Rights Act does not authorize any monetary damages. See, e.g., *Olagues v. Russoniello*, 770 F.2d 791, 804-05 (9th Cir. 1985) (holding that there exists no cause of action for damages under Section 5 of the Act); *Windy Boy v. Big Horn County*, 647 F. Supp. 1002, 1023-24 (D. Mont. 1986) (allowing no damages in a vote dilution suit under Section 2 of the Act because "injunctive relief is the universal remedy in Voting Rights Act cases"); *Webber v. White*, 422 F. Supp. 416, 426 (N.D. Tex. 1976).

86. See 42 U.S.C. § 1973 (1983).

87. See, e.g., *NAACP DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 676 (N.D. Ga. 1980).

88. See 16B C.J.S. *Constitutional Law* § 1264 (2005) ("[T]he doctrine of equal representation, a constitutional requirement under the Fourteenth Amendment [that] requires that each person's vote count the same as any other person's, and that constituencies include approximately equal numbers of voters, so that the weight of individual votes in larger districts will not be substantially diluted, and individuals in those districts will not be deprived of fair and effective representation.") (internal citations omitted).

89. See, e.g., *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 858 (E.D. Wis. 2001).

90. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("[T]he doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).") (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980))). See also generally 13A FED. PRAC. & PROC. JURIS. 2d § 3533. A claim for monetary damages almost always avoids a finding of mootness. See 13A FED. PRAC. & PROC. JURIS. 2d § 3533.3. However, plaintiffs in voting rights do not seek damages, but rather prospective injunctive relief against continued violations of the right to vote. See *supra* notes 84-88 and accompanying text.

leaving those who champion the fundamental right to vote and their attorneys to foot the bill.

Some such suits begin to mirror the factual scenario of *Buckhannon* itself.<sup>91</sup> Plaintiffs bring suit alleging that a particular statute, ordinance, or regulation is unconstitutional or otherwise invalid and seek a declaration to that effect along with injunctive relief.<sup>92</sup> Suits of this kind may involve an attack on laws regulating voter qualification,<sup>93</sup> registration,<sup>94</sup> candidacy requirements,<sup>95</sup> or any manner of other effects on voters or the voting process.<sup>96</sup> Then, as in *Buckhannon*, the defendants can repeal, amend, or supersede the statute, ordinance, or regulation, thereby mooting the challenge to its predecessor. This situation demonstrates one aspect of voting rights litigation that compounds the problem of strategic capitulation, and that is the additional difficulty of avoiding mootness with the voluntary cessation exception to that doctrine<sup>97</sup> when the suit is against governmental defendants—which is almost always the case in voting rights litigation.

The voluntary cessation exception, as noted by the Court in *Buckhannon*, maintains 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,” since “if it did, the courts would be compelled to leave ‘[t]he defendant . . . free to return to his old ways.’”<sup>98</sup> Generally, voluntary cessation of a challenged practice does not moot a case unless “subsequent events make absolutely clear that the allegedly wrongful behavior could not reasonably be expected

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91. See *supra* notes 50-57 and accompanying text.

92. See, *Schweier v. Cox*, 340 F.3d 1284 (11th Cir. 2003).

93. See, e.g., *Carrington v. Rash*, 380 U.S. 89, 89-91 (1965).

94. See, e.g., *Schweier* 340 F.3d at 1285-86.

95. See, e.g., *Bullock v. Carter*, 405 U.S. 134, 135-37 (1972).

96. See, e.g., *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 529-31 (S.D. Ohio 2004) (granting preliminary injunction on Fourteenth Amendment grounds barring enforcement of state statute allowing for the presence of persons at polling places who would challenge the qualifications of voters in predominantly African-American precincts); *NAACP v. Browning*, Civ. No. 4:07-cv-402 SPM/WCS (N.D. Fla. Sept. 17, 2007) (challenging under the Fourteenth Amendment a Florida law providing for the automatic purge of voters whose voter registration records or applications contain data that is not completely identical to data contained in error-prone government databases).

97. In addition to a defendant’s voluntary cessation, there are three other major exceptions to the doctrine of mootness: (1) where the plaintiff would suffer collateral legal consequences if the case were not adjudicated; (2) where the wrong complained of is capable of repetition yet evading review; and (3) in class actions where the named party ceases to represent the class. See, e.g., *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005). State courts are not bound by the justiciability limitations inherent in Article III of the Constitution, e.g., *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989), and so many have fashioned additional exceptions to the mootness doctrine that federal courts may not recognize. See *infra* note 123.

98. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), (citing *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)).

to recur,” and defendants bear a heavy burden in establishing this.<sup>99</sup> However, the exception generally applies with much less force to government defendants because courts are more likely to trust them to honor commitments to change their conduct,<sup>100</sup> and many lower courts have ruled that legislative repeal of a challenged law does not even fall within the voluntary cessation exception at all, or does so only in exceptional circumstances.<sup>101</sup> As mentioned above, this compounds the problem of strategic capitulation in voting rights cases because they are almost always brought against government defendants, so avoiding dismissals on mootness grounds is that much more difficult. The cases set forth in the next part illustrate this and other problems.

#### IV. STRATEGIC CAPITULATION IN VOTING RIGHTS CASES

A handful of cases decided after *Buckhannon* involve voting rights issues and demonstrate that the strategic capitulation allowed and encouraged by the decision makes fee recovery more difficult and thereby discourages the private enforcement of voting rights. One example is *Chapman v. Gooden*,<sup>102</sup> a case brought in Alabama state court to challenge the disfranchisement of individuals convicted of felonies. In 1996, Alabama citizens ratified an amendment to the state constitution altering the nature of felon disfranchisement such that only persons convicted of felonies involving moral turpitude would be disqualified from voting.<sup>103</sup> If a person had been convicted of such a felony, he or she could apply to the Pardons and Parolees Board for a Certificate of Eligibility to vote.<sup>104</sup> In 2005, questions arose regarding the implementation of these laws, and the Attorney General of Alabama issued an opinion letter explaining that persons convicted of

99. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (internal citations omitted).

100. See 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FED. PRAC. & PROC. JURIS* 2D § 3533.7 (2d ed. 1984). In addition, “[s]pecial ambiguities arise when new officials replace those who had pursued a challenged policy. . . . Many cases suggest that the plaintiff must show that the case is not moot because the challenged practices were not personal to the former officials.” *Id.* (internal citations omitted). See also Albiston and Nielsen, *supra* note 71, at note 140 and accompanying text; Michael Ashton, *Recovering Attorneys’ Fees with the Voluntary Cessation Exception to Mootness Doctrine After Buckhannon* Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 WIS. L. REV. 965, 983 (2002).

101. See Ashton, *supra* note 100, at 988-90.

102. *Chapman v. Gooden*, No. 1051712, 2007 WL 1576103 (Ala. June 1, 2007).

103. ALA. CONST. of 1901, art. VIII, § 177 (amended 1996). Previously, disfranchisement would follow from conviction of specified offenses, all felonies punishable by imprisonment, and all “crimes of moral turpitude.” ALA. CONST. of 1901, art. VIII, § 182 (repealed 1996).

104. ALA. CODE § 15-22-36.1 (2003).

felonies not involving moral turpitude remained eligible to vote and were therefore ineligible to apply for a Certificate of Eligibility.<sup>105</sup>

After the Attorney General issued his opinion, the Alabama Secretary of State notified every voter registrar in Alabama that she would seek advice regarding which felonies were disfranchising felonies and which were not, but she told them not to register anyone convicted of any felony, regardless of whether it involved moral turpitude, if they did not have a Certificate.<sup>106</sup> Plaintiff Richard Gooden had been convicted of felony driving under the influence—a felony not involving moral turpitude under Alabama law—and tried to register to vote in Jefferson County but he was denied because he did not have a Certificate of Eligibility.<sup>107</sup> In September of 2005, he brought suit against the registrar and the Secretary of State for three reasons: (1) to allege violations of the Alabama Constitution and state laws,<sup>108</sup> (2) to seek declaratory relief to establish his own eligibility to vote, and (3) to clarify the eligibility of persons convicted of felonies not involving moral turpitude to vote without a Certificate of Eligibility.<sup>109</sup> He also sought injunctive relief requiring the Secretary of State to notify and advise the registrars of Jefferson County and other areas, to direct them to register Gooden and other similarly situated individuals to vote, and to issue a press release and other forms of notice calculated to apprise the public of the law and the disqualifying crimes.<sup>110</sup>

However, in November of 2005, the Attorney General of Alabama intervened in the suit, and admitted that Gooden was improperly denied registration.<sup>111</sup> As the case progressed,<sup>112</sup> the Attorney General's Opinion Letter was sent to registrars throughout the state.<sup>113</sup> The Secretary of State issued revised voter registration forms that added the word "disqualifying" before the word "felony" in the question asking about convictions.<sup>114</sup> The defendants finally moved for sum-

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105. *Gooden*, 2007 WL 1576103, at \*1-2 (citing Op. Att'y Gen. 2005-092). An additional question was posed as to which felonies involved moral turpitude under Alabama law. *Id.* The Attorney General stated that though no exhaustive list exists, several judicial decisions have set forth crimes that are felonies involving moral turpitude and crimes that are not. *Id.* at \*3-4.

106. *Id.* at \*2, \*3 (citing Compl., ¶ 12, ¶ 17). In November of 2005, the month after the complaint was filed, the Secretary of State conducted training meetings for the registrars, again advising them to "continue longstanding practice until [receipt of a] response by the attorney general" to her May 2005 inquiry." *Id.* at \*5.

107. *Id.* at \*3 (citing Compl., ¶ 13-17).

108. *Id.* at \*4.

109. *Id.*

110. *Id.*

111. *Id.* at \*5.

112. *Id.* at \*5. Gooden filed an amended complaint in December of 2005 adding another plaintiff and seeking to certify a class of plaintiffs as well as a class of defendants consisting of all the voter registrars in Alabama. *Id.*

113. *Id.*

114. *Id.*

mary judgment, asserting that the case was moot because plaintiffs sought-after relief had already been provided.<sup>115</sup> After a series of rulings,<sup>116</sup> the trial court rendered judgment for plaintiffs,<sup>117</sup> but the Supreme Court of Alabama reversed on jurisdictional grounds,<sup>118</sup> including that the claims were moot when judgment was entered.<sup>119</sup>

In finding that the claims were moot, the Court first rejected the argument that the voluntary cessation doctrine precluded such a finding.<sup>120</sup> The Court concluded that, after the Alabama Attorney General intervened and “brought with him the construction and application of [state law] advocated by the plaintiffs,”<sup>121</sup> there was no dispute that anyone would continue to be disfranchised solely for having any kind of felony conviction, and the “posture of the case, the identity of the parties, and the remedial action taken” established that there existed no reasonable likelihood that the wrong would be repeated.<sup>122</sup> Likewise, the Court found the public interest exception to mootness<sup>123</sup> inapplicable because even though the issues were of public importance, the situation was unlikely to recur.

Finally, the Supreme Court of Alabama reversed the trial court’s award of attorney’s fees to plaintiffs.<sup>124</sup> Relying on *Buckhannon*, the

115. *Id.* at \*6.

116. *Id.* at \*7-8. Plaintiffs had requested the certification of a plaintiff class and a defendant class, and the trial court actually certified these but dismissed some of the plaintiffs’ claims before, nevertheless, ruling on the merits of the challenges to the defendants’ past practices and the constitutionality of the state law. *Id.*

117. *Id.* The trial judge found that the defendant’s past practices had violated the Plaintiffs’ due process rights under the Alabama Constitution and enjoined it, but he also went “much further.” *Id.* He ruled that the disfranchisement provision of the Alabama Code was unconstitutionally vague because it did not catalogue and codify the felonies involving moral turpitude for which individuals could be disqualified, and enjoined it until such time as the Legislature passed legislation specifically identifying all such felonies. *Id.*

118. *Id.* at \*10-12. The Court reversed the judgment striking down the statute for vagueness because it determined that the issue had not been properly plead and litigated as such, and was therefore not justiciable: “The case [did] not involve a dispute about how to distinguish between felonies that involve moral turpitude and those that do not; instead it involve[d] the secretary of state and [the Jefferson County registrar], acting upon direction from the secretary of state, ignoring the distinction altogether and not attempting” to apply the law correctly. *Id.* at \*10.

119. *Id.* at \*12-16.

120. See *supra* notes 95-100 and accompanying text.

121. *Gooden*, 2007 WL 1576103 at \*14.

122. *Id.*

123. Alabama law contains an exception to mootness in cases involving a “broad public interest,” that is applicable depending on “the public nature of the question, the desirability of an authoritative determination for the purpose of guiding public officers, and the likelihood that the question will generally recur.” *Id.* at \*14 (citing *Slawson v. Alabama Forestry Comm’n*, 631 So.2d 953 (Ala. 1994) and 1A C.J.S. *Actions* § 81 (2005)). Many states have carved out this exception to the mootness doctrine, but federal courts usually do not recognize it. See *Avis K. Poai, Hawaii’s Justiciability Doctrine*, 26 U. HAW. L. REV. 537, 549 n.108 (2004); *Harvard Law Review Association, Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1693 n.92 (1970).

124. *Gooden*, 2007 WL 1576103 at \*14.



Court held that the plaintiffs did not secure an alteration of the legal relationship of the parties with judicial imprimatur before the claims had become moot, particularly because the trial court's judgment was void for mootness, and therefore they were not prevailing parties entitled to attorney's fees.<sup>125</sup> Yet, the plaintiffs' filing of the suit resulted in "[the Jefferson County registrar] undisputedly discontinu[ing] her former practice of indiscriminately rejecting the applications of all convicted felons," notification to every registrar in the state of the Attorney General's opinion clarifying that only certain felonies could be the basis of disqualification, and the promulgation of new statewide revisions of voter registration forms indicating the same.<sup>126</sup> But for *Buckhannon*, the Alabama Attorney General's intervention and strategic capitulation to the plaintiffs' claims would not have prevented them from obtaining a fee award for their attorneys.<sup>127</sup>

Aside from cases like *Gooden* that exemplify the problem of strategic capitulation through the abandonment of illegal practices, the typical *Buckhannon* scenario of the "voluntary" repeal of legislation affects plaintiffs in voting rights cases as well. For example, in the recent litigation of *Common Cause/Georgia v. Billups*, numerous plaintiffs challenged legislation in the state of Georgia requiring voters to present photographic identification at the polls.<sup>128</sup> In 2005, Georgia enacted a law that required voters to present one of several forms of government-issued identification in order to vote.<sup>129</sup> The practical impact was that if a person did not already have a Georgia driver's license or one of the other approved forms of identification,<sup>130</sup> then he or she would have to travel an appreciable distance to one of the Department of Driver Services centers,<sup>131</sup> and pay at least \$20, though an exception was available for indigent persons.<sup>132</sup> In view of

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125. *Id.* at \*19.

126. *Id.* at \*16, \*5-6.

127. A fee application based on the catalyst theory would presumably garner such an award because Plaintiffs achieved widespread notice and direction on the correct application of the law, their own registration as qualified voters, and the revision of forms that would presumably prevent some confusion among voters; their constitutional claims were not frivolous, and the lawsuit was a substantial or significant cause of the defendant's change in conduct. *See supra* notes 47-48 and accompanying text.

128. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

129. *Billups*, 406 F. Supp. 2d at 1331.

130. *Id.*

131. *Billups*, 406 F. Supp. 2d at 1338-39. There are only fifty-six full-time customer service centers and two part-time service centers throughout Georgia's 159 counties, and there are none within the cities of Atlanta or Rome. *Id.* at 1338.

132. *Id.* at 1339. The 2005 enactment contained a provision allowing persons who wished to obtain an identification card for voting purposes but could not afford one to obtain one free of charge if she or he swore and affirmed that "(a) he or she is eligible to receive the Photo ID card free of charge because he or she is indigent and cannot pay the fee for the Photo ID card; (b) he

this, Georgia Secretary of State Cathy Cox wrote a memorandum to the Governor urging careful consideration of the bill.<sup>133</sup> Given that she could not recall a single documented case of fraud relating to voter impersonation at the polls in her six years on the job, she expressed her belief that the enactment was “(1) unnecessary, (2) creates a very significant obstacle to voting on the part of hundreds of thousands of Georgians, including the poor, the infirm, and the elderly who do not have drivers licenses because they are either too poor to own a car, are unable to drive [a] car, or have no need to drive a car, (3) very unlikely to receive preclearance under the Voting Rights Act,” and likely in violation of the Georgia and United States Constitutions.<sup>134</sup> Nevertheless, Republican Governor Sonny Perdue signed the bill into law,<sup>135</sup> and the United States Department of Justice issued a controversial preclearance for it.<sup>136</sup>

Plaintiffs then brought suit alleging that the photo identification (ID) requirement violated the Georgia Constitution, the Fourteenth and Twenty-Fourth Amendments to the United States Constitution,<sup>137</sup> the Civil Rights Act of 1964,<sup>138</sup> and Section 2 of the Voting Rights Act of 1965.<sup>139</sup> Plaintiffs argued that the photo ID law violated the Twenty-Fourth Amendment specifically because it was in the nature of a poll tax, since voters who did not have a valid form of identifica-

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or she desires a Photo ID card to vote in a primary or election in Georgia; and (c) he or she does not have any other form of identification that is acceptable under O.C.G.A. § 21-2-417 for voter identification purposes; (d) he or she is registered to vote in Georgia or is applying to register as part of his or her application for a Photo ID card; and (e) he or she does not have a valid driver's license issued by the State of Georgia.” *Id.* (citing Decl. of Alan Watson ¶¶ 3-4, Ex. A).

133. *Id.* at 1333.

134. *Id.*

135. *Id.* at 1335-36.

136. *Id.*

137. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST..amend. XIV, § 1. “The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.” U.S. CONST..amend. XXIV, § 1.

138. 42 U.S.C. § 1971(a)(2)(A)—(B): “No person acting under color of law shall—(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote; (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]”

139. 42 U.S.C. § 1973. *See supra* note 8.

tion would have to obtain one at a cost of at least \$20.<sup>140</sup> Although the law contained a provision allowing the fee to be waived if a person claimed indigence, plaintiffs argued that this was illusory and even if effective, still placed an impermissible financial burden on the right to vote.<sup>141</sup> The trial court agreed with plaintiff's poll tax argument, concluding that under all the circumstances, it placed a cost on the franchise in violation of the Twenty-Fourth Amendment.<sup>142</sup> The court further rejected defendants' argument that the waiver provision for indigents saved the requirement because it was not discretionary and was always granted if requested, reasoning that voters may not be aware of that policy, that the form required an individual to state he or she was indigent even if that was not true, and that some voters might simply be too embarrassed over their inability to afford an ID card to complete the affidavit.<sup>143</sup> "In any event," the court held, the waiver provision could not save the photo ID requirement because, under *Harman v. Forsennius*,<sup>144</sup> the waiver provision constituted a "material requirement" imposed on voters who did not want to pay for the card.<sup>145</sup> Accordingly, the court held that plaintiffs had a substantial likelihood of prevailing on the merits<sup>146</sup> of this claim, as well as some others,<sup>147</sup> and for that reason, enjoined the 2005 Photo ID Act in October of 2005.<sup>148</sup>

However, in January of 2006, the Georgia legislature adopted the 2006 Photo ID Act.<sup>149</sup> This legislation amended the section dealing with the required forms of identification and struck the section which required an affidavit of indigence to obtain a photo ID without cost.<sup>150</sup> Instead, under the 2006 Act, all a voter had to do to obtain a photo ID was to "swear 'that he or she desires an identification card in order to vote . . . and that he or she does not have any other form of identification that is acceptable under [Georgia] Code § 21-2-417' and to 'produce evidence that he or she is registered to vote in Georgia.'"<sup>151</sup> As a result, defendants sought dismissal of various claims, including all

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140. *Billups*, 406 F. Supp. 2d at 1366.

141. *Id.* at 1367.

142. *Id.* at 1369-70.

143. *Id.*

144. *Harman v. Forsennius*, 380 U.S. 528 (1965) (holding that Virginia violated the Twenty-Fourth Amendment by imposing upon federal voters a material requirement, which forced them to pay the customary poll tax as necessary for state elections or file a certificate of residence).

145. *Billups*, at 1326.

146. *Id.* at 1376.

147. *Id.*

148. *Billups*, 406 F. Supp.2d at 1377-78.

149. *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1305 (N.D. Ga. 2006).

150. *Id.*

151. *Id.*

claims brought against the 2005 Act for mootness.<sup>152</sup> Noting that, “generally, a challenge to the constitutionality of a statute is mooted by repeal of that statute [. . . unless . . .] there is a substantial likelihood that the challenged statutory language will be reenacted,”<sup>153</sup> the court accepted defendants’ representations that they would not reenact the 2005 Act or seek to enforce it, and found all challenges to it moot.<sup>154</sup> Consequently, the court dismissed all such challenges.<sup>155</sup>

Plaintiffs continued to pursue their claims against the 2006 Photo ID Act and had a trial on the merits in 2007.<sup>156</sup> In addition to removing the fee and administrative hurdle to obtaining a photo ID for voting purposes, the 2006 Act also made photo IDs available from local county voter registrars.<sup>157</sup> Based on these changes and the testimony of the plaintiffs that, though burdensome, it would be possible for them to obtain a photo ID, the court concluded that the plaintiffs did not suffer any palpable injury and therefore lacked standing.<sup>158</sup> Likewise, the court found that plaintiff organizations failed to establish that they had standing to sue on behalf of their members, or that they had standing to sue in their own right.<sup>159</sup> Nevertheless, the court analyzed the merits out of an “abundance of caution”<sup>160</sup> and denied plaintiffs’ a permanent injunction against the law, concluding that the burden on the right to vote imposed by the requirement was not significant and in any event was rationally related to the State’s interest in preventing voter fraud.<sup>161</sup> Though plaintiffs’ various claims were ultimately rejected, they did succeed in preventing the imposition of a poll tax through the burdensome and costly procedures envisioned by the 2005 Act.<sup>162</sup> Yet, based on the Supreme Court’s recent decision in *Sole v. Wyner*,<sup>163</sup> which held that a plaintiff who obtains a preliminary injunction but nevertheless later loses on the ultimate merits is not a “prevailing party,” defendants have opposed a fee award for the plain-

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152. See Brief in Support of Defs.’ Motion to Dismiss Second Amended Complaint For Declaratory & Injunctive Relief in Part Pursuant to Fed. R. Civ. P. 12(b)(6), *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, No. 4:05-cv-201-HLM (N.D. Ga. 2006).

153. See *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004).

154. Order Dismissing Plaintiffs’ Second Amended Complaint, Dated June 29, 2006, *Common Cause v. Billups*, 504 F. Supp. 2d 1333, No. 4:05-cv-201-HLM (N.D. Ga. 2006) (on file with author) at 8-9.

155. *Id.* at 10.

156. *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1342 (N.D. Ga. 2007).

157. *Id.* at 1344-45.

158. *Id.* at 1373-74.

159. *Id.*

160. *Id.* at 1374.

161. *Id.* at 1375-82.

162. See *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1376 (2005) (order of Oct. 18, 2005 granting plaintiffs’ motion for preliminary injunction).

163. *Sole v. Wyner*, 127 S. Ct. 2188 (2007).

tiffs,<sup>164</sup> arguing that plaintiffs achieved only “transient victories” with earlier injunctions,<sup>165</sup> and an award based on the poll tax victory would be tantamount to an award based on the catalyst theory<sup>166</sup> because that claim was eventually dismissed as moot after the Georgia Legislature repealed the 2005 Act.<sup>167</sup> Although this litigation is still pending and the court has not yet ruled on the fee request, the photo ID case presents a stark example of the injustice that *Buckhannon* creates when plaintiffs successfully enforce the Constitution and laws but fail to meet technical requirements because of defendants’ unilateral actions.

Finally, strategic capitulation may occur through a defendant’s decision to comply with the law in an enforcement action. The most disconcerting example of this is a suit under § 5 of the Voting Rights Act,<sup>168</sup> in which the defendant determines that the best course of action is to submit the voting changes for preclearance by the Attorney General. Once this has occurred, the three-judge district court convened to enforce the preclearance requirement<sup>169</sup> is without jurisdiction to do anything more.<sup>170</sup> An example is *Lopez v. Merced County, California*,<sup>171</sup> in which plaintiffs brought suit against Merced County and several political subdivisions therein for § 5 violations arising from over 200 annexations and other boundary changes.<sup>172</sup> Plaintiffs sought a declaration that the annexations and other changes were “voting changes” within the meaning of § 5, and an injunction prohibiting further implementation of the changes or any elections conducted pursuant to them.<sup>173</sup> Plaintiffs then sought a preliminary injunction against the certification of the results of upcoming elec-

164. Defs’ Memorandum in Opposition to Plaintiffs’ Preliminary Motion for Reasonable Attorneys’ Fees, Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, No. 4:05-cv-00201-HLM (N.D. Ga. 2007) (on file with the author).

165. *Id.* at 8-9.

166. *See supra* notes 47-49 and accompanying text.

167. Defendants’ Memorandum, *supra* note 164 at 10-12.

168. *See supra* note 6, at 84-85 and accompanying text.

169. 42 U.S.C. § 1973(c) (2000) requires that that any action under that section “shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28”. Section 2284 is the current three judge court statute providing both the procedure for convening a district court of three judges, as well as setting forth when it should occur and what a single district judge is empowered to do before three judges are convened. *See generally* Wright & Miller, Federal Practice and Procedure, 17A Fed. Prac. & Proc. Juris.3d § 4235 (2007).

170. The authority of a § 5 enforcement court is narrowly circumscribed. Once convened, it “may determine only [1] whether § 5 covers a contested change, [2] whether § 5’s approval requirements were satisfied, and [3] if the requirements were not satisfied, what temporary remedy, if any, is appropriate. *See Lopez v. Monterey County, Cal.*, 519 U.S. 9, 23-24 (1996).

171. *Lopez v. Merced County, Cal.*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007).

172. *Id.* at 1074.

173. Complaint at 11-13, *Lopez v. Merced County*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007) (No. 1:06-cv-01526-OWW-DLB).

tions, but the court refused to grant one because of the proximity to the election and the balance of the hardships, particularly since “Plaintiffs’ interests [were] protected because the Defendant jurisdictions [had] submitted for preclearance . . . every [voting change] at issue.”<sup>174</sup>

Thereafter, the Department of Justice precleared the changes,<sup>175</sup> and Defendants filed motions to dismiss for mootness.<sup>176</sup> The court granted the motions to dismiss because the purpose of the claims—to enforce the preclearance requirement either by precipitating a submission to the Attorney General or a declaratory judgment action in the District of Columbia<sup>177</sup>—had been achieved.<sup>178</sup> Likewise, although Plaintiffs also sought a declaratory judgment that the unprecleared changes were in fact subject to the preclearance requirement and the Defendants denied that they were even covered by § 5,<sup>179</sup> the court declined to grant such relief, concluding that “any declaration on the question of § 5 coverage . . . would not be based on any specific facts and thus constitute an advisory opinion[.]”<sup>180</sup> Accordingly, although this litigation is pending and has yet to be finally resolved, it is clear that *Buckhannon* presents substantial obstacles to obtaining relief on the merits for plaintiffs in § 5 enforcement actions where defendants’ submission of outstanding voting changes effectively ends the controversy.<sup>181</sup> What is more, § 5 is particularly problematic because the limited purpose of these suits actually allows defendants to moot the litigation more easily, since there is only one thing the suit aims to achieve—submission of voting changes for preclearance.

## V. CONCLUSION

The enforcement of federal civil rights laws—and thus the ultimate success of these fundamental protections—is dependent on the extent to which private parties may go to court to vindicate them. This much is clear from the barriers to enforcement by the federal government because of funding and other issues organic to the bureaucracy of public enforcement,<sup>182</sup> let alone problems like the recent politicization

174. *Lopez* at 1081.

175. Order Dismissing Plaintiffs’ First Amended Complaint, *Lopez v. Merced County*, No. 1:06-cv-01526-OWW-DLB 2007 WL 1687021, at \*2, ¶ 9 (E.D. Cal. June 8, 2007).

176. *Id.* at \*2, ¶ 12.

177. *See supra* note 6..

178. *Lopez*, 2007 WL 1687021, at \*3.

179. *Id.* at \*2, ¶¶ 7, 11.

180. *Id.* at \*3.

181. *See supra* note 170 and accompanying text.

182. *See supra* notes 67-76 and accompanying text.

and turmoil in the enforcement agency.<sup>183</sup> Indeed, a system of mixed private and public enforcement is desirable for various reasons, not the least of which is the insulation of enforcement from capture by established interests.<sup>184</sup> To this end, Congress has often authorized the award of attorney's fees to prevailing parties, and courts previously utilized their equitable powers to reward these individuals when they enforced such important public policies as "private attorneys general."<sup>185</sup> Yet, the *Buckhannon* decision stripped courts of the catalyst theory as a basis for awards, reallocating the burdens of litigation<sup>186</sup> and opening the door to tactics unfortunately all too successful against litigants who seek to enforce federal law or bring about social change rather than monetary recovery.<sup>187</sup>

Since the decision, commentators and practitioners have identified the perversion of incentives brought about by *Buckhannon*, including the reduction of plaintiffs' leverage in settlement and the incentive for defendants to delay until the last minute and then cease the challenged conduct to avoid judgment and fees.<sup>188</sup> These threats to the private enforcement scheme are no more real or troublesome than in the voting rights context. Government actors who fail to ensure at all levels of government the compliance with laws regulating the elective franchise have no incentive to do so until litigation is commenced and then can swiftly move to provide enough of the relief sought by victims to presumably avoid the need for judicial relief that would satisfy *Buckhannon* and compensate those who enforce the law. Likewise, *Buckhannon* gives governments no incentive whatsoever to comply with the preclearance requirement of § 5 of the Voting Rights Act. They can enact and administer unprecleared voting changes with no fear or any consequence, for all they have to do when sued for failure to submit voting changes is submit them, and then only after it becomes likely that the changes are covered by § 5, thereby achieving the purpose of a § 5 and rendering it moot.

However, despite the dramatic effects of *Buckhannon* on civil rights and voting rights enforcement, the Court's holding that "prevailing party" is a term of art has forced lower courts to apply it to § 1988, and the code section allowing attorney's fees for those who enforce voting rights as well, § 1973l(e). Because these provisions are almost identical, it is difficult to make the argument that voting rights litiga-

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183. See *supra* notes 3-11 and accompanying text.

184. Albiston, *supra* note 71.

185. See *supra* note 27 and accompanying text.

186. See *supra* note 58 and accompanying text.

187. See *supra* notes 76-80, 90 and accompanying text.

188. See *supra* notes 46, 71 and accompanying text.

tion should be spared from *Buckhannon*.<sup>189</sup> Accordingly, the only real solution to the problem is congressional action. Though such efforts have been unsuccessful so far, both in the civil rights context as well as other contexts, the need for change remains pressing. The Leadership Conference for Civil Rights, in partnership with the National Campaign to Restore Civil Rights, will soon support new legislation that would, among other things, restore the catalyst theory for civil rights litigants who enforce our nation's fundamental public policies in this arena. This legislation should be supported wholeheartedly, and only after its passage will the congressional intent that fee-shifting be utilized to provide incentives for and strengthen private enforcement be restored, and the fundamental guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution be realized.

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189. See *supra* note 44.



