FEDERAL GOVERNMENT LITIGATION — EQUAL ACCESS TO JUSTICE ACT — FOURTH CIRCUIT HOLDS THAT ATTORNEY'S FEES ARE PAYABLE TO CLAIMANT AND ARE ELIGIBLE FOR ADMINISTRATIVE OFFSET. — *Stephens ex rel. R.E. v. Astrue*, 565 F.3d 131 (4th Cir. 2009).

Congress has enacted a number of statutes designed to encourage attorneys to represent clients who might not otherwise be able to afford much-needed counsel. The Equal Access to Justice Act[1] (EAJA) is one such statute. Enacted in 1980, the EAJA directs a court to award to the "prevailing party other than the United States fees and other expenses . . . incurred by that party" in certain civil actions involving the United States.[2] Within the past few years, the Social Security Commissioner began withholding from the payment of these awards the amount that the litigant owes to the government.[3] Recently, in *Stephens ex rel. R.E. v. Astrue*,[4] the Fourth Circuit approved this practice, holding that fee awards under the EAJA are payable to the prevailing party and not directly to the party's attorney, and can therefore be offset by the party's debt to the government.[5] By focusing excessively on the apparent clarity of the statute's text, *Stephens* has undermined not only the EAJA, but also closely related fee-shifting statutes such as the Civil Rights Attorney's Fees Awards Act of 1976[6] (§ 1988), which uses very similar language.[7] In doing so, *Stephens* threatens the ability of low-income individuals to attract and retain counsel.

In 2007, Natalie Stephens prevailed against the federal government in a Social Security case and sought attorney's fees under the EAJA.[8] For the first twenty-five years of the statute's existence, the Social Security Commissioner paid these awards, in full, directly to the claimant's attorney.[9] After the passage of the Debt Collection Improvement Act of 1996[10] and the establishment of the Treasury Offset Program,[11] the Commissioner began to offset EAJA fee awards by the

---

1 Pub. L. No. 96-481, tit. II, 94 Stat. 2325 (1980) (codified as amended in scattered sections of 5, 15, 28, and 42 U.S.C.).

2 28 U.S.C. § 2412(d)(1)(A) (2006).

3 *See* Stephens *ex rel.* R.E. v. Astrue, 565 F.3d 131, 135–36 (4th Cir. 2009).

4 565 F.3d 131.

5 *Id.* at 137.

6 42 U.S.C. § 1988(b) (2006).

7 *Compare id.*, *with* 28 U.S.C. § 2412(d)(1)(A).

8 *See* Stephens v. Astrue, 539 F. Supp. 2d 802, 805 (D. Md. 2008).

9 *See Stephens*, 565 F.3d at 135.

10 Pub. L. No. 104-134, § 31001, 110 Stat. 1321, 1321-358 to -380 (codified as amended in scattered sections of 26, 28, 31, and 42 U.S.C.); *see* 31 U.S.C. § 3716(c)(6) (2006).

11 *See* 31 C.F.R. § 285.5(e)(1) (2008) ("Federal payments . . . eligible for offset . . . include . . . fees, refunds, judgments[,] . . . and other payments made by Federal agencies.").

claimant's debt to the government.[12] Stephens's fee award was reduced in this way.[13] Stephens petitioned for the fees to be paid directly to her counsel, a petition that was consolidated with thirty-three similar petitions in the U.S. District Court for the District of Maryland.[14]

Magistrate Judge Gauvey held that an EAJA fee award is payable directly to the prevailing party's attorney and therefore cannot be offset.[15] The magistrate judge noted that a literal reading of the statute's central provision — setting forth that fees go to the "prevailing party"[16] — might dictate a contrary result, but she observed that other aspects of the statute's text, including the savings provision that Congress had added in 1985,[17] suggested "the congressional understanding" that the "actual recipient of the attorney's fee awards under [the] EAJA" was the attorney.[18] Moreover, the EAJA's legislative history demonstrated that the Act's "specific purpose" was "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."[19] The magistrate judge stated that the interpretation advocated by the Commissioner would "reduce[] the availability of counsel for future claimants," defeating Congress's intent and producing "an irrational and unfair result."[20] The magistrate judge rejected court decisions that had come out the other way as exaggerating the clarity of the EAJA's text and misconstruing its purpose.[21] The magistrate judge also found that her interpretation of the EAJA was consistent with prior interpretations of similar fee-shifting statutes.[22] The magistrate judge concluded that because EAJA awards are the attorney's property, they cannot be subject to offset for the plaintiff's debt because "no mutuality of debt exists between the government and [the plaintiff's] attorneys."[23]

---

12 *Stephens*, 565 F.3d at 135–36.

13 *Id.*

14 *See* Stephens v. Astrue, 539 F. Supp. 2d 802, 805 (D. Md. 2008).

15 *Id.*

16 28 U.S.C. § 2412(d)(1)(A) (2006) ("[A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . [unless] the position of the United States was substantially justified.").

17 Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 183, 186 (codified at 28 U.S.C. § 2412 note).

18 *Stephens*, 539 F. Supp. 2d at 806.

19 *Id.* at 808 (quoting Comm'r, INS v. Jean, 496 U.S. 154, 163 (1990)) (internal quotation mark omitted).

20 *Id.* at 809.

21 *See id.* at 810–15.

22 *See id.* at 815–21.

23 *Id.* at 822 (alteration in original) (quoting Marré v. United States, 117 F.3d 297, 304 (5th Cir. 1997)) (internal quotation mark omitted).

The Fourth Circuit reversed. Writing for a unanimous panel, Chief Judge Williams[24] held that the plain language of the EAJA mandates that attorney's fees be payable directly to each claimant.[25] Chief Judge Williams began by summarizing the two sources that provide attorney's fees for Social Security benefits claimants: the EAJA and the Social Security Act[26] itself.[27] She then turned to the central question: to whom do EAJA fee awards belong?[28] Having set forth that "when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms,"[29] she declared that the text of the EAJA is "clear."[30] "Prevailing party" is specifically defined as being tied to the party's, and not the attorney's, net worth;[31] the "party" must submit a statement detailing "fees and other expenses";[32] and the EAJA "lumps attorney's fees with a variety of other costs."[33] These provisions demonstrated, according to Chief Judge Williams, that the statute "was not enacted for the benefit of counsel to ensure that counsel gets paid."[34] Bolstering this conclusion was Congress's use of language in the Social Security Act "specifically authoriz[ing] payment of attorney's fees to 'such attorney'"[35] and the existence of "settled law" that only a party has standing to apply for EAJA fees.[36] The court also observed that the Supreme Court had counseled that fee-shifting statutes using the term "prevailing party" should be interpreted in the same manner.[37] Favoring the Fourth Circuit's interpretation of the

---

[24] Chief Judge Williams was joined by Judge Traxler and Chief District Judge Conrad, sitting by designation.

[25] *Stephens*, 565 F.3d at 134.

[26] 42 U.S.C.A. §§ 301–1397mm (West 2003 & Supp. 2009).

[27] *Stephens*, 565 F.3d at 134–35. The Act provides that the Commissioner may certify a fee "for payment to such attorney out of . . . past-due benefits." 42 U.S.C. § 406(b)(1)(A) (2006).

[28] *Stephens*, 565 F.3d at 137. This question had "engendered a circuit split." *Id.* *Compare* Reeves v. Astrue, 526 F.3d 732, 738 (11th Cir. 2008) (fees payable to the party), Manning v. Astrue, 510 F.3d 1246, 1256 (10th Cir. 2007) (same), *and* FDL Techs., Inc. v. United States, 967 F.2d 1578, 1581 (Fed. Cir. 1992) (same), *with* Ratliff v. Astrue, 540 F.3d 800, 802 (8th Cir. 2008) (fees payable directly to the attorney), *cert. granted*, No. 08-1322, 2009 WL 1146426 (U.S. Sept. 30, 2009), *and* King v. Comm'r of Soc. Sec., 230 F. App'x 476, 481 (6th Cir. 2007) (same).

[29] *Stephens*, 565 F.3d at 137 (quoting Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004)) (internal quotation mark omitted).

[30] *Id.* (citing 28 U.S.C. § 2412(d)(1)(A) (2006)).

[31] *Id.* at 138 (citing *Manning*, 510 F.3d at 1251); *see* 28 U.S.C. § 2412(d)(2)(B) (defining "party" as one "whose net worth did not exceed $2,000,000 at the time the civil action was filed").

[32] *Stephens*, 565 F.3d at 138 (quoting 28 U.S.C. § 2412(d)(1)(B)) (internal quotation mark omitted).

[33] *Id.* (citing 28 U.S.C. § 2412(d)(2)(A)).

[34] *Id.* (quoting *Manning*, 510 F.3d at 1251) (internal quotation mark omitted).

[35] *Id.* (quoting 42 U.S.C. § 406 (2006)).

[36] *Id.* (quoting *Manning*, 510 F.3d at 1252) (internal quotation mark omitted).

[37] *Id.* at 138 n.3 (citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602–03, 603 n.4 (2001)).

EAJA was the fact that the Supreme Court had already indicated, if not actually held, that under one such statute, § 1988, fees "run to the party, not the attorney."[38]

Chief Judge Williams, while receptive to some of Stephens's arguments, found them insufficient to overcome the interpretation mandated by the statute's text.[39] Although the statute's purpose might be undermined if fee awards can be offset by other debts, the court held that it could not "use Congress's general statements of findings and purpose to override the plain meaning of specific provisions of the Act."[40] Chief Judge Williams also rejected what she characterized as Stephens's "call to common sense":[41] while it might be counterintuitive that attorney's fees would not go to the attorney, "[w]hen the words of a statute are unambiguous, . . . 'judicial inquiry is complete.'"[42]

In concentrating solely on the text of the EAJA — whose plain meaning is not as clear as the court claims it to be — *Stephens* fails to effect the purpose of the Act, and has therefore significantly undermined its effectiveness. What is even more troubling about the court's decision, however, is its implications for other fee-shifting statutes, in particular § 1988, whose text closely parallels that of the EAJA. Section 1988 allows for attorney's fees in civil rights suits and is used primarily in cases involving state defendants. Many states, like the federal government, have debt offset statutes, and decisions like *Stephens* may encourage states to apply these statutes to § 1988 fee payouts, reducing the ability of low-income individuals to challenge deprivations of their civil rights. Nevertheless, while there is reason to think that courts will treat § 1988 and the EAJA similarly, one important difference may emerge in the form of federal preemption analysis. Even having concluded that § 1988 fee awards go to the litigant and not his counsel, a court may still strike down as preempted any state effort to offset such awards, as such state action conflicts with the congressional purpose underlying § 1988. In this manner, a dose of much-needed purposivism may slip in through the back door.

Stephens reflects the dangers of an overly rigid focus on a statute's text: by concentrating on wording that seems to indicate one result — the "prevailing party" language — the court overlooked other aspects of the statute that create textual ambiguity and ignored the underlying purpose of the Act. As Professor Lawrence Solan has argued, a text may be facially ambiguous, or it may become ambiguous only upon

---

[38] *Id.* at 138 (citing Venegas v. Mitchell, 495 U.S. 82, 87 (1990); Evans v. Jeff D., 475 U.S. 717, 731–32 (1986)).

[39] *See id.* at 140.

[40] *Id.* at 139 (quoting Reeves v. Astrue, 526 F.3d 732, 737 (11th Cir. 2008)).

[41] *Id.*

[42] *Id.* at 139–40 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)).

more in-depth analysis, but it is equally true in both cases that "[w]e should not insulate ourselves from the context in which legally significant words were uttered if we care about ascertaining what the speaker intended to convey."[43] The EAJA's text is not as clear as the Fourth Circuit assumed; that this question has resulted in divergent rulings among the federal circuits indicates that there is some textual ambiguity.[44] The provisions providing for the calculation of fees based on the attorney's hourly rate and his time spent on the case[45] "suggest[] it is the attorney . . . who is to receive the award for his actual, documented work."[46] The savings provision, which requires that an attorney "refund[] to the claimant the amount of the smaller fee" awarded under the EAJA or the Social Security Act if fees are awarded under both,[47] offers further textual support for the proposition that EAJA awards belong to the attorney. Although the Fourth Circuit contended that this language reflects Congress's understanding that EAJA fees eventually end up in the hands of the party's attorney, the district court's contrary determination is at least as plausible.[48] The EAJA's text is therefore not unambiguous, and a court's inquiry should not "begin, and end, with the plain language of § 2412(d)(1)(A)."[49]

This unrelenting focus on the statutory text led the Fourth Circuit to mischaracterize the purpose of the EAJA.[50] *Stephens* followed *Manning v. Astrue*[51] in concluding that the statute's text demonstrates that its purpose is not "to ensure that counsel gets paid."[52] While compensating counsel may not be the ultimate goal of the EAJA, it is the means that Congress used to alleviate "its concern that persons

---

[43] Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 256. *But see* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 17 (Amy Gutmann ed., 1997) ("It is the *law* that governs, not the intent of the lawgiver.").

[44] *See* Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2066 (2005) ("[Textualists] must know perfectly well that difficult cases reach higher courts primarily because the language of the relevant statute is not clear enough to resolve the issues at hand.").

[45] *See* 28 U.S.C. § 2412(d)(1)(B), (2)(A) (2006).

[46] Stephens v. Astrue, 539 F. Supp. 2d 802, 806 (D. Md. 2008).

[47] Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 183, 186 (codified at 28 U.S.C. § 2412 note).

[48] *Compare Stephens*, 565 F.3d at 139, *with Stephens*, 539 F. Supp. 2d at 806 ("[The savings p]rovision would not be necessary if . . . attorney's fees under EAJA belong to and necessarily go to the prevailing party.").

[49] *Stephens*, 565 F.3d at 137.

[50] *Stephens* provides support for the assertion that textualism "is subtly incompatible with an attitude of deference toward other institutions . . . . In effect, the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning." Thomas W. Merrill, Essay, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994).

[51] 510 F.3d 1246 (10th Cir. 2007).

[52] *Stephens*, 565 F.3d at 138 (quoting *Manning*, 510 F.3d at 1251) (internal quotation mark omitted).

'may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.'"[53] As the lower court observed, "Key to retention of counsel is an assurance that if successful, counsel would receive fees for his or her work."[54] By failing to give proper weight to the goal of ensuring "that counsel gets paid," the Fourth Circuit may have severely decreased the effectiveness of the statute.

The detrimental impact of the Fourth Circuit's decision is not limited to its effect on the EAJA: *Stephens* is also troubling for the implications it has on future courts' interpretations of other fee-shifting statutes, most importantly § 1988. Congress passed § 1988 in order to ensure that plaintiffs suing for violations of their civil rights under § 1983[55] were able to "enlist private attorneys general."[56] Section 1988 has proven to be an important tool to ensure that civil rights laws are enforced.[57] *Stephens* and decisions like it, however, could diminish § 1988's vitality: § 1988's text closely mirrors that of the EAJA, including, most importantly, its designation that fees go to the "prevailing party."[58] The Supreme Court has stated that "fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike."[59] Furthermore, the Court has set forth that, in certain contexts, standards applying to its interpretations of one fee-shifting statute with prevailing party language apply to all other such statutes with prevailing party language.[60] The Fourth Circuit was aware of these admonitions; it was for this reason that it cited *Evans v. Jeff D.*[61] and *Venegas v. Mitchell*,[62] both of which had language indicating that § 1988 fees go to the litigant, not the attorney.[63] One might think that in these two cases the Supreme Court had already closed the door on any uncertainty with respect to the recipient of § 1988 awards. But, as both

---

53 Sullivan v. Hudson, 490 U.S. 877, 883 (1989) (quoting Equal Access to Justice Act, Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325 (1980)).

54 Stephens v. Astrue, 539 F. Supp. 2d 802, 808 (D. Md. 2008).

55 42 U.S.C. § 1983 (2006).

56 Randal S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work*, 69 BROOK. L. REV. 281, 313 (2003).

57 *See* Evans v. Jeff D., 475 U.S. 717, 741 (1986) ("[Section 1988] has given the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial.").

58 42 U.S.C. § 1988(b). This section reads, in relevant part, that in actions to enforce certain federal provisions, "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." *Id.*

59 Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (quoting Northcross v. Memphis Bd. of Educ., 412 U.S. 427, 428 (1973) (per curiam)).

60 Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

61 475 U.S. 717; *see Stephens*, 565 F.3d at 138–39 (citing *Jeff D.*, 475 U.S. at 731–32).

62 495 U.S. 82 (1990); *see Stephens*, 565 F.3d at 138 (citing *Venegas*, 495 U.S. at 87).

63 *See Venegas*, 495 U.S. at 87 ("Section 1988 makes the prevailing *party* eligible for a discretionary award of attorney's fees."); *Jeff D.,* 475 U.S. at 731–32.

the circuit and district courts in *Stephens* recognized, neither of these cases definitively set forth to whom § 1988 fee awards belong, but instead addressed who has standing to *request* fees.[64] Decisions such as *Stephens* will, however, provide further ammunition for those who might contend that § 1988 fees belong to the party and not his attorney, and may increase the likelihood that a court considering the issue will decline to read § 1988 in light of its purpose. The Fourth Circuit's interpretation of the EAJA may therefore encourage governmental units to offset § 1988 fees by the litigant's debts, diminishing the incentives for counsel to take on civil rights cases.

An additional element of purposivism may, however, enter a court's analysis if a state, not the federal government, attempted to offset these awards. In contrast to the EAJA, which applies only in cases involving the federal government, § 1988 provides for attorney's fees primarily in cases involving state parties.[65] A state, like the federal government, has the right "to apply the unappropriated moneys of [its] debtor, in [its] hands, in extinguishment of the debts due to [it]."[66] States have passed laws allowing them to exercise this right[67] and might be expected, following *Stephens*, to attempt to apply such laws to offset § 1988 awards. But even if a court were to hold that § 1988 fees initially belong to the party and not his attorney, preemption analysis may nevertheless lead the court to hold that any state attempt to offset these awards is preempted by federal law. In federal preemption analysis, "[t]he purpose of Congress is the ultimate touchstone."[68] Preemption need not be express, but a federal statute must "actually conflict" with a state law to preempt it by implication.[69] As the pur-

---

[64] *See Stephens*, 565 F.3d at 138 (observing that the Court was "never directly confronted" with this question in its § 1988 jurisprudence); Stephens v. Astrue, 539 F. Supp. 2d 802, 817 (D. Md. 2008) ("[T]he core issue in *Jeff D.* and *Venegas* was who had the right to seek fees, not who could receive the fee award."); *see also* Curtis v. City of Des Moines, 995 F.2d 125, 128–29 (8th Cir. 1993) (holding, post-*Venegas*, that § 1988 fee awards could not be attached as the property of the plaintiff to satisfy a debt to a third party because the awards do not belong to the plaintiff).

[65] *See* Unification Church v. INS, 762 F.2d 1077, 1081 (D.C. Cir. 1985) (discussing the limited use of § 1988 in recovering attorney's fees from federal defendants).

[66] Lomax v. Comptroller of Treasury, 593 A.2d 1099, 1103 (Md. 1991) (quoting United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947)) (internal quotation mark omitted).

[67] *See, e.g.*, CAL. GOV'T CODE § 12419.5 (West 2005).

[68] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (alteration in original) (quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)). There is, however, a presumption against preemption of state law unless doing so was "the clear and manifest purpose of Congress." *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation mark omitted).

[69] Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) (quoting Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)); *see also* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 491–92 (1987) (holding that a state law "is invalid to the extent that it . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985))).

pose of Congress in enacting § 1988 was to ensure that attorneys have monetary incentives to represent civil rights plaintiffs,[70] a state policy reducing these incentives by offsetting fee awards could be held to "actually conflict" with, and therefore be preempted by, § 1988 itself. In *Jeff D.*, the Supreme Court suggested in dicta that § 1988 bars a state from enacting certain policies, including those that have the long-run effect of "deter[ring] attorneys from representing plaintiffs" in civil rights cases.[71] *Inmates of the Rhode Island Training School v. Martinez*[72] applied this logic to hold that to the extent that a state statute prohibiting a lawyer or law firm from sharing legal fees with a nonlawyer "operate[d] to prevent [plaintiffs] from collecting the attorneys' fees in dispute," it was inconsistent with § 1988 and "preempted as a matter of federal law."[73] Thus, the necessary consideration of congressional purpose inherent in preemption analysis might lead even a court focusing strictly on the statute's prevailing party language to prohibit a state from offsetting § 1988 fee awards.

Such preemption considerations may soon be the only legal barrier to the offset of fee awards. The Supreme Court has signaled its intention to resolve the circuit split surrounding the interpretation of the EAJA's "prevailing party" language by granting certiorari in *Ratliff v. Astrue*,[74] in which the Eighth Circuit held that EAJA awards are payable directly to the claimant's attorney and cannot be offset.[75] The Court may well follow *Stephens*, holding that EAJA fees are the property of the claimant and sanctioning governmental offsets of fee awards. The Court has not, in recent years, construed fee-shifting statutes in a particularly expansive manner.[76] If the Court refuses to read the EAJA in light of its purpose, the time will have come for Congress to act. Congress should clarify that awards under the EAJA, § 1988, and similar fee-shifting statutes are intended for the prevailing party's *counsel*, not the prevailing party. If Congress takes this simple step, it could be assured that its goal of creating incentives for attorneys to help those in need will not be so easily subverted by decisions like *Stephens* and that justice will be more readily attainable for all.

---

[70] *See* Venegas v. Mitchell, 495 U.S. 82, 86 (1990).

[71] Evans v. Jeff D., 475 U.S. 717, 740 (1986); *see id.* at 738–41.

[72] 465 F. Supp. 2d 131 (D.R.I. 2006).

[73] *Id.* at 141; *see also* Bernhardt v. L.A. County, 339 F.3d 920, 927–30 (9th Cir. 2003) (stating that if the county did have a policy of settling all federal civil rights cases for "a lump sum, including all attorney's fees," *id.* at 921, that policy may be preempted by § 1988).

[74] 540 F.3d 800 (8th Cir. 2008), *cert. granted*, No. 08-1322, 2009 WL 1146426 (U.S. Sept. 30, 2009).

[75] *Id.* at 802.

[76] The power of § 1988, for example, has been somewhat lessened by a number of recent decisions. *See, e.g.*, Sole v. Wyner, 127 S. Ct. 2188 (2007) (holding that a litigant who wins a preliminary injunction but loses the final decision cannot recover fees under § 1988). *See generally* Jeffrey, *supra* note 56, at 313–30.