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Note

Nominal Damages, Nominal Victory: Estate of Farrar v. Cain’s Improper Limit on Awards of Attorneys’ Fees Under § 1988

James D. Weiss

Joseph and Dale Farrar brought a $17 million lawsuit to challenge the actions of various Texas state officials who shut down a facility for troubled teens that the Farrars had operated. They sued pursuant to 42 U.S.C. § 1983, arguing that the defendants violated their civil rights by engaging in malicious prosecution aimed at closing the school, thereby depriving them of the right to pursue their livelihood and profession. A jury agreed that one of the defendants, then-Lieutenant Governor William Hobby, violated Joseph Farrar’s civil rights. The jury,

1. Estate of Farrar v. Cain, 941 F.2d 1311, 1312 (5th Cir. 1991), cert. granted sub nom. Farrar v. Hobby, 112 S. Ct. 1159 (1992). The Farrars sued then-Lieutenant Governor William Hobby, Judge Clarence D. Cain, County Attorney Hartel, and the director and two employees of the Texas Department of Public Welfare. Id. The defendants acted to shut down the Farrars’ facility after a grand jury indicted Joseph Farrar for the murder of a student. Id. The indictment was later dismissed. Id.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Farrar, 941 F.2d at 1312. The Court of Appeals for the Fifth Circuit vacated a summary judgment for the defendants on these charges and remanded the case for trial. Farrar v. Cain, 642 F.2d 86 (5th Cir. 1981).

4. 941 F.2d at 1312-13. Hobby had played an active role in the events leading to the closing of the Farrars’ facility. Id. at 1312. After learning of the death of a student there, he issued a press release criticizing the Texas Department of Public Welfare’s (TDPW’s) licensing procedures, and he urged the director of the TDPW to investigate. Id. Hobby also discussed the matter with Governor Dolphe Briscoe, accompanied Governor Briscoe on a tour of the facility, and attended the hearing at which the State of Texas obtained a temporary injunction closing the school. Id.
however, did not grant Farrar any damages.\(^5\) After an appeal to the Fifth Circuit Court of Appeals,\(^6\) the district court entered an award of nominal damages in the amount of one dollar.\(^7\)

Subsequently, Dale Farrar and the co-administrators of Joseph Farrar's estate filed an application for attorneys' fees pursuant to 42 U.S.C. § 1988.\(^8\) The district court awarded them $280,000 in fees and $27,932 in expenses.\(^9\) The Fifth Circuit reversed this decision, reasoning that because the Farrars had sought only monetary damages, the award of one dollar of the requested $17 million did not qualify them as "prevailing parties" under § 1988.\(^10\) To "prevail," plaintiffs must change the legal relationship between the parties, something that in the court's view, the Farrars did not accomplish.\(^11\)

*Estate of Farrar v. Cain* raises an issue central to the interpretation and enforcement of § 1988 and the civil rights statutes it encompasses.\(^12\) By demanding that civil rights plaintiffs receive more than nominal damages in order to qualify as "prevailing parties," the Fifth Circuit consciously rejected decisions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits\(^13\) and added much risk to a civil rights plaintiff's deci-

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\(^5\) *Id.* at 1312.

\(^6\) *Farrar v. Cain*, 756 F.2d 1148 (5th Cir. 1985). The court relied on *Carey v. Piphus*, 435 U.S. 247, 265-67 (1978), to hold that even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages. 756 F.2d at 1152. Thus, because the jury found that Hobby had violated Farrar's rights, it was error for the trial court not to award nominal damages. *Id.*

\(^7\) *See Farrar*, 941 F.2d at 1315.

\(^8\) *Id.* at 1313. At the time the Farrars filed for attorneys' fees, 42 U.S.C. § 1988 stated in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.


\(^9\) *See Farrar*, 941 F.2d at 1315.

\(^10\) *Id.*

\(^11\) *Id.*

\(^12\) *See supra* note 8 (listing relevant statutes).

\(^13\) *Farrar*, 941 F.2d at 1316. For a listing of the decisions the court rejected, see *infra* note 103.
This Comment critiques the Fifth Circuit’s decision in *Estate of Farrar v. Cain* and its use of the “changing legal relationships” standard for defining prevailing parties under § 1988. Part I describes § 1988’s legislative and judicial background and discusses how other courts have applied it to cases in which the plaintiffs recovered only nominal damages. Part II examines the holdings and rationale of *Farrar v. Cain*, paying particular attention to the court’s interpretation of recent Supreme Court precedents. Part III analyzes the *Farrar* court’s approach to prevailing parties and evaluates the court’s application of this approach to nominal damages situations. The Comment concludes that although Supreme Court interpretations of § 1988 might allow an outcome like that in *Farrar*, such an outcome is neither compelled nor desirable. The restrictive standard for prevailing parties announced in *Farrar* departs from the purposes and plain language of § 1988, and misconstrues and unjustifiably extends the Supreme Court’s language to weaken severely the enforcement powers Congress placed in the hands of those whose civil rights have been violated.

### I. BACKGROUND

#### A. THE “AMERICAN RULE” AND ITS EXCEPTIONS

Since *Arcambel v. Wiseman* in 1796, the Supreme Court has accepted, as a general rule in the United States, that the prevailing litigant is not entitled to collect any attorneys’ fees from the loser. This “American Rule” differs from the law in England, where, for centuries, the prevailing party usually has been entitled to attorneys’ fees. Advocates for the American Rule contend that of the two systems, the American approach better ensures free access to the courts by eliminating the de-

14. For discussion of the “changing legal relationships” standard in general, see infra part I.C.3.
15. 3 U.S. (3 Dall.) 306 (1796).
terrent threat of having to pay the opponent’s fees. Critics respond that the American Rule penalizes those with meritorious claims who lack the resources to hire an attorney and bring the matter to court.

Responding to the shortcomings of the American Rule, Congress passed legislation allowing fee shifting in a number of circumstances. In addition, courts developed various equitable exceptions to the American Rule where statutes were silent. Thus, in Trustees v. Greenough, the Supreme Court accepted what has come to be known as the common fund doctrine, which allows a party who successfully preserves or recovers a fund for the benefit of herself and others to recover her costs, including her attorneys’ fees, from the fund or from the others enjoying the benefit. Similarly, in F.D. Rich Distilling Corp.

18. See McCormick, supra note 17, at 641; Kevin L. Collins, Note, Section 1988 Attorney’s Fees: Awards Should Be Liberal to Encourage Vindication of Civil Rights, 54 UMKC L. Rev. 662, 662 (1986); see also Fleishman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (noting that “the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel”). For a more detailed description of the development of the American Rule and the justifications advanced for it, see John Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, 47 LAW & CONTEMP. PROBS., Winter 1984, at 9.

19. See, e.g., Albert A. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CAL. L. REV. 792, 792-94 (1966) (stating that because of detrimental impact on “the little man,” the American Rule is “a festering cancer in the body of our law without whose excision our society will not be great”); Richard V. Falcon, Award of Attorneys’ Fees in Civil Rights and Constitutional Litigation, 33 MD. L. Rev. 379, 387 (1973) (“A system purposely designed to forestall litigation aimed at vindicating important public rights could not be more effective than the present system which so penalizes those seeking vindication of those rights.”); Collins, supra note 18, at 662.

20. For a summary of the statutes enacted by Congress authorizing courts to award attorneys’ fees, see Marek v. Chesny, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting).

21. 105 U.S. 527 (1882). See generally Ayeska, 421 U.S. at 257-58 (discussing Trustees v. Greenough and the cases that have followed it).

22. Greenough, 105 U.S. at 532-33; see Ayeska, 421 U.S. at 257; Dan B. Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem, 1986 DUKE L.J. 435, 440-41; Collins, supra note 18, at 662. See generally John P. Dawson, Lawyers and Involuntary Clients: Attorney’s Fees from Funds, 87 HARV. L. REV. 1597 (1974) (discussing development of common fund exception). Closely related to the common fund exception is the “substantial” or “common” benefit exception, first announced by the Supreme Court in Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); see Mary F. Derfner, The Civil Rights Attorney’s Fees Awards Act of 1976, in PUBLIC INTEREST PRACTICE AND FEE AWARDS 13, 16 n.14 (Herbert B. Newberg ed., 1980). In Mills, the Court ruled that successful plaintiffs in a shareholder’s derivative suit were entitled to fees from the corporation because their action had bene-
v. United States ex rel. Industrial Lumber Co., the Supreme Court agreed that a court may assess attorneys’ fees when the losing party “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”

The broadest equitable exception to the American Rule has been the private attorney general theory. Under this theory, courts could award attorneys’ fees to the prevailing party if the litigation served an important congressional purpose affecting a large segment of the population. Courts viewed the private attorney general theory as an especially strong justification for awarding attorneys’ fees in cases brought under civil rights statutes lacking fee-shifting provisions.

24. Id. at 129. See generally Joan Chipser, Note, Attorney’s Fees and the Federal Bad Faith Exception, 29 HASTINGS L.J. 319 (1977) (discussing development of federal bad faith exception). For recent cases in which the court employs the bad faith exception to award attorneys’ fees, see, e.g., American Hosp. Ass’n v. Sullivan, 935 F.2d 216, 222 (D.C. Cir. 1991) (2-1 decision); United States ex rel. Yonker Constr. Co. v. Western Contracting Corp., 936 F.2d 936 (8th Cir. 1991); Todd Shipyards Corp. v. Cunard Line, Ltd., 945 F.2d 1056, 1064-65 (9th Cir. 1991); Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991), cert. denied, 112 S. Ct. 913 (1992); Cruz v. Savage, 896 F.2d 626, 628 (1st Cir. 1990).
25. See, e.g., Collins, supra note 18, at 662-63. The private attorney general theory assumes that “meaningful legal representation is an important form of political power, one that should be equally available to all. In such a context, the award of fees to a private attorney general is simply one way of allocating the costs of law enforcement and policymaking.” Comment, Court Awarded Attorney’s Fees And Equal Access to the Courts, 122 U. PA. L. REV. 636, 677 (1974). Thus, private attorney general cases involve the necessity of fee shifting to permit meaningful private enforcement of protected rights. Id. at 666. In some cases, when plaintiffs obtain substantial public benefits through their litigation, the theory overlaps with the common benefit approach. See supra note 22; Comment, supra, at 667. It is a necessary supplement to the common benefit approach when plaintiffs effectuate strong congressional policies but do not obtain a substantial public benefit—cases “when the court cannot feasibly match the costs with the benefits which are created or protected by judicial action.” Id. at 668.
Such awards ceased when the Supreme Court blocked the judicial application of the private attorney general theory in *Alyeska Pipeline Co. v. Wilderness Society.* While accepting the common fund and bad faith exceptions to the American Rule as inherent in the powers of the courts, the Supreme Court held that only Congress could authorize the shifting of attorneys' fees on a private attorney general basis. The Court reasoned that the judiciary was ill-suited to determine which cases involve public policies important enough to be covered by the private attorney general theory—that judgment was historically and properly left to Congress.

B. THE ORIGINS AND INTENT OF § 1988

In direct response to the Court's decision in *Alyeska,* Congress passed an amendment to 42 U.S.C. § 1988 known as the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act" or "Fees Act"). The Act allows courts to award attorneys' fees

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28. Id. at 257-59, 269.
29. Id. at 263-64. In the Court's words:
Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorney's fees only in connection with the former.

Id. Some commentators agreed. See, e.g., Comment, supra note 25, at 670 ("The obvious difficulty with the 'strength of public policy' factor common to the decisions is that it requires a subjective evaluation on the part of a judge. In effect, it asks him to distinguish important rights from less important ones and thereby invites usurpation of the legislative function."). *Alyeska* eliminated the need for this evaluation by assuming that Congress did not intend for fee shifting to occur absent specific congressional authorization.

Other commentators have pointed out that such an assumption may be unwarranted. As noted by Senator Tunney, "[C]ongressional silence in these matters is merely a by-product of the legislative process and not a conscious signal to the courts of any kind. The question of attorney's fees often fails to surface during a legislative debate because the focus of concern is on other issues in the legislation." John V. Tunney, *Financing the Costs of Enforcing Legal Rights,* 122 U. PA. L. REV. 632, 633-34 (1974); see also Jo Ann Farrington, Comment, *Alyeska Pipeline Turns Off the Tap: Can Public Interest Law Survive?*, 71 NW. U. L. REV. 239, 251 (1976) (pointing out that absence of reference to attorneys' fees in legislation does not necessarily indicate that "Congress intended to deprive the courts of their traditional equity power to make such awards").

to parties prevailing in specified civil rights actions, including actions brought under the Reconstruction-era Civil Rights Acts.\textsuperscript{31} The reports of the House and Senate Judiciary Committees and the comments made in floor debate on the measure provide clues about Congress's view of the purposes of the Act.

Primarily, Congress viewed the Act as a necessary part of civil rights law enforcement.\textsuperscript{32} Through the Act, Congress recognized that the American Rule was not appropriate in situations involving alleged violations of the civil rights laws.\textsuperscript{33} Rather than easing access to the courts, the American Rule created almost insurmountable barriers to parties seeking vindication of their civil rights.\textsuperscript{34} Given the lack of resources of many

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\item \textsuperscript{31} See supra note 8 (providing the text of the Act and including the statutes to which it applies).
\item \textsuperscript{32} S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) [hereinafter Senate Report], reprinted in 1976 U.S.C.C.A.N. 5908, 5910. According to the Senate Committee, "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which [the civil rights acts passed since 1866] contain." Id. More broadly, the report states:
  
  In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

  Id. Thus, the Act aims to prevent the civil rights laws from becoming "mere hollow pronouncements which the average citizen cannot enforce." Id. at 6, 1976 U.S.C.C.A.N. at 5913.

  The Report of the House Judiciary Committee expressed similar sentiments:

  Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Act] is designed to give such persons effective access to the judicial process where grievances can be resolved according to law.


  \textsuperscript{33} Senate Report, supra note 32, at 4, 1976 U.S.C.C.A.N. at 5912 (stating that "[this bill] . . . is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate").

  \textsuperscript{34} Absent a fee-shifting provision, civil rights plaintiffs face difficulty in obtaining legal representation. As explained during the final floor debate by Senator Kennedy, co-floor leader for the Act with Senator Abourezk:

  The lawyer who undertakes to represent a client alleging a violation of the civil rights statutes covered by this bill faces significant uncertainty of payment, even where he has a strong case. For there is [sic] often important principles to be gained in such litigation, and rights to be conferred or enforced, but just as often no large promise of money-
victims of civil rights violations and the fact that, as the House Committee noted, "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens," Congress believed that shifting attorneys' fees was a necessary prerequisite to enforcement of these laws. Congress also thought it anomalous that because Alyeska, some civil rights plaintiffs could recover attorneys' fees under modern civil rights legislation such as Title II of the Civil Rights Act of 1964, while others suing under the Reconstruction Civil Rights Acts, including § 1983, could not. The Act thus served to make Congress's civil rights laws consistent.

35. HOUSE REPORT, supra note 32, at 1, reprinted in DERFNER, supra note 32, at 52; accord SENATE REPORT, supra note 32, at 2, reprinted in 1976 U.S.C.C.A.N. at 5910 (stating that "[a]ll of these civil rights laws [included in the Act] depend heavily upon private enforcement").

36. HOUSE REPORT, supra note 32, at 1, reprinted in DERFNER, supra note 32, at 52. The House Committee explained:

In many instances, where these [Federal civil rights] laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.


37. SENATE REPORT, supra note 32, at 3-4, reprinted in 1976 U.S.C.C.A.N. at 5911. The Committee noted that since 1964, every major civil rights law Congress had passed included, or was amended to include, one or more fee-shifting provisions. Id. The Reconstruction Acts did not contain such provisions, however, so that under Alyeska, "awards of fees [were] ... suddenly unavailable in the most fundamental civil rights cases." Id.

38. Id. at 4, reprinted in 1976 U.S.C.C.A.N at 5912; see also HOUSE REPORT, supra note 32, at 1, reprinted in DERFNER, supra note 32, at 52. During the floor debate on the measure, Senator Abourezk, as co-floor leader, offered a third justification for the Act. 122 CONG. REC. 33,315 (1976). He noted that as a result of the Alyeska decision, courts would be required to analyze a party's actions to determine bad faith in order to award attorneys' fees. Id.; see also Susan J. Bryson, Comment, Attorneys' Fees Allowed under Bad Faith Exception after Alyeska Decision Narrowed "Private Attorney General" Doctrine: Doe v. Poelker, 8 CONN. L. REV. 551, 555 (1976) (stating that after the demise of private attorney general doctrine, courts will turn to bad faith exception in order to award fees); Farrington, supra note 29, at 258 (observing
Although the purposes of the Act were thus relatively clear, Congress never defined exactly what it meant by the phrase “prevailing party.” The legislative history, however, suggests that Congress intended the definition to be broad. The committee reports explicitly adopted the standards used for awarding fees under the fee-shifting provisions of the Civil Rights Act of 1964. The Supreme Court had interpreted these provisions to mean that a successful plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” In addition, the committees that bad faith and common benefit exceptions might be used to justify fees in situations where the private attorney general theory previously would have been invoked. Such an analysis is a complex, time-consuming process requiring drawn-out evidentiary hearings, the need for which would disappear with the passage of the Act. 

39. Perhaps the drafters of the bill and the writers of the report believed that the plain language would suffice. On that level, Black’s Law Dictionary defines “prevailing party,” in part, as:

The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.


One commentator summarizes the Newman standard as follows:

The Supreme Court in Newman determined that fee provisions in civil rights statutes are designed to facilitate private enforcement of those rights. Thus, the courts should be concerned primarily with assuring potential plaintiffs that they will not be burdened with attorney’s fees. Liberal shifting of fees in favor of prevailing plaintiffs in civil rights actions will encourage private litigation and promote the enforcement objectives of the civil rights statutes.


Note that Congress adopted a different standard for fee shifting to prevailing defendants. Defendants, if successful, may recover fees only if the plaintiff’s suit “was clearly frivolous, vexatious, or brought for harassment purposes.” SENATE REPORT, supra note 32, at 5, reprinted in 1976 U.S.C.C.A.N. at 5912. See generally E. Richard Larson, The Origins and History of Attorneys’ Fees Law, in COURT AWARDS OF ATTORNEYS’ FEES 9, 37–39 (PLI Litig. & Admin. Practice Course Handbook Series No. 324, 1987) (discuss-
stated that fees may be awarded during the course of litigation—particularly when a party has succeeded on an important matter even if not on all issues—or when parties vindicated rights through a consent judgment or without formally obtaining relief.\textsuperscript{4}\textsuperscript{2}

Moreover, the committees instructed courts not to reduce the amount of fee awards simply because the rights involved were nonpecuniary in nature.\textsuperscript{4}\textsuperscript{3} Instead, the committees cited the Fifth Circuit's analysis in \textit{Johnson v. Georgia Highway Express}\textsuperscript{4}\textsuperscript{4} for a list of considerations appropriate in determining fee awards.\textsuperscript{4}\textsuperscript{5}

Overall, then, the legislative history of the Attorneys' Fees

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  \item The reasons for the different standards are obvious. Congress, having provided for attorneys' fees as a means of enabling aggrieved parties to bring enforcement suits, does not intend to deter those aggrieved parties by making them face the prospect of paying their opponents' fees if the suit, though brought in good faith, is unsuccessful. Congress does, however, intend to deter frivolous and harassing litigation, and the availability of fees to prevailing defendants would definitely deter those plaintiffs who seek, for their own ends, to take advantage of citizen suit provisions.'
  \end{itemize}


42. \textsc{senate report}, supra note 32, at 5, reprinted in 1976 U.S.C.C.A.N at 5912. The House Committee added:

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  \item The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded before a full evidentiary hearing before a judge or jury.
  \end{itemize}

\textsc{house report}, supra note 32, at 7, reprinted in \textsc{derfner}, supra note 32, at 58.


44. 488 F.2d 714 (5th Cir. 1974).

45. \textsc{senate report}, supra note 32, at 6, reprinted in 1976 U.S.C.C.A.N. at 5913; \textsc{house report}, supra note 32, at 8, reprinted in \textsc{derfner}, supra note 32, at 59. Those considerations are: (1) the amount of time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) whether other employment by the attorney was precluded by his or her acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) the amount of awards in similar cases. \textit{Johnson}, 488 F.2d at 717-19. The court drew these factors from the American Bar Association's rules for professional conduct. Dan B. Dobbs, \textit{Reducing Attorneys' Fees for Partial Success: A Comment on Hensley and Blum}, 1986 Wis. L. Rev. 835,
Awards Act indicates that § 1988 as amended is designed to ease access to the courts, with standards liberal enough to encourage private enforcement of civil rights laws. The Act provides resources to victims and incentives for lawyers to represent civil rights plaintiffs. It works as a special kind of contingent fee, with the money coming out of the pocket of the

46. See 122 Cong. Rec. 33,313 (1976). As Senator Kennedy stated, “In enacting the basic civil rights attorneys fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws.” Id. Senator Tunney, the original sponsor of the legislation, reiterated the importance of shifting fees, saying:

[Most of the responsibility for enforcement [of legislation promising equal rights to all] has to rest upon private citizens, who must go to court to prove a violation of the law.... Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unwidtided; and the entire Nation, not just the individual citizen, suffers.]

Id. Advocates and opponents of fee shifting have reached radically different conclusions about the incentive structure for litigation created by legislation like the Fees Act. Some advocates of fee shifting argue that while increasing meritorious claims, fee shifting may actually reduce the total amount of litigation. See Falcon, supra note 19, at 389-91; McCormick, supra note 17, at 642. These commentators point to the increased incentives fee shifting creates for defendants to settle meritorious claims early, rather than engage in long, drawn out litigation that they previously might have used to “wear down” the plaintiffs. In Falcon's words, “[A]wards of fees should operate as an incentive to settle cases on the basis of merit rather than respective wealth—on principle rather than on principal.” Falcon, supra note 19, at 390-91.


47. 1 GmFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.5:103 (1980); see also Custom v. Quern, 482 F. Supp. 1000, 1004 (N.D. Ill. 1980) (stating that profit incentive is necessary to achieve the Act's purpose of encouraging attorneys to represent civil rights plaintiffs).
defendant rather than from an award of damages to the plain-
tiff.\textsuperscript{48} By passing the Act, Congress repudiated the rationale of
the American Rule in the civil rights context.\textsuperscript{49} In its place,
Congress contemplated a different general rule: that parties ordi-

narily are entitled to attorneys' fees if they prevail, unless
special circumstances make such awards unjust.\textsuperscript{50}

C. JUDICIAL INTERPRETATIONS OF § 1988

1. The "Prevailing Party" Standard

Since passage of the Attorney's Fees Awards Act, courts
have struggled to determine exactly when a party has prevailed
for § 1988 purposes. In one of the earliest appellate decisions to
consider the matter, the First Circuit concluded in the case of
\textit{Nadeau v. Helgemoe}\textsuperscript{51} that plaintiffs may be considered prevail-
ning parties if they succeed on any significant issue which
achieves some of the benefit the parties sought in bringing
suit.\textsuperscript{52} Most of the other federal circuits adopted this stan-
dard.\textsuperscript{53} The Fifth and Eleventh Circuits took a more restrictive
approach, however, demanding that a party succeed on the
"central issue" in the litigation and achieve the "primary relief
sought."\textsuperscript{54} In \textit{Texas State Teachers v. Garland Independent

\textsuperscript{48} See \textit{Hazard & Hodes, supra} note 47, § 1.5:103.
\textsuperscript{49} See \textit{supra} note 33-34 and accompanying text.
\textsuperscript{50} See \textit{supra} note 41 and accompanying text. Illustrating the breadth of
this standard, courts applying the \textit{Newman} standard in 1964 Civil Rights Act
actions and in § 1988 actions have rejected virtually all alleged "special circum-
stances" that would allow denial of fees. See \textit{Derfner, supra} note 22, at 44 (ob-
serving that "plaintiffs who prevail under an enumerated statute get fees
almost as a matter of course . . . courts are generally reluctant to accept any
factor as a 'special circumstance' "); \textit{Timothy J. Helms, Attorney's Fees for
Prevailing Title VII Defendants: Toward a Workable Standard}, 8 U. TOL. L.
REV. 259, 263-64 (1977); \textit{Larson, supra} note 41, at 32. For a review of some of
the situations not deemed to be special circumstances, see \textit{John W. Witt, The
Civil Rights Attorneys' Fees Awards Act of 1976}, 13 URB. LAW. 589, 603-04
\textsuperscript{51} 581 F.2d 275 (1st Cir. 1978).
\textsuperscript{52} Id. at 278-79.
\textsuperscript{53} \textit{Texas State Teachers v. Garland Indep. Sch. Dist.}, 489 U.S. 782, 784
Aurora}, 766 F.2d 1464, 1466 (10th Cir. 1985); \textit{Gingras v. Lloyd}, 740 F.2d 210, 212
(2d Cir. 1984); \textit{Fast v. School Dist. of Ladue}, 728 F.2d 1030, 1032-33 (8th Cir.
1984) (en banc); \textit{Lummi Indian Tribe v. Oltman}, 720 F.2d 1124, 1125 (9th Cir.
1983)). See \textit{generally} \textit{David Berger, Prevailing Party Concepts in Court
Awards of Attorneys' Fees, in COURT AWARDS OF ATTORNEYS' FEES 41, 48-49
(PLI Litig. & Admin. Practice Course Handbook Series No. 324, 1987) (discuss-
ing thresholds for prevailing party status in different circuit courts).
\textsuperscript{54} \textit{Texas State Teachers}, 489 U.S. at 784 (citing \textit{Simien v. San Antonio,
School District, the Supreme Court resolved this split, rejecting the central issue test and formally adopting the *Nadeau v. Helgemoe* "significant issue—some benefit" standard as "the inquiry which should be made in determining whether a civil rights plaintiff is a prevailing party within the meaning of § 1988."

While helpful, the significant issue test does not resolve the question of whether plaintiffs who obtain favorable judgments, but who recover only nominal damages, are prevailing parties for § 1988 purposes. Interspersed among evolving Supreme Court interpretations of § 1988, most circuit courts have held that such plaintiffs are entitled to fees, though the amounts may be reduced to reflect the low recovery.

809 F.2d 255, 258 (5th Cir. 1987); Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985) (en banc).

56. *Id.* at 791. In rejecting the central issue test, the Court noted that: By focusing on the subjective importance of an issue to the litigants, [the test] asks a question which is almost impossible to answer. Is the "primary relief sought" in a disparate treatment action under Title VII reinstatement, backpay, or injunctive relief? This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in an inquiry which two commentators have described as "excruciating." . . . In sum, the search for the "central" and "tangential" issues in the lawsuit, or for the "primary," as opposed to the "secondary," relief sought, much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988 and is essentially unhelpful in defining the term "prevailing party."

*Id.* (citations omitted).

57. *But see* Berger, *supra* note 53, at 50 (arguing that "[u]nless a court requires a 'central issue test,' nominal damages may qualify as prevailing for attorney fee purposes").

58. *See, e.g.,* McCann v. Coughlin, 698 F.2d 112, 128-29 (2d Cir. 1983) (stating that "[t]he fact that a plaintiff is awarded only nominal damages does not indicate that he has been unsuccessful or has not prevailed on his claim"); Skoda v. Fontani, 646 F.2d 1193, 1194 (7th Cir. 1981) (observing that although one dollar nominal damages in civil rights action "may be considered a small victory, plaintiffs did win a verdict in their favor. They are thus prevailing parties under 42 U.S.C. § 1988."); Perez v. University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979) (stating that "while the award of nominal damages does not permit the court to deny an award, it is a factor that may be considered on the amount of the award"); Burt v. Abel, 585 F.2d 613, 617-18 (4th Cir. 1978) (stating that "[t]he fact that plaintiff may prevail on the merits yet . . . recover only nominal damages shall in no way diminish his eligibility for attorney's fees under § 1988, though it is one of the factors properly to be considered on the amount of such award"); see also Allen v. Higgins, 902 F.2d 682, 684 (8th Cir. 1990) (same); Scofield v. City of Hillsborough, 862 F.2d 759, 766 (9th Cir. 1988) (same); Nephew v. City of Aurora, 830 F.2d 1547, 1550 (10th Cir. 1987) (same), cert. denied, 485 U.S. 976 (1988).
2. Early Supreme Court Interpretations of § 1988

The Supreme Court's early interpretations of § 1988 shaped the contours of many of these circuit decisions, although the Court has not considered the nominal damages question directly. In *Hensley v. Eckerhart* and *City of Riverside v. Rivera*, the Court emphasized that whether a litigant was

59. 461 U.S. 424 (1983). In *Hensley*, the Court considered whether a partially prevailing plaintiff could recover attorneys' fees for unsuccessful claims. *Id.* at 426. The Court stated that plaintiffs are not entitled to fees for unsuccessful claims based on facts and legal theories unrelated to the successful claims. *Id.* at 435. In the Court's words, "The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unrelated claim." *Id.* When the various claims in a suit were based upon a common core of facts or related legal theories, however, plaintiffs are entitled to fees that reflected the degree of their success. *Id.* at 436. The Court instructed district courts to figure the fee award "lodestar" by first multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Id.* at 433. The court is then to use its discretion to adjust the award up or down based upon "other considerations ... including the important factor of 'results obtained.'" *Id.* at 434. In other words, a court may reduce the fee award to a partially prevailing plaintiff to account for the limited success. *Id.* at 437.

60. 477 U.S. 561 (1986). In *Rivera*, the Court upheld the application of the *Hensley* "lodestar" approach to a suit in which the plaintiff recovered only monetary damages, even though the fees far exceeded the damage award. Specifically, a five-member majority affirmed an award of $245,456.25 in attorneys' fees to plaintiffs who recovered $33,350 in damages. *Id.* The plaintiffs sued the city, the police chief, and various police officers over the conduct in breaking up a private party. *Id.* at 564. The Court was divided in its analysis. Writing for a plurality, Justice Brennan concluded that since Congress had given no indication that attorneys' fees under § 1988 were to be proportionate to damages awarded, it would be improper for the Court to adopt such a rule. *Id.* at 581. Justice Powell concurred, agreeing that a rule of proportionality would be improper. *Id.* at 585. In his view, however, the award of private damages would rarely benefit the public interest to an extent that would justify the disproportionality between the damages and fees that existed in *Rivera*. *Id.* at 586 n.3. Only the lower court's strict adherence to the formula established in *Hensley* led Powell to affirm the award. *Id.* at 586. Thus, the Justices differed in their views of how strictly courts should measure "results obtained" where monetary damages were concerned. A majority agreed, however, that fee awards need not be proportionate to damages. Courts may consider other factors, including the public interest, in setting fee amounts. Perhaps not surprisingly, reaction to the *Rivera* decision was mixed. One commentator saw it as fulfilling the promise and purposes of the Fees Awards Act. See Venita M. Lang, Comment, *Constitutional Law—Attorney's Fee Award is Upheld Where it Exceeds the Amount of Damages Recovered by Plaintiff in the Underlying Civil Rights Case—City of Riverside v. Rivera*, 30 How. L.J. 859, 873-74 (1987). Another saw the fee awards approved in *Rivera* as "literally too much of a good thing ... enriching litigious attorneys at the expense of the public whose interest is supposedly served." Gregory S. Heier,
entitled to a fee award was distinct from the particular amount that should be reasonably awarded. 61 This distinction allowed courts to consider the degree of the "results obtained" only when setting award amounts. 62 Moreover, the Court indicated that "results" need not be measured in monetary terms alone. As Justice Brennan noted in Rivera, civil rights actions "vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." 63 The Court therefore rejected any requirement that attorneys' fees be conditioned on, or proportionate to, a monetary damages award. 64 Through these decisions, the Court fostered and reinforced the circuit court view that nominal damage awards do not per se prevent a court from


61. See Hensley, 461 U.S. at 429. The standards for entitlement to fees, while never clearly established, were loose. In Hensley, the Court cited with approval the Nadeau test it later formally adopted. Id. at 433; see supra notes 51-58 and accompanying text. In addition, the Court acknowledged that the purpose of § 1988 was to ensure "effective access to the judicial process" for persons with civil rights grievances. 461 U.S. at 429 (citing HOUSE REPORT, supra note 32, at 1). It then cited the Senate Judiciary Committee's report, SENATE REPORT, supra note 32, for the rule in Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968), that a prevailing plaintiff ordinarily should recover an attorneys' fee unless special circumstances would render such an award unjust. 461 U.S. at 429.

62. Hensley, 461 U.S. at 434 (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)); see supra note 45 (listing factors to be used in determining fee awards). The Court invited district courts to consider the other Johnson factors as well, but it diminished their significance by stating that courts "should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." Hensley, 461 U.S. at 434 n.9. The Supreme Court also explained, "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained." Id. at 436; see also Gayle L. Troutwine, A Primer on Attorneys' Fees Awards: Fee Computation Under Federal and State Attorneys' Fee Statutes, and Common Fund Recoveries, in COURT AWARDS OF ATTORNEY'S FEES 89, 95 (PLI Litig. & Admin. Practice Course Handbook Series No. 324, 1987) (noting that "monetary results are generally a factor in computing the amount of fees to be awarded").

63. Rivera, 477 U.S. at 574 (plurality opinion). Justice Brennan added, "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." Id. at 575. Indeed, "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so." Id. at 577.

64. Id. at 576; see supra note 60 (stating that Justice Powell, concurring, agreed with the four-justice plurality that a rule of proportionality would be improper).
granting even large attorney fee awards to prevailing parties in civil rights suits.

3. Recent Limits on “Prevailing Parties”

In more recent decisions, the Court has suggested limits upon the kind of results it is willing to accept as “prevailing” for § 1988 purposes—limits that might apply to nominal damages situations. In Texas State Teachers v. Garland Independent School District,\(^65\) the Court stated that as the “floor in this regard,” the “plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.”\(^66\) This “absolute limitation” for prevailing party status distinguished those plaintiffs who truly prevailed from those who won only “a technical victory.”\(^67\)

For examples of “technical victories,” the Court cited its decisions in Hewitt v. Helms\(^68\) and Rhodes v. Stewart.\(^70\) In Hewitt, the Court held that a favorable judicial statement of law in the course of litigation that ultimately results in judgment against the plaintiff is not enough to qualify the plaintiff as a “prevailing party” for the purposes of § 1988.\(^71\) The plaintiff in Hewitt, an inmate suing prison officials who had placed him in restrictive confinement, had obtained an appellate ruling that his rights had been violated, but because on remand the district court granted defendants qualified immunity, the plaintiff never received a final judgment in his favor.\(^72\) Furthermore, because he was released from prison before any decision was rendered, he never reached any other sort of settlement and had no standing to seek injunctive redress of his grievances.\(^73\) He was thus completely incapable of recovering anything—either damages or injunctive relief.\(^74\) The “victory,”

\(^66\) Id. at 792.
\(^67\) Id.
\(^68\) Id.
\(^70\) 488 U.S. 1 (1988) (per curiam).
\(^71\) Hewitt, 482 U.S. at 763. As the Court explained, “Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.” Id. at 760. “Some relief on the merits” meant a resolution of the dispute, whether through judicial decree or otherwise, that affected the relationship between the plaintiff and the defendant. Id. at 760-61; see also Texas State Teachers v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989).
\(^72\) Hewitt, 482 U.S. at 758.
\(^73\) Id. at 759.
\(^74\) Id. at 760. The case was procedurally complex. Essentially, plaintiff
the one statement of law in the plaintiff's favor in a case that otherwise went against him, was purely technical, the Court said.  

Helms brought suit under § 1983 against a number of prison officials who placed him in administrative confinement for seven weeks pending an investigation of his involvement in a prison riot. Id. at 757. A prison hearing committee found Helms culpable for misconduct and sentenced him to six months of disciplinary confinement, solely on the basis of the uncorroborated hearsay testimony of one of the guards. Id. The Court of Appeals for the Third Circuit held that the officials had denied Helms due process. See id. at 758. After an appeal to the U.S. Supreme Court, Hewitt v. Helms, 459 U.S. 460 (1983), in which the Court upheld as constitutional the prison's process for determining administrative confinement but said nothing about the hearing committee's finding of culpability itself, the court of appeals remanded with instructions to enter judgment against the officials on the unconstitutionality of the finding—unless the officials could establish a defense of immunity. See Hewitt, 482 U.S. at 758. The district court then granted qualified immunity to all of the defendants and entered a summary judgment against the plaintiff. See id. On appeal, Helms sought both damages and the expungement of the misconduct finding from his record. Id. The Third Circuit Court of Appeals affirmed the district court's judgment without comment. See id. at 759. Helms then sought attorneys' fees under § 1988. Id. The district court denied the claim, reasoning that Helms was not a prevailing party. See id. The defendants were immune from damage awards, the request for injunctive relief was mooted by Helms' release from prison, and although the Board of Corrections had revised its procedures since Helms began his suit, he neither sought nor benefited from the revisions, meaning that he could not claim he was a "catalyst" for the changes. See id. The Third Circuit reversed this decision. The court concluded that its prior holding was "a form of judicial relief which serves to affirm the plaintiff's assertion that the defendants' actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future." Id. (quoting Helms v. Hewitt, 780 F.2d 367, 370 (3d Cir. 1986)). The Supreme Court rejected this argument because Helms obtained no relief. See infra note 75 and accompanying text.

75. In the Court's words: "The only 'relief' [the plaintiff] received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law in an otherwise unfavorable opinion." Hewitt, 482 U.S. at 762. Emphasizing the technical nature of the victory, the Court continued:

There would be no conceivable claim that the plaintiff had "prevailed," for instance, if the District Court in this case had first decided the question of immunity, and the Court of Appeals affirmed in a published opinion which said: "The defendants are immune from suit for damages and the claim for expungement is either moot or has been waived, but if not for that we would reverse because Helms' constitutional rights were violated." That is in essence what happened here, except the Court of Appeals expressed its view on the constitutional rights before, rather than after, it had become apparent that the issue was irrelevant to the case. There is no warrant for having status as a "prevailing party" depend upon the essentially arbitrary order in which district courts or courts of appeals choose to address issues.  

Id. Thus, the constitutional claim was irrelevant to the suit and would never
Similarly, in *Rhodes* the Court held that two inmates who sued prison officials to change prison policies were not "prevailing parties" because by the time the court granted a declaratory judgment in their favor, the case was moot—one of the plaintiffs had died and the other had been released from prison.\(^7\) Therefore, the plaintiffs' victory fell short of the standards necessary to "prevail" under § 1988.\(^7\)

4. After *Texas State Teachers*

The impact of *Texas State Teachers*, *Hewitt*, and *Rhodes* on nominal damages cases remains unsettled. In *Texas State Teachers*, the Court appears to have struck a balance among three lines of not necessarily consistent precedent. From *Hensley* and *Rivera*, the Court adopted the "significant issue" standard and reaffirmed that monetary damages awarded to a plaintiff are relevant only to the amount of fees reasonably recovered, not to the availability of fees *vel non*.\(^7\) At the same time, the Court, looking to *Hewitt* and *Rhodes*, determined that the plaintiff's victory must not be so insignificant as to be merely technical. Finally, the Court cast its holding in terms of congressional intent, stating that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress in-

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76. *Rhodes v. Stewart*, 488 U.S. 1, 2 (1988). At issue in the case was the plaintiffs' claim that prison officials violated their First and Fourteenth Amendment rights by denying them permission to subscribe to a magazine. *Id.* Because of the death of one plaintiff and the release of the other, their requested change in prison policies could not have benefited either of them. *Id.* at 4. "The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." *Id.; see also Montes v. Thornburgh*, 919 F.2d 531, 538 (9th Cir. 1990) (interpreting *Rhodes*); *Mosley v. Hairston*, 765 F. Supp. 915, 918 (S.D. Ohio 1991) (same).

77. *Rhodes*, 488 U.S. at 4. In dissent, Justice Blackmun expressed doubts about the Court's seemingly restrictive interpretation of § 1988:

In ordinary usage, "prevailing" means winning. In the context of litigation, winning means obtaining a final judgment or other redress in one's favor. While the victory in this case may have been an empty one, it was a victory nonetheless. In the natural use of our language, we often speak of victories that are empty, hollow, or Pyrrhic. Thus, there is nothing anomalous about saying that respondent prevailed although he derived no tangible benefit from the judgment entered in his favor.

*Id.* at 7 (Blackmun, J., dissenting).

Where nominal damage cases fit into this balance is an open question. At least two federal circuit courts have concluded that Texas State Teachers allows an award of attorneys' fees to plaintiffs winning nominal damages. In Ruggiero v. Krzeminski, a jury granted nominal damages after finding that police officers violated the plaintiffs' rights by conducting an illegal search. The Second Circuit affirmed an award of attorneys' fees, reasoning that although the jury had awarded no compensatory damages, its finding that the police violated the plaintiffs' rights changed the legal relationship between the plaintiffs and the defendants. The Ninth Circuit adopted this reasoning in Romberg v. Nichols. The Supreme Court has yet to determine whether such victories truly make plaintiffs "prevailing parties" under § 1988—or whether they qualify as "technical victories" and nothing more. The Court will take up this issue next term, however, when it reviews the Fifth Circuit's opinion in Estate of Farrar v. Cain.

II. ESTATE OF FARRAR V. CAIN: THE COURT'S ANALYSIS

The holding in Farrar reflects a restrictive view of the

79. Id. at 792-93. Commentators agree that "[t]he legislative purpose behind a fee award statute should always be kept in mind when considering both the issues of entitlement and computation." Troutwine, supra note 62, at 95.
80. 928 F.2d 558 (2d Cir. 1991).
81. Id. at 564.
82. Id. In the court's words:
Simply because the jury found that the Ruggieros did not establish their claims in all respects does nothing to lessen the significance or importance of the Ruggiero's success. Although no compensatory damages were awarded, the jury's determination "changes the legal relationship" between the Ruggieros and the Officers in that a violation of rights had been found.

83. 953 F.2d 1152, 1159 (9th Cir. 1992) (per curiam). Like the Second Circuit in Ruggiero, the Ninth Circuit concluded:
The fact that the jury awarded the Rombergs only one dollar each in damages does nothing to vitiate the fact that the defendants were found liable on the merits of violating the Rombergs' civil rights. Despite the amount of the award, the Rombergs still prevailed on a significant legal issue, and that alone is significant.

85. The court held that in an action seeking monetary damages, a plaintiff receiving only nominal damages does not qualify for prevailing party status. Id. at 1315.
Supreme Court’s rulings in *Texas State Teachers*, *Hewitt*, and *Rhodes*. Unlike the Second Circuit Court of Appeals in *Ruggiero*, the Fifth Circuit in *Farrar* determined that merely winning a judgment and nominal damages was not enough to change the legal relationship between the plaintiff and the defendant. The *Farrar* court relied heavily on *Hewitt* and *Rhodes* to hold that the plaintiff’s “victory” was insufficient to qualify him for attorneys’ fees under § 1988.

The court in *Farrar* began its analysis by focusing on the minimum standards for prevailing party status set out in *Texas State Teachers*. Because the Supreme Court noted that it had first laid the “floor” of the changing legal relationships standard in *Hewitt*, the *Farrar* court looked there for the principles underlying the requirement. In the *Farrar* court’s view, *Hewitt* drew a distinction between “a vindication of rights” and “some relief on the merits.” Relying on a passage in *Hewitt* in which the Supreme Court stated that the “end of the rainbow” in civil litigation is not a judicial decree but “some action (or cessation of action) by the defendant that the judgment produces,” the Fifth Circuit concluded that a “vindication of rights” without some “relief on the merits” did not constitute prevailing party status for § 1988 purposes.

The court then drew on *Rhodes* to buttress its view that an

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86. *Id.* at 1317.
87. *Id.*
88. *Id.* at 1313; see *supra* part I.C.3 (discussing the Supreme Court’s minimum standards for prevailing parties).
89. *Farrar*, 941 F.2d at 1313.
90. *Id.* at 1314.
91. *Id.* (quoting *Hewitt* v. Helms, 482 U.S. 755, 761 (1987)). The complete passage as quoted by the court is as follows:

“In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. . . . The real value of the judicial pronouncement—what makes it a proper resolution of a ‘case or controversy’ rather than an advisory opinion—is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff . . . . As a consequence of the present lawsuit, Helms obtained nothing from the defendants. The only ‘relief’ he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law in an otherwise unfavorable opinion.”

*Id.* For a discussion of the *Farrar* court’s use of this passage, see *infra* notes 110-13 and accompanying text.
92. *Farrar*, 941 F.2d at 1314.
application of the Hewitt principles to Farrar was appropriate. After acknowledging that prior to Rhodes one might have distinguished between a mere favorable statement of law as in Hewitt and an actual judgment in the plaintiff’s favor, the court stated that Rhodes “extended the Hewitt principle to situations in which the plaintiff has secured such a judgment but has failed to win relief from the defendant.”

In the court’s view, Farrar was such a case. The plaintiffs sued for $17 million in damages and “the jury gave them nothing.” They received no money damages, no declaratory relief, and no injunctive relief. The finding that one of the defendants had violated Farrar’s civil rights “did not in any meaningful sense” change the legal relationship between the parties. Nor was the result a success on a significant issue that achieved some of the benefit the Farrars sought in bringing suit. Farrar’s victory was “a technical victory ... so insignificant, and ... so near the situations addressed in Hewitt and Rhodes, as to be insufficient to support prevailing party status.”

While denying Farrar relief under § 1988, the court stated that it was in no way diminishing the significance of a finding of a constitutional violation. Indeed, it reaffirmed its view that a “violation of constitutional rights is never de minimis, in the sense that a constitutional violation is never so small or trifling that the law takes no account of it.” It stated, however, that this case was not a struggle over constitutional principles. It was a damage suit and nothing more, and “when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988.”

In reaching its decision, the court consciously rejected opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. The court dismissed most of the circuit cases

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93. Id. at 1317.
94. Id. at 1315.
95. Id.
96. Id.
97. Id.
98. Id. (quoting Texas State Teachers v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989)).
99. Id.
100. Id. (quotations omitted).
101. Id.
102. Id.
103. Id. at 1316. The cases cited as reaching opposite conclusions were: Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991); Scofield v. City of Hillsborough, 862 F.2d 759, 766 (9th Cir. 1988); Coleman v. Turner, 838 F.2d
either because they were decided before *Hewitt* and *Rhodes*, or because the court deciding them did not refer to either case in its decision. In the Fifth Circuit's view, *Hewitt* and *Rhodes*, together with *Texas State Teachers*, dictate that a constitutional violation is not necessarily sufficient to qualify a party as a prevailing party under §1988, and that finding was all that the Farrars had gained. They needed more.

III. PREVAILING PARTIES IN A NOMINAL DAMAGES CONTEXT

If *Estate of Farrar v. Cain* is a correct reading of *Texas State Teachers, Rhodes, and Hewitt*, it suggests a dramatic shift in the way courts will determine prevailing party status under §1988. Courts must look beyond identifying whether a plaintiff has succeeded on a significant issue that achieved some of the benefit sought in bringing suit, the standard that most of the federal circuits have used in granting fees to civil rights plaintiffs who obtained only nominal damages. Instead,

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1004, 1005 (8th Cir. 1988); Nephew v. City of Aurora, 830 F.2d 1547, 1553 n.2 (10th Cir. 1987) (en banc), cert. denied, 485 U.S. 976 (1988); Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987).

104. *Farrar*, 941 F.2d at 1317. The court distinguished Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991), on similar grounds, saying that the Second Circuit did not discuss or cite *Hewitt* or *Rhodes* in its opinion, relying instead on the Supreme Court's opinions in *Texas State Teachers* and *Hensley*. *Farrar*, 941 F.2d at 1317.

105. *Farrar*, 941 F.2d at 1317. Judge Reavley, in dissent, stated that he did “not read *Hewitt, Rhodes*, and *Garland* to go so far. The plaintiffs prevailed in their claim although the amount of their benefit was only nominal.” *Id.* at 1317 (Reavley, J., dissenting).

106. As evidence of *Farrar*’s role in bringing about such a shift, the Eighth Circuit recently quoted *Farrar* in denying attorneys’ fees to plaintiffs in a civil rights action who received nothing in damages. See *Warren v. Fanning*, 950 F.2d 1370, 1375 (8th Cir. 1991). In *Warren*, unlike *Farrar*, the court did not award even nominal damages to the plaintiffs. *Id.* Nonetheless, the *Warren* court’s reasoning echoes the *Farrar* approach: “In an action seeking only money damages, a determination that a constitutional violation has occurred, unaccompanied by any kind of damage award, not even a nominal award, does not sufficiently change the legal relationship between the parties so as to make the verdict anything more than a technical victory.” *Id.* But see *Romberg v. Nichols*, 953 F.2d 1152, 1159 (9th Cir. 1992) (per curiam) (rejecting *Farrar* and noting that, “[i]n the realm of civil rights, where Congress and the courts historically have sought to encourage the vindication of society’s most cherished principles for their own sake, a nominal damages award does not a nominal victory make”). The situation in *Romberg* differed from *Farrar* and *Warren* in that the plaintiffs in *Romberg* were not even seeking monetary damages; they simply wanted to vindicate their rights. *Id.* at 1160.

107. See supra part I.C.1.
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under Farrar, when civil rights plaintiffs win only nominal damages, a court must examine the nature of the suit to determine whether constitutional principles really are at stake. If the only goal is monetary damages, then winning a nominal amount is insufficient to “change the legal relationship” between the parties, and is thus insufficient to entitle the plaintiffs to attorneys’ fees under § 1988.

In the Farrar court’s view, the Supreme Court’s introduction of the “changing legal relationships” requirement in Texas State Teachers, Hewitt, and Rhodes significantly tightened the standards for prevailing parties. Close analysis of these decisions, however, suggests that they do not compel the outcome in Farrar. The Farrar court’s approach is at odds with both the Supreme Court’s and Congress’s views of what it means to prevail under § 1988.

A. FARRAR’S CHANGING LEGAL RELATIONSHIPS STANDARD: MISAPPLYING HEWITT AND RHODES

The Farrar court held that plaintiffs seeking monetary damages alone who win only nominal amounts do not change the legal relationship between themselves and the defendants.108 The court’s heavy reliance on Hewitt and Rhodes in reaching this conclusion is misplaced. As construed in Texas State Teachers, Hewitt and Rhodes were examples of situations in which plaintiffs won nothing more than “a technical victory.”109 The Farrar court interpreted them to be much more, drawing from them a broad distinction between a vindication of rights and relief on the merits.

In so doing, the court misconstrued both Hewitt and Rhodes. A key passage in Hewitt describes the circumstances under which a judicial statement of law is equivalent to a final judgment or a judicial decree—in the same way that a monetary settlement is the informal equivalent of relief gained through a damage award.110 The passage concludes that however a dispute is resolved, what matters in determining whether a plaintiff “prevails” is a change in the legal relationship between the parties.111 In reaching its decision, the Farrar

108. See supra notes 94-96 and accompanying text.
110. See supra note 81 for the passage as quoted in Farrar.
111. Farrar, 941 F.2d at 1315. Note that in adopting this “changing legal relationships” language later in Texas State Teachers, 489 U.S. at 790-91, the Supreme Court did not intend to make the significant issue test more restric-
court relied on this passage to develop its distinction between a vindication of rights and actual relief on the merits. The *Farrar* court failed to recognize, however, that the passage in *Hewitt* served only to introduce the Court's illustration of how ineffectual and technical the plaintiff's "victory" truly was.

In *Hewitt*, there was no "change in the legal relationship," not because the plaintiff did not win damages per se, but because the defendants were immune from damages suits and all other claims for relief were mooted by the plaintiff's release from prison. In a sense, then, the plaintiff had no cause of action. The statement of law in his favor on appeal did nothing to alter that fact. Indeed, if the court had examined the issues in the case in a different order, deciding the immunity question first, the plaintiff probably would not have obtained even his favorable statement of law. Likewise, the Supreme Court applied *Hewitt* in *Rhodes* because the plaintiffs there obtained a declaratory judgment that was meaningless when rendered because one of the plaintiffs had died and the other had been released from prison. By the time the court announced the judgment, the case was moot.

The message of *Hewitt* and *Rhodes* is that to "change legal relationships," a plaintiff must prevail with something more than an advisory opinion. There must be a resolution to a live dispute. In this sense, relief on the merits can consist of either a final judgment vindicating rights, a monetary damage award, or both. The plaintiffs in *Farrar*, though they won

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112. See supra note 92 and accompanying text.
113. See supra note 75 for continuation of the passage as written in *Hewitt*.
114. Thus, as noted by the Ninth Circuit in *Robinson v. Ariyoshi*, *Hewitt* instructs courts to deny fee requests "based in effect on some favorable statements of law in opinions that had been vacated." *Robinson v. Ariyoshi*, 933 F.2d 781, 784 (9th Cir. 1991).
116. See supra note 76 and accompanying text.
117. See *Hewitt*, 482 U.S. at 761. ("The real value of the judicial pronounce-ment—what makes it a proper resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute which affects the behavior of the defendant toward the plaintiff").
118. See supra notes 63-64 and accompanying text (discussing the holding
only nominal damages, did obtain a favorable resolution of their dispute. The jury found that one of the defendants committed an act or acts under color of state law that deprived Joseph Farrar of a civil right. As the Second Circuit Court of Appeals stated in Ruggiero, such a finding changes the legal relationship between the parties—even if the court does not award compensatory damages. It establishes finally and formally that the plaintiff was the victim of the defendant’s illegal acts. It thus places them on opposite sides of the legal order, vindicating the plaintiff and casting society’s disapproval upon the defendant. The stigma of a civil rights violation may be especially damning in a case like Farrar, where the wrongdoer is a politician. In addition, the verdict may deter the defendant and others from committing similar acts in the future.

Nothing made the Farrars’ verdict moot. The result was a favorable resolution of a live dispute. It changed the legal relationship between the parties, as the court in Farrar should have recognized.

B. THE SIGNIFICANT ISSUE TEST IN FARRAR: AN IMPROPER RETURN TO CENTRAL ISSUE ANALYSIS

In addition to finding there was no change in the legal relationship between the parties, the Farrar court concluded that

in City of Riverside v. Rivera, 477 U.S. 561, 574 (1986), which states that entitlement to fees is not conditioned on monetary damage awards and that results may not necessarily be measurable in monetary terms); see also Romberg v. Nichols, 953 F.2d 1152, 1158 (9th Cir. 1992) (per curiam) (stating that “victory in civil rights litigation is not always measurable in ordinary economic terms”).

119. See supra note 82 and accompanying text.

120. For a useful definition of mootness, see Fairfield Gloves v. United States, 73 F.R.D. 133 (Cust. Ct. 1976), aff’d, 558 F.2d 1023 (C.C.P.A. 1977). In the court’s words:

The function of a decision is to decide a controversy affecting the rights of some party to the litigation. Where due to a change in circumstances before decision an actual controversy has ceased to exist and there is no live question to decide, a decision whether or not relief should be granted is an empty formality and of no effect. Id. at 139-40. Seen in this light, the declaratory judgment in Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (per curiam), can be termed “an empty formality.” With the death of one plaintiff and the release of the other from prison, the circumstances changed. As a result, the plaintiffs in Rhodes, who had sought changes in prison policies, could no longer benefit from any changes stemming from the decision. Id. Thus, their rights were no longer affected by the litigation, and the controversy ceased to exist. Id. The same cannot be said of the plaintiffs in Farrar. Their controversy only ceased to exist when the court rendered its judgment, and not before.
the plaintiffs in *Farrar* fell short of the "significant issue—some benefit" test for identifying prevailing plaintiffs. In the court's view, the plaintiffs did not succeed because the sole aim of the suit was a damage award, and the plaintiffs obtained only one dollar of the $17 million sought. The court's analysis was flawed because it failed to recognize the significance of the finding of a civil rights violation that resolved a live dispute. The court went so far as to distinguish its assertion that constitutional violations are never *de minimis*, stating that *Farrar* was "no struggle over constitutional principles," but a damage suit and nothing more.

The court's approach appreciably narrows the significant issue test the Supreme Court adopted in *Texas State Teachers*. Indeed, it invokes the kind of analysis that the *Texas State Teachers* Court specifically rejected. The *Farrar* approach, in essence, calls for a determination whether monetary damages or a constitutional principle is the "central issue" in the litigation. In *Texas State Teachers*, the Supreme Court rejected such a central issue test as both overly restrictive and "unhelpful" in defining the term "prevailing party."

A civil rights plaintiff is entitled to attorneys' fees upon succeeding on a significant issue in the litigation and achieving some of the benefit sought in bringing suit. Under this "gen-


122. Id.

123. Id.

124. *Texas State Teachers* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989); see also supra note 56 and accompanying text (detailing the Court's reason for rejecting the central issue test). The *Farrar* approach also implicitly invites courts to award attorneys' fees based upon the court's own assessment of the importance of the issues involved. Thus, in the *Farrar* court's view, constitutional issues are more important than damage suits under the civil rights statutes. The Supreme Court in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975), the very decision that engendered The Fees Act, held that only Congress could determine which issues are important enough to merit an award of attorneys' fees. See *supra* notes 27-29 and accompanying text for a discussion of the *Alyeska* Court's holding.

125. See *supra* note 56 and accompanying text (discussing the Supreme Court's determination of the proper inquiry in *Texas State Teachers*, 489 U.S. at 791). Note that although the text of the Act allows a court to use discretion in granting fee awards, courts have, in practice, interpreted the Act as making such awards all but mandatory to plaintiffs who substantially prevail. 1 HAZARD & HODES, supra note 47, § 1.5:103; see also *Miller v. Staats*, 706 F.2d 336, 340 (D.C. Cir. 1983) (recognizing that courts have "only narrow discretion to deny fee awards"); *Kulkarni v. Alexander*, 662 F.2d 758, 766 n.18 (D.C. Cir. 1978) (noting that the statutory reference to a court's discretion "does not authorize a refusal to award any fees to a prevailing plaintiff unless special cir-
erous” standard, it is difficult to disagree with the dissent in Farrar, which stated that the plaintiffs did prevail for § 1988 purposes. A finding of a constitutional violation, which resolves a live dispute, is never insignificant—even if the plaintiffs obtain only nominal damages as a remedy. In bringing suit, the Farrars charged the defendants with violating the law. A court agreed with them, vindicating their rights and preserving the vitality of the law. In so doing, the court provided some of the benefit sought in bringing suit—both in terms of one dollar in damages, and more importantly, in terms of a favorable verdict—which is a prerequisite benefit, even in a suit for damages.

Perhaps the Farrar court did not deem the plaintiffs’ success “significant” simply because of the apparent anomaly of a $300,000 fee award to plaintiffs who won only one dollar in damages. If so, Hensley v. Eckerhart and City of Riverside v. Rivera provide important guidance. Apparently believing that Hewitt and Rhodes diminished the significance of Hensley and Rivera, the Farrar court made only passing reference to Hensley and no reference to Rivera in reaching its decision. In these decisions, however, the Supreme Court established that entitlement to a fee award does not depend upon the size of a monetary damages award. If a fee award is

126. See Texas State Teachers, 489 U.S. at 792 (characterizing the “significant issue—some benefit” standard as a “generous” formulation).
128. But see supra note 57 (noting that nominal damages qualify as prevailing unless a court requires the “central issue” test).
130. 477 U.S. 561 (1986). For discussion of Rivera, see supra notes 60, 63-64 and accompanying text.
133. See Estate of Farrar v. Cain, 941 F.2d 1311, 1313 nn.4 & 6 (5th Cir. 1991) (citing Hensley, 461 U.S. at 424, only to illustrate that the Supreme Court had articulated standards for determining whether a party has prevailed for purposes of recovering attorneys’ fees under § 1988), cert. granted sub nom. Farrar v. Hobby, 112 S. Ct. 1159 (1992).
134. See supra notes 61-62 and accompanying text.
unreasonable given the results obtained, the remedy is not to deny the award, but to reduce it to reflect the plaintiff's limited success. Moreover, Rivera suggests that there may be nothing unreasonable about the $300,000 fee award in Farrar. Reasonable fee awards may be vastly disproportionate to the monetary damages. In the civil rights area especially, a plaintiff's success is often best measured in nonmonetary terms.

C. A STANDARD AT ODDS WITH THE LANGUAGE AND INTENT OF THE ACT

The foregoing analysis suggests that the Supreme Court did not compel the Farrar court's approach to defining prevailing parties, and that by more generously applying the Court's recent precedents, the Farrar court could have concluded that the Farrars did prevail for §1988 purposes. An analysis of the Farrar approach in light of the language and purposes of the Fees Awards Act bolsters this conclusion.

There is little doubt that the Farrar approach differs fundamentally with the language of the Act. As Justice Black-
mun noted, "In ordinary usage, 'prevailing' means winning." It does not mean analyzing whether a plaintiff won on constitutional grounds in a suit that a court determines addresses constitutional principles. It simply means winning. Nowhere is this plain language definition more important than in the civil rights area, and it appears to be what Congress intended.

The initial sponsor of the legislation, Senator Tunney, noted that where civil rights are concerned, the entire nation suffers when private citizens do not have the resources to go to court to "prove a violation of the law." In his view at least, citizens vindicate their rights and the congressional policies behind the civil rights legislation simply by proving violations of the law—by prevailing in the most direct sense.

Indeed, Congress seemed to contemplate that winning a favorable verdict would qualify as prevailing under the Act. The House Judiciary Committee, for example, emphasized that the phrase "prevailing party" was not intended to be "limited to the victor only after entry of a final judgment," suggesting as a matter of course that civil rights plaintiffs who do win final judgments prevail for § 1988 purposes.

More generally, by passing the Act, Congress sought to facilitate private enforcement of its public civil rights laws. Though the actions would be private, the nation as a whole would benefit as citizens enforced its laws. In drafting and debating the Act, Congress did not differentiate between the various civil rights laws it included under § 1988. It did not dif-

damages, see supra note 64 and accompanying text, the district court's grant of attorneys' fees in Farrar is not "absurd." As at least five federal circuits have apparently agreed that it is not an absurd result to award fees to plaintiffs winning only nominal damages. See supra note 53. The plain language of the Act therefore must control.

139. Rhodes v. Stewart, 488 U.S. 1, 7 (1988) (Blackmun, J., dissenting); see supra note 39 (supplying dictionary definitions of "prevailing party").

140. See supra note 34 (noting that in civil rights actions, unlike tort or antitrust actions, damage awards are not likely to be large enough incentive to encourage lawyers to represent plaintiffs); supra note 138 (illustrating that purposes of Act go beyond compensation). If the Act is to serve the broad purposes Congress outlined for it, it must be read to allow fee awards even when compensation for actual damages is small or nominal.


142. House Report, supra note 32, at 7, reprinted in Derfner, supra note 32, at 58 (portions of the House Committee's discussion of the "prevailing party issue").


differentiate between suits that sought monetary damages and those that sought other forms of relief. While acknowledging that the extent of relief may affect the amount of fees awarded, it did not suggest that entitlement to fees should depend on achieving some requisite level of success beyond a finding of a violation of the law. Instead, Congress adopted the rule, already in place for the fee shifting provisions of the Civil Rights Act of 1964, that prevailing parties in civil rights actions are entitled to attorneys' fees unless special circumstances make such awards unjust. If Congress had intended a more narrow interpretation of the language in the Act, it presumably would have said so.

The Farrar approach violates these congressional directives. Congress's goal was to lower the barriers that prevented private citizens whose rights had been violated from enforcing a set of laws that Congress deemed particularly important. Yet the Farrar court's approach raises the barriers anew. It returns the risk and expense of litigation directly to those who are victims of civil rights abuses, thereby deterring them from enforcing the laws passed to protect them. While it is reasonable to demand, as Congress did, that plaintiffs proceed only if they have meritorious claims, demanding predictions about the size of a damage award or the importance of a settlement—at the risk of what amounted to $300,000 in fees in Farrar—places a heavy obstacle before victims of civil rights abuses.

It may be true that the "end of the rainbow" in litigation is not the judgment, but the remedy. Congress seemed to believe, however, that civil rights laws are enforced through judgments and other vindications of rights, not through damage awards per se. Fundamentally, Congress intended to prevent those who violate civil rights laws from proceeding with impunity. Under the Farrar approach such violators are free to do so unless a plaintiff can confidently assert in advance not only that she can prove a violation of the law, but that the case will result in an award of compensatory damages or a settlement of some constitutional principle. Congress sought to encourage civil rights suits, hoping that enforcing the laws would stop the violators. Farrar, by making civil rights law enforce-

146. See supra note 32 (providing the language of the House and Senate Committee reports regarding the purpose underlying the Fees Awards Act).
ment more difficult and more daunting, moves in the opposite direction.

CONCLUSION

In reaching its decision, the Farrar court disregarded the admonition in Texas State Teachers that the touchstone of the prevailing party inquiry must be whether the legal relationships were altered in the fashion Congress intended to foster in passing the fee shifting statute. The court failed to see that regardless of the amount awarded in damages, legal relationships are changed when violators can no longer proceed with impunity. As a result, the standard announced in Farrar offends the plain language and both the judicial and the legislative backgrounds of § 1988. By demanding that plaintiffs not only prove violations of the law, but that they also win substantial damages or settle some significant constitutional question before they can be termed “prevailing parties,” the Farrar approach unnecessarily and ill-advisedly shifts the risk of pursuing civil rights actions back to the victims.

147. See supra text accompanying note 79 (discussing the Supreme Court’s articulation of the “touchstone of the prevailing party inquiry” from Texas State Teachers v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93 (1989)).