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Don't Let the Facts Get in the Way of the Truth: Revisiting How *Buckhannon* and *Alyeska Pipeline* Messed Up the American Rule

LANDYN WM. ROOKARD*

The Supreme Court in the 1796 case of *Arcambel v. Wiseman*¹ set out the American Rule with this cryptic statement of dubious accuracy²: “The general practice of the United States is in opposition [sic] to it [fee shifting]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.”³ This was the extent of the Court’s reasoning, and it has supported the rule that each party pays its own attorney’s fees⁴ for over two hundred years. Most notably, *Arcambel* was cited to support the Court’s rejection of the “private attorney general” exception to the American Rule in *Alyeska Pipeline Service Co. v. Wilderness Society* in 1975.⁵ *Alyeska Pipeline* was in turn cited to

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1. 3 U.S. (3 Dall.) 306 (1796) (per curiam).

2. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9, 15; John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1576 (1993).

3. *Arcambel*, 3 U.S. at 306.

4. Any article dealing with the Rule must first “decide a matter of style and usage. Should we refer to ‘attorney fees,’ ‘attorneys fees,’ ‘attorney’s fees,’ or ‘attorneys’ fees?’” *Stallworth v. Greater Cleveland Reg’l Transit Auth.*, 105 F.3d 252, 253 n.1 (6th Cir. 1997). As Judge Danny Boggs, writing for the Sixth Circuit, entertainingly observed,

In federal statutes, rules and cases, we find these forms used interchangeably, nay, promiscuously. There is sometimes no consistency within even the same body of law. Compare, for example, FED.R.CIV.PROC. 16(f) (“attorney’s fees”) with FED.R.CIV.P. 54(d) (“attorneys’ fees”). Statutes providing for the award of payments to lawyers are similarly divided. Compare the statute at issue in this case, 28 U.S.C. § 1447(d) (“attorney fees”) with 42 U.S.C. § 1988, the Civil Rights *Attorney’s Fees Awards Act of 1976* (emphasis added). We acknowledge that even some published opinions of this court have been marked by unexplained inconsistency. . . . [W]e are now advised by the Court’s Reporter of Decisions that “[t]he Supreme Court Style Manual expressly advises opinion writers to use the phrase ‘attorney’s fees’”

Id. (emphasis in original) (italics in original) (citations omitted). The court then quoted at length from a legal dictionary, which advised, “The only form to avoid at all costs is *attorneys fees*, in which the first word is a genitive adjective with the apostrophe wrongly omitted.” *Id.* at 254 n.1 (emphasis in original) (quoting BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 91 (2d ed. 1995)). While Judge Boggs elected to use “attorney fees” to be consistent with the statute which the court was interpreting, I will stay clear of the unconscionable “attorneys fees” and instead use “attorney’s fees” throughout to mirror modern statutory usage. See, e.g., 42 U.S.C. §§ 1988(b), 2000e-5(k) (2012); 52 U.S.C. § 10310(e) (2012).

5. 421 U.S. 240, 246, 249–50 (1975).

support the Court's rejection of the catalyst theory in "prevailing party" fee shifting statutes in *Buckhannon* in 2001.⁶ For the American Rule, what happened in 1796 set the tone for over two centuries of muddled precedent.⁷

Between 1796 and the present, the Supreme Court and lower courts have handed down myriad opinions embracing, emending, and rejecting various exceptions to the American Rule.⁸ The line to *Buckhannon* may be traced through four significant permutations⁹: First, implicitly recognizing the Rule's imperfections, American courts created exceptions to it as justice mandated.¹⁰ The fee-shifting statutes at issue in *Buckhannon* have their origins in three of these judicially created exceptions: the common fund exception, the substantial benefits exception, and the private attorney general exception.¹¹ Second, the Supreme Court, relying upon an 1853 court-costs statute to curtail what it perceived as ad hoc decision making by the lower courts, asserted the primacy of the American Rule in *Alyeska Pipeline*.¹² Third, Congress whirred into action, crafting statutory exceptions to the American Rule that often mirrored the exceptions created by courts before *Alyeska Pipeline*.¹³ These statutes frequently provide for fee shifting to the "prevailing party" in areas of law designed to promote private enforcement of public rights.¹⁴ The lower courts overwhelmingly interpreted this language to award fees to parties that served as "catalysts" for policy change.¹⁵ Finally, the Supreme Court again determined that the lower courts took improper liberties, instead interpreting "prevailing party" to require victory backed by "judicial imprimatur" in *Buckhannon*.¹⁶

But amidst this unsettled jurisprudential stew have emerged two distinct lines of Supreme Court cases: The first resounds in equity and generally embraces exceptions to the American Rule.¹⁷ The second resounds in statutory interpretation and generally

6. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001).

7. This Comment expresses no opinion on the wisdom of the American Rule or even on fee shifting in general, either by statute or judicial decision. The exclusive focus of this Comment is on the Supreme Court's unsatisfactory jurisprudence in this area of the law.

8. 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, 1093–98 (2007); Leubsdorf, *supra* note 2; Vargo, *supra* note 2; *infra* Part I.

9. Cf. Albiston & Nielsen, *supra* note 8, at 1093–103 (articulating this basic trajectory while additionally addressing a line of cases that effected a "more subtle erosion of fee-shifting provisions . . . under the guise of promoting settlement"). This is, of course, an oversimplification, but one that allows for a manageable juxtaposition of the American Rule's equitable and statutory development.

10. See Leubsdorf, *supra* note 2, at 28–29; *infra* Part I.

11. See *infra* Part I.

12. See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 652 (2013); Vargo, *supra* note 2, at 1578 n.90; *infra* Part II.

13. See Burbank, *supra* note 12, at 652.

14. See *id.*

15. See *infra* Part III.

16. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601–02 (2001).

17. See *infra* Part I.

rejects exceptions to the Rule.¹⁸ But only the Supreme Court's decisions at equity have produced the types of discussions befitting the kinds of transmogrifications effected upon the American Rule. These equitable decisions have produced functional and logical, if imperfect, exceptions to the conceptually rigid Rule.¹⁹

By contrast, *Alyeska Pipeline* and *Buckhannon*, two seminal Supreme Court decisions resounding in statutory interpretation, lack conscientiousness and transparency, primarily for two reasons. First, the two decisions are grounded in an implicit philosophy of substantive minimalism,²⁰ which counsels that courts defer as much as possible to the political branches “on the premise that decisionmaking by the political branches is generally preferable to decisionmaking by the judiciary.”²¹ Substantive minimalism, advocated by Professor Cass Sunstein and others, maintains that political decision making is “sig[n]ificantly more legitimate in a democratic sense than judicial decisionmaking” and that this superior legitimacy outweighs whatever advantages the judiciary might have in its ability to protect individual rights.²² Professor Christopher Peters has identified several theoretical problems with substantive minimalism, particularly as it pertains to deciding individual rights.²³ Among these: substantive minimalism fails to appreciate that the courts are less prone to majoritarian control (and the subsequent possibility for disrespect for individual rights) than the political branches; overlooks the value of adjudication, which provides a better opportunity for the parties to participate meaningfully in the decision-making process than the political branches; and ignores the benefits of the courts' gradualist decision making and capacity for error correction.²⁴

In *Buckhannon* and *Alyeska Pipeline*, the theoretical problems with substantive minimalism come to fruition. Instead of fully contemplating and acknowledging the

18. See *infra* Parts II, IV.

19. See *infra* Part I; cf. *infra* Part III (describing application of statutory exception as similar to powers at equity).

20. It is beyond the scope of this Comment to make a broad assessment of the relative merits of substantive minimalism and more extensive judicial review. Instead, I contend that, at least in the context of the Court's American Rule jurisprudence, the philosophy has done a disservice to Congress, litigants, and the Court's own precedent.

21. Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1476 (2000).

22. *Id.*; see, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); cf. Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998) (articulating a deferential theory of jurisprudence wherein the Supreme Court “treat[s] more of its precedents as provisional than is formally permitted under the doctrine of stare decisis” to allow “social and political actors other than the Court to take leading roles in addressing novel situations”).

23. Peters, *supra* note 21.

24. *Id.* at 1494–1513; cf. Samantha von Ende, Note, *SEQUELA: Casey, Gonzales, and State Legislatures' Unscrupulous Use of Science in Crafting Legislation To Regulate Pregnant Women and Women's Access to Reproductive Health*, 4 IND. J.L. & SOC. EQUALITY 21 (2016) (observing, in the context of women's health regulations, that “legislatures have relied on junk science and debunked theories in order to propose and pass hundreds of morality-based laws” and noting the superior adjudicative fact-finding ability of trial courts).

consequences of their rule, the narrow majorities²⁵ latched upon an interpretation of statutory language that they deemed absolute and indisputable.²⁶ These statutory readings are detached entirely from the equitable moorings of the exceptions to the American Rule, give unnecessarily short shrift to the ability of district courts to do their jobs, and effect absurd results in light of clear congressional goals and ambiguous language—all in the name of deference to Congress.²⁷

Second, the Supreme Court has painted its substantively minimalistic art pieces with a broad procedural brush to unnecessarily bind parties with distinct factual and legal issues. This lack of procedural minimalism, which I refer to as “procedural maximalism” as a shorthand,²⁸ diminishes the representative legitimacy of the Court’s holdings and disguises the superficiality of its reasoning, which may not withstand scrutiny in a distinguishable case.²⁹ The quality of the reasoning—not the breadth of the label—should justify another court applying a holding from one case to another similar (though nonidentical) case when it comes before the court.³⁰ *Alyeska Pipeline*, in which the Court put a stop to the doctrinal development of equitable exceptions to the American Rule in the name of statutory interpretation, is a more traditional example of this lack of restraint.³¹ Without explaining why it chose to do so, the Court rejected several, moderate approaches that could have preserved doctrinal development while reaching the Court’s desired result.³²

The *Buckhannon* Court rejected procedural minimalism in a different fashion: by making empirical assumptions about the policy implications of its holding.³³ The Court assumed that rejecting the catalyst doctrine in favor of its judicial-imprimatur rule would provide efficiency benefits without exacting substantial costs of justice.³⁴ As illustrated by Professors Albiston and Nielsen, these empirical assumptions have proven to be false.³⁵ Even worse, however, these empirical assumptions have gained

25. *Alyeska Pipeline* was a five-to-two decision, albeit one in which the most liberal justice on the Court, Justice Douglas, did not participate. IIT Chi.-Kent Coll. of Law, *Alyeska Pipeline Service Company v. Wilderness Society*, OYEZ, <https://www.oyez.org/cases/1974/73-1977> [<https://perma.cc/68XR-824N>] (sort justices “by ideology”). *Buckhannon* was a five-to-four split. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

26. See *infra* Parts II, IV.

27. Compare *infra* Parts II, IV, with *infra* Parts I, III.

28. I do this recognizing, of course, that almost any ruling could always be broader.

29. Peters, *supra* note 21, at 1515 (“[A] lack of procedural minimalism, in the form of the articulation of broad judicial rules, threatens the legitimacy of interest representation in adjudication. Interest representation only works when the interests of subsequent litigants and conforming nonlitigants are coextensive with those of the participating litigants in material ways. But this is unlikely to be the case when a court announces a broad rule . . .”).

30. *Id.* at 1516 (“The deep reasoning underlying the decision, precisely because it *is* deep reasoning, will have applications in other [similar] cases. In effect, the reasoning will operate as a sort of rule, influencing the decisions of future cases to which that reasoning is relevant.” (emphasis in original)).

31. See *infra* Part II.B.

32. See *id.*

33. See *infra* Part IV.B–C.

34. See *infra* Part IV.B.

35. Albiston & Nielsen, *supra* note 8.

traction as “factual precedents,”³⁶ binding lower courts and preventing them from considering evidence to the contrary.³⁷ That is, courts of appeals applying *Buckhannon* have refused to countenance evidence to the contrary of the Supreme Court’s assumptions, even as they have extended the case’s holding beyond its clear, black-letter law.³⁸ The Supreme Court has resolved the distinct cases of nonparties by making sweeping factual assumptions, a method that surely comports with no conscientious jurisprudence. The situation demands that the academy and bench seriously address appellate fact-finding practices and the precedential weight assigned to appellate-found facts.

Ultimately, procedural rules reflect policy decisions that directly impact the real rights of litigants, for example, by altering the costs, risk exposure, or likelihood of success in litigation.³⁹ “[O]ne purpose can rarely be advanced without some other purpose being set back, or reduced in significance. That means that there must be a tradeoff, hopefully consciously and openly made”⁴⁰ The American Rule, replete with exceptions and nuances, has developed in a manner that is anything but “consciously and openly made,” especially compared to the Federal Rules of Civil Procedure, which make up the bulk of American civil procedure law.⁴¹ The Supreme Court’s interpretation of attorney’s fees statutes frustrates Congress’s and the Court’s own intended benefits. If nothing else, litigants of all ilk deserve an American Rule that is the product of consistent, reasoned decision making that takes into account its effect on the myriad interests implicated by fee shifting and public-interest litigation.

I. EQUITABLE DEVELOPMENT OF THE PRIVATE ATTORNEY GENERAL EXCEPTION

Alyeska Pipeline and *Buckhannon* take aim at the private attorney general doctrine in two forms: as a judicially created exception in the former and as a statutory analogue in the latter. The judicially created private attorney general exception described in Section C evolved from two closely related, carefully cabined exceptions: the common fund exception addressed in Section A and the substantial benefit extension addressed in Section B.

36. Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 76 (2013) [hereinafter Larsen, *Factual Precedents*]; see Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1274 (2012) [hereinafter Larsen, *Confronting Supreme Court Fact Finding*] (discussing proliferation of Supreme Court-found facts).

37. See *infra* Part IV.C.

38. See *infra* Part IV.C.

39. Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993 (2012).

40. *Id.* at 995.

41. Compare *id.* at 997 (“[T]he *Federal Rules of Civil Procedure* . . . are issued by the U.S. Supreme Court, with most of the work done by committees of judges, practicing lawyers, and law professors as part of a very public and open process.” (italics in original)), and Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60, 69–70 (2013) (noting how the key framers of the Federal Rules of Civil Procedure publicly emphasize empiricism and transparency), with Leubsdorf, *supra* note 2, at 28 (“[O]ne of the most curious features of the American rule in the nineteenth century was its almost total absence of justification.”).

Each exception stems from the courts' "inherent equitable powers" instead of rule or statute.⁴² Further, each exception represents a balanced assessment of the impact of the new rule upon litigants and a workable, if imperfect, alteration to an otherwise rigid American Rule. For the most part, the courts recognized that their holdings would impact parties' legitimate expectations during litigation and sought to minimize undesirable collateral consequences by carefully tailoring their rules. That the exceptions were grounded in "equity" provides a fine starting place to begin to understand why these exceptions succeed in, at a minimum, conscientiously recalibrating the tradeoffs between different types of litigants⁴³:

[E]quity is defined by its commitment to "basic fairness." As a result of this fundamental commitment, the Supreme Court has been repeatedly forced in its equity cases to confront and balance, as a matter of institutional policy, the competing claims of formal and substantive fairness. Thus, the Court's equity decisions constitute an ongoing two hundred year-old debate over the scope and limits of substantive justice within the context of a legal system committed to procedural formality and stare decisis.⁴⁴

A. Common Fund Exception

As the name suggests, the common fund doctrine initially allowed for fee recovery in actions benefiting an existing fund.⁴⁵ In this situation, it is not the opposing party per se that pays the successful litigant's lawyers, but the "class of which the successful litigant is a member, which would have had to pay these expenses had it brought the action itself."⁴⁶

The Supreme Court's seminal case recognizing the common fund doctrine, *Trustees v. Greenough*,⁴⁷ involved a suit in equity by one Francis Vose, a bondholder in the Florida Railroad Company, on behalf of all bondholders against the trustees of the Internal Improvement Fund of Florida and the board itself.⁴⁸ Vose's action stopped and reversed several fraudulent conveyances from the Fund and cleared out the corrupt managers.⁴⁹ In so doing, Vose saved a tremendous amount of money for his fellow bondholders—none of whom had to bear the expense of litigation.⁵⁰

42. Vargo, *supra* note 2, at 1584; *see, e.g.*, *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939) (Frankfurter, J.) ("But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.")

43. *See Morrison, supra* note 39, at 996 ("[T]radeoffs . . . are not fixed, but [are] recalibrated as circumstances change.")

44. John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 24 HOUS. L. REV. 1425, 1427 (1998) (footnotes omitted).

45. Vargo, *supra* note 2, at 1579–80.

46. George D. Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784, 786 (1939).

47. 105 U.S. 527 (1881).

48. *Id.* at 527–28.

49. *Id.* at 529.

50. *Id.*

The Supreme Court affirmed an award of attorney's fees from the Fund (save for one particular item to which we will return) and did so with a rich analysis of the equities at play.⁵¹ The Court noted two particular benefits. First, the Court observed that a contrary rule would result in unjust enrichment for the nonparty bondholders.⁵² Vose prosecuted his case with "vigor" and "at much expense;"⁵³ the other bondholders should not waltz away with the "unfair advantage" of disproportionate pecuniary gain.⁵⁴ Second, the Supreme Court believed that common fund doctrine provided a solution to a collective action problem: some actions that would ultimately be beneficial for a group would be cost prohibitive for an individual to bring if the initiator had to bear all expenses.⁵⁵ This was the type of suit to be encouraged—though "the complainant [was] not a trustee, he has at least acted the part . . . in relation to the common interest."⁵⁶ As one district judge later observed, the prospect of fees encourages attorneys to bring valuable actions, akin to a maritime salvage award to encourage salvors to dig up ships found amongst the ocean blue.⁵⁷

On the other side of the ledger, the Court first dispatched with any concerns that shifting fees would be unfair to the trustees. While the trustees who were the subject of the instant suit may have done no wrong, the acts of their predecessors "furnished

51. *See id.* at 531–38. Justice Miller, the lone dissenter, contributed a short but amusing opinion, admitting that he "had no opportunity to examine the authorities cited in the opinion" but nonetheless objected to the doctrine. *Id.* at 538 (Miller, J., dissenting). Justice Miller's admission likely reflects the considerable chore that legal research was in 1881.

52. *Id.* at 532 (majority opinion); Vargo, *supra* note 2, at 1580.

53. *Greenough*, 105 U.S. at 529.

54. *Id.* at 532.

55. *See id.* at 534–35 ("In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and, in most cases, though not in this, no single creditor, nor any three or four of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts." (quoting Judge Lowell, Massachusetts)); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 72–73 (2007) ("Collective action problems exist whenever it is in individuals' self-interest not to contribute to a group activity even though all of the individuals would be better off if everyone were to contribute. In a resulting irony, each individual is made worse off by pursuing her own self-interest."); *see also* Albiston & Nielsen, *supra* note 8, at 1095; Leslie, *supra* at 74 ("Corporate wrongs often create collective action problems.").

56. *Greenough*, 105 U.S. at 532.

57. *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931). Judge Woolsey wrote:

Indeed the situation may very well be compared . . . to salvage at sea.

In salvage cases courts have wisely come to think that, as a matter of public policy, it is necessary to give such adequate reward to a successful salvor as will make others to whom salvage situations are presented interested in attempting salvage operations. There must always be a flavor of generosity in the awards to success in order that an appetite for effort may be stimulated.

Id. The analogy came naturally for Judge Woolsey, who was known for his "brilliant and poignantly phrased decisions" and his expertise in admiralty law. *John M. Woolsey, Retired Jurist, 68: Former Federal Judge Here Dies—Expert on Plagiarism Made "Ulysses" Ruling*, N.Y. TIMES, May 5, 1945, at 15.

abundant ground for instituting the proceedings.”⁵⁸ The litigation fees, the Court said, were part of the administration expenses of the trust and must therefore be borne thereby.⁵⁹

Finally, mindful of the possible incentives created by fee shifting, the Court made several limitations to the exceptions abundantly clear: Fee allowances must be “made with moderation and a jealous regard to the rights of those who are interested in the fund,” considering whether the legal expenditures were “fairly and honestly made” and reasonable under the circumstances.⁶⁰ The Court also reversed one expense item granted by the trial court: fees “for the personal services and private expenses of the complainant.”⁶¹ These expenses, like excessive attorney’s fees,

would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid.⁶²

The Court struck a balance. It did not necessarily want to encourage *all* suits to remedy illegal pecuniary loss in a common benefit; suits to recover *de minimis* losses which would unnecessarily trouble the fund managers and courts, for example, should still be discouraged due to the inconvenience of litigation. Therefore, the Court took a carefully measured approach. First, it made plain that the cause must accrue as a result of some mismanagement of the fund. Second, it limited fee recovery to only inarguably *legal* fees—and even then, only legal fees that were moderate and that reasonably contributed to the pecuniary gain of all participants in the fund.⁶³ The exception balanced competing objectives: encouraging suits for the common benefit where a collective action problem might prevent any suit, while ensuring that fee awards remain sufficiently modest so as to discourage unwarranted “intermeddling.” After all, business managers must be free to work without the specter of perpetual judicial oversight prompted by litigious busybodies. Finally, the Court, based upon its experience and survey of cases employing the common benefit exception, trusted that “the eminent [trial] judges under whose direction many of these cases have been administered” had the institutional capacity to exercise discretion and strike the necessary balance in application.⁶⁴ And it did all of this without as much as a solitary reference to the Court’s categorical statements from 1796 in *Arcambel*.⁶⁵

58. *Greenough*, 105 U.S. at 532.

59. *Id.* at 532–33.

60. *Id.* at 536–37.

61. *Id.* at 537.

62. *Id.* at 538.

63. See, for example, *Central Railroad & Banking Co. of Georgia v. Pettus*, 113 U.S. 116, 128 (1885), where the Court appeared to proscribe fee awards above the agreed-upon rate between attorney and client as one categorical limitation.

64. *Greenough*, 105 U.S. at 536.

65. See *supra* notes 2–5 and accompanying text.

B. Substantial Benefit Exception

The substantial benefit doctrine⁶⁶ removed two constraints from the common fund doctrine: First, the doctrine allows a fee award where litigation confers benefits not upon a fund, but upon an insular, identifiable group of nonparties.⁶⁷ Second, the doctrine allows a fee award where litigation confers substantial, nonpecuniary benefits upon nonparties.⁶⁸

1. Nonparty Beneficiaries

The Supreme Court first recognized the substantial benefit exception in the 1939 case of *Sprague v. Ticonic National Bank*,⁶⁹ which allowed the plaintiff to recover fees for securing pecuniary benefits for a group of nonparties. Lottie Sprague deposited about \$5000 at Ticonic National Bank to be held in trust.⁷⁰ Ticonic secured the deposited funds by earmarking some bonds, pursuant to statute.⁷¹ The bank went into receivership and the receivers failed to “take over the trust under which the bonds were held.”⁷² Sprague (along with the trust beneficiary) brought suit against the receivers to establish a lien on the bonds for her trust deposit and enforce the bank’s fiduciary duties.⁷³ But Sprague was not alone: fourteen other trusts were secured by

66. The substantial benefit and common fund exceptions have proven versatile. Commonly collapsed into one analysis, courts have awarded fees in antitrust litigation, mass disaster torts, class actions, and union litigation, to name a few. *See Vargo, supra note 2*, at 1581, 1583.

67. *See Vargo, supra note 2*, at 1582; *infra* Part I.B.1.

68. *See infra* Part I.B.2.

69. 307 U.S. 161 (1939). One scholar traces the substantial benefit exception to the Supreme Court’s 1921 decision in *Winton v. Amos*, 255 U.S. 373 (1921). *Vargo, supra note 2*, at 1582. While the Court in *Winton* cites to *Greenough* and *Pettus*, *Winton* did not involve attorney’s fees shifting. In a bit of an odd posture, the Court sitting in equity considered fee awards to individuals who, under contract with certain members of the Choctaw Nation, successfully lobbied Congress for a law to protect certain financial and property assets for the tribe. *Winton*, 225 U.S. at 391–93. First, the Court held that these circumstances fell within the *Greenough* doctrine, even as the fees were not attorney’s fees. *See id.* at 394. Second, the Court noted that the claimants had contracts with “large numbers of Mississippi Choctaws,” indicating that they were not “intermeddlers.” *Id.* However, the Court took a hard look at each of the fee claims and disallowed six of the fee claims for not being “substantially instrumental in producing a result beneficial” to the entire tribe. *Id.* at 394–95, 397–98. For example, one claimant’s actions benefitted several individual members of the tribe, but did “nothing to advance the claims” of the broader tribe. *Id.* at 397. Another claimant failed to show that the legislation was actually the result of his services. *Id.* at 398. Only one of the seven claims was sufficiently meritorious to warrant remand for further factual findings. *Id.*

While *Winton* stands as an interesting articulation of how courts may evaluate the propriety of fee requests under the common fund and substantial benefit exceptions, a Westlaw search reveals that the Supreme Court has never cited the case for its fees holdings. Furthermore, no published circuit court of appeals opinion has cited the relevant Westlaw headnote.

70. *Sprague*, 307 U.S. at 162.

71. *Id.*

72. *Sprague v. Ticonic Nat’l Bank*, 28 F. Supp. 229, 230 (D. Me. 1939), *modified*, 110 F.2d 174 (1st Cir. 1940).

73. *Id.*

the same bonds and were thus in the same situation.⁷⁴ By succeeding on the merits in her claim, Sprague “necessarily established the claims” of the fourteen nonparties as to the lien on the bonds.⁷⁵ Yet it was Sprague alone who bore the expense of litigation, and,

although the total assets of the bank were not sufficient to satisfy the unsecured creditors, the proceeds of the bonds [which had secured the trusts’ funds] were more than sufficient to discharge all trust obligations; and she therefore prayed the court for reasonable counsel fees and litigation expenses to be paid out of the proceeds of the bonds.⁷⁶

The Supreme Court, citing its “historic equity jurisdiction,”⁷⁷ remanded the cause to allow Sprague’s prayer to be heard by the trial court in the first instance. The Court rejected as meaningless the difference between suits generating benefits for a set class or previously existing fund, as in *Greenough*, and a suit like *Sprague*, where the decision generated pecuniary benefits for an identifiable group of nonparties.⁷⁸ In the former, “one professes to sue representatively or formally makes a fund available for others.”⁷⁹ In the latter, “a fund is for all practical purposes created for the benefit of others” by the plaintiff’s success.⁸⁰ While the intent to benefit others with litigation may well “be a relevant circumstance in making the fund liable for [an attorney’s] costs,”⁸¹ the Court determined that drawing a line between the two types of cases would be unduly formalistic and advance no particular policy.

But, as the Court again made clear, these “allowances are appropriate only in exceptional cases and for dominating reasons of justice.”⁸² On remand, the court was to make an individualized determination as to whether fees would be appropriate in this case, taking into account how to best achieve justice among the plaintiff, the particular nonparty beneficiaries, and the other creditors in bankruptcy who could not possibly be paid in full from the bank’s funds.⁸³

2. Nonpecuniary Benefit

In *Mills v. Electric Auto-Lite Co.*,⁸⁴ decided in 1970, the Supreme Court embraced

74. *Sprague*, 307 U.S. at 166; *Sprague*, 28 F. Supp. at 230.

75. *Sprague*, 307 U.S. at 166.

76. *Id.* at 163.

77. *Id.* at 164.

78. *See id.* at 166.

79. *Id.* at 167.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* On remand, the district and appellate courts assessed the impact of awarding fees on nonparty creditors and concluded that “the District Court was warranted in concluding that the trivial disadvantage to the unsecured creditors was not a significant countervailing consideration. The general creditors have already received nearly ninety per cent of their claims, and \$1,214.51 distributed among them would mean very little to any of them.” *Sprague v. Ticonic Nat’l Bank*, 110 F.2d 174, 177 (1st Cir. 1940), *modifying* 28 F. Supp. 229 (D. Me. 1939).

84. 396 U.S. 375 (1970).

the second extension to the common fund doctrine, allowing a plaintiff to recover attorney's fees for achieving nonpecuniary benefits for an identifiable group of people.⁸⁵ Two shareholders in the Electro Auto-Lite Company brought a derivative suit that successfully rescinded a merger approved by shareholder vote with a materially false proxy statement, in violation of securities laws—a suit not necessarily destined to produce a monetary recovery.⁸⁶ This, the Court said, in no way interfered with its historic equitable power to award attorney's fees.⁸⁷

The lack of an actual pecuniary recovery in the corporate context poses no problem when the benefits recovered are “capable of expression in monetary terms, if only by estimating the increase in market value of the shares attributable to the successful litigation.”⁸⁸ But frequently a corporate action could impede or destroy some other “essential right to the stockholder's interest,” one that is not capable of determine pecuniary measurement.⁸⁹ The Court, in this case, identified an accurate proxy statement as such an “essential right” by looking to statute: Congress imposed strict proxy requirements and determined that “fair and informed corporate suffrage” is important to a corporation's well-being.⁹⁰ Finally, there may be no other way to enforce a shareholder's right to an informed proxy vote other than to sue; “[t]o award attorneys' fees in such a suit . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.”⁹¹

Again, the Court carefully cabined the exception, noting first that a nonpecuniary benefit “must be something more than technical in its consequence” to qualify as a substantial benefit.⁹² Second, as in the other exceptions heretofore discussed, awarding attorney's fees was shifting fees not to the opposing party per se but to the other beneficiaries of the action (namely, the corporation and its shareholders). Furthermore, while the plaintiffs in *Mills* were entitled to attorney's fees for securing the rescission of the transaction, the cause still had to be remanded to determine whether further relief would be appropriate.⁹³ If so, the meaningfulness of that further relief could be a factor in determining whether an additional award of attorney's fees would be appropriate.⁹⁴

C. Private Attorney General Exception

The exegesis of the private attorney general exception in the lower courts produced a bevy of opinions and language exalting the role of equity in ensuring just

85. *See id.* at 389–97.

86. *Id.* at 377, 392–93, 397.

87. *See id.* at 392–93.

88. *Id.* at 395.

89. *Id.* at 396 (quoting *Bosch v. Meeker Coop. Light & Power Ass'n*, 101 N.W.2d 423, 427 (Minn. 1960)).

90. *Id.*

91. *Id.* at 396–97.

92. *Id.* at 396 (quoting *Bosch*, 101 N.W.2d at 427).

93. *Id.* at 396–97.

94. *See id.* at 396.

outcomes, though without a uniform test.⁹⁵ The district court's decision in *La Raza Unida v. Volpe*,⁹⁶ endorsed by the Eighth Circuit⁹⁷ and approved by several others,⁹⁸ perhaps best sets out the factors generally evaluated by courts in awarding attorney's fees against a defendant⁹⁹: "1) the effectuation of strong public policies; 2) the fact that numerous people received benefits from plaintiffs' litigation success; 3) the fact that only a private party could have been expected to bring this action."¹⁰⁰

This exception justified attorney's fees awards in myriad situations where courts felt compelled to allow some measure of pecuniary recovery to mitigate the expense of litigating for public benefits—for example, in environmental and racial discrimination cases. The *La Raza Unida* court awarded fees where plaintiffs succeeded in enjoining construction of a new highway.¹⁰¹ The court found that the defendants failed to comply with a variety of environmental and relocation procedures before approving the highway,¹⁰² which would have displaced 5000 residents and destroyed "the last remaining parks in southern Alameda County."¹⁰³ In *Knight v. Auciello*,¹⁰⁴ the First Circuit awarded fees in a § 1982 suit where the defendant refused to rent an apartment to a black tenant because of his race, even though the statute did not expressly provide for attorney's fees.¹⁰⁵ As in the other equitable exceptions, district courts were instructed to take many factors into consideration when assessing whether to shift fees and determining a fair award.¹⁰⁶

95. Cf. *The Supreme Court, 1974 Term—Federal Jurisdiction and Procedure—Awards of Attorneys' Fees Under Private Attorney General Rationale*, 89 HARV. L. REV. 170, 179 (1975) [hereinafter *Awards of Attorneys' Fees*] (describing a lack of "judicially manageable standards" in applying the private attorney general exception).

96. 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd sub nom.* *La Raza Unida of S. Alameda Cty. v. Volpe*, 488 F.2d 559 (9th Cir. 1973).

97. *Fowler v. Schwarzwald*, 498 F.2d 143, 146 (8th Cir. 1974).

98. *E.g.*, *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973) (Tuttle, J.); *Nat. Res. Def. Council, Inc. v. EPA*, 484 F.2d 1331, 1333 (1st Cir. 1973); *see, e.g.*, *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974).

99. *See* Peter Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 329 (1973) (describing *La Raza Unida* as the "most significant" of the private attorney general cases because of the "reasoned analysis provided by the court"); *see, e.g.*, *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974) (determining that fee shifting is available where a plaintiff brings an action with "no potential substantial award of damages" to vindicate constitutional rights of "an entire class"), *vacated*, 421 U.S. 982 (1975); *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) (en banc), *rev'd sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

100. *La Raza Unida*, 57 F.R.D. at 101.

101. *La Raza Unida*, 57 F.R.D. 94; *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), *aff'd sub nom.* *La Raza Unida of S. Alameda Cty. v. Volpe*, 488 F.2d 559 (9th Cir. 1973).

102. *La Raza Unida*, 337 F. Supp. 221, 233–34.

103. *La Raza Unida*, 57 F.R.D. at 100.

104. 453 F.2d 852 (1st Cir. 1972) (per curiam).

105. *Id.*; *see also* *Lee v. S. Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (concluding that "attorney's fees are part of the effective remedy . . . to carry out the congressional policy" of 42 U.S.C. § 1982).

106. *See, e.g.*, *Incarcerated Men of Allen Cty. Jail v. Fair*, 507 F.2d 281, 289 (6th Cir. 1974) (Celebrezze, J.).

In the absence of statutory authorization for fee shifting, the lower courts latched on to language about the tremendous breadth of equity from several Supreme Court decisions, including the decisions discussed above.¹⁰⁷ The D.C. Circuit, for example, in *Wilderness Society v. Morton* (which would eventually be reversed in *Alyeska Pipeline*), relied heavily on dicta from *Hall v. Cole*,¹⁰⁸ which certainly could be read to support a broad private attorney general exception:

Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation" and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."¹⁰⁹

The private attorney general exception extended the benefits of the common fund and substantial benefit exceptions (diffusion of litigation costs, enforcement of legal norms for which a collective action problem exists, and flexibility for trial judges to ferret out "unworthy" plaintiffs) to a much broader class of plaintiffs. Under the common fund exception, fee recovery is limited to plaintiffs pursuing benefits on behalf of a group of beneficiaries with an established fund. In developing the substantial benefit exception, courts emphasized that some successful suits benefit many others not party to a lawsuit.¹¹⁰ But, as courts applying the private attorney general exception recognized, these broadly beneficial suits are most certainly not limited to suits benefiting an established common fund.¹¹¹ Implicit in the private attorney general exception is the judgment that the common fund exception is underinclusive—it fails to adequately promote some types of desirable suits, even as it rewards plaintiffs for bringing others.¹¹² The entire public is harmed by certain behaviors, such as pollution or discrimination, and the private attorney general exception encouraged suits to eradicate such behaviors.

Achieving this desired effect required dispensing with a key limiting requirement of the common fund exception—namely, that the litigation benefits a specific group

107. See, e.g., *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1029–30 (D.C. Cir. 1974) (en banc), *rev'd sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Cooper v. Allen*, 467 F.2d 836, 841 (5th Cir. 1972).

108. 412 U.S. 1 (1973).

109. *Id.* at 4–5 (footnotes omitted) (citation omitted) (first quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939); then quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391–92 (1970)).

110. See, e.g., *Incarcerated Men*, 507 F.2d at 283, 285.

111. See, e.g., *id.* 285–86 (rejecting substantial benefit exception in suit by incarcerated individuals to address terrible prison conditions but embracing private attorney general exception because suit benefited not only "the present inmates of the jail but also all future inmates of the facility" and fee award ensured that "the vindication of public constitutional rights [would] not depend upon the financial resources of the particular individuals who seek to secure those rights").

112. See, e.g., *id.* at 285.

of persons. Instead, in operation, the benefitted group *must* be broad.¹¹³ Anything smaller would likely fail to meet the importance or breadth requirements of the private attorney general exception.¹¹⁴ Furthermore, while the common fund exception shifted fees *to the group of beneficiaries*, the private attorney general exception provides no defined group to which fees can be shifted. Instead, and still under a compensatory rationale, it is the defeated defendant (which, in suits against public entities, may be the benefiting taxpayers) who must pay for the attorney who bested it.

Thus, while the exception carried with it heretofore unrealized, substantial benefits—perhaps even an increase in net just results—it also exacted additional costs. The courts of appeals recognized that defendants may frequently be faced not only with plaintiffs who had greater incentive to litigate, but also higher-risk litigation.¹¹⁵ As before, the exception accorded courts additional flexibility with which they could pursue equitable results, but this equity moved even further from an American “Rule” toward, perhaps, an American Standard.¹¹⁶ The Supreme Court was not willing to take that path without a clear congressional directive.

II. ALYESKA PIPELINE: AN UNSCRIPTED RESET FOR THE AMERICAN RULE

In *Alyeska Pipeline*, a group of environmental groups brought suit to enjoin the Secretary of the Interior from permitting construction of a trans-Alaskan oil pipeline.¹¹⁷ The environmentalists alleged that Alyeska Pipeline failed to complete the required environmental impact analyses under the National Environmental Policy Act (NEPA) of 1969¹¹⁸ and that the requested right-of-way width exceeded the requirements in the Mineral Leasing Act (MLA) of 1920.¹¹⁹ During the first round through the D.C. Circuit, the court reinstated the injunction dissolved by the district court, but solely on the highly technical width requirements of the MLA to avoid the more complicated NEPA issue.¹²⁰ Congress then amended the MLA to allow pipeline construction to proceed.¹²¹ During the second trip to the D.C. Circuit, the court awarded attorney’s fees on a private attorney general theory.¹²² The combination of the plaintiffs’ efforts to protect the environment and to stop Alyeska Pipeline from

113. See, e.g., *Incarcerated Men*, 507 F.2d 281.

114. Cf. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972) (requiring, *inter alia*, that plaintiff’s litigation benefit “numerous people” to justify an award of attorney’s fees), *aff’d sub nom.* *La Raza Unida of S. Alameda Cty. v. Volpe*, 488 F.2d 559 (9th Cir. 1973).

115. E.g., *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1032 (D.C. Cir. 1974) (en banc), *rev’d sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

116. But cf. *Company Information*, AM. STANDARD, <http://www.americanstandard-us.com/companyinfo/overview.aspx> [<https://perma.cc/5PP5-7E3H>] (describing the history of American Standard, the plumbing company that invented the “one-piece toilet”).

117. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 241.

118. *Id.* at 241–44 (citing 42 U.S.C. §§ 4321–47 (1970)).

119. *Id.* (citing 30 U.S.C. § 185 (1970)).

120. *Id.* at 244 (citing *Wilderness Soc’y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (en banc), *appeal after remand*, 495 F.2d 1026, 1032 (D.C. Cir. 1974) (en banc), *rev’d sub nom.* *Alyeska Pipeline Serv. Co.*, 421 U.S. 240).

121. *Id.* at 244–45; Act of Nov. 16, 1973, Pub. L. No. 93-153, tit. I, § 101, 87 Stat. 576 (codified at 30 U.S.C. § 185 (Supp. III 1974)).

122. *Id.* at 245–46.

circumventing the plain language of the MLA constituted the “compelling interest” that swung the equities in the plaintiffs’ favor.¹²³

Decided in 1975, *Alyeska Pipeline* definitively rejected any possibility of a judicially crafted private attorney general exception—or any other new equitable exception to the American Rule.¹²⁴ But it did so with a façade of substantive minimalism beneath which the Supreme Court purported to defer entirely to Congress’s wishes and a lariat of procedural maximalism with which the Court bound dissimilar nonparties.

A. Substantive Minimalism: Take Your Complaints to Congress

The Supreme Court’s commitment to substantive minimalism dominated the first half of the opinion reversing the attorney’s fees award. Illustrative of this are two of the Court’s statutory justifications: First, the Court tied its decision—and the near-absolute supremacy of the American Rule—to a court-costs statute from 1853.¹²⁵ Second, the Court asserted that, because Congress had crafted several statutes with “specific and explicit provisions” for fee shifting, Congress intended *only* those statutes to allow attorney’s fee awards.¹²⁶ And, despite the Court’s megadeference to its discerned congressional directive, it doubled down on the validity of the other judicially created exceptions discussed in Part I.¹²⁷

There are substantial problems with both of these justifications;¹²⁸ I highlight just a few. The 1853 court-costs statute, as stylistically modified in 1874 and thereafter left unchanged until 1948, said: “The following [short list of acceptable costs] and *no other compensation* shall be taxed and allowed to attorneys . . . in the courts of the United States . . . except in cases otherwise expressly provided by law.”¹²⁹ In 1948, Congress amended the statute, removing the “no other compensation” language.¹³⁰ While the Court pointed to the Reviser’s Note as evidence that the amended statute meant only to consolidate statutory provisions and not to change the law,¹³¹ the Court’s holding clearly engrafted nonexistent statutory language on to the

123. *Wilderness Soc’y*, 479 F.2d at 1032–39 (“Although Congress has now given the go-ahead to the pipeline on the basis of the impact statement prepared by the Department, this appeal helped focus attention in Congress on the major issue raised—the relative merits of a trans-Canadian versus a trans-Alaskan route. We take the action of Congress approving the impact statement, not as a total rejection of the arguments made on appeal, but rather as a recognition that appellants had raised a very substantial question” (emphasis omitted) (footnote omitted) (citations omitted)).

124. 421 U.S. 240.

125. *Id.* at 251–60 (citing Act of Feb. 26, 1853, ch. 80, 10 Stat. 161).

126. *Id.* at 260–63.

127. *Id.* at 257–59.

128. See generally *id.* at 272–88 (Marshall, J., dissenting); *Awards of Attorneys’ Fees*, *supra* note 95 (criticizing the majority’s textual and historical analysis).

129. See *Alyeska Pipeline*, 421 U.S. at 255 (majority opinion) (emphasis added) (quoting Revised Statutes of 1874 § 823).

130. *Id.* at 256 n.29 (“The 1948 Code does not contain the language used in the 1853 Act and carried on for nearly 100 years that the fees prescribed by the statute ‘and no other compensation shall be taxed and allowed’”).

131. *Id.* at 256 n.29.

fees statute. “[N]othing,” said the Court, “in the 1948 Code indicates a congressional intention to depart from that rule”¹³²—except, of course, the change in the statutory language. Furthermore, the Supreme Court recognized the common fund and substantial benefit exceptions, making broad observations about its historic powers at equity, without ever being troubled by the 1853 statute.¹³³ *Alyeska Pipeline* is a stark retreat from the Court’s ode to equity in *Mills v. Electric Auto-Lite Company*,¹³⁴ decided a mere five years prior. Combined, this history substantially weakens the Court’s claim to a definitive statutory mandate.

The Court’s second statutory justification, that Congress, by including fee-shifting provisions in some statutes, meant to stop the courts from exercising their equitable powers in other situations, suffers from similar shortcomings. First, the rationale proves far too much. Recognizing that Congress, too, may provide for fee shifting does not explain why courts exercising their historic equitable powers could not also do so. The Court also failed to explain how it discerned that Congress, by enacting several statutes with fee-shifting provisions, intended to prevent fee shifting under other statutes, instead of merely ensuring that fee shifting would be available in certain situations. Congress just as easily could have made clear that it did *not* want fee shifting either in particular statutes or as a general proposition. Congress’s actual activity proves Justice Marshall’s argument in dissent just as much as it proves the majority’s position.¹³⁵ Thus, it should have been uncontroversial for this “tie” to result in a true judicial determination.

Ultimately, “there appears to be no principled basis for construing [the fee statutes] to preclude fee awards under the private attorney general rationale while preserving equitable power in both bad faith and common benefit situations.”¹³⁶ Given the well-documented judicial development of the Rule and the flimsiness of the fee statute upon which the Court relied, it clearly was the judiciary’s established place to craft exceptions as justice required, subject to Congress’s corrective actions. In fact, by attributing to Congress such a hardline intent with such insufficient evidence, the Court may well have undermined Congress’s actual intent; perhaps Congress was actually content with the status quo. But so construing the statute also undermined the carefully built equitable foundations of the other exceptions. The Court’s holding required future decisions outside the narrow pillars of the common fund and substantial benefit exceptions to spurn the usual guideposts of equitable decision making (such as balancing of incentives and fairness among both parties and nonparties) with a mere citation to *Alyeska* or the court-costs statute.

The Court concluded that it “need labor the matter no further. It appears to us that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself.”¹³⁷ Despite the Court’s one-paragraph policy analysis to support rejection of the private attorney general

132. *Id.*

133. *See supra* Part I.A–B.

134. 396 U.S. 375 (1970); *see supra* Part I.B.2.

135. *See Alyeska Pipeline*, 421 U.S. at 272–88 (Marshall, J., dissenting); *Awards of Attorneys’ Fees*, *supra* note 95.

136. *Awards of Attorneys’ Fees*, *supra* note 95, at 175.

137. *Alyeska Pipeline*, 421 U.S. at 269.

exception,¹³⁸ the Court made it crystal clear that the costs statute was performing the heavy lifting. It is unclear if this policy analysis is at all a part of the *ratio decidendi*¹³⁹ or, if it is, how critical it is to the decision—but it is clearly truncated, one-sided, and subordinate in location and length to the rest of the opinion. This represents a terrific departure from the Supreme Court’s careful weighing of the equities in its earlier American Rule jurisprudence and, as the next Section argues, fails to sufficiently justify the seismic shift it imposed upon the judiciary’s equitable power and responsibility.

B. Procedural Maximalism

As Justice Marshall and other commentators have noted, the world of possible outcomes in *Alyeska Pipeline* was not dichotomous.¹⁴⁰ The Court could have embraced a result other than affirming the private attorney general exception as applied or completely eradicating the exception, as the Court ultimately did. It could have decided that, under the private attorney general framework, the equities did not sufficiently favor the plaintiff, as the dissenters from the D.C. Circuit urged (and perhaps with some reason).¹⁴¹

Or the Court could have limited the exception to allow fee awards “only where constitutional rights have been vindicated” instead of the broader category of

138. The Court highlighted the difficulty in determining what statutes are “important enough to warrant” fee shifting without express congressional guidance; the incongruity of the express unavailability of fees against the United States under the then-enacted 28 U.S.C. § 2412; and numerous other questions that might require resolution through litigation, such as how district court awards should be reviewed, whether the exception would apply to plaintiffs and defendants, and whether fees should be mandatory or discretionary. *Alyeska Pipeline*, 421 U.S. at 263–64. Of course, if the Court had not determined that it was without power to recognize an equitable exception to the American Rule, the Court itself could have made reasonable policy determinations on these issues or provided guidance to the lower courts so that they could make reasonable policy determinations.

139. For an intriguing discussion of how to identify the *ratio decidendi* of a particular case, see, for example, Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771 and Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930). At least one view holds that “the ratio decidendi is the rule or principle that the precedent-setting court considered to be necessary for its decision.” Collier, *supra*, at 799 (emphasis omitted) (citing Rolf Sartorius, *The Doctrine of Precedent and the Problem of Relevance*, 53 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 343, 349–50 (1967)).

140. See *Alyeska Pipeline*, 421 U.S. at 272–88 (Marshall, J., dissenting); *Awards of Attorneys’ Fees*, *supra* note 95.

141. See *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1039–42 (D.C. Cir. 1974) (MacKinnon, J., dissenting) (“I would refuse to compensate appellants’ attorneys for any work they did on the NEPA issue—the main thrust of which would have made us further dependent upon another foreign nation, albeit our good neighbor, the Queen of the Snows to the north, for resources vital to our well-being as an independent nation. . . . In addition to recovery on the basis of an issue never decided by this court, appellants’ victory here is premised on the narrow statutory interpretation issue on which they actually prevailed on the merits. . . . [T]he width limitation surely was not the motivating force behind appellants’ decision to institute legal action.”), *rev’d sub nom. Alyeska Pipeline*, 421 U.S. 240; *id.* at 1042–46 (Wilkey, J., dissenting).

important statutory rights.¹⁴² This would have negated many of the Court's concerns about dealing with the "important rights" standard and its uncertainty.¹⁴³ It also would have shown sufficient respect for Congress by leaving the responsibility of determining which statutory rights warranted fee shifting to it. Furthermore, it is certainly reasonable to conclude that constitutional rights normatively warrant greater protection than other rights, and attorney's fees would aid in vindicating such rights.

Finally, the Court could have rejected the private attorney general exception while still maintaining the courts' time-honored powers at equity to do justice in the particular case, and recognize or develop new exceptions as necessary. *Alyeska Pipeline* rejected all middle-road proposals, including manageable solutions such as these.

In so doing, the Court bound future distinguishable cases with parties that were not before the Court.¹⁴⁴ Instead of ruling as narrowly as possible, the Court ruled as broadly as possible. Even if the private attorney general exception was unaligned with congressional wishes or was otherwise unwise as a matter of equity or some other policy basis, the Court need not have closed the doors to future litigants who may have had compelling interests warranting independent consideration.

By ruling broadly, the Supreme Court allowed an accident of timing to lock in the common fund, substantial benefit, and punitive¹⁴⁵ exceptions as the sole equitable exceptions to the Rule. Indeed, the Court admitted as much: "Congress has not repudiated the judicially fashioned [common benefit and punitive] exceptions to the general rule against allowing substantial attorneys' fees . . ." ¹⁴⁶ Even if the tradeoffs from the earlier exceptions were justified through reasoned decisions, stopping doctrinal development altogether was not. The Court's abbreviated policy discussion touched only on the private attorney general exception it faced.¹⁴⁷ It offered absolutely no policy justification for the solution it selected once it rejected the circuit courts' majority position. The litigants having to deal with the American Rule's new statutory wig deserved more.

III. CATALYST DOCTRINE: EQUITY REDUX

Congress stepped into the *Alyeska Pipeline* void and filled it with myriad statutes to ensure that important rights could be vindicated. The legislative history to the Civil Rights Attorney's Fees Awards Act of 1976,¹⁴⁸ the model fee-shifting statute passed in the *Alyeska Pipeline* aftermath,¹⁴⁹ made Congress's intent perfectly clear: "The

142. *Awards of Attorneys' Fees*, *supra* note 95, at 180.

143. *See Alyeska Pipeline*, 421 U.S. at 263–64.

144. *See Peters*, *supra* note 21, at 1513–21; *supra* notes 28–32 and accompanying text.

145. For a thorough analysis of the punitive exceptions to the American Rule, see generally Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613 (1983). These generally allow for attorney's fees awards in contempt proceedings and for bad faith. *Id.*

146. *Alyeska Pipeline*, 421 U.S. at 260. Of course, Congress also had not repudiated the private attorney general exception.

147. *Id.* at 263–64.

148. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988).

149. Albiston & Nielsen, *supra* note 8, at 1093–94.

purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by [*Alyeska Pipeline*.]¹⁵⁰ Many of these statutes provided for fees to a “prevailing party.”¹⁵¹ The judiciary, now without the equitable power to provide for fee shifting as justice mandates, set out to interpret this congressional response; the Supreme Court, once more displeased with the lower courts, rejected this interpretation in favor of its own, higher standard.

One by one each circuit filled the interpretive void left by the new slew of “prevailing party” statutes. Each circuit, save one, settled upon the “catalyst theory” to give meaning to the term “prevailing.”¹⁵² Simply put, the catalyst theory awards attorney’s fees to the plaintiff if “it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.”¹⁵³ This required a showing 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.’”¹⁵⁴ Some circuits further required that the plaintiff show that success was the result of “threat of victory” and not “nuisance” or “threat of expense.”¹⁵⁵

For example, in *DeMier v. Gondles*,¹⁵⁶ the Fourth Circuit (which would eventually

150. S. REP. NO. 94-1011, at 1 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5909; see H.R. REP. NO. 94-1558, at 2–3 (1976); Albiston & Nielsen, *supra* note 8, at 1093–94.

151. *E.g.*, Civil Rights Attorney’s Fees Awards Act, 90 Stat. at 2641; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 8, 102 Stat. 1619, 1634 (codified as amended at 42 U.S.C. § 3613(c)(2)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 505, 104 Stat. 327, 371 (codified as amended at 42 U.S.C. § 12205).

152. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 643 (2001). Compare *New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397–400 (6th Cir. 1996); *Marbley v. Bane*, 57 F.3d 224, 233–35 (2d Cir. 1995); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Zinn ex rel. Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *Cullens v. Ga. Dep’t of Transp.*, 29 F.3d 1489, 1494–95 (11th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 545–50 (3d Cir. 1994); *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist.*, # 1, 17 F.3d 260, 262–63 (8th Cir. 1994); *Am. Council of the Blind of Colo., Inc. v. Romer*, 992 F.2d 249, 250–51 (10th Cir. 1993); *Craig v. Gregg Cty.*, 988 F.2d 18, 21 (5th Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257–58 (6th Cir. 1993); *Grano v. Barry*, 783 F.2d 1104, 1108–10 (D.C. Cir. 1986); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1474–75 (10th Cir. 1985); *Institutionalized Juveniles v. Sec’y of Pub. Welfare*, 758 F.2d 897, 910–17 (3d Cir. 1985); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758–60 (2d Cir. 1984); *Doe v. Busbee*, 684 F.2d 1375, 1379–80 (11th Cir. 1982); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982); *Robinson v. Kimbrough*, 652 F.2d 458, 465–67 (5th Cir. 1981); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187–88 (9th Cir. 1981); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980) (per curiam); *Nadeau v. Helgemoe*, 581 F.2d 275, 279–81 (1st Cir. 1978), with *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (per curiam); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979).

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

154. Albiston & Nielsen, *supra* note 8, at 1100 (alteration added) (quoting *Buckhannon*, 532 U.S. at 627–28 (Ginsburg, J., dissenting)) (synthesizing elements of catalyst theory).

155. *Buckhannon*, 532 U.S. at 628 (Ginsburg, J., dissenting) (quoting *Marbley*, 57 F.3d at 234–35).

156. 676 F.2d 92 (4th Cir. 1982).

be the sole circuit to expressly reject the catalyst doctrine) affirmed a grant of attorney's fees in a § 1983 suit challenging the Arlington County Sheriff's Office strip search policy. DeMier was arrested for playing a stereo too loudly; Weitzel was arrested for writing obscene words on a traffic ticket.¹⁵⁷ Both were strip-searched.¹⁵⁸ The plaintiffs sued in November 1980.¹⁵⁹ About one month later, the sheriff's office temporarily suspended its strip search policy, and in April 1981, the state legislature enacted a statute to cabin the sheriff's strip search authority.¹⁶⁰ Shortly thereafter, the plaintiffs moved for voluntary dismissal.¹⁶¹ In a typical catalyst-doctrine analysis,¹⁶² the court explained the suit's influence on the changed strip search policy:

As the district court noted, at the time this suit was filed the strip search policy had recently survived challenge in a separate suit and the Sheriff had resolutely declared his intention to maintain the policy. According to the numerous exhibits of newspaper articles and editorials submitted by appellees, this suit caused considerable publicity, both locally and nationwide, and "increased political pressure" regarding the policy. The conclusion appears inescapable that even if other complaints contributed to the change in policy, this suit was a major contribution.¹⁶³

On that basis, the court affirmed the fee award.

In *Foremaster v. City of St. George*,¹⁶⁴ the Tenth Circuit reversed a denial of plaintiff's fees in an Establishment Clause¹⁶⁵ challenge to St. George, Utah's practice of granting electricity subsidies to the local Mormon temple. After *Foremaster* filed suit, the city terminated the electricity subsidy.¹⁶⁶ The district court determined that *Foremaster* lacked standing and dismissed his complaint but found that the city "terminated the subsidy to reduce tension in the community and to save time and expense of litigating *Foremaster's* lawsuit."¹⁶⁷ The court of appeals reversed the district court on the standing issue; determined that city's conduct actually ran afoul of the Establishment Clause; and, on the basis of the district court's finding that the city terminated the subsidy in part to avoid litigating *Foremaster's* claim, remanded the cause for a determination of attorney's fees.¹⁶⁸

DeMier and *Foremaster* are examples of how the catalyst doctrine compensated plaintiffs for effecting legal change, even when their actions ended short of settlement or judgment. It was a means of implementing Congress's *express* desire (which was lacking before *Alyeska Pipeline*) to encourage private persons to enforce certain

157. *Id.* at 92–93.

158. *Id.* at 93.

159. *Id.* at 92.

160. *Id.* at 93.

161. *Id.*

162. *See, e.g.,* Grano v. Barry, 783 F.2d 1104, 1108–12 (D.C. Cir. 1986).

163. *DeMier*, 676 F.2d at 93.

164. 882 F.2d 1485 (10th Cir. 1989).

165. U.S. CONST. amend. I.

166. *Foremaster*, 882 F.2d. at 1486–87.

167. *Id.* at 1488.

168. *Id.* at 1488–89, 1492. 42 U.S.C. § 1988(b) (2012) allows a court, in its discretion, to award prevailing parties in civil rights suits a "reasonable attorney's fee as part of the costs."

laws. The catalyst doctrine allowed each court to evaluate the proceeding before it and fashion a result based upon that evaluation—not based upon the presence or absence of a formality.

However, courts also refused to mechanically grant attorney's fees whenever the defendant changed its conduct. Not terribly unlike a court operating in equity, the lower courts understood the catalyst doctrine to require a weighing of competing interests and values. In *Grano v. Barry*, for example, the D.C. Circuit vacated and remanded an order granting a fee award to citizens who successfully enjoined the District of Columbia's issuance of a permit to demolish a historic tavern until its fate could be decided by initiative vote.¹⁶⁹ Even though the initiative was eventually declared unconstitutional by a different court and the tavern was demolished, the court of appeals agreed with the district court that the plaintiffs were prevailing parties because the plaintiffs' actions guaranteed that the "initiative still had the potential to mean something."¹⁷⁰ That another court later undercut the litigants' ultimate goal was inapposite to the determination of whether the plaintiffs' litigation in federal court produced the desired relief.¹⁷¹

However, this was not the end of the inquiry. The court still had to determine whether the award of fees was ultimately just:

Apart from the unusual circumstance that the vote on the Rhodes Tavern initiative was ultimately declared unconstitutional, the District has also stressed its uniquely frustrating position in the litigation: it had no choice under District law but to issue the demolition permit once the conditions precedent were fulfilled. No matter which course it followed—granting or withholding the permit—either the plaintiffs or Carr would have claimed it was acting unconstitutionally. In such a squeeze play, it argued, it would not be equitable to assess attorneys' fees against it.¹⁷²

The D.C. Circuit remanded the cause to the trial court to consider whether these "special circumstances" undermined the fairness of the fee award.¹⁷³

Other courts, too, ensured that fee shifting was in the interests of justice. The Seventh Circuit scrutinized fee requests premised upon settlement agreements to ensure that the defendant would not be slapped with attorney's fees for providing a plaintiff with "wholly gratuitous" relief.¹⁷⁴ In *Hooper v. Demco, Inc.*, Hooper sought insurance coverage for an up-and-coming cancer treatment to treat his aggressive bone marrow cancer.¹⁷⁵ The insurance company rejected the request as "investigative" and "experimental" under Hooper's policy and Hooper brought

169. 783 F.2d 1104 (D.C. Cir. 1986).

170. *Id.* at 1109 (emphasis omitted).

171. *Id.*

172. *Id.* at 1111.

173. *Id.* at 1111–12.

174. *Compare* *Hooper v. Demco, Inc.*, 37 F.3d 287 (7th Cir. 1994) (Coffey, J.) (refusing to shift attorney's fees based on settlement), *with* *Dixon v. City of Chicago*, 948 F.2d 355 (7th Cir. 1991) (shifting fees where settlement brought relief sought by plaintiffs and ensured compliance with federal law).

175. *Hooper*, 37 F.3d at 288–89.

suit.¹⁷⁶ The parties quickly settled and the insurance company “spearheaded a charitable fund-raising effort” that led to the company and various charities covering the entirety of Hooper’s treatment expenses.¹⁷⁷ Hooper died after treatment and before the appeal.¹⁷⁸ Hooper’s estate contended that it should be awarded attorney’s fees under the Employee Retirement Income Security Act. The court rejected the request as entirely gratuitous:

In this case the defendant did not coldly turn its back on its employee with a cursory “See you in court” but instead, sidestepped its own health plan by arranging for outside help for the plaintiff’s medical bills. These actions are all the more respectable in light of the evidence which supported the defendant’s position in the litigation.¹⁷⁹

Hooper demonstrated a careful weighing of tradeoffs. If by trying to assist a plaintiff to recover from an injury a defendant would open itself to potentially substantial attorney’s fees shifting without regard to the merit of the lawsuit, the defendant may well forego the gratuitous activity. Such a rule would be detrimental to all of society by discouraging amicable resolution of disputes. The cost of occasionally diminishing a plaintiff’s fee recovery in court is a small price to pay for maintaining proper incentives for achieving mutually beneficial alternatives.

Grano and *Hooper* illustrated that courts were cognizant that fee shifting could have undesirable, unintended consequences if left unchecked. The catalyst doctrine gave the courts sufficient room to develop a fee-shifting rule that would (in their view) carry out Congress’s mandate but not offend principles of equity or discourage desirable behavior. In a sense, then, the courts understood Congress’s corrective actions post-*Alyeska Pipeline* to require a return not necessarily to the *status quo ante*, but to the foundations of the equitable exceptions to the American Rule: evaluating and balancing litigation incentives, considering the impact of a fee award upon non-parties, and trying to ensure that some types of important litigation would not succumb to a collective action problem. And the courts did so with some support: Congress designed fee shifting to “allow courts to provide the *familiar* remedy of reasonable counsel fees to prevailing parties.”¹⁸⁰ As Part I establishes, granting attorney’s fees in an equitable fashion was quintessentially familiar to the courts and the result of decades of doctrinal development of the American Rule. While perhaps imperfect, these cases demonstrate that the catalyst doctrine was a workable solution to advance clear congressional objectives.

176. *Id.* at 289.

177. *Id.* at 290 & n.7.

178. *Id.* at 291.

179. *Id.* at 295.

180. S. REP. NO. 94-1011, at 2 (1976) (emphasis added), as reprinted in 1976 U.S.C.C.A.N. 5908, 5909–10; see *supra* notes 148–51 and accompanying text.

IV. *BUCKHANNON*: DON'T LET THE FACTS GET IN THE WAY OF THE TRUTH

Buckhannon was a battleground upon which the conservative and liberal wings of the Court duked it out over competing notions of statutory interpretation,¹⁸¹ the persuasive value of dicta and circuit court unanimity,¹⁸² and the policy implications of each wing's preferred interpretation of "prevailing party."¹⁸³ The Court rejected the catalyst doctrine. Instead, the Court held, a party "prevails" under fee-shifting statutes only upon earning a result christened with "judicial imprimatur."¹⁸⁴ Without some sort of judicial signature, be it on a settlement agreement or a consent decree, a party may not recover attorney's fees even if the party ultimately receives all other requested relief. The prevailing fivesome of Chief Justice Rehnquist (delivering the Court's opinion) and Justices O'Connor, Scalia, Kennedy, and Thomas preferred Black's Law Dictionary while the dissent, led by Justice Ginsburg, preferred Webster's New International Dictionary. The majority gave the lower courts and its own dicta little heed, while the dissent believed they warranted some respect. And the majority (especially Justice Scalia in concurrence, joined by Justice Thomas) and the dissent took very different views of how its rule would impact litigants appearing before the federal courts.

As in *Alyeska Pipeline*, *Buckhannon*'s holding was crafted with a primer of substantive minimalism and finished with a procedural varnish that was far from minimalistic. Section A briefly deals with the substantive minimalism; again, the Court took statutory text that may only be fairly described as ambiguous and attributed to it an unequivocal interpretation. The balance of this Part, however, deals with the Court's analysis of the policy implications of both its rule and the catalyst doctrine. The Court's empirical assumptions about the efficiency gained by its rule over the catalyst doctrine about these implications have given its holding potentially tremendous breadth, again reflecting a lack of procedural minimalism by binding parties not before it. Most critical, the evidence culled by Professors Albiston and Nielsen and others suggests that these empirical assumptions may well be false. Thus, and as courts and academics continue to work out the precedential value of appellate *factual* findings,¹⁸⁵ the Court may well have bound parties not before it to a *false* assumption.

A. *Prevailing Parties: The Battle of the Dictionaries*

The *Buckhannon* majority's spin on substantive minimalism divorced the question of statutory interpretation from statutory purpose. While not strictly minimalistic in the *Alyeska Pipeline* sense, where the Court declined to embrace its own historic authority and instead sloughed it upon Congress, *Buckhannon*'s minimalism reveals the same disregard for the Court's responsibility to interpret and assess the impact of

181. Compare *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001), with *id.* at 633 (Ginsburg, J., dissenting).

182. Compare *id.* at 605 (majority opinion), and *id.* at 621 (Scalia, J., concurring), with *id.* at 622 (Ginsburg, J., dissenting).

183. Compare *id.* at 608–10 (majority opinion), and *id.* at 617–20 (Scalia, J., concurring), with *id.* at 635–40.

184. *Id.* at 605 (majority opinion) (emphasis omitted).

185. See *infra* Part IV.C; sources cited *infra* note 247.

its holding. And the Court reached this result despite its roughly contemporaneous (and later unanimous) recognition that principles of interpretation are “often countered . . . by some maxim pointing in a different direction.”¹⁸⁶

After a brief explication of the case and a one-paragraph homage to the American Rule, Chief Justice Rehnquist observed that “Congress employed the term ‘prevailing party,’ a legal term of art.”¹⁸⁷ This meant that Black’s Law Dictionary applied,¹⁸⁸ which in turn meant that the catalyst rule must be rejected in favor of the “judicial imprimatur” requirement.¹⁸⁹ The term “prevailing party” was so clear to the Court, in fact, that it did not need to “determine which way [the] various policy arguments cut.”¹⁹⁰

According to the Court, these magical words absolved it of the responsibility to more carefully probe Congress’s wishes.¹⁹¹ But even the likes of Justice Scalia have recognized that “[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”¹⁹² That is, even if Chief Justice Rehnquist and company (including Justice Scalia) sincerely believed that they had trod upon the definition that they would have intended had they drafted the statute, it does not follow that it was the *most appropriate* interpretation of what Congress had written. Four colleagues and myriad circuit courts believed another interpretation to be not only “textually permissible” but superior. This reality, of its own force, should have been enough of a signal to the majority that it needed to seriously engage in the real possibility that its hardline, Black’s Law Dictionary–based interpretation may have undermined Congress’s objectives. As in *Alyeska Pipeline*, the Court’s insistence that the statutory language was so clear as to relieve itself from any further interpretive obligation certainly weakens the vitality of the remainder of the analysis as part of the *ratio decidendi*.¹⁹³

As a normative matter, the Court owes it to the litigants, the public, and even Congress to thoroughly think through the costs and benefits of its decisions in all but perhaps the clearest of statutory mandates, in which case Congress should bear that burden.¹⁹⁴ But where, as here, the result is far from preordained, the Court should not hide behind the supposed power of a word in a statute. Substantive minimalism’s call for deference should not interfere with “the province and duty of the judicial

186. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001); *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014) (8-0 decision) (quoting *Circuit City*, 532 U.S. at 115).

187. *Buckhannon*, 532 U.S. at 603.

188. *Id.* at 603 (citing *Prevailing Party*, BLACK’S LAW DICTIONARY (7th ed. 1999) (“prevailing party” on page 1206 cross-references to “party (2)” and “prevailing party” on page 1145)).

189. *Id.* at 605 (emphasis omitted). Scalia, in concurrence, added detail about other uses of “prevailing party” in the United States Code. *Id.* at 611–14 (Scalia, J., concurring).

190. *Id.* at 610 (majority opinion).

191. *Cf.* Danieli Evans, *What Would Congress Want? If We Want To Know, Why Not Ask?*, 81 U. CIN. L. REV. 1191 (2013).

192. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 63 (2012); *see* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 n.3, 558 (2013) (reviewing SCALIA & GARNER, *supra*).

193. *See supra* note 139 and accompanying text.

194. *Cf.* Morrison, *supra* note 39.

department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”¹⁹⁵ Perhaps if the *Buckhannon* Court realized that its empirical assumptions—the focus of the remainder of this Part—might carry precedential weight, it would have more carefully assessed the impact of its rule in relation to the statute’s express purpose.

B. The Supreme Court’s Empirical Assumptions

At bottom, the majority endorsed a rule that it believed would support settlement. It took “a static, ex post approach focused on how the catalyst theory affects incentives once an enforcement action is commenced.”¹⁹⁶ The catalyst doctrine, according to the Court, had altered Congress’s intended balance and increased costs in two ways. First, it necessitated ancillary litigation over whether fees should be shifted under the three-part test.¹⁹⁷ While professing its faith in the district courts’ ability to make this assessment, the Court was displeased with the costs of the catalyst doctrine—the doctrine undermined what it termed “ready administrability.”¹⁹⁸ The Court’s rule, by contrast, was virtually self-executing. Second, defendants who wished to voluntarily provide relief would be less likely to do so under the catalyst doctrine for fear of additionally paying a fee award. Requiring judicial imprimatur eliminated the possibility that voluntarily acquiescing parties could be on the hook for attorney’s fees, which, the Court emphasized, can be “even more significant than[] their potential liability on the merits.”¹⁹⁹ The concurrence added a third cost: the increased possibility of false positives, where trial courts would fail to keep fees out of the hands of an undeserving plaintiff.²⁰⁰ This risk, according to Justice Scalia, was far graver than the (assumed) increased risk of false negatives:

[I]t seems to me the evil of the [possibility of false positives] far outweighs the evil of the [possibility of false negatives]. There is all the difference in the world between a rule that denies the extraordinary boon of attorney’s fees to some plaintiffs who are no less “deserving” of them than others who receive them, and a rule that causes the law to be the very instrument of wrong—exact[ing] the payment of attorney’s fees to the extortionist.²⁰¹

The dissent rejoined first by criticizing the Court’s rule as underinclusive and discouraging plaintiffs with meritorious claims from bringing suit.²⁰² The Court’s rule only rewards some litigants who effect congressionally desired change and not others: “The decision allows a defendant to escape a statutory obligation to pay a

195. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

196. *Albiston & Nielsen*, *supra* note 8, at 1091.

197. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609–10 (2001) (majority opinion).

198. *Id.* at 610 (quoting *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

199. *Id.* at 608 (quoting *Evans v. Jeff D.*, 475 U.S. 717, 734 (1986)).

200. *Id.* at 618 (Scalia, J., concurring).

201. *Id.*

202. *See id.* at 635–36 (Ginsburg, J., dissenting).

plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint."²⁰³ Ex ante, the dissent criticized the Court's emphasis on settlement as underappreciating the impact its rule would have on the entire system of private enforcement.²⁰⁴ As Professors Albiston and Nielsen observe, "[E]ncouraging settlement in the short run will mean little if, over time, opportunities for defendants to comply in response to legal challenges decline because plaintiffs bring fewer enforcement actions in the first place."²⁰⁵ Second, the dissent criticized the Court for its unwarranted distrust of the district courts' ability to avoid false positives by sifting through meritorious and nonmeritorious claims.²⁰⁶ Finally, the dissent accused the Court of misapprehending the object of litigation, and public interest litigation in particular.²⁰⁷ An aggrieved plaintiff seeking to enforce an important legal right cares naught about a judicial signature.²⁰⁸ More importantly, the class of persons who would have been subject to the untoward, illegal behavior but for a change in the defendant's activities cares naught about a formal judgment.²⁰⁹ The goal—for the litigant and for Congress—is to change behavior.²¹⁰ It is how *Buckhannon* impacted the ability of plaintiffs to achieve this goal to which I now turn.

1. Cost Assumptions

Underlying the majority's assessments of the costs of its rule are at least two empirical assumptions.²¹¹ One, identified and tested by Albiston and Nielsen, was the Court's insistence that their standard would not dissuade plaintiffs from bringing "meritorious but expensive claims,"²¹² and thus significantly frustrate Congress's stated intent. Through a national survey of over two hundred public interest organizations, Albiston and Nielsen demonstrate that the Court's assumption was erroneous. Instead, "[o]rganizations that engage in impact litigation, litigate against 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."²¹³ In a world where repeat players have a serious advantage over one-shot litigators,²¹⁴

203. *Id.* at 622.

204. *See id.* at 634–40; Albiston & Nielsen, *supra* note 8, at 1091.

205. Albiston & Nielsen, *supra* note 8, at 1091–92.

206. *Buckhannon*, 532 U.S. at 639–40 (Ginsburg, J., dissenting) ("And Congress assigned responsibility for awarding fees not to automatons unable to recognize extortionists, but to judges expected and instructed to exercise 'discretion.'").

207. *See id.* at 634.

208. *See id.* ("At the end of the rainbow lies not a judgment, but some action . . . by the defendant . . ." (second omission in original) (internal quotation omitted) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987))).

209. *See id.*

210. *See id.*

211. *See generally* Albiston & Nielsen, *supra* note 8.

212. *Id.* at 1087, 1191, 1130.

213. *Id.* at 1120–21.

214. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (discussing the continuum between

the *Buckhannon* decision significantly alters the power balance between public interest plaintiffs and defendants by discouraging and impeding lawyers from pursuing enforcement actions.²¹⁵

A second key assumption, also identified by Albiston and Nielsen, was the Court's claim that strategic capitulation would not be a problem. "Strategic capitulation" occurs when "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."²¹⁶ The catalyst doctrine ensured that defendants could not unilaterally moot claims by providing relief only to the particular plaintiff without also compensating the plaintiff's attorneys for bringing the claim.²¹⁷

The Court, in response to these concerns, argued first that the voluntary cessation exception to mootness would provide sufficient protection for plaintiffs from insincere changes in behavior.²¹⁸ However, as Albiston and Nielsen observe:

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.²¹⁹

And there is a further problem as well: government defendants (especially, but not exclusively, when acting legislatively) are frequently granted special solicitude in the voluntary cessation analysis.²²⁰ Finally, some suits are simply not amenable to

"one-shotters" and "repeat players").

215. Albiston & Nielsen, *supra* note 8, at 1121. For a closer look at how *Buckhannon* has impacted certain types of plaintiffs, see, for example, Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 543–49; Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 31–33 (2008); 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, 40–59 (2004); Brian J. Sutherland, *Voting Rights Rollback: The Effect of Buckhannon on the Private Enforcement of Voting Rights*, 30 N.C. CENT. L. REV. 267, 276–87 (2008). Also, see Annabelle Chan, Comment, *The Buckhannon Stops Here: Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources Should Not Apply to the New York Equal Access to Justice Act*, 72 FORDHAM L. REV. 1341, 1359–62, 1365–69 (2004). Further research should evaluate how public interest litigants and organizations have adapted their strategies to deal with *Buckhannon*.

216. Albiston & Nielsen, *supra* note 8, at 1091.

217. *See id.*

218. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The voluntary cessation doctrine holds that a defendant's voluntary conduct may not moot a case unless the defendant demonstrates "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190.

219. Albiston & Nielsen, *supra* note 8, at 1102.

220. Albiston & Nielsen, *supra* note 8, at 1112 & n.140 (collecting cases); see, e.g., Steven B. Dow, *Navigating Through the Problem of Mootness in Corrections Litigation*, 43 CAP. U. L. REV. 651, 675 & n.238–46 (2015) (same); Michael Ashton, Note, *Recovering Attorneys'*

mootness doctrine exceptions. For example, a Freedom of Information Act²²¹ suit is mooted once the requested information is provided because relief and recurrence are mutually exclusive.²²²

Second, the Court noted that strategic capitulation would only threaten plaintiffs seeking solely equitable relief; “so long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case.”²²³ While this is certainly accurate, damages are frequently unavailable in private attorney general suits against state actors, especially given the recent expansion of sovereign immunity.²²⁴ Strategic capitulation, Albiston and Nielsen conclude, certainly occurs and disproportionately so among public interest litigants.

The Supreme Court missed the mark on both of its empirical assumptions underlying its estimated costs; requiring judicial imprimatur does in fact exact many costs on one side of the ledger. *Buckhannon* has chilled public interest litigation “across the political spectrum,” and defendants have had success unilaterally mooting lawsuits to avoid paying fees (and, in some instances, to avoid providing meaningful relief).²²⁵

2. Benefit Assumptions

Perhaps all of *Buckhannon*’s increased costs would nonetheless be justified if the anticipated benefit is sufficient. After all, we tolerate costs, even high costs, in many policy areas in exchange for some benefits.²²⁶ The Court targeted one major benefit—lower taxpayer cost—albeit in more words that were obscured by citations to its earlier decisions to support extraordinarily broad propositions.²²⁷ Indeed, the Supreme Court gleaned from these earlier decisions a quasi-canon of construction,

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, 969 (“[T]he voluntary cessation exception most likely will not be applied to government defendants . . .”).

221. 5 U.S.C.A. § 552 (Westlaw through Pub. L. No. 114-327).

222. See Albiston & Nielsen, *supra* note 8, at 1106.

223. *Buckhannon*, 532 U.S. at 608–09.

224. Albiston & Nielsen, *supra* note 8, at 1102.

225. *Id.* at 1132.

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

Id. at 1132–33.

226. Cf., e.g., A. L. Berthelsen, *Can Cost-Overruns Be Controlled?*, U.S.A.F. JAG L. REV., Mar.–Apr. 1966, at 43, 44 (1966) (“[O]verexpenditure, followed by demand for reimbursement, has come to be a significant problem in the administration of the [government] cost contract.”).

227. See *Buckhannon*, 532 U.S. at 609–10 (expressing worries over “ready administrability” and duplicitous litigation); cf. Collier, *supra* note 139, at 800 (“[T]he ‘traditional’ conception [of precedential authority] is that an excessively broad principle . . . is dictum.”).

whereby it “avoid[s] an interpretation of the fee-shifting statutes that would have ‘spawn[ed] a second litigation of significant dimension,’” *viz.*, increased cost.²²⁸ The Court’s concern over “ready administrability,”²²⁹ too, is not an abstract concern over the capacity of the district courts, but instead reflects a judgment that any increase in “justice” that might result from a different standard is not worth the increased cost.²³⁰ The underlying assumption, then, is that the Court’s rule would effect this benefit of decreased costs.

As Albiston and Nielsen allude to, however, this assumption is far from certain. Albiston and Nielsen briefly mention three consequences of *Buckhannon* that tend to undermine any efficiency benefits that its rule may claim. First, the Supreme Court’s observation that the voluntary cessation exception may be available to ensure that a defendant may not unilaterally defeat fee shifting cuts both ways, as the exception frequently requires ancillary proceedings and inquiries into the defendant’s motives.²³¹ To the extent that the voluntary cessation exception mitigates any of the damage done by the judicial imprimatur standard, it is far from obvious that it is any more efficient.

Second, strategic capitulation actually draws out litigation that should otherwise settle quickly.²³² Again, Albiston and Nielsen explain how this is so: “[W]hen 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.”²³³ It is at least possible, and perhaps greatly possible, for a defendant to unilaterally terminate litigation by capitulating and thereby defeat a motion for attorney’s fees. Furthermore, because the defendant alone knows how or when the defendant might capitulate, the defendant may do so at the most convenient possible moment. And they may do so while a plaintiff continues to tarry and expend both her own resources and the court’s resources, unsuspecting of the defendant’s ultimate plan.

This possibility is far from theoretical. In *Buckhannon* itself, an assisted-living home and a resident challenged a state law requiring residents to be capable of “self-preservation”²³⁴ (that is, be able on their own to reach fire exits) under the Fair Housing Amendments Act²³⁵ and the Americans with Disabilities Act.²³⁶ As the plaintiffs were preparing to proceed to trial, the state legislature eliminated the “self-preservation” provision, mooting the case.²³⁷ But, all the while,

228. *Buckhannon*, 532 U.S. at 609 (second alteration in original) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)).

229. *Id.* at 610 (quoting *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

230. *Cf. Morrison*, *supra* note 39.

231. *See* Albiston & Nielsen, *supra* note 8, at 1102 n.78; Ashton, *supra* note 220, at 968.

232. *See* Albiston & Nielsen, *supra* note 8, at 1130.

233. *Id.* at 1101.

234. *Buckhannon*, 532 U.S. at 600–01.

235. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. § 3601–19 (2000)).

236. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101–213 (2000)).

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

the plaintiffs expend[ed] further resources unaware that the defendants intend[ed] to capitulate. Indeed, citing [Federal Rule of Civil Procedure] 11, the *Buckhannon* plaintiffs unsuccessfully sought to recover \$62,459 of litigation expenses they incurred after defendants became aware, but did not disclose, that the legislature was likely to repeal the challenged rule.²³⁸

In many other situations and cases, too, judges and scholars have recognized that *Buckhannon* actually discourages early settlement and protracts litigation.²³⁹

But while scholars and courts have latched upon the impact for plaintiffs,²⁴⁰ the greater burden upon the judicial system and taxpayer has been insufficiently emphasized and examined. The *Buckhannon* Court expressed particular concern with the expense of the catalyst doctrine. But extended litigation, replete with additional expenditures for courts and defense attorneys (frequently government attorneys, in many public interest cases), snowballs quickly.²⁴¹ As with the prospect of increased satellite litigation for voluntary cessation issues, the substantial expense of protracted litigation threatens to entirely undermine whatever efficiency benefits *Buckhannon* targeted. Furthermore, the *Buckhannon* majority could not pretend to be unaware of this possibility, as Justice Ginsburg emphasized this issue in her dissent.²⁴²

Finally, there are the less easily measured—but still very real—pecuniary costs of hamstringing private enforcement mechanisms.²⁴³ Public enforcement is extremely costly, which is a large part of why Congress has expanded fee-shifting provisions to encourage and enable private enforcement.²⁴⁴ For example, substantial public expense might be saved where litigation curtails the funding of illegal activity. These costs are in addition to immeasurable social costs caused by the illegal activity itself.

238. Albiston & Nielsen, *supra* note 8, at 1101–02 (emphasis added).

239. See sources cited *supra* note 215.

240. See, e.g., *Bingham v. New Berlin Sch. Dist.*, 550 F.3d 601, 604 (7th Cir. 2008) (Rovner, J.) (observing, in the Individuals with Disabilities Education Act context, that “[a] school district can delay providing expensive educational services as long as possible and hope that the parents either tire of the battle, rematriculate elsewhere, or that the child ages out of the school system. By doing so they do not risk having to pay the opposing side’s attorneys’ fees at the end of the protracted battle, provided they capitulate sometime prior to judgment”); see also sources cited *supra* note 215.

241. See, e.g., LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), www.uscourts.gov/file/document/litigation-cost-survey-major-companies (“The reality is that the high transaction costs of litigation . . . threaten to exceed the amount at issue in all but the largest cases.”); Landyn Wm. Rookard, Note, *A Referee Without a Whistle: Magistrate Judges and Discovery Sanctions in the Seventh Circuit*, 91 IND. L.J. 569, 569 nn.5–8 (2016) (collecting authorities).

242. *Buckhannon*, 532 U.S. at 640 (Ginsburg, J., dissenting) (“Might not one conclude overall . . . that the catalyst rule ‘saves judicial resources’ by encouraging ‘plaintiffs to discontinue litigation after receiving through the defendant’s acquiescence the remedy initially sought?’” (citations omitted) (first quoting *Paris v. U.S. Dep’t of Hous. & Urban Dev.*, 988 F.2d 236, 240 (1st Cir. 1993); then quoting *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999))).

243. See Albiston & Nielsen, *supra* note 8, at 1089–91.

244. See S. REP. NO. 94-1011, at 4 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5911 (“[F]ee shifting provisions have been successful in enabling vigorous enforcement of modern

Albiston and Nielsen's research establishes that *Buckhannon* had far greater costs than the majority anticipated. Their research also suggests that *Buckhannon*'s holding did not realize the majority's sought-after taxpayer savings. This is a case where the Court's interpretation "obstruct[ed] the document's purpose" rather than furthering it.²⁴⁵ The damage done was ill confined, however, as the lower courts have treated these assumptions as precedential to expand *Buckhannon*.

C. Procedural Maximalism: Erroneous Assumptions Become Factual Precedent

Buckhannon's unsupported empirical assumptions, which may be well characterized as facts found by "mere judicial intuition,"²⁴⁶ have had far-reaching implications for other cases. This stems from the uncertain precedential value of appellate court-found legislative facts.²⁴⁷

A legislative fact "provides descriptive information about the world that judges use as foundational building blocks to form and apply legal rules" and is exempt from judicial notice procedural requirements.²⁴⁸ Such facts "may not be the product of careful deliberation,"²⁴⁹ according to Professor Allison Larsen, for several reasons. First, often neither the fact's accuracy nor its usage to support a proposition is subject to the adversarial process. Leaving aside the high frequency with which facts are found without citation, Larsen found that, of the 120 most salient Supreme Court decisions handed down between 2000 and 2010, over half contained at least one citation to an authority not contained in any of the party or amicus briefs.²⁵⁰ That is, the Court selected the authority entirely of its own accord without the opportunity

civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy."); Burbank et al., *supra* note 12, at 645–46 ("Privately-initiated litigation satisfies the impulse in favor of decentralized regulation, and even though the federal and state governments substantially subsidize civil courts, the system is likely cheaper for the state, and hence for the taxpayers . . . than exclusive reliance on centralized (state-initiated) enforcement would be."); see also Albiston & Nielsen, *supra* note 8, at 1089–91.

245. SCALIA & GARNER, *supra* note 192, at 63.

246. Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 223, 249 (2014).

247. See, e.g., *Rowe v. Gibson*, 798 F.3d 622, 635–44 (7th Cir. 2015) (Hamilton, J., concurring in part and dissenting in part) (highlighting many of the problems with judicial factual research in general and appellate research in particular); Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 36, at 1274; Larsen, *Factual Precedents*, *supra* note 36, at 71; Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable* (pt. 1), 19 GREEN BAG 2D 187, 188 (2016) ("Criticisms of my opinions tend to focus on my citing Internet websites in them."); Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51 (2013); Sperino & Thomas, *supra* note 246, at 249 ("The treatment of the courts of these cases is even more remarkable because these cases are some of the most factually intensive in the courts, making them the least appropriate for judges to decide."); Robert Iafolla, *In High Stakes Friedrichs Case, U.S. Supreme Court Has No Record To Review*, REUTERS LEGAL, Jan. 8, 2016, 1/8/16 REUTERS LEGAL 11:00:01.

248. Larsen, *Factual Precedents*, *supra* note 36, at 71.

249. *Id.*

250. Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 36, at 1274.

for the scrupulous or skeptical to respond. Second, justices marshal facts “to build arguments and to tell a ‘story.’”²⁵¹ This means that

factual authorities are selected for a reason distinct from how likely they are to be accurate. As one judge candidly explained, a judge “picks her rhetoric to foreshadow the result.” . . . “Motivated reasoning” and “confirmation bias” are terms psychologists use to describe this phenomenon—we look for sources to support what we already think we know.²⁵²

As a result, factual claims may be biased or “plainly incorrect.”²⁵³

The problem, of course, goes beyond the one erroneous legislative fact that may support (in whole or in part) an appellate court decision. Rather, it is compounded by the fact’s precedential value—especially when the deciding court is the Supreme Court. While the jurisprudential and theoretical precedential weight of legislative facts is far from clear,²⁵⁴ there is mounting evidence that lower courts and the Supreme Court are treating such facts as actually preclusive. In a growing list of cases, the factual findings have gained precedential life and their results may not be distinguished by presentation of evidence of factual falsity.²⁵⁵

The Court’s factual assumption in *Buckhannon* that its rule would produce greater administrability and decreased costs but would not chill public interest claims has seeped into the lower courts’ jurisprudence and become precedential. The Third Circuit held that *Buckhannon* allowed fee shifting only upon a consent decree or “enforceable judgment on the merits” and, applying that holding, determined that a temporary restraining order did not meet that standard.²⁵⁶ *Buckhannon* referred to

251. Larsen, *Factual Precedents*, *supra* note 36, at 101.

252. *Id.* (quoting Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1377 (1995)) (citing Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT’L L. 405, 420–21, 434 (2012)). This seems to be especially possible where, as here, the Court firmly rests its holding on a minimalistic deference to a particular reading of a particular word, resulting in even less scrutiny of the Court’s factual observations. *Cf. infra* text accompanying notes 256–68.

253. Larsen, *Factual Precedents*, *supra* note 36, at 101.

254. *See* sources cited *supra* note 247.

255. Larsen cites two examples: the claim in *Citizens United v. FEC*, 558 U.S. 310 (2010), (which invalidated corporate campaign expenditure limits) that corporate independent expenditures do not corrupt politics, and the claim in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), (which affirmed a law school’s affirmative action program) that racially diverse viewpoints improve a law school education. Larsen, *Factual Precedents*, *supra* note 36, at 94–96. Both factual findings have supplanted the actual factual evidence marshaled in two cases against the Court’s finding. In a Montana case, the state supreme court distinguished *Citizens United* on its own factual record about expenditures and corruption. *Id.* at 95–96 (citing *W. Tradition P’ship, Inc. v. Attorney Gen.*, 271 P.3d 1 (Mont. 2011), *rev’d sub nom.* *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam)). The Supreme Court promptly and curtly reversed. *Am. Tradition P’ship*, 132 S. Ct. 2490. In a Fifth Circuit case, the court refused to consider the substantial record against the Court’s *Grutter* finding about the benefits of racial diversity. Larsen, *Factual Precedents*, *supra* note 36, at 96–97 (citing *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013)).

256. *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 232 (3d Cir. 2011) (en banc).

judgments on the merits and consent decrees as “examples”—not as the ultimate limitation on “judicial imprimatur,”²⁵⁷ as the dissent vehemently pointed out: “The Majority’s insistence on a ‘judgment,’ rather than *Buckhannon*’s broader ‘judicial imprimatur,’ will only unnecessarily drag out cases and lead to judicial inefficiency. The essential question in the prevailing party inquiry is whether the party has obtained a judicial alteration of the legal relationship between the parties.”²⁵⁸ The Third Circuit noted that the Supreme Court considered the “policy argument . . . that without the catalyst theory ‘defendants [could] unilaterally moot[] an action before judgment in an effort to avoid an award of attorney’s fees’—but was not swayed. Thus, *however persuasive that argument may seem, it cannot influence our decision here.*”²⁵⁹ The Third Circuit refused to countenance a challenge to the Supreme Court’s *factual* assumption, even as its holding arguably extended the scope of *Buckhannon*.²⁶⁰

The Sixth Circuit recently considered the impact of *Buckhannon* on the ability to recover attorney’s fees for “time spent defending or enforcing a prior consent decree”²⁶¹ and explicitly addressed the weight due to Supreme Court’s assumptions:

[W]e are hesitant to conclude . . . that *Buckhannon* has no import in the post-decree context. In fact, the rationale underlying *Buckhannon*’s limitations in the pre-decree or pre-judgment context—avoiding fact-intensive and time-consuming satellite litigation—suggests that we should also accord it some weight in the post-decree context. The real question is how much work it should do given these contextual differences, *i.e.*, before there has been any judicially-sanctioned material alteration of the parties’ legal relationship or after such an alteration.²⁶²

The Sixth Circuit reached a middle ground between no fee shifting and fee shifting only upon a material change in legal relationship, holding that the action to enforce the decree must be necessary and result (as in *Buckhannon*) in a judicial determination that secures successful enforcement.²⁶³

And the general assumption upon which the *Buckhannon* Court’s policy argument rests (*viz.* that making plaintiffs’ suits more difficult will deter “extortionists” and result in greater efficiency²⁶⁴) is appearing in other areas of law. In *University of Texas Southwestern Medical Center v. Nassar*,²⁶⁵ for example, the Supreme Court held that Title VII retaliation claims can only be proved by but-for causation and not by a motivating factor analysis. In so doing, the Court assumed (without any

257. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604–05 (2001) (“We think, however, the ‘catalyst theory’ falls on the other side of the line from these examples.”).

258. *Singer Mgmt. Consultants*, 650 F.3d at 239–40 (Roth, J., dissenting).

259. *Id.* at 232 (majority opinion) (alterations in original) (emphasis added) (citation omitted) (quoting *Buckhannon*, 532 U.S. at 608–09).

260. *See generally id.* at 232–40 (Roth, J., dissenting); *id.* at 240–46 (Aldisert, J., dissenting).

261. *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 612 (6th Cir. 2013).

262. *Id.* at 624.

263. *Id.* at 625.

264. *Buckhannon*, 532 U.S. at 640.

265. 133 S. Ct. 2517 (2013).

empirical evidence) that the higher causation standard would be necessary to remedy a “fakers and floodgates problem,” whereby too many plaintiffs without credible claims were assumedly rushing for the opportunity to make a quick buck.²⁶⁶ Lower courts are already drawing upon the Court’s assumptions to justify their decisions²⁶⁷ and the assumptions are becoming “part of the running, default narrative about retaliation.”²⁶⁸

An appellate judge may find facts in three ways: the judge may send a case to the trial court to receive evidence on the issue, the judge may engage in independent “extra-record research,” or the judge may “simply assert an emphatic view of the fact with nothing to support the view except for ‘common experience.’”²⁶⁹ In *Buckhannon*, the Court took route three, and erroneously so. That erroneous fact is now generating extensive precedent in the lower courts and binding distinct nonparties. But an even greater concern for public interest litigants is that this factual precedent could serve to further undermine the vitality of fee-shifting statutes, especially with the Supreme Court’s quasi-canon of construction whereby it “avoid[s] an interpretation of the fee-shifting statutes that would have ‘spawn[ed] a second litigation of significant dimension’”²⁷⁰—meaning, an increase in cost. Congress’s intentional scheme of private attorney general enforcement could be in serious jeopardy without renewed and specific remedial action.

CONCLUSION

The American Rule has always been subject to exceptions. Acting in equity, the Supreme Court itself jumped aboard and shepherded development of the common fund and substantial benefit exceptions. These exceptions were carefully crafted to weigh litigation incentives, consider their impact on nonparties, and provide guidance to district judges who were expected to exercise discretion in performing their historic equitable responsibility to do justice in the particular case. The lower courts, competent at and comfortable with performing this type of inquiry, interpreted their statutory mandate to award fees to “prevailing parties” in much the same way through the catalyst doctrine.

Under the guise of deference, the Court has shirked its responsibility to interpret the law in a coherent and reasonable manner. Particularly in *Buckhannon*, the Court’s broadly applicable empirical assumptions have caused lower courts to hold that litigants may not marshal evidence of the decision’s empirical shortcomings to limit

266. Sperino & Thomas, *supra* note 246, at 224, 235–36. As in *Buckhannon*, these assumptions are likely ill-founded. *See id.* at 237–41.

267. *E.g., id.* at 225 (citing *Chase v. U.S. Postal Serv.*, No. 12-11182-DPW, 2013 WL 5948373, at *11 (D. Mass. Nov. 4, 2013); *Childs-Bey v. Mayor & City Council of Balt.*, No. TJS-10-2835, 2013 WL 5718747, at *2 (D. Md. Oct. 17, 2013), *aff’d*, 564 Fed. App’x 13 (4th Cir. 2014); *Foster v. Univ. of Md. E. Shore*, No. TJS-10-1933, 2013 WL 5487813, at *2 (D. Md. Sept. 27, 2013), *rev’d*, 787 F.3d 243 (4th Cir. 2015)).

268. *Id.* at 249.

269. Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 36, at 1260.

270. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609 (2001) (second alteration in original) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)).

the decision to its factual context. This is part of a disturbing trend of appellate-found facts that are not subject to adversarial scrutiny. It is extremely hard not to sympathize with the district courts and courts of appeals in this situation—after all, the Supreme Court itself has a track record of treating its factual findings as precedential.²⁷¹ Clearly, it is the responsibility of the fact-finding (or fact-assuming) appellate court to make the grounds for, and extent of, its holdings explicitly clear. Generally speaking, Congress has the power to enact a statute that is internally inconsistent or contrary to public policy.²⁷² If the Court truly believes that a statute's language is *so* clear as to override the presumption that Congress writes sensible statutes (and even if the majority believes that the particular interpretation would effectuate that sensible purpose), the Court should say so in clear terms.²⁷³ After saying so, there is nothing wrong with then making observations to dispel any concerns that one may have about the implications of the rule. But in making a decision's language-based *ratio decidendi* unmistakable, the Court would enable the lower courts to distinguish the Court's holdings on factual grounds and prevent a decision from obtaining unwarranted breadth on the basis of untested factual findings.

While the Court's fact finding may well have serious ramifications for public interest litigation, Congress remains available to correct the Court's errors. Already, it has begun to do so.²⁷⁴ But in pursuit of perfect deference to Congress, the Court in *Alyeska Pipeline* and *Buckhannon* has twice forced Congress to expend time, energy, and taxpayer money remedying the Court's mistakes. The Supreme Court would have done well to recognize that the courts have long been endowed with the equitable power to do justice in the particular case and that Congress depends upon the courts to operationalize its statutory frameworks. When Congress is displeased with the leeway the courts have at equity, Congress may of course restrict that leeway. Particularly in the application of the American Rule, an operating presumption that courts have equitable powers to begin with would have been far more in keeping with the Rule's storied history.

271. See *supra* note 255 and accompanying text.

272. See, e.g., *James v. Strange*, 407 U.S. 128, 133–34 (1972) (“Our task, however, is not to weigh this statute’s effectiveness but its constitutionality. Whether the returns under the statute justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch.”).

273. This may seem contradictory, as I have already argued that the Court clearly rested its holding in *Buckhannon* on the weight of the term “prevailing party.” See Part IV.A; see also *Buckhannon* 532 U.S. at 610 (“Given the clear meaning of ‘prevailing party’ in the fee-shifting statutes, we need not determine which way these various policy arguments cut.”). However, here I am arguing for doctrinal development whereby the Court exercises restraint in how it interprets its own cases wholly dependent upon a language-based interpretation. Cf. Larsen, *Factual Precedents*, *supra* note 36, at 113–14 (“[A]bsent a clear statement from the Supreme Court announcing a rule informed by a factual generalization, a lower court should assume it is not bound by the Court’s factual statement. . . . My clear statement rule would provide an incentive for the Supreme Court to be precise on the role facts play in its decisions.”).

274. E.g., OPEN Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525 (codified as amended at 5 U.S.C. § 552(a)(4)(E)(ii) (2012)) (amending FOIA’s fee-shifting provision to provide that a party may prevail upon a “voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial”).