Notes

AVOIDING MERE INCANTATIONS: EVALUATING SUCCESS ON NONFEE CLAIMS WHEN DETERMINING PREVAILING-PARTY STATUS UNDER 42 U.S.C. § 1988

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ABSTRACT

The American rule dictates that regardless of the outcome, parties pay for their own attorneys' fees unless Congress has specifically enacted a fee-shifting statute authorizing courts to award fees to prevailing parties. One of the most recognized fee-shifting statutes is 42 U.S.C. § 1988. Courts and scholars have extensively discussed whether a plaintiff is a prevailing party under § 1988. Yet both have largely ignored one scenario in which a plaintiff files a suit containing both constitutional claims for which fees are authorized under § 1988 (fee claims) and state law claims for which fees are not authorized (nonfee claims). Courts then, invoking the avoidance doctrine, simply rule on the state law claim and leave the constitutional claim unaddressed. In this scenario, is the plaintiff a prevailing party under § 1988? The few courts that have addressed this question have adopted a rule that unnecessarily favors plaintiffs at the expense of defendants by allowing courts to award fees without finding that the defendants violated the plaintiffs' constitutional rights. It also creates a

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system that is ripe for abuse—one in which plaintiffs can use pleading tricks to obtain fee awards with "mere incantations" of fee claims. This Note proposes revising this rule by requiring that the fee and nonfee claims be reasonably related, with a heavy emphasis on whether they are based on related legal theories. This new rule would still let courts invoke the avoidance doctrine but would better protect defendants without unnecessarily burdening plaintiffs.

INTRODUCTION

Congress passed 42 U.S.C. § 1983 and other civil rights statutes to give private citizens and businesses the power to sue the government when it violates their constitutional or federal statutory rights. Recognizing that many victims of constitutional violations cannot afford to bring civil suits, Congress enacted 42 U.S.C. § 1988, which gives courts the power to make defendants pay the attorneys' fees of plaintiffs that prevail on certain civil rights claims, called fee claims. But § 1988 fails to address a critical procedural issue: what happens when plaintiffs bring both fee claims and nonfee claims (those based on laws not covered by § 1988, such as state statutes) and win only on those other (nonfee) grounds? Should defendants have to pay plaintiffs' attorneys' fees anyway?

In 2007, the Fourth Circuit confronted just this problem. In *Giovanni Carandola, Ltd. v. City of Greensboro*,[1] the City of Greensboro passed an ordinance limiting where "sexually oriented businesses" could locate in the city.[2] Giovanni Carandola, Ltd. (Carandola), along with five other adult businesses, filed a § 1983 suit alleging the city violated the First and Fourteenth Amendments.[3] Carandola additionally included a nonfee claim that it was not subject to the ordinance as written.[4] Carandola moved for summary judgment based only on the nonfee claim.[5] The court granted summary judgment for Carandola on the nonfee claim but did not rule on the fee claim.[6]

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1. Giovanni Carandola, Ltd. v. City of Greensboro, 258 F. App'x 512 (4th Cir. 2007) (per curiam).

2. *Id.* at 514.

3. *Id.*

4. *Id.*

5. *Id.*; Plaintiff-Appellants' Supplemental Brief in Case Number 07-1249, at 9, *Carandola*, 258 F. App'x 512 (Nos. 06-2181 & 07-1249), 2007 WL 1974220.

6. *Carandola*, 258 F. App'x at 514, 516.

Had Carandola won the § 1983 claim, the court could have required Greensboro to pay Carandola's attorney's fees under § 1988. Absent any § 1983 claim, however, the American rule—the traditional rule of attorney compensation—would have required Carandola to pay its own fees. The Fourth Circuit ultimately and correctly decided that the fee claims and the nonfee claims were too unrelated to justify holding that the plaintiffs were prevailing parties.[7] But its reasoning was unclear,[8] and other courts have reached the opposite result.[9]

The problem the Fourth Circuit faced was how to reconcile two competing policy goals: encouraging civil rights suits and protecting defendants from paying attorneys' fees for meritless claims. Congress enacted § 1988 to encourage plaintiffs to bring suits to vindicate their civil rights.[10] But the text of § 1988 assumes that courts reached decisions on the merits of fee claims. In practice, however, the rule of avoidance occasionally hinders plaintiffs. This rule asks courts to avoid deciding constitutional claims when they can reach a decision on other grounds.[11] So in situations like *Carandola*, in which courts do not address fee claims,[12] courts often fail to decide fee claims that may have merit. If plaintiffs never receive attorneys' fees in *Carandola*-like situations, then courts undermine the purpose of § 1988. But § 1988 makes losing defendants pay more than in ordinary litigation under the American rule. As a result, forcing defendants to pay attorneys' fees in *Carandola*-like situations for potentially meritless fee claims seems unfair. Indeed, it could encourage plaintiffs to tack on a meritless fee claim—to bring it as a "mere incantation"[13]—just to recover attorneys' fees.

To avoid this unfairness and potential abuse, courts that have faced this issue agree that some relationship must exist between the

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7. *Id.* at 514.

8. *See infra* Part II.B.2.

9. *See infra* Part II.B.

10. *See infra* Part I.

11. *Carandola*, 258 F. App'x at 517–18 (citing H.R. REP. NO. 94-1558, at 4 n.7 (1976)). For more on the avoidance doctrine, see *infra* notes 32–33 and accompanying text.

12. In fact, the *Carandola* court did not invoke the avoidance doctrine. The plaintiffs simply had not put the fee claim before the court on summary judgment. *Carandola*, 258 F. App'x at 518. For the purposes of this Note, however, *Carandola* is portrayed as a typical situation in which courts struggle with *Gagne* and *Smith*.

13. Smith v. Cumberland Sch. Comm., 703 F.2d 4, 9 (1st Cir. 1983), *aff'd sub nom.* Smith v. Robinson, 468 U.S. 992 (1984).

fee claim and the other, nonfee claim on which the plaintiff prevails.[14] But courts cannot agree how related those claims must be.[15] The Supreme Court has addressed this issue twice, first in *Maher v. Gagne*[16] and then again in *Smith v. Robinson*.[17] In *Gagne*, the Court cursorily established a two-prong rule—what this Note calls the *Gagne* rule—that allows fees (1) if the fee claim is "substantial" and (2) if the fee claim and nonfee claim arise from a "common nucleus of operative fact."[18] Recognizing that *Gagne*'s two-prong test allowed attorneys' fees too easily, the *Smith* Court clarified that fee claims must be "reasonably related to the plaintiff's ultimate success."[19] But the Court did not explain how courts should incorporate *Smith* into the existing *Gagne* rule.

As a result, lower courts have struggled to apply *Gagne* and *Smith* in *Carandola*-like situations.[20] Their confusion, in turn, has undermined the purpose of § 1988—without a fairly balanced test, either undeserving plaintiffs can obtain attorneys' fees at the defendants' expense or victims of constitutional violations are discouraged from suing. Interestingly, scholars have largely ignored this confusion among the courts. Although scholars have debated other aspects of fee-shifting statutes, they have not seriously discussed the relationship between *Gagne* and *Smith*. The handful of articles that do address the two-prong *Gagne* rule and the later *Smith* modifications merely mention that *Smith* restricted the two-prong *Gagne* rule, but they neither point out that courts have failed to incorporate these restrictions nor propose any method for properly recognizing the impact of *Smith*.[21]

This Note, then, provides the first analysis of the proper circumstances for courts to award attorneys' fees under § 1988 in *Carandola*-like situations. After considering several possible approaches, it argues that courts should make the *Smith* rule the third prong of the *Gagne* test. Before awarding fees in situations similar to the *Carandola* case, courts should find that (1) the fee claim is

14. *See infra* Part II.

15. *See infra* Part II.B.

16. Maher v. Gagne, 448 U.S. 122 (1980).

17. Smith v. Robinson, 468 U.S. 992 (1984).

18. *Gagne*, 448 U.S. at 132 & n.15.

19. *Smith*, 468 U.S. at 1007.

20. *See infra* Part II.B.

21. *E.g.*, Erika Geetter, Comment, *Attorney's Fees for § 1983 Claims in Fair Hearings: Rethinking Current Jurisprudence*, 55 U. CHI. L. REV. 1267, 1277–78 (1988).

substantial; (2) the fee claim and nonfee claim arise from a common nucleus of operative fact; and (3) the fee claim is reasonably related to the plaintiff's ultimate success, focusing primarily on whether the fee and nonfee claims present related legal theories. This solution best resolves the competing policy concerns that § 1988 attempts to balance.

Part I of this Note gives the legislative history of § 1988 and explains the policy concerns that underpin it. Part II presents courts' responses to the problem this Note addresses. It explores the Court's reasoning in the *Gagne* decision and explains why it modified the *Gagne* standard in *Smith*. It then shows the variety of approaches lower courts have taken to apply *Gagne* and *Smith*. Part III considers the benefits and drawbacks of their approaches and sets out the proposed three-prong test.

I. THE HISTORY AND COMPETING POLICY PURPOSES OF § 1988

Under the American rule, litigants pay their own attorneys' fees regardless of who wins, unless a statute or an enforceable contract provision authorizes fee shifting.[22] In *Alyeska Pipeline Service Co. v. Wilderness Society*,[23] the Supreme Court reaffirmed the importance of the American rule and held that only Congress could shift fees and only through "specific and explicit [statutory authorizations] for the allowance of attorneys' fees."[24] Congress quickly exercised that power and passed the Civil Rights Attorney's Fees Award Act of 1976 (§ 1988).[25] When it enacted § 1988, Congress primarily focused on encouraging plaintiffs to go to court to vindicate their civil rights.[26] Congress understood that it needed private enforcement by citizens

22. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 257 (1975). For an excellent history on the American rule, see generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (Winter 1984).

23. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

24. *Id.* at 260.

25. 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 (2000)).

26. *See, e.g.*, 122 CONG. REC. S16251 (daily ed. Sept. 21, 1976) (statement of Sen. Scott), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94559, S. 2278): SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 19 (Comm. Print 1976) ("[S]piraling court costs have created an absolute necessity of attorney's fee provisions [in civil rights statutes] . . . [t]o encourage citizens to go to court in private suits to vindicate its policies and protect their rights.").

to ensure "effective enforcement of [f]ederal civil rights statutes."[27] Often, though, private citizens do not have the resources to go to court, so Congress created fee-shifting statutes to encourage litigants to bring the cases.[28] Section 1988 enticed lawyers to take civil rights cases with indigent clients because they were more likely to be compensated for their time if they prevailed.[29]

The text of § 1988(b) states that "[i]n any action or proceeding to enforce a provision of [various civil rights statutes], 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."[30] In many cases in which plaintiffs seek attorneys' fees, the court has already reached a decision on the merits of the underlying fee claim. The rules in this situation are well-defined; plaintiffs who win on fee claims can seek attorneys' fees, and plaintiffs who lose cannot.[31] But when the court has not reached the merits of the fee claim but decides the nonfee claim, the outcome is less clear. Courts sometimes avoid deciding fee claims because of a "longstanding judicial policy of avoiding unnecessary decision of important constitutional issues,"[32] commonly referred to as the avoidance doctrine.[33] Thus courts must decide whether to award fees without ever having reached the constitutional issue that fee shifting is designed to help.

In deciding whether plaintiffs may seek attorneys' fees under § 1988 in these *Carandola*-like situations, courts must decide between two competing policy interests: encouraging civil rights suits and protecting defendants from paying attorneys' fees for meritless claims. On the one hand, preventing plaintiffs from seeking attorneys' fees in all *Carandola*-like situations seems to unduly punish plaintiffs for courts' decisions to rely on the avoidance doctrine. Plaintiffs could bring entirely meritorious fee claims but also choose to include

27. H.R. REP. NO. 94-1558, at 1 (1976), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 209.

28. *E.g.*, *id.* at 2–3, 9, *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 210–11, 217.

29. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 96 (1989) (allowing a prevailing attorney to recover more than the fixed amount of the contingency fee the plaintiff had agreed to pay); Blum v. Stenson, 465 U.S. 886, 894–95 (1984) (allowing pro bono attorneys to recover fees under § 1988 after their clients prevailed).

30. 42 U.S.C. § 1988(b).

31. *See infra* note 36 and accompanying text.

32. Maher v. Gagne, 448 U.S. 122, 133 (1980) (quoting Gagne v. Maher, 594 F.2d 336, 342 (2d Cir. 1979)).

33. *See, e.g.*, *Carandola*, 258 F. App'x at 518 (referring to the doctrine in this manner).

nonfee claims. In such cases, courts, acting on their own initiative, may invoke the avoidance doctrine and refuse to even consider the fee claims. Plaintiffs are then forced to either exclude perfectly valid nonfee claims from their complaints or else risk losing the opportunity to seek attorneys' fees for reasons entirely unrelated to the merit of their claims.

On the other hand, in a *Carandola*-like situation the court has not ruled that the defendant violated any constitutional rights, so imposing attorneys' fees punishes defendants without any finding of wrongdoing. The text of § 1988, consistent with legislative intent,[34] states that courts may award fees when defendants have actually violated the plaintiffs' constitutional rights.[35] Following this interpretation, courts have unanimously held that plaintiffs are not entitled to fees when they lose on their fee claims.[36] Moreover, allowing fees in all *Carandola*-like cases creates a loophole in the system and encourages plaintiffs to abuse § 1988. A clever plaintiff—or, more realistically, a clever plaintiff's counsel—who intendeds to bring a state law claim could simply tack on a constitutional claim, even one that is almost certainly meritless.[37] The court would presumably invoke the avoidance doctrine and decide the case on the dispositive nonfee grounds, giving the plaintiff a windfall of attorney's fees. The Supreme Court itself has recognized this potential for abuse: "If a litigant could obtain fees simply by an incantation of § 1983, fees would become available in almost every case."[38] Accordingly, the Court has cautioned that "plaintiffs may not rely

34. *See, e.g.*, S. REP. NO. 94-1011, at 2 (1976), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 8 (noting that the legislation was needed so that "those who violate the Nation's fundamental laws are not to proceed with impunity"); H.R. REP. NO. 94-1558, at 1, *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 209 (stating that the purpose of the legislation is to give plaintiffs access to courts when "laws are violated").

35. 42 U.S.C. § 1988 (2000).

36. *See, e.g.*, Luria Bros. & Co. v. Allen, 672 F.2d 347, 357 (3d Cir. 1982) ("We find no legislative intent to treat a losing party in a § 1983 action as a 'prevailing party' simply because he prevails on a related state claim.").

37. Although this Note does not address the ethics of such tactics, it acknowledges that jurisdictions' rules of professional conduct may bar some abuses of § 1988. *See, e.g.*, FED. R. CIV. P. 11(b) ("By presenting to the court a pleading . . . an attorney . . . certifies that: . . . (1) it is not being presented for any improper purpose; [and] (2) [all] claims . . . are warranted by existing law or by a nonfrivolous argument for extending the law . . . .").

38. Smith v. Robinson, 468 U.S. 992, 1003 (1984).

simply on the fact that substantial fee-generating claims were made during the course of litigation."[39]

The legitimate need to avoid penalizing a plaintiff for a court's understandable reluctance to resolve constitutional questions when other grounds are dispositive should not "alter the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success."[40] Even in cases like *Carandola*, which lacked any intimation that the plaintiffs had brought their constitutional claims as a pleading trick to obtain fees, fidelity to the American rule and basic notions of fairness dictate that courts should not award fees unless they have some indication that the defendants have engaged in conduct for which Congress has specifically authorized an award of fees. As Part II discusses, though the Court has acknowledged the need to address these concerns, the rules adopted by the lower courts fail to properly incorporate the Court's guidance.

II. PERPETUATING THE IMBALANCE: THE *GAGNE* RULE AND FEDERAL COURTS' SUBSEQUENT TREATMENT

A. Supreme Court Treatment

1. *The Undesirable Rule:* Maher v. Gagne. In § 1988's legislative history, Congress took the position that plaintiffs' rights should trump in *Carandola*-like situations. Although the text of § 1988 and the Senate report did not mention this scenario, the House report addressed it in a footnote and recommends awarding attorneys' fees.[41] In that footnote, the House report identified two criteria for determining when plaintiffs can recover attorneys' fees. First, the fee claim must be substantial.[42] Second, both the fee claim and the nonfee claim must arise out of a common nucleus of operative fact.[43]

In dicta in a footnote in *Maher v. Gagne*, the Court endorsed the House report's proposed two-prong test without any modification.[44]

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39. *Id.* at 1007.

40. *Id.*

41. H.R. REP. NO. 94-1558, at 4 n.7 (1976), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 212. The Senate report for § 1988 includes no corresponding passage.

42. *Id.* (quoting Hagans v. Lavine, 415 U.S. 528, 536 (1974)).

43. *Id.* (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).

44. Maher v. Gagne, 448 U.S. 122, 132 & n.15 (1980).

The Court thus agreed that, for plaintiffs to recover attorneys' fees after prevailing on grounds other than fee claims, (1) the fee claim must be substantial and (2) both the fee claim and the nonfee claim must arise out of a common nucleus of operative fact.[45]

This two-prong *Gagne* rule has substantial breadth. In essence, the rule allows a party to seek fees if it prevails on any properly joined nonfee claim so long as the fee claim remained undecided in the case and was not frivolous.[46] The first prong of the *Gagne* rule requires merely that the fee claim be substantial, which is simply the federal-question test for federal jurisdiction.[47] A fee claim is substantial so long as it is not "essentially fictitious," "wholly insubstantial," "obviously frivolous," or "obviously without merit."[48] As one court put it,

> [C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial . . . . A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."[49]

The first prong requires no additional inquiry into whether the constitutional claim would have been likely to succeed.[50]

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45. *Id.* at 132 n.15 (quoting H.R. REP. NO. 94-1558, at 4 n.7).

46. *E.g.*, Seaway Drive-In, Inc. v. Twp. of Clay, 791 F.2d 447, 451–52 (6th Cir. 1986). In *Seaway Drive-In, Inc.*, the court explained that

> [t]he test quoted from the legislative history [of § 1988] for determining when fees may be awarded based on an unaddressed fee claim—*i.e.*, the requirements that the fee claim be substantial and that the fee and nonfee claims arise out of a common nucleus of operative fact—is identical to [the test] that a district court must apply when determining whether the court has pendent jurisdiction over state law claims. . . . In other words, to hold that the constitutional claims in this case were not substantial is to hold that the District Court did not have jurisdiction over the state law claims.

Id.

47. *E.g.*, Sw. Bell Tel. Co. v. City of El Paso, 346 F.3d 541, 551 (5th Cir. 2003).

48. Hagans v. Lavine, 415 U.S. 528, 537 (1974). The legislative history cited *Hagans*, along with *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), for guidance when defining "substantial." H.R. REP. NO. 94-1558, at 4 n.7, *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 212.

49. Turillo v. Tyson, 535 F. Supp. 577, 581 (D.R.I. 1982) (quoting *Hagans*, 415 U.S. at 537–38).

50. *See Hagans*, 415 U.S. at 538 (explaining that "claims of doubtful or questionable merit" can still be substantial).

The second prong requires only that the fee and nonfee claims arise out of a common nucleus of operative fact; the claims do not need any other similarities. The fee and nonfee claims share a common nucleus of operative fact if the nonfee claim was properly joined in the case under the federal court's supplemental jurisdiction.[51] Courts do not have to inquire into the degree of factual or legal relatedness between the fee and nonfee claims.[52] The *Gagne* rule's expansive nature thus infringes defendants' rights by too readily awarding attorneys' fees and encourages using pleading tricks to circumvent the American rule. In fact, the Court later seemed to regret its hasty and unquestioning acceptance of the House report's rule. Four years after *Gagne*, the Court addressed the merits of the *Gagne* rule in *Smith v. Robinson*.

2. *Subsequent Consideration:* Smith v. Robinson. Although the procedural history of *Smith* is complicated,[53] in essence the plaintiffs had alleged fee claims, which courts had not addressed,[54] and nonfee claims, on which the plaintiffs had prevailed[55]—a *Carandola*-like situation. The Court began by reaffirming the general two-prong *Gagne* rule.[56] Yet this time, the Court recognized the *Gagne* rule's overly broad reach and potential for abuse. It acknowledged that the two-prong *Gagne* rule allowed a court to award fees any time a plaintiff prevailed on a nonfee claim that was properly joined in a case under the court's supplemental jurisdiction. Such a test, the Court reasoned, invited abuse: "If a litigant could obtain fees simply by an incantation of § 1983, fees would become available in almost every case."[57] The Court wanted more than just the presence of an unaddressed fee claim in the case;[58] it wanted some assurance that the

51. *Gibbs*, 383 U.S. at 725. *Gibbs* is the case cited in the legislative history as a guide for when claims arise out of a common nucleus of operative fact. H.R. REP. NO. 94-1558, at 4 n.7, *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 212.

52. *See, e.g.*, *Sw. Bell Tel. Co.*, 346 F.3d at 551.

53. Smith v. Robinson, 468 U.S. 992, 995 (1984).

54. *Id.* at 1007.

55. *Id.* at 1002 (concluding that the plaintiffs had prevailed on claims based on the Education of the Handicapped Act, which does not authorize an award of fees).

56. *See id.* ("[W]hen the claim upon which a plaintiff actually prevails is accompanied by a 'substantial,' though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate." (citing Maher v. Gagne, 448 U.S. 122, 130–31 (1980))).

57. *Id.* at 1003.

58. *See id.* at 1007 ("The fact that constitutional claims are made does not render automatic an award of fees for the entire proceeding.").

relationship between the fee and nonfee claims was close enough to still uphold the purpose of § 1988—protecting plaintiffs' civil rights.[59]

To allay these concerns, the Court held that, in addition to meeting the two prongs of the *Gagne* rule, the fee and nonfee claims must be "reasonably related."[60] Defining when claims are reasonably related, the Court stated that when the case contains fee and nonfee claims asking for "different relief" based on (1) "different legal facts" and (2) different "*legal theories*," the court may not award fees simply because the plaintiff prevails on the nonfee claim.[61] *Gagne* arguably already prohibited—under its common nucleus of operative fact prong—fee awards when the facts of the fee and nonfee claims are totally unrelated. But as this Note explains in Parts II.B.2 and III.B, the *Smith* opinion significantly restricts *Gagne* by adding a requirement that the fee and nonfee claims share reasonably related *legal theories*.

B. The Circuit Courts' Failure to Recognize and Integrate Smith

Despite the Court's effort to narrow the *Gagne* rule and articulate a workable standard, courts have struggled to interpret *Smith*. Often the end result is that they continue to apply the original two-prong *Gagne* rule without properly incorporating *Smith*'s restrictions (if they mention *Smith* at all). Since *Smith*, seven circuit courts have addressed the *Gagne* rule. Four courts have failed to read *Smith* as imposing any changes on the two-prong *Gagne* rule. Three courts have found that *Smith* does alter the *Gagne* rule but have not properly interpreted *Smith*'s effect to adequately protect defendants and limit the potential for abuse. This Section's analysis of the circuit courts' failure to adequately integrate *Smith* sets the stage for Part III, which advocates adding *Smith*'s "reasonably related" language to the *Gagne* test as a third factor, with a particular emphasis on whether the fee and nonfee claims present reasonably related legal theories.

1. *Failure to Recognize* Smith. The Fifth, Tenth, and Ninth Circuits have failed to read *Smith* as imposing any restrictions on the two-prong *Gagne* rule. Two of these circuits did not recognize *Smith* at all. The Fifth Circuit did not even mention *Smith* when discussing whether to award fees. Instead it merely approved the original *Gagne*

59. *See supra* notes 26–29, 35–36 and accompanying text.

60. *Smith*, 468 U.S. at 1007.

61. *Id.* at 1015 (emphasis added).

rule, holding that proper findings that courts have supplemental jurisdiction over plaintiffs' nonfee claims make plaintiffs eligible for fee awards.[62] In doing so, the Fifth Circuit failed to impose any requirement that fee and nonfee claims be reasonably related, leaving defendants vulnerable to paying fees even without any indication that they violated plaintiffs' civil rights. Similarly, the Tenth Circuit apparently did not recognize that *Smith* modifies the *Gagne* rule. It framed the rule using only the original two prongs and then briefly mentioned approvingly that the plaintiff sought the same relief for both the fee and nonfee claims.[63] Again, the court did not mention that the fee and nonfee claims, particularly the legal theories behind each claim, should be reasonably related.

The Ninth Circuit did acknowledge *Smith* as having some effect, but not on the breadth of the *Gagne* rule. Instead it read *Smith* as standing for the proposition that courts should interpret § 1988 broadly.[64] The court merely approved the original two-prong *Gagne* rule without requiring fee and nonfee claims to be reasonably related.[65]

2. *Failure to Properly Incorporate* Smith. Only four circuits have tried to restrict the *Gagne* rule after *Smith*, but they ultimately have failed to meaningfully limit the *Gagne* standard. Two of these circuits—the Sixth and the Eleventh—attempted to directly incorporate *Smith*'s "reasonably related" language, but they did not give it any real weight. The Sixth Circuit interpreted *Smith* as requiring plaintiffs seeking attorneys' fees to present fee and nonfee claims involving related facts *or* related legal theories.[66] Thus, even if two claims rely on drastically different legal theories, they satisfy the Sixth Circuit's watered-down reading of *Smith* so long as they are based on the same facts because all cases arising out of a common nucleus of operative fact share some facts. According to the Sixth Circuit, any situation that meets the *Gagne* rule also meets the *Smith* rule. *Smith* therefore imposes no actual limits on *Gagne* under the Sixth Circuit's approach. Yet the concerns expressed in *Smith* about *Gagne* indicate that *Smith* was supposed to impose a limit.

62. Sw. Bell Tel. Co. v. City of El Paso, 346 F.3d 541, 551 (5th Cir. 2003).

63. Plott v. Griffiths, 938 F.2d 164, 167–68 (10th Cir. 1991).

64. Gerling Global Reinsurance Corp. v. Garamendi, 400 F.3d 803, 810 (9th Cir. 2005).

65. *Id.* at 808–09.

66. Seaway Drive-In, Inc. v. Twp. of Clay, 791 F.2d 447, 455 (6th Cir. 1986).

The Eleventh Circuit took a similarly flawed approach. Unlike earlier courts that continued *Gagne*'s two-prong approach, the court properly[67] read *Smith* as creating a new third prong—that the fee and nonfee claims be reasonably related—in addition to the substantiality and common nucleus of operative fact requirements of the two-prong *Gagne* rule.[68] But the court then defined "reasonably related" as "aimed at achieving the same result based on the same facts *or* legal theories . . . . [so that] if the fee and nonfee claims merely present alternate theories of recovery for the same injury, they are reasonably related."[69] Its approach thus suffers from the same defect as the Sixth Circuit's—it allows an award of fees if the fee and nonfee claims are merely factually related.

The Seventh Circuit focused on the second prong of the *Gagne* rule—the degree of factual relatedness required between the fee and nonfee claims. Indirectly recognizing *Smith*'s impact, it modified *Gagne*'s second prong—the common nucleus of operative fact standard—requiring instead that the fee and nonfee claims be "closely related factually."[70] To define "closely related factually," the Seventh Circuit adopted a standard from another Seventh Circuit case,[71] *Lenard v. Argento*.[72] *Lenard* required courts to find a higher factual similarity between fee and nonfee claims before awarding fees than they must find when establishing supplemental jurisdiction[73]—that is, the *Lenard* court demanded a higher degree of factual similarity between fee and nonfee claims than does the second prong of the *Gagne* rule.

The Fourth Circuit, in *Carandola*, came closest to meaningfully restricting the *Gagne* rule's reach. Unlike other circuits, the Fourth Circuit apparently did not read the substantiality and common nucleus of operative fact requirements as equivalent to the supplemental jurisdiction test. According to the Fourth Circuit, after

67. *See infra* Part III.C.

68. Scurlock v. City of Lynn Haven, 858 F.2d 1521, 1527–28 (11th Cir. 1988) ("Thus, in order to receive attorney's fees when only nonfee claims are addressed, a plaintiff must show that it (1) has prevailed and that the section 1983 claim (2) meets the substantiality test, (3) arises from a common nucleus of operative fact with the nonfee claims, and (4) is reasonably related to the plaintiff's ultimate success." (internal quotation marks omitted)).

69. *Id.* (emphasis added).

70. Wis. Hosp. Ass'n v. Reivitz, 820 F.2d 863, 869 (7th Cir. 1987).

71. *Id.*

72. Lenard v. Argento, 808 F.2d 1242 (7th Cir. 1987).

73. *Id.* at 1245–46.

Smith, "the non-fee claim must have been reasonably related to the fee claim."[74] Accordingly, the court defined "reasonably related" claims as ones raising "tightly intertwined" legal issues.[75] Although the *Carandola* court could have used this new language to substantively restrict *Gagne*, it instead claimed that its opinion was in line with the Tenth Circuit's and Sixth Circuit's decisions. It simply ruled against the plaintiffs and distinguished *Carandola* from those cases because, in *Carandola*, the district court had not invoked the avoidance doctrine.[76]

These circuits' approaches prove problematic because they all allow an award of fees merely because the fee and nonfee claims are *factually* related. As Part III.B shows, factual similarity offers no assurance that the defendant actually violated the plaintiff's constitutional rights. Returning to the *Carandola* case, if courts imposed only a heightened factual relatedness standard, Carandola and the other plaintiffs could recover fees because they raised factually related claims. Both the plaintiffs' nonfee and fee claims stemmed from the ordinance's enactment and the existence of the sexually oriented businesses. Yet there was no indication in *Carandola* that the City of Greensboro had actually violated the plaintiffs' constitutional rights under the First and Fourteenth Amendments. A heightened factual similarity requirement simply does not address the *Smith* Court's policy concerns. As Part III.C argues, to properly incorporate *Smith* into *Gagne*, courts must find that fee and nonfee claims are based on related *legal theories* in addition to their factual similarity.

III. ALTERNATIVES FOR HEIGHTENING THE STANDARDS UNDER THE *GAGNE* RULE: ADDING A THIRD PRONG AND REQUIRING RELATED LEGAL THEORIES

Courts should give true force to *Smith*'s restrictions on *Gagne*. But to do so, they require a rule synthesizing the two cases that refrains from "penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive."[77] At the same time, this new

74. Giovanni Carandola, Ltd. v. City of Greensboro, 258 F. App'x 512, 517 (4th Cir. 2007) (per curiam).

75. *Id.*

76. *Id.* at 517 n.2.

77. *Smith*, 468 U.S. at 1007.

rule must protect defendants from fee awards when plaintiffs merely invoke a fee claim or when courts lack assurance that there is a reasonable probability defendants have actually violated plaintiffs' civil rights.

As discussed in Part II.B, courts that have considered *Smith* have disagreed about how to incorporate that opinion into the *Gagne* rule. Those courts have primarily taken one of three approaches. First, some courts have strengthened the first prong of the *Gagne* rule and required plaintiffs to show a greater likelihood of success on the merits of the fee claim.[78] Second, some courts have stiffened the second prong of the *Gagne* rule and incorporated *Smith*'s reasonably related requirement into the common nucleus of operative fact inquiry.[79] This approach requires a higher degree of factual similarity than the original *Gagne* rule required. Finally, some courts have viewed *Smith*'s reasonably related requirement as a separate and new prong of the *Gagne* rule[80]—creating a three-prong *Gagne* rule.

This Part argues that courts should reject the first approach because it leads to results that completely defeat the purpose of the *Gagne* rule and the avoidance doctrine. Although the second and third tests are both feasible, the third alternative—setting "reasonably related" as a separate and new requirement of the *Gagne* rule—is most likely to provide clear guidance to courts so that they can properly fulfill the purpose behind § 1988 while protecting defendants from paying plaintiffs' attorneys' fees when Congress did not intend defendants to do so.

A. First Alternative: A Heightened Substantiality Requirement

The two-prong *Gagne* rule's requirement that the fee claim be substantial merely requires that it not be so devoid of merit that it

78. The Sixth Circuit criticized the United States District Court for the Eastern District of Michigan for taking a similar approach. *See* Seaway Drive-In, Inc. v. Twp. of Clay, 791 F.2d 447, 452 (6th Cir. 1986) ("The District Court applied a more stringent 'substantiality' test than this and improperly denied the fee request.").

79. The Middle District of North Carolina arguably took this approach. *See* Giovanni Carandola, Ltd. v. City of Greensboro, No. 1:05CV1166, 2007 WL 703333, at *2 (M.D.N.C. Mar. 1, 2007) (mem.) ("The types of cases involving a [*sic*] similar pendant [*sic*] and § 1983 claims that are appropriately deemed to share a common nucleus of facts are generally those in which a plaintiff presents a number of related issues to the court, and the court reaches a decision on one claim while abstaining from ruling on the constitutional one."), *aff'd*, 258 F. App'x 512 (4th Cir. 2007) (per curiam).

80. The Eleventh Circuit took this approach. Scurlock v. City of Lynn Haven, 858 F.2d 1521, 1528 (11th Cir. 1988).

does not warrant judicial consideration.[81] A heightened substantiality requirement for the fee claim could help ensure that courts will restrict the scope of the two-prong *Gagne* rule to situations that are more likely to involve actual civil rights violations. Stringently interpreted, this alternative would require courts to decide the merits of constitutional claims if the party prevails on the nonfee claim. Section 1988's legislative history suggested this is the correct approach when the unaddressed fee claim does not have constitutional implications.[82] This alternative, however, is inappropriate when dealing with unaddressed constitutional claims because it completely disregards judicial hesitancy to unnecessarily decide constitutional questions in the first place.

Alternatively, courts could require that fee claims meet a more minimal viability standard by finding parties eligible for fees if fee claims could survive motions to dismiss or summary judgment motions. Although this standard would be less offensive to the avoidance doctrine because courts would make no final decision on the merits of the constitutional claims, it would not sufficiently restrict the scope of the two-prong *Gagne* rule, and it would still require courts to make some determination on the merits of the constitutional claims. These requirements would restrict *Gagne*'s inquiry into whether the fee claims were substantial, but they would do little to ensure that the claims would likely succeed on the merits. For example, a plaintiff can survive a motion to dismiss even though "actual proof of those facts is improbable, and ' . . . a recovery is very remote and unlikely.'"[83] Similarly, even if a plaintiff prevailed against a summary judgment motion, the plaintiff's claims are not necessarily meritorious. The Supreme Court has even stated, in a related context, that demonstrating a *substantial* likelihood of success on the merits may not provide sufficient assurance that the defendant violated a plaintiff's civil rights to justify an award of fees under § 1988.[84]

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81. *See supra* notes 47–48 and accompanying text.

82. H.R. REP. NO. 94-1558, at 4 n.7 (1976), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 212 ("To the extent a plaintiff joins a claim under one of the statutes enumerated in [§ 1988] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the nonfee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees." (citing Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973))).

83. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

84. In a case considering 42 U.S.C. § 1983, the plaintiff had obtained a temporary injunction by demonstrating a substantial likelihood of success on the merits. Wyner v. Struhs,

Although the Court was speaking in a context outside of the *Gagne* rule,[85] its sentiments are telling: they indicate that even heightened viability standards do not ensure that the claims ultimately would have prevailed. Requiring fee claims to survive a motion to dismiss or summary judgment standard would not sufficiently restrict the *Gagne* rule because those standards provide no real assurance that the defendant violated the plaintiff's civil rights.

Regardless of the degree of viability courts required, imposing a heightened substantiality standard under the *Gagne* rule would be undesirable. Courts applying such a standard would likely need to conduct a highly fact-bound inquiry into the merits of the fee claims. Courts would struggle to administer this standard because it would spawn a second round of litigation,[86] which the Court has repeatedly stressed courts should avoid.[87] This second round of litigation would force courts to decide constitutional issues despite their understandable hesitancy to do so, or else it would fail to meaningfully restrict the scope of the *Gagne* rule by allowing courts to award attorneys' fees without any indication that the defendant violated the plaintiff's civil rights.

B. Second Alternative: Heightened Common Nucleus of Operative Fact Requirement

Alternatively, courts could restrict the *Gagne* doctrine by requiring a heightened factual similarity between fee and nonfee claims. Under the two-prong *Gagne* rule, "common nucleus of operative fact" merely means that "if[] considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial

254 F. Supp. 2d 1297, 1300, 1303 (S.D. Fla. 2003), *rev'd sub nom.* Sole v. Wyner, 127 S. Ct. 2188 (2007). The Supreme Court held that the plaintiff was not eligible for an award of fees under § 1988 after failing to obtain a permanent injunction. *Sole*, 127 S. Ct. at 2191.

85. *See Sole*, 127 S. Ct. at 2191 ("This Court expresses no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees.").

86. The Court employed similar reasoning when rejecting the catalyst theory as a ground for awarding fees under § 1988. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609–10 (2001) ("[A] 'catalyst theory' hearing would . . . 'likely depend on a highly factbound inquiry' and . . . . is clearly not a formula for 'ready administrability.'" (citations omitted)).

87. *E.g.*, *id.* at 609; Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

proceeding."[88] After *Smith*, some courts arguably have already read "common nucleus of operative fact" to impose a heightened requirement for factual similarity between fee and nonfee claims beyond *Gagne*'s test for supplemental jurisdiction.[89]

Logically, a heightened common nucleus of operative fact standard would require factual similarity between fee and nonfee claims. Under this standard, courts would find that claims are related if they grew out of the same incident. For example, if a plaintiff who had been beaten by the police filed a claim for excessive force and an equal protection claim—arguing that the police beating was racially motivated—then the claims would be sufficiently factually related because both grew out of the beating.[90] This restriction would limit the scope of the *Gagne* rule by requiring a more rigorous analysis of the factual connection between the fee and nonfee claims than *Gagne* requires. This factual-similarity requirement would potentially limit the pleading tricks[91] available to plaintiffs. Moreover, it would not offend the avoidance doctrine because courts could evaluate claims' factual similarity without deciding the merits of the constitutional fee claim.

Although strengthening the common nucleus of operative fact test could restrict the *Gagne* rule, it fails to properly offer some indication that defendants actually violated the plaintiff's civil rights. Courts could award fees as long as fee and nonfee claims were factually related, even if the claims were not based on similar legal theories.[92] Theoretically, courts could interpret the heightened common nucleus of operative fact inquiry to encompass both factual

88. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), *cited with approval in* H.R. REP. NO. 94-1558, at 4 n.7 (1976), *reprinted in* SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., *supra* note 26, at 212.

89. *See, e.g.*, Wis. Hosp. Ass'n v. Reivitz, 820 F.2d 863, 869 (7th Cir. 1987) (requiring courts shifting fees to find that that the fee and nonfee claims are "closely related" factually); *supra* note 79.

90. This example is taken from *Lenard v. Argento*, in which the court held that "[t]he beating claim and the claim of a conspiracy to deny [the plaintiff] the equal protection of the laws are related to each other, because they both grow out of the beating." Lenard v. Argento, 808 F.2d 1242, 1246 (7th Cir. 1987). *Lenard*, however, is not within the scope of the *Gagne* doctrine, because the plaintiff had prevailed on an equal protection fee claim, and so the trial court decided the case on *Hensley* grounds. *Id.* at 1244–46.

91. *See supra* notes 38–40 and accompanying text.

92. The factual similarity could be conceptual or temporal. *See Lenard*, 808 F.2d at 1246 (analyzing claims for conceptual and temporal similarities to determine whether the claims were related).

and legal similarity.[93] This approach, however, seems inconsistent with the plain meaning of "common nucleus of operative *fact*." Without requiring similarity between the legal theories underpinning fee and nonfee claims, plaintiffs could seek fees even though success on the nonfee claims does not bear at all on success on the fee claims. Under this test, even the *Carandola* plaintiffs theoretically could still obtain a fee award. There, the plaintiffs' statutory interpretation claim and constitutional claim both grew out of a city ordinance affecting an adult bookstore. Thus, the heightened common nucleus of operative fact requirement, although feasible, would not restrict the scope of the *Gagne* rule enough to offer some indication that the defendant violated the plaintiff's civil rights.

C. Third Alternative: Requiring Reasonably Related Legal Theories as a Third Prong

Third, and most preferably, courts could restrict the scope of *Gagne* by reading *Smith* as creating a new and separate requirement for determining eligibility for fees. Under this approach, the substantiality and common nucleus of operative fact prongs of the *Gagne* rule would remain as merely federal question and supplemental jurisdiction inquiries. Then a third prong would require plaintiffs to show that fee and nonfee claims are reasonably related. This approach is appealing because it avoids weakening the restriction and emphasizes the need for a heightened inquiry into the similarity of the claims. As Part II.B has shown, when courts fail to view "reasonably related" as a separate inquiry, they often ultimately view the *Gagne* rule simply as a supplemental jurisdiction inquiry.[94]

Although the Supreme Court has acknowledged that "there is no certain method of determining when claims are 'related' or 'unrelated,'"[95] it encouraged courts to look at whether the claims dealt with different facts and legal theories.[96] *Smith* held that the claims were not reasonably related when they relied on different facts, legal theories, *and* warranted different relief.[97] Thus, when determining whether fee and nonfee claims are reasonably related, courts could appropriately take one of two approaches to determine whether

93. *See supra* note 79.
94. *See supra* Part II.B.
95. Hensley v. Eckerhart, 461 U.S. 424, 437 n.12 (1983).
96. *Id.* at 435.
97. Smith v. Robinson, 468 U.S. 992, 1015 (1984).

plaintiffs are eligible for fees in light of *Smith*. Courts could interpret *Smith* liberally and determine that parties have prevailed for § 1988 purposes so long as they present fee and nonfee claims involving reasonably related relief, facts, *or* legal theories.[98] Otherwise, courts could interpret *Smith* as imposing a more restrictive test and view parties as having prevailed only if fee and nonfee claims share reasonably related relief, facts, *and* legal theories. Most critically under this approach, though, courts must find that fee and nonfee claims raise related legal theories. Although the latter option more likely would deny prevailing-party status to plaintiffs when the *Gagne* rule applies, it most effectively limits fee eligibility to situations in which some likelihood exists that the defendant violated the plaintiff's civil rights without requiring courts to formally adjudicate the constitutional claim on the merits.

The first approach—requiring that the plaintiff only show that the fee and nonfee claims were reasonably related through relief, facts, *or* legal theories—would not meaningfully restrict the *Gagne* rule or offer courts any indication that the defendant violated the plaintiff's civil rights. Again returning to the *Carandola* case, a state could enact a statute regulating sexually oriented businesses. The plaintiff could then file a suit alleging violations of the First and Fourteenth Amendments (a fee claim) and also argue, based solely on statutory interpretation, that the statute did not apply to its business (a nonfee claim). If the court ruled on the state law claim and did not address the fee claim, counsel for the plaintiff could argue that it is a prevailing party under the looser interpretation of "reasonably related" because the plaintiff sought the same relief (a declaratory judgment) and the plaintiff's fee and nonfee claims involve similar facts (the enactment of the statute and the content of the statute as applied to the business).[99] But a court ruling that a statute does not apply to a particular plaintiff in no way suggests that the statute itself violates the plaintiff's civil rights. Allowing a party to

98. *See* Plaintiff-Appellants' Supplemental Reply Brief in Case Number 07-1249, at 9, Giovanni Carandola, Ltd. v. City of Greensboro, 258 F. App'x 512 (4th Cir. 2007) (Nos. 06-2181 & 07-1249), 2007 WL 2680234 ("In *Smith* the Supreme Court denied fees because *both* of the following were true: the claims presented by the plaintiffs advanced different legal theories and proceeded from different facts. The logical extension of this is that claims which share *either* a common factual basis *or* proceed from a common legal theory are sufficiently related to support a fee award." (citation omitted)).

99. In fact, plaintiffs' counsel raised precisely this argument. *See id.* at 6–10 (arguing that the two claims were sufficiently related because they asked for the same relief and were factually similar).

prevail for § 1988 purposes based solely on relief-based, factual, or legal similarity thus does not substantively differentiate the reasonably related standard from the common nucleus of operative fact inquiry.

If courts instead interpret *Smith* restrictively and require plaintiffs to demonstrate relief-based, factual, *and* legal similarity, then the *Gagne* rule would allow plaintiffs to recover fees despite the avoidance doctrine and also give at least some assurance that the defendant violated the plaintiff's civil rights. For example, if a plaintiff filed a lawsuit arising from a police beating, presenting claims under state battery laws and alleging a due process violation for excessive force, the fee and nonfee claims would be similar enough to meet this restrictive test. The fee and nonfee claims would, demand the same relief (damages), be factually related (arising out of the beating), and present similar legal theories (the unacceptable use of force). The most important connection is that the fee and nonfee claims—not considering the state or federal nature of the claims—present related legal theories. This nexus helps to assure the court that, given the success on the nonfee claim, the plaintiff was at least somewhat likely to succeed on the fee claim without actually requiring the court to evaluate the merits of the constitutional issue. With the police brutality example, the success of the nonfee claim would give the court at least some indication that the harm alleged under the fee claim actually occurred because both claims alleged similar harm. This more stringent approach most appropriately addresses the fairness concerns voiced in *Smith*: it still respects the avoidance doctrine, but it lets courts be more certain that a plaintiff who prevailed on a nonfee claim would also prevail on the fee claim.

CONCLUSION

Plaintiffs should have access to the courts to vindicate violations of their civil rights. Section 1988 provides a valuable tool to ensure that high litigation costs do not prevent plaintiffs from realizing this goal. Although the statute's legislative history and the early court decisions interpreting it understandably read § 1988 broadly to help accomplish these statutory goals, its scope must be considered against the backdrop of the American rule, which is "deeply rooted in our history and in congressional policy."[100] Because of the rule's

100. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245–46, 271 (1975).

importance, courts should construe exceptions to the American rule narrowly. The *Gagne* rule, however, as most circuit courts have interpreted it, extends the scope of § 1988 entirely too far.

Although courts should not punish plaintiffs by denying fees because of courts' hesitancy to decide constitutional issues, defendants deserve consideration as well. Courts must take steps to protect defendants from being forced to pay the fees of their opponents' counsel without any indication that the defendants have violated the rights § 1988 seeks to protect. To balance these two policy interests, the courts should restrict the *Gagne* rule. Before finding a plaintiff eligible for fees in a *Gagne* situation, federal courts should find that

> 1. the fee claim is substantial enough to support federal question jurisdiction;
>
> 2. the nonfee claim and the fee claim arise out of a common nucleus of operative fact, meaning that the nonfee claim was properly joined under the court's supplemental jurisdiction; and
>
> 3. the nonfee claim is reasonably related to the fee claim because it is based on substantially similar facts, legal theories, *and* desired relief, with a particular emphasis on how related the legal theories are.

Although this more restrictive rule would likely prevent some plaintiffs from recovering fees even though their unaddressed fee claims would have been successful, it properly incorporates *Smith* into *Gagne* and addresses the *Smith* Court's policy concerns. Yet this new rule allows the heart of *Gagne* to survive while offering increased protection to defendants who are otherwise vulnerable to paying attorneys' fees even though they did not violate plaintiffs' civil rights. Section 1988 was created to help plaintiffs hold defendants accountable for civil rights violations. The modifications to the *Gagne* rule this Note advocates give *some* assurance that defendants have violated plaintiffs' civil rights without requiring courts to unnecessarily look into the actual merits of constitutional claims. These modifications should help restore § 1988 to its original purpose and promote uniformity among lower courts when awarding fees.