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# EVENING THE ODDS: THE CASE FOR ATTORNEYS' FEE AWARDS FOR ADMINISTRATIVE RESOLUTION OF TITLE VI AND TITLE VII DISPUTES

MARJORIE A. SILVER†

*In this Article Professor Silver addresses the shifting of attorneys' fees in administratively resolved claims under Titles VI and VII of the Civil Rights Act of 1964. Professor Silver begins by establishing Congress' commitment to provide informal methods for resolving disputes under these statutes and its intent to use fee-shifting provisions as a means of inducing effective access to counsel. She then discusses the United States Supreme Court's decision in North Carolina Department of Transportation v. Crest Street Community Council, Inc. and contrasts its reasoning with two earlier Court decisions dealing with administrative proceedings and attorneys' fees. Professor Silver argues that Crest undermines Congress' intended designs for both informal dispute resolution and fee-shifting in civil rights enforcement. She then proposes standards by which the Court might have evaluated whether separate federal actions to recover attorneys' fees should lie for civil rights cases resolved administratively. After countering arguments against fee recovery, the author calls on Congress to reverse the path the Supreme Court has taken and to amend the relevant civil rights fee-shifting statutes to allow explicitly for fee awards to parties who have prevailed in administrative proceedings under those statutes.*

## INTRODUCTION

Commencing with the Civil Rights Act of 1964, Congress has enacted numerous civil rights statutes with the overriding purpose of eradicating discrimination based on various invidious characteristics and providing redress to the victims of that discrimination.<sup>1</sup> To effectuate the goals of nondiscrimination and to provide meaningful remedies for acts of discrimination, Congress has employed various procedural devices and dispute resolution mechanisms.<sup>2</sup> Congress has granted litigants access to the federal courts to redress violations of

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1. See, e.g., Civil Rights Act of 1964, tits. VI, VII, 42 U.S.C. § 2000d, e (1982); Education Amendments Act of 1972, tit. IX, 20 U.S.C. § 1681 (1982); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982).

2. See Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 508-19 (1987).

these civil rights, and has created as well administrative agencies empowered to oversee the enforcement of nondiscrimination laws and to provide less formal alternatives for the resolution of complaints and charges of discrimination by aggrieved individuals. Additionally, to ensure that aggrieved individuals have access to legal representation, Congress has promulgated over the years various statutes that confer upon courts the power to award attorneys' fees to parties who prevail on their civil rights claims. Prominent among such statutes are section 706(k) of the Civil Rights Act of 1964,<sup>3</sup> providing for fees to parties who prevail in employment discrimination actions or proceedings under Title VII,<sup>4</sup> and the 1976 amendments to section 1988,<sup>5</sup> providing for fees to parties who prevail in actions or proceedings to enforce statutes enumerated in section 1988. Among these enumerated statutes is Title VI,<sup>6</sup> which prohibits discrimination based on race, ethnicity, and national origin in federally funded programs. As with many remedial statutory schemes, the task has devolved on the courts to clarify the scope and application of these fee-shifting statutes.

The courts have held that one may be a "prevailing party" within the meaning of the fee-shifting statutes by obtaining a favorable settlement,<sup>7</sup> and that one may be awarded fees for obtaining relief even outside the contours of the federal litigation in which fees are sought, when such litigation has served as a "catalyst" for obtaining relief.<sup>8</sup> In 1980 the United States Supreme Court held in *New York Gaslight Club, Inc. v. Carey*<sup>9</sup> that a federal court could award section 706(k) attorneys' fees to a party who had prevailed in mandatory state administrative proceedings under Title VII.<sup>10</sup> After that decision, lower courts divided on whether a court could award attorneys' fees under section 1988 to a party who filed suit solely to recover such fees for prevailing at the administrative level.<sup>11</sup> In 1985 the Supreme Court held, in *Webb v. Dyer County Board of Education*,<sup>12</sup> that a prevailing party in a section 1983 action was not automatically entitled to section 1988 attorneys' fees for services performed in connection with nonmandatory state administrative proceedings.<sup>13</sup> The following year, in *North Carolina Department of Transportation v. Crest Street Community Coun-*

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3. 42 U.S.C. § 2000e-5(k) (1982).

4. *Id.* § 2000e.

5. *Id.* § 1988.

6. *Id.* § 2000d.

7. *E.g.*, *Maier v. Gagne*, 448 U.S. 122, 129 (1980).

8. *E.g.*, *Sullivan v. Pennsylvania Dep't of Labor*, 663 F.2d 443, 448 (3d Cir. 1981) (fees allowed where attorney's work in mooted Title VII action found to be catalyst to successful union arbitration), *cert. denied*, 455 U.S. 1020 (1982); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970) (plaintiff considered prevailing party if "lawsuit acted as a catalyst which prompted [the defendant] to take action" to correct unlawful practice).

9. 447 U.S. 54 (1980).

10. *Id.* at 71.

11. *Compare, e.g.*, *Crest St. Community Council, Inc. v. North Carolina Dep't of Transp.*, 769 F.2d 1025 (4th Cir. 1985) (holding district court could award fees for administrative resolution of Title VI action), *rev'd*, 479 U.S. 6 (1986) *with* *Latino Project, Inc. v. City of Camden*, 701 F.2d 262 (3d Cir. 1983) (holding no fees for Title VI action resolved administratively).

12. 471 U.S. 234 (1985).

13. *Id.* at 243 (holding that district court did not abuse discretion in denying § 1988 fees in § 1983 action for work performed in connection with nonmandatory state administrative proceedings).

*cil, Inc.*,<sup>14</sup> the Court had the opportunity to decide whether section 1988 provided for attorneys' fees for the successful administrative resolution of a Title VI complaint in a federal action filed solely to recover such fees. In *Crest* the Court held that a prevailing party in a federal administrative proceeding under Title VI had no right to attorneys' fees under section 1988 when recovery was sought in a federal action filed solely to recover such fees.<sup>15</sup> Under the Court's holding, fees are available to a party who files a federal court action before obtaining a successful administrative resolution of his complaint, but not to a party who first obtains a successful administrative resolution, and then files suit to recover attorneys' fees.

This Article demonstrates that the Court's reasoning in *Crest* is inconsistent with its reasoning on section 706(k) in *Carey*<sup>16</sup> and that by denying fees in such circumstances the Court has countermanded the congressional preference that less formal agency processes be used where feasible to resolve discrimination complaints. In addition, the Court's decision in *Crest* has frustrated congressional intent to provide effective access to counsel through the inducement of fee-shifting. The *Crest* decision is one example among many in recent years of retrenchment by the Court as well as by the executive branch in their commitment to civil rights enforcement. In this era of renewed awareness of pervasive discrimination against minority groups, realization of the original and still extant goals of the civil rights laws requires that fees be available to prevailing parties in cases resolved through congressionally created administrative proceedings that enforce laws such as Title VII and Title VI.<sup>17</sup> Part I of this Article explores Congress' commitment to using agencies for the informal resolution of disputes arising under Title VII and Title VI and recounts the historical development of civil rights fee-shifting statutes. Part II summarizes the Court's decisions in *Crest* and the two earlier Supreme Court cases dealing with attorneys' fees for administrative proceedings—*Carey*<sup>18</sup> and *Webb*.<sup>19</sup> Part III explains how the Court's result in *Crest* was neither compelled by the language, nor consistent with the purpose, of section 1988, and was inconsistent with the Court's prior decisions. It demonstrates that the result in *Crest* frustrated congressional desire for consistent interpretation and application of the civil rights fee-shifting statutes. The section concludes by articulating a standard for identifying those

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14. 479 U.S. 6 (1986).

15. *Id.* at 15.

16. 447 U.S. 54 (1980).

17. Throughout this article, any discussion of Title VI (discrimination based on race, ethnicity or national origin) is similarly applicable to Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 (1982) ("Title IX") (discrimination based on gender in educational programs) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") (discrimination based on handicap). Each of these laws prohibits discrimination in federally funded programs and activities and is enforced through administrative procedures identical to those of Title VI. Issues concerning attorneys' fee-shifting are comparable for the three statutes. Title VI and Title IX are explicitly included within § 1988's coverage. The 1978 amendments to the Rehabilitation Act added a virtually identical attorneys' fee provision applicable to Section 504. 29 U.S.C. § 794a(b) (1982). I refer generally in the text only to Title VI not only as a shorthand reference to any of these, but also because the *Crest* case involved a Title VI violation.

18. 447 U.S. 54.

19. 471 U.S. 234.

administrative proceedings for which separate actions for fees should be authorized under the fee-shifting statutes. Part IV debunks various fallacious assumptions about awarding fees for Title VI cases resolved administratively. These assumptions include the assertion that the absence of any requirement in Title VI that a party must first pursue administrative remedies before filing suit suggests that the fee for administrative resolution should be treated differently than under Title VII, which has such a requirement; that allowing suits for such fees will increase the burden on the courts; that such suits will formalize informal administrative processes and discourage settlement of disputes; and that private attorneys are unnecessary at Title VI administrative proceedings. Part V proposes that to further its own declared goals for civil rights legislation Congress should amend both sections 1988 and 706(k) to provide explicitly for federal court fee awards to parties who have prevailed in Title VI and Title VII administrative proceedings.

### I. MECHANISMS FOR ERADICATING DISCRIMINATION: AGENCIES, INFORMAL RESOLUTION OF DISPUTES, AND FEE-SHIFTING

The comprehensive package of remedial measures that became the Civil Rights Act of 1964 was the result of recognition by both Congress and the President that invidious discrimination, largely discrimination against blacks, would not be solved short of dramatic federal intervention.<sup>20</sup> The Act reinforced the commitment to eradicate discrimination with the enforcement power of the United States, enabling the Attorney General to bring suit to enforce the Act's provisions.<sup>21</sup> Another key component of the Act was the inclusion of administrative enforcement machinery and an emphasis on informal, nonjudicial approaches for remedying discrimination.<sup>22</sup>

20. Silver, *supra* note 2, at 485-86.

21. Titles II, III, IV, and VII of the Civil Rights Act of 1964 each explicitly empowers the Attorney General to institute a civil suit in federal court. See 42 U.S.C. § 2000a-5 (1982) (Title II); *id.* § 2000b (Title III); *id.* § 2000c-6 (Title IV); *id.* § 2000e-5(f)(1) (Title VII). Title VI does so by implication and as implemented by its regulations. *Id.* § 2000d-1; 34 C.F.R. § 100.8(a) (1987).

22. See Silver, *supra* note 2, at 486-87; 499-500. Title II (public accommodations) provided that an aggrieved individual could not bring any civil action under § 2000a-3(a) until 30 days after notification to a state or locality with applicable law prohibiting such a practice; in the absence of such a state or local law, the court in its discretion could refer the matter to the Community Relations Service established by Title X "for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days," with the possibility of an extension of another 60 days. 42 U.S.C. § 2000a-3(d) (1982). The Community Relations Service was authorized to make full investigation of any such matter, hold any necessary hearings, and "endeavor to bring about a voluntary settlement between the parties." *Id.* § 2000a-4. Title III (public facilities) neither creates an administrative enforcement mechanism nor mentions voluntary compliance. *Id.* § 2000b.

Title IV (public education; desegregation of public schools) authorizes the Secretary of the Department of Education to provide technical assistance to local governments and school boards to assist them in implementing school desegregation plans, *id.* § 2000c-2, and authorizes financial assistance as well for such purposes, *id.* § 2000c-3 to 5. Both Titles III and IV authorize the Attorney General to institute suit to enforce their provisions upon finding that the aggrieved individuals are not themselves competent to do so. *Id.* §§ 2000b, 2000c-6.

Title VI prohibits discrimination based on race, color, or national origin in federally assisted programs, *id.* § 2000d, and vests primary enforcement responsibility in each funding agency, *id.* § 2000d-1. It further provides that no action to terminate federal financial assistance, or any other

Congress vested enforcement powers in administrative agencies primarily for the traditional reasons it turns to agencies: expedience and expertise.<sup>23</sup> Relying on agencies to adjudicate controversies frees judicial resources and generally incurs less cost and time than resolving a case through litigation.<sup>24</sup> Also, agencies specialize and thus develop sophistication and expertise less accessible to the generalist branches of government.

Provisions for informal resolution of violations complement many of the reasons for assigning initial enforcement to administrative agencies. "Voluntary compliance," the term of art for such informal resolution, is more expedient, more cost-effective, and less confrontational than formal alternatives, whether such alternatives be judicial or administrative litigation.<sup>25</sup> Congress manifested in the 1964 Act a definite preference for informal resolution where feasible.<sup>26</sup> Title VI's legislative history in particular underscores the congressional intent that the "draconian remedy" of fund termination should serve as the stick to induce voluntary compliance and nondiscrimination based on race, ethnicity, and national origin in programs and activities receiving federal funds, so that actual termination of federal financial assistance would be a rare, uncommon occurrence.<sup>27</sup>

But creating and funding enforcement agencies was only part of Congress' effort to eradicate discrimination. Congress recognized that judicial redress would be necessary when compliance problems could not be resolved administratively.<sup>28</sup> Originally, the plaintiff in a judicial action was likely to be the United States itself; all the major provisions of the 1964 Act provided that the United States might bring suit should it fail to resolve discrimination problems informally.<sup>29</sup> Title VI gave the agency the option of bringing administrative

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legal action, can be taken before the agency "has determined that compliance cannot be secured by voluntary means." *Id.*

Title VII creates the Equal Employment Opportunity Commission (EEOC), *id.* § 2000e-5, and empowers it to seek the elimination of unlawful practices through "informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b).

23. See *Crowell v. Benson*, 285 U.S. 22, 46 (1932) (upholding administrative factfinding because "[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task"); S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 203 (2d ed. 1985).

24. *Silver*, *supra* note 2, at 495, 499.

25. *Silver*, *supra* note 2, at 560-62.

26. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [the goal of equal employment opportunity]."), *cited in* *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253, 1257 (2d Cir. 1979), *aff'd*, 447 U.S. 54 (1980); see also *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346, 351 (M.D. Ala. 1967) ("philosophy of the [1964 Act] is to induce as much voluntary compliance as possible").

27. See *Silver*, *supra* note 2, at 521-22.

28. See *Evans v. Jeff D.*, 475 U.S. 717, 749 (Brennan, J., dissenting) ("Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited." (citing H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976))).

29. Titles II, III, IV, VI, and VII all enable the Attorney General to institute suit if compliance is not otherwise achieved. See *supra* note 22.

proceedings or referring the matter to the Department of Justice.<sup>30</sup> Only Titles II and VII of the 1964 Act explicitly provided that an aggrieved individual, as well as the United States, might bring suit herself.<sup>31</sup> In fact, the lower courts disagreed on whether an individual might bring a private right of action under Title VI until the Supreme Court determined, in a series of cases commencing with *Cannon v. University of Chicago*,<sup>32</sup> that such a right existed.<sup>33</sup>

In addition to being the only sections of the 1964 Act that created an explicit private right of action, only Titles II and VII originally provided for attorneys' fees to a prevailing party (other than the United States) in actions brought under those titles.<sup>34</sup> While not the first fee-shifting statutes,<sup>35</sup> they were the first to shift fees in any modern federal civil rights action.<sup>36</sup>

In the years following the 1964 Act, numerous lower courts used a "private

30. Section 602 of the Act, provides, in part:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . , or (2) by any other means authorized by law . . . .

Civil Rights Act of 1964, tit. VI, § 602, 42 U.S.C. § 2000d-1 (1982).

By regulation, such other means includes referral to the Department of Justice "with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act)." 34 C.F.R. § 100.8(a) (1987).

31. 42 U.S.C. § 2000a-3(a) (1982) (discrimination in public accommodations); *id.* § 2000e-5(f)(1) (discrimination in employment). Under Title VII, a charging party could ask for and receive a notice of right to sue from the agency if the EEOC failed to resolve the problem within 180 days from the filing of the charge and the EEOC, or, in the case of a respondent which is a governmental entity, the Attorney General, has not filed a civil action within that time. *Id.* Title II, which vested no enforcement authority in any agency other than the Department of Justice, provides that either an aggrieved individual, *id.* § 2000a-3(a), or, in the case of pattern and practice discrimination, the Attorney General, *id.* § 2000a-5(a), may bring suit in federal court. Title II explicitly disavows any requirement of exhaustion of administrative or other remedies. *Id.* § 2000a-6(a). Under Title II, however, the only remedy—other than attorneys' fees—is injunctive relief. *Id.* § 2000a-3(a).

32. 441 U.S. 677, 717 (1979) (establishing a private right of action under Title IX). The Court proceeded to make clear that the same private rights of action also existed under other nondiscrimination statutes. *See* *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983) (private action under Title VI); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (private action under Section 504).

The prior uncertainty regarding the existence of a private right of action under Titles VI, IX and Section 504 is relevant to the analysis of whether § 1988 should be interpreted to apply to cases resolved administratively, consistent with the Court's interpretation of § 706(k) in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980). *See infra* notes 247-56 and accompanying text.

33. *Compare* *Smith v. United States Postal Serv.*, 742 F.2d 257, 258 (6th Cir. 1984) and *Doe v. New York Univ.*, 442 F. Supp. 522, 524 (S.D.N.Y. 1978) (requiring exhaustion of administrative remedies under Section 504 as prerequisite to prosecuting suit) with *Whitaker v. Board of Higher Educ. of the City of New York*, 461 F. Supp. 99, 108 (E.D.N.Y. 1978) (not requiring exhaustion under Section 504).

34. Tit. II, § 204(b), 42 U.S.C. § 2000a-3(b); tit. VII, § 706(k), 42 U.S.C. § 2000e-5(k).

35. *See* H. NEWBERG, *ATTORNEY FEE AWARDS* § 28.01 (1986) (listing fee award statutes dating back to the Securities Act of 1933, 15 U.S.C. § 77k(e) (1982)).

36. *See id.* Actually, the very first fee-shifting statute was the Enforcement Act of 1870, 16 Stat. 140 (repealed 1894), which protected voting rights. The causes of action established by these provisions, however, were repealed in 1894. Act to Repeal Statutes Relating to Supervisors of Elections and Special Deputy Marshals, 28 Stat. 36 (1894); *see* S. REP. NO. 1011, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5912. Such fee-shifting is in counterpoint to the prevailing "American Rule," which provides, unless subject to a specific exception, that each party to litigation bears his own attorneys' fees, regardless of who prevails. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975).

attorney general" theory to award fees to plaintiffs who prevailed in a variety of public interest litigation.<sup>37</sup> That theory held that in order to encourage and foster public interest litigation, prevailing parties should be allowed to recover fees, not for their private gain, but for their service for the public good. Looking to Congress' example in the fee-shifting statutes, these courts concluded that effective redress of civil and environmental rights required effective access to competent counsel which could be facilitated by awarding fees as part of the remedy to prevailing plaintiffs.<sup>38</sup> However the Supreme Court put an abrupt halt to this movement in 1975 with its decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>39</sup>

In *Alyeska* the Court held that only Congress, and not the courts, could carve exceptions to the traditional American rule that each party in litigation bears its own attorneys' fees.<sup>40</sup> In that case the lower court relied on the "private attorney general" theory to award attorneys' fees to the Wilderness Society as a prevailing plaintiff in litigation to halt construction of the Alaska pipeline. While the Court did not denigrate the nobility of the lower court's aim, it proclaimed that such policy decisions were for the elected branch of government and not for the courts.<sup>41</sup>

One year later, in explicit response to the *Alyeska* decision,<sup>42</sup> Congress passed the Civil Rights Attorney's fees Awards Act of 1976, amending section 1988. The Act provides as follows:

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.<sup>43</sup>

The section 1988 fee-shifting provision was modeled on section 706(k), Title

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37. See, e.g., *Souza v. Travisono*, 512 F.2d 1137 (1st Cir.), *vacated*, 423 U.S. 809 (1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974); *Fowler v. Schwartzwalder*, 498 F.2d 143 (8th Cir. 1974); *Cornist v. Richland Parish School Bd.*, 495 F.2d 189 (5th Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (en banc), *rev'd sub nom.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Morales v. Haines*, 486 F.2d 480 (7th Cir. 1973); see also *Alyeska*, 421 U.S. at 282-85 (Marshall, J., dissenting) (arguing that guidelines for proper application of "private attorney general" theory had been suggested in a number of prior Supreme Court decisions).

38. See, e.g., *Souza*, 512 F.2d at 1138; *Taylor*, 503 F.2d at 905.

39. 421 U.S. 240.

40. *Id.* at 269 (1975). The Court relied on an 1853 federal statute that excluded attorneys' fees from the costs that might be taxed against a losing party in a federal suit. *Id.*; see 28 U.S.C. §§ 1920, 1923(a) (1982).

41. While acknowledging that Congress had "acquiesced" in judicial crafting of some exceptions to the traditional rule, the Court emphasized that at no time had Congress "retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors," nor had it "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska*, 421 U.S. at 260.

42. See, e.g., S. REP. NO. 1011, *supra* note 36, at 3.

43. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1982)). The language of the Act as originally enacted varied somewhat from that cited, which reflects Congress' 1980 amendments enacted to have § 1988 conform to provisions of the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504(a)(1) (1982)).



VII's fee-shifting component.<sup>44</sup> Its import was to provide effective access to redress of violations of the enumerated civil rights statutes.<sup>45</sup> A House Report described the purpose of section 1988 as follows:

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these 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 [section 1988] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.<sup>46</sup>

By enacting section 1988, Congress endeavored to facilitate the redress of civil rights violations, whether such violations were the result of discrimination forbidden by Congressional statutes, as in the case of Title IX and Title VI, or the transgression of other constitutionally or statutorily secured rights, as in the case of the reconstruction era civil rights laws. Finding no reason for differential treatment, Congress strove to harmonize access to counsel under these statutes with that previously available under Title VII and other fee-shifting statutes.<sup>47</sup>

Neither the fee-shifting statutes themselves, nor the legislative history surrounding the enactment of either the 1964 Civil Rights Act or the 1976 amendments makes clear what the relationship is, or should be, among the administrative agencies that enforce civil rights, the goal of promoting informal resolution of discrimination disputes, and the provision of attorneys' fees to prevailing parties. Further, case law sheds no light on how these three elements complement or contradict each other. The statutes are clear that fees are available to prevailing parties in federal litigation under Title VI and Title VII. The legislative history is clear that one need not have obtained a favorable judgment in order to be a "prevailing party" within the terms of the statute: a settlement in which one obtains all or part of the relief sought suffices.<sup>48</sup> What was left

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44. "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. REP. NO. 1011, *supra* note 36, at 4; see *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (citing S. REP. NO. 1011, *supra* note 36, at 4).

45. See S. REP. NO. 1011, *supra* note 36, at 2, 6; H.R. REP. NO. 1558, *supra* note 28, at 1.

46. H.R. REP. NO. 1558, *supra* note 28, at 1.

47. Congress has enacted anywhere from 100, see *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 562 (1986), to 200 fee-shifting statutes, see *Larson, The Origins and History of Attorneys' Fees Law*, in *COURT AWARDS OF ATTORNEYS' FEES LITIGATING ANTITRUST, CIVIL RIGHTS, PUBLIC INTEREST, AND SECURITIES CASES* 1, 30 (PLI 1987); see also 131 CONG. REC. 21,390 (1985) (statement of Sen. Lowell Weicker concerning EHA Attorney's Fees Amendment) (over 130 fee-shifting statutes). As pointed out in S. REP. NO. 1011, *supra* note 36, at 3-4, every major civil rights law since 1964 contains, or has been amended to contain, provisions for fee-shifting. See, e.g., Civil Rights Act of 1968, tit. VIII, § 811, 42 U.S.C. § 3612(c) (1982); Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1982); Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b) (1982); Voting Rights Act Extension of 1975, 42 U.S.C. § 19731(e) (1982).

48. See S. REP. NO. 1011, *supra* note 36, at 5, cited in *Maher v. Gagne*, 448 U.S. 122, 129 (1980).

unclear in the legislative history, and thus forms the focus of the current inquiry, is whether attorneys' fees were to be available for work done at the administrative level and, if so, whether such fees were available in a suit filed solely to recover fees for a matter resolved administratively. The Court made clear in *Alyeska* that answering that question was solely a matter of ascertaining congressional intent. Divining that intent was the Court's task in *New York Gaslight Club, Inc. v. Carey*,<sup>49</sup> *Webb v. Dyer County Board of Education*,<sup>50</sup> and *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*<sup>51</sup>

## II. THE CASES: *CAREY*, *WEBB*, AND *CREST*

### A. New York Gaslight Club, Inc. v. Carey<sup>52</sup>

In 1980 the Court was called upon to decide whether the attorneys' fees provision of Title VII, section 706(k), extended to state administrative and judicial proceedings. In *Carey* plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that the New York Gaslight Club denied her a position as a cocktail waitress because of her race.<sup>53</sup> As required by Title VII, the EEOC in turn referred her complaint to the New York State Division of Human Rights.<sup>54</sup> After an investigation during which plaintiff was represented by private counsel, the state agency found probable cause to believe that the Club had discriminated against Carey as alleged. Efforts at conciliation failed. A state administrative hearing found discrimination and ordered the club to offer Carey employment and back pay. Inasmuch as the state agency had no authority to order attorneys' fees, none were awarded.<sup>55</sup> While this determination was on state appeal, the Equal Employment Opportunity Commission (EEOC) began its proceedings and, based largely on the state findings, also found probable cause. Conciliation attempts failed and on July 13, 1977, plaintiff was issued a notice of right to sue.<sup>56</sup> On August 26 the state appeal board affirmed the state's findings, and the club appealed to the New York Supreme Court. Plaintiff cross-petitioned for enforcement of the state agency decision.

On September 30 plaintiff filed suit in federal district court under Title VII, seeking damages, injunctive relief, and attorneys' fees. On November 3 the Appellate Division of the New York Supreme Court affirmed the state agency determination.<sup>57</sup> In a February 3, 1978, conference in federal court, the club agreed that if the New York Court of Appeals denied their motion for leave to

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49. 447 U.S. 54 (1980).

50. 471 U.S. 234 (1985).

51. 479 U.S. 6 (1986).

52. 447 U.S. 54 (1980).

53. *Id.* at 56.

54. *Id.* at 56-57. Section 706(c) requires the EEOC to refer complaints to state fair employment agencies that have jurisdiction and meet certain criteria.

55. *Id.* at 57. The New York Human Rights law did not authorize an award of attorneys' fees for work done at either state administrative or judicial proceedings. *Id.* at 67 n.7.

56. *Id.* at 58.

57. *Id.*

appeal, they would comply with the Division's order. That court did so one week later. The sole remaining issue, then, was plaintiff's request for attorneys' fees for the time spent in all proceedings.

The district court denied the fee request, holding that the fortuity of the filing of a protective suit in federal court did not make the defendants liable for plaintiff's representation costs in the state proceedings.<sup>58</sup> The court also concluded that plaintiff could have pursued her state administrative remedies without the expense of private counsel, since state law provided that division attorneys would present the case in support of the complaint to the hearing examiner.<sup>59</sup> A divided panel of the Court of Appeals reversed.<sup>60</sup> The court framed the issue as "whether section 706(k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court."<sup>61</sup> The court examined a variety of factors and concluded that one who prevailed on her complaint in state administrative proceedings under Title VII was entitled to recover attorneys' fees just as one would who prevailed in federal court.<sup>62</sup>

The Supreme Court agreed.<sup>63</sup> It examined the words of the statute and found the language unambiguous.<sup>64</sup> Justice Blackmun, writing for the Court, stated that the inclusion of the word "proceedings" left "little doubt" that fee awards for services performed in proceedings other than court actions were available under section 706(k).<sup>65</sup> Noting that the contemporaneous language in Title II, the public accommodations section of the 1964 Act,<sup>66</sup> created no comparable administrative machinery, and that its fee-shifting provision was identical to that of Title VII except that Title II's contained no reference to "proceedings," the Court concluded that the words "or proceeding" in section 706(k) were not "mere surplusage."<sup>67</sup>

The question of whether section 706(k) applied to required proceedings before federal administrative agencies had been answered in the affirmative by all the courts of appeals that had considered the question.<sup>68</sup> The Court found nothing in the statute to suggest that Congress intended to make a distinction between federal and state proceedings<sup>69</sup> and found, instead, reason to conclude

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58. 458 F. Supp. 79, 81 (S.D.N.Y. 1978), *rev'd*, 598 F.2d 1253 (2d Cir. 1979), *aff'd*, 447 U.S. 54 (1980).

59. *Id.* at 81.

60. *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253 (2d Cir. 1979), *aff'd*, 447 U.S. 54 (1980).

61. *Id.* at 1257.

62. *Id.* at 1260; *see Carey*, 447 U.S. at 60.

63. *Carey*, 447 U.S. at 63.

64. *Id.*

65. *Id.* at 61.

66. 42 U.S.C. § 2000a-3(b) (1982).

67. *Carey*, 447 U.S. at 61.

68. *Id.* at 61 n.2. The Supreme Court has never directly addressed the question of whether attorneys' fees were awardable for required proceedings before the EEOC, *see Parker v. Califano*, 561 F.2d 320, 324 n.14 (D.C. Cir. 1977), but since *Carey* it has been assumed that such is the case. *See Skinner v. E.E.O.C.*, 551 F. Supp. 333, 337 (1982); *Porter v. District of Columbia*, 502 F. Supp. 271, 273 (D.D.C. 1980), *rev'd on other grounds*, 673 F.2d 552 (D.C. Cir. 1982).

69. *Carey*, 447 U.S. at 61-62.

that "proceedings" was intended to refer to either.<sup>70</sup>

Heeding the congressional intent to facilitate the bringing of complaints to redress discrimination, the Court concluded that permitting an attorneys' fee award to a party who prevailed at the state or local administrative level would further this goal, and that a contrary rule that would make the complainant bear the costs of mandatory state and local proceedings would inhibit the enforcement of a meritorious claim.<sup>71</sup> The Court thus concluded that "section 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit *solely* to obtain an award of attorney's fees for legal work done in state and local proceedings."<sup>72</sup> Justice Stevens offered a concurring opinion in which he expressed doubt as to whether Congress intended in section 706 to authorize a federal action solely to recover attorneys' fees incurred in either mandatory or optional state proceedings, but he asserted the question was not presented by the case at hand since Carey's federal suit was filed before the case was finally resolved at the state level.<sup>73</sup> To Stevens, it was not clear that a statute that empowered a "court" to award fees authorized the court to award fees when no federal litigation was necessary to resolve the underlying merits of the dispute.<sup>74</sup> Thus, Justice Stevens limited his concurrence to agreeing that recovery for attorneys' fees was authorized for work performed at administrative proceedings that were prerequisite to a court action.<sup>75</sup>

Carey established the application of section 706(k) to Title VII plaintiffs who prevailed in related state and local proceedings. Whether the Court would reach a similar result when faced with a comparable question under section 1988 was first presented as an issue five years later in *Webb v. Dyer County Board of Education*.<sup>76</sup> In *Webb* the Court was called upon to decide whether fees were awardable under section 1988 to prevailing parties in a section 1983 federal

70. *Id.* at 62.

71. *Id.* at 63.

72. *Id.* at 66 (emphasis added). The Court dismissed several arguments made by defendants, including the argument that the state agency provided counsel to present the case at the administrative hearing. The Court noted that at the time of the state hearing in this case, "[c]omplainants were 'encouraged' to obtain private counsel due to a growing caseload and staff limitations." *Id.* at 69.

It is thus obvious that the assistance provided a complainant by the Division attorney is not fully adequate, and that the attorney has no obligation to the complainant as a client. In fact, at times the position of the Division may be detrimental to the interests of the complainant and to enforcement of federal rights.

*Id.* at 70.

73. *Id.* at 71-72 (Stevens, J., concurring).

74. *Id.* at 72 (Stevens, J., concurring). This opinion paved the way for Stevens to join the majority in *Crest*. See *infra* notes 109-20 and accompanying text. He also wrote the majority opinion in *Webb*. See *infra* notes 85-88 and accompanying text.

75. *Carey*, 447 U.S. at 72-73 (Stevens, J., concurring). Justices White and Rehnquist dissented without original opinion, based on Judge Mulligan's dissent from the judgment of the court of appeals. *Id.* at 71 (Rehnquist & White, JJ., dissenting). Judge Mulligan had taken issue with the circuit court majority's opinion that disallowing fees would encourage needless litigation. *Carey*, 598 F.2d at 1260-64. To the contrary, Judge Mulligan asserted that allowing fees for cases settled administratively would in fact encourage federal suits solely for the purpose of recovering fees. Judge Mulligan argued additionally that remuneration for state proceedings should be determined by state law, and that New York's provision for agency counsel was adequate to vindicate plaintiff's rights. *Id.*

76. 471 U.S. 234 (1985).

court action for work performed in related state administrative proceedings.<sup>77</sup>

B. *Webb v. Dyer County Board of Education*<sup>78</sup>

*Webb* asked whether the district court could exclude time spent by plaintiff's attorney pursuing optional administrative proceedings before a school board from the calculation of a "reasonable fee" in a subsequent successful section 1983 action.<sup>79</sup> *Webb*, an elementary school teacher, claimed that he was wrongfully dismissed, and invoked his rights under Tennessee law to a hearing to challenge the cause of his dismissal.<sup>80</sup> His attorney argued to the school board that the Board had denied *Webb* the right to a pretermination hearing and that racial discrimination was one of several reasons for *Webb's* dismissal. After a series of hearings, the Board adhered to its original decision.<sup>81</sup> *Webb's* attorney subsequently commenced a section 1983 action in federal court, alleging that the Board's action was unconstitutional and violated several civil rights laws, including section 1983. The suit was eventually settled by consent order, but the matter of attorneys' fees was reserved for future resolution by the parties or the court.<sup>82</sup> Negotiations between the parties on the fee were unsuccessful, the school board claiming petitioner was not entitled to recover fees for counsel's services in the administrative proceedings.<sup>83</sup> The district court agreed and the circuit court affirmed.<sup>84</sup>

The Supreme Court granted certiorari because of a conflict on the availability of attorneys' fees under section 1988 for time spent in state administrative proceedings prior to filing a federal civil rights action.<sup>85</sup> Petitioner relied heavily on *Carey* to support his claim for fees. The Court found *Carey* inapplicable because of the absence of any requirement in section 1983 comparable to that in Title VII requiring a claimant to pursue state administrative remedies prior to filing suit in federal court.<sup>86</sup> The Court reasoned further that section 1988 only authorized a fee in an "action or proceeding" to enforce section 1983, and "[a]dministrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce section 1983."<sup>87</sup> The Court thus concluded that the district court's denial of time spent on administrative proceedings as not relating directly to the litigation was "well

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77. Section 1983 is one of the several statutes enumerated in section 1988. See *supra* note 43 and accompanying text.

78. 471 U.S. 234 (1985).

79. *Id.* at 236.

80. *Id.* Under Tennessee law, no teacher may be dismissed without cause. TENN. CODE ANN. § 49-5-511(a) (1983). Any teacher who challenges the grounds for his dismissal has a right to a hearing. *Id.* § 49-5-512.

81. *Webb*, 471 U.S. at 236-37.

82. *Id.* at 237.

83. *Id.* at 238-39.

84. *Webb v. Dyer County Bd. of Educ.*, 715 F.2d 254 (6th Cir. 1983), *aff'd*, 471 U.S. 234 (1985).

85. *Webb v. Dyer County Bd. of Educ.*, 466 U.S. 935 (1984).

86. *Webb*, 471 U.S. at 240.

87. *Id.* at 241.

within the range of reasonable discretion."<sup>88</sup>

Justice Brennan, joined by Justice Blackmun, issued an opinion concurring in part and dissenting in part. His principal disagreement with the majority was the latter's failure to remand the matter to the district court for a determination of whether any of the attorney's work performed at the administrative level was compensable under the proper standard.<sup>89</sup> Justice Brennan's standard for whether compensation was awardable under section 1988 was first, whether the collateral proceeding for which fees were sought was an "action or proceeding" within the meaning of section 1988 and second, whether the work in the collateral proceeding "demonstrably contributed 'to enforce[ment of] a provision' of the civil rights laws."<sup>90</sup> *Carey*, according to Brennan, resolved the first part of the inquiry: state administrative proceedings may be "actions or proceedings" within the meaning of section 1988, since section 706(k) was the prototype for section 1988.<sup>91</sup> The exhaustion requirement in Title VII was irrelevant in defining "action or proceeding" because like words presumably have like meaning. Its relevance, rather, was in determining whether the second part of the inquiry was satisfied: whether such proceedings made a "demonstrable contribution" to enforcing petitioner's section 1983 claim.<sup>92</sup> Proceedings, said Brennan, although not mandatory under the federal scheme, may still contribute to congressional design.<sup>93</sup>

Justice Brennan further recognized a distinction between wasteful, duplicative processes, and those which might serve as satisfactory substitutes for, or supplements to, the judicial processes designed to vindicate federal civil rights. Depriving a prevailing party of compensation for the latter, said Brennan, might create an unwanted incentive for filing federal litigation whenever possible, in order for a complainant "to steer himself into section 1988's safe harbor."<sup>94</sup>

It is evident that the *Webb* majority saw a clear distinction between the

88. *Id.* at 244. The Court suggested, but did not hold, that it also would have been reasonable for the district court to have determined that some portion of the time spent on the administrative proceeding would have been properly reimbursable as related to the litigation. *See Hensley v. Eckhardt*, 461 U.S. 424, 433 (1983) (time compensable under § 1988 is that "reasonably expended on the litigation" (emphasis added by *Webb* majority)). Instead, the district court took an all-or-nothing approach and the majority did not challenge that approach. *Webb*, 471 U.S. at 243.

89. *Webb*, 471 U.S. at 245 (Brennan, J., concurring in part and dissenting in part).

90. *Id.* at 246 (Brennan, J., concurring in part and dissenting in part).

91. *Id.* at 246 n.3 (Brennan, J., concurring in part and dissenting in part) (citing relevant legislative history); *see supra* note 44 and accompanying text.

92. *Id.* at 247-48 (Brennan, J., concurring in part and dissenting in part).

93. *Id.* at 248 (Brennan, J., concurring in part and dissenting in part) ("[C]ollateral proceedings may frequently accord with Congress' general intent for courts to 'use that combination of Federal law, common law and State law as will be best adapted to the object of the civil rights laws.'" (quoting S. REP. NO 1011, *supra* note 36, at 3 n.1)).

94. *Webb*, 471 U.S. at 249-50. Brennan devised a three-part test for ascertaining when state administrative work is "useful and of a type ordinarily necessary" to warrant a § 1988 fee award. First, the court must conclude that the administrative work for which fees were sought was "independently reasonable." Second, the court must find that such work, or a discrete portion of it, "significantly contributed to the success of the federal-court outcome and eliminated the need for work that otherwise would have been required in connection with the litigation." Third, fees should be awarded only to the extent that the "administrative work was equally or more cost-effective" than comparable litigation work would have been. *Id.* at 253. In doing such an analysis, the district court was to have broad discretion. *Id.* at 254. Brennan then applied his analysis to the facts of *Webb* and

mandatory nature of the state proceedings under Title VII in *Carey* and the optional state proceedings pursued by plaintiff in *Webb*. *Webb* of course did not raise the question of whether administrative processes which obviated the need for federal court action should be compensable under section 1988. This question, presented not in terms of optional state proceedings, but rather in terms of nonmandatory federal processes, was posed squarely by *Crest*.

C. North Carolina Department of Transportation v. Crest Street Community Council, Inc.<sup>95</sup>

In September 1978 respondents, Crest Street Community Council, Inc. (Crest), filed an administrative complaint with the United States Department of Transportation. The complaint challenged the North Carolina Department of Transportation's proposed extension of a federally funded major expressway through a predominantly black neighborhood in Durham, and alleged that such action would violate Title VI.<sup>96</sup> In February 1980 the federal department's Director of Civil Rights determined that probable cause existed to believe that the state department's plan would violate Title VI, and urged that department to negotiate with Crest to resolve the alleged violation.<sup>97</sup> The federal department was proceeding against the backdrop of a 1973 injunction against any construction of the highway extension, issued in an unrelated federal district court action based on alleged violations of federal transportation and environmental laws.<sup>98</sup> In February 1982 Crest, the state department, and the City of Durham reached a preliminary agreement on the Title VI claim.<sup>99</sup> Subsequently, in August of that year, the state department moved to dissolve the district court injunction.<sup>100</sup> In response, Crest moved to intervene in that action and filed a proposed complaint alleging the Title VI violations. While Crest's petition was pending, the district court resolved its suit by entering a consent judgment dissolving its injunction and dismissing the action and Crest's Title VI claims on condition that the state department implement what the parties called the Final Mitigation Plan.<sup>101</sup>

Crest then filed a new action for section 1988 attorneys' fees for counsel's services consisting of more than 12,000 hours spent over five years in preparing the administrative complaint, assisting in the federal Department of Transporta-

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suggested that at least some portion of the work done at the state administrative level was entitled to compensation, *id.* at 254-58, and thus criticized the majority for its failure to remand. *Id.* at 259-60.

95. 479 U.S. 6 (1986).

96. *Id.* at 9.

97. *Id.*

98. *Id.* at 9. The injunction was issued in *ECOS, Inc. v. Brinegar*, No. C-352-D-72 (M.D.N.C. Feb. 20, 1973).

99. *Crest*, 479 U.S. at 10.

100. *Id.*

101. *Id.* The Final Mitigation Plan spelled out what measures the City and the state department of transportation would take to mitigate the detrimental effect of the proposed highway on the Crest Street community.

tion's investigation, and negotiating a resolution of the dispute.<sup>102</sup> The district court granted summary judgment for the North Carolina Department of Transportation and dismissed the action.<sup>103</sup> The court agreed with the petitioners that section 1988 provided no basis for *Crest* to recover attorneys' fees from the state department.<sup>104</sup>

A unanimous Court of Appeals for the Fourth Circuit reversed and remanded.<sup>105</sup> Finding guidance in *Carey*, the circuit court concluded that *Crest* was a "'prevailing party' in a 'proceeding to enforce . . . title VI of the Civil Rights Act of 1964,'"<sup>106</sup> and thus within the ambit of section 1988.<sup>107</sup> Viewing the phrase "action or proceeding" to naturally connote "civil action" and "administrative proceeding," the court concluded that the administrative proceedings before the federal department were the kinds of proceedings contemplated by section 1988's language.<sup>108</sup>

The Supreme Court reversed,<sup>109</sup> hinging its decision on the fact that the action in which the fees were sought was not, in the "plain language" of section 1988, an "action or proceeding to enforce" a civil rights law listed in that section.<sup>110</sup> It bolstered its conclusion by reference to section 1988's legislative history. The Court found that all of the references in the senate and house reports were to courts and judicial proceedings, and, while not requiring a judicial judgment for recovering section 1988 fees, Congress did contemplate at least the filing of a judicial complaint on the merits.<sup>111</sup>

The Court did not endeavor to distinguish an action for fees under Title VII and section 706(k) from an action for fees under Title VI and section 1988.<sup>112</sup> Rather, it dealt with the statement in *Carey* that "section 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit *solely to obtain an award of attorney's fees for legal work done in state and local proceedings*,"<sup>113</sup> by condemning it as dictum, noting Justice Stevens' concurring opinion in that case.<sup>114</sup>

102. *Id.* at 10. According to the Court, "[t]he result of this diligent labor was both substantial and concrete." *Id.*

103. *Crest St. Community Council, Inc. v. North Carolina Dep't of Transp.*, 598 F. Supp. 258 (E.D.N.C. 1984), *rev'd*, 769 F.2d 1025 (4th Cir. 1985), *rev'd*, 479 U.S. 6 (1986).

104. *Crest*, 769 F.2d at 1033-34.

105. 769 F.2d 1025 (4th Cir. 1985), *rev'd*, 479 U.S. 6 (1986).

106. *Id.* at 1028-29 (quoting § 1988).

107. *Id.* at 1028.

108. *Id.* at 1029 ("Some of the substantive provisions listed in § 1988 explicitly contemplate civil actions in state or federal court, and some, such as Title VI, *explicitly contemplate initial administrative proceedings* with possible later judicial review." (emphasis added)). Referring to the Court's analysis in *Carey* interpreting the identical language, the court acknowledged Congress' intent to pattern § 1988 on § 706(k), and concluded that "Congress' expressed policy of uniformity among the fee statutes [would] be furthered by adopting the same construction of the same language." *Id.*

109. *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986).

110. *Id.* at 11-12, 16.

111. *Id.* at 12-13 (citing S. REP. NO. 1011, *supra* note 36; H.R. REP. NO. 1558, *supra* note 28).

112. The Court appropriately acknowledged the parallels between the two attorneys' fees statutes. *Id.* at 13-14.

113. *Carey*, 447 U.S. at 66 (emphasis added).

114. *Crest*, 479 U.S. at 13-14 (quoting *Carey*, 447 U.S. at 71 (Stevens, J., concurring)) ("Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees . . . is not only doubtful but is a question that is plainly not presented by this record.").



It limited *Carey* to its particular facts, since a Title VII action was filed before the ultimate resolution of the case in the state proceedings. Even if it made greater sense to have the same rule regardless of whether the suit was filed before or after the administrative resolution, said the Court, "[t]he short answer is that Congress did not write the statute that way."<sup>115</sup>

Furthermore, the Court suggested that a distinction between cases resolved administratively before a suit on the merits is filed and cases resolved administratively only after the suit on the merits is filed is not as anomalous as preceding majorities of the Court might have thought, because a fee award depends not only on the results obtained, but on what steps were taken to achieve those results.<sup>116</sup> The *Crest* majority believed it "entirely reasonable" to restrict fee awards to plaintiffs who had found it necessary to file in court in order to obtain relief.<sup>117</sup> The Court rejected the suggestion in *Carey* that the result reached in *Crest* would contribute to the proliferation of unnecessary lawsuits aimed merely at obtaining attorneys' fees.<sup>118</sup> Rather, the *Crest* majority embraced its assertion in *Webb* that competent counsel will not be influenced by the application of the fee-shifting statutes in making decisions about whether to file suits in court.<sup>119</sup> The Court reaffirmed that a district court may award fees for time spent on administrative proceedings to enforce the civil rights claim that occur prior to the filing of the court suit.<sup>120</sup>

Justice Brennan again dissented, this time joined by Justices Marshall and Blackmun,<sup>121</sup> asserting that the majority's decision ignored the Court's past decisions, the purpose of section 1988, and the burden the decision placed on the district courts. First, Brennan argued that nothing in the language of section 1988 compelled the Court's result.<sup>122</sup> An action filed to recover attorneys' fees, although solely filed to recover fees, is nonetheless a part of the "proceeding to enforce" the civil rights claim, the right to fees being an important part of that claim.<sup>123</sup>

Second, Brennan argued that the Court's position betrayed the purpose un-

115. *Id.* (quoting *Garcia v. United States*, 469 U.S. 70, 79 (1984)) ("The legislative history clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit.")

116. *Id.*

117. *Id.*

118. *Carey*, 447 U.S. at 66 n.6.

119. The Court stated:

Upon reflection . . . we think that the better view was expressed by our conclusion in *Webb* . . . that "competent counsel will be motivated by the interests of the client to pursue . . . administrative remedies when they are available and counsel believes that they may prove successful." An interpretation of § 1988 cannot be based on the assumption that "an attorney will advise the client to forgo an available avenue of relief solely because § 1988 does not provide for attorney's fees . . . ."

*Crest*, 479 U.S. at 14-15 (quoting *Webb*, 471 U.S. at 241, n.15).

120. *Crest*, 479 U.S. at 15. Relying on dicta to that effect in *Webb*, 471 U.S. at 243, recovery could be had even when the prior proceeding was not one specifically to enforce one of the civil rights laws enumerated in § 1988. *Crest*, 479 U.S. at 15.

121. *Crest*, 479 U.S. at 16.

122. *Id.* at 17.

123. *Id.* at 17-18.

derlying section 1988—the promotion of uniform enforcement of the federal civil rights acts for all citizens.<sup>124</sup> He noted that important civil rights are often, but not always, vindicated in administrative proceedings.<sup>125</sup> Because Congress recognized that providing a right without the ability to vindicate that right is meaningless, it provided for attorneys' fees after the Court's *Alyeska* decision.<sup>126</sup>

Brennan found the majority's decision irreconcilable with the Court's reasoning in *Carey* and its subsequent reaffirmation of *Carey*<sup>127</sup> in *White v. New Hampshire*.<sup>128</sup> Furthermore, he rejected the majority's conviction that its decision would not result in unnecessary litigation.<sup>129</sup> He believed that where there is no exhaustion requirement—and there is none under Title VI—complainants would file suit just to protect a section 1988 claim. Further, denying fees to a plaintiff who succeeds at the agency proceedings while granting fees to a plaintiff who succeeds only in court, would be to treat similarly situated persons disparately.<sup>130</sup> While stopping short of suggesting that counsel would refuse to take on matters for which the administrative route is indicated, Brennan found likely that given the absence of any exhaustion route, counsel would either file a protective lawsuit or forgo the administrative route entirely, a result inconsistent with sound policy.<sup>131</sup>

Justice Brennan did not go as far as he might have. Not only is the majority's decision in *Crest* inconsistent with sound policy, it violates the policy Congress has in fact chosen in erecting a strong administrative and informal compliance structure in the 1964 Civil Rights Act. Congress not only tolerates attempted administrative resolution; it affirmatively encourages such an approach. Congress did not address this while enacting section 1988—as discussed in Part III, Congress seems to have given little thought to fees for the administrative processes—but Congress' commitment to administrative enforcement of the civil rights laws is manifest in the language and history of Title VI and Title VII and the procedures available for their enforcement.<sup>132</sup> The result reached by the majority in *Crest* thus frustrates the intent of Congress that both formal and less formal means be used to eradicate discrimination and vindicate discriminatory acts and further disrupts congressional desire that the civil rights fee-shifting statutes be interpreted and applied consistently and uniformly.

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124. *Id.* at 18.

125. *Id.*

126. *Id.*

127. *Id.* at 21.

128. 455 U.S. 445, 451-52 n.13 (1982) (*Carey* applies to suits filed solely to recover fees).

129. *Crest*, 479 U.S. at 21.

130. *Id.* at 22 (quoting *Blow v. Lascaris*, 523 F. Supp. 913, 917 (N.D.N.Y. 1981) ("Unfairness results when 'complainants with meritorious claims who succeed in . . . administrative proceedings are denied any possible action for attorney's fees in federal court, while those claimants with equally or less meritorious claims who lose in administrative proceedings but happen to prevail in federal court are granted attorney's fees.'"), *aff'd*, 668 F.2d 670 (2d Cir.), *cert. denied*, 459 U.S. 914 (1982)).

131. "Initial resort to the administrative forum and the settlement of claims by the agency should be encouraged, not discouraged." *Id.* at 25; *see also* *Parker v. Califano*, 561 F.2d 320, 333 (D.C. Cir. 1977) (not allowing fees for work done at administrative level "would penalize the lawyer for his pre-trial effectiveness and his resultant conservation of judicial time").

132. *See supra* text accompanying notes 22-27.

### III. THE ROLE FOR THE COURT: THE SEARCH FOR MEANING AND CONSISTENCY IN THE CIVIL RIGHTS FEE-SHIFTING STATUTES

The *Carey/Webb/Crest* trilogy demonstrates that the Court has failed to reconcile the goal of the federal civil rights laws to eradicate discrimination and provide effective redress for acts of discrimination with Congress' provision for both administrative enforcement mechanisms and attorneys' fees to prevailing civil rights plaintiffs. This has led to conflicting focuses and analyses in the various majority opinions that raise these issues, resulting in the lack of a consistent, reasoned approach to awarding attorneys' fees for cases resolved administratively.<sup>133</sup>

Undoubtedly, much of the Court's difficulty results from a lack of any clear declaration of congressional intent. The legislative history of both sections 1988 and 706(k) shows that apparently few, if any, legislators ever thought about whether fees should be available for work done and/or for cases resolved at the administrative level.<sup>134</sup> The Court's task therefore is to address the question

133. Inconsistency in its approach to attorneys' fees cases reaches more broadly than issues revolving around fees for administrative resolutions. Recently, in *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 107 S. Ct. 3078 (1987), the Court reversed the district court's adjustment of the lodestar to compensate for what the district court found to be the riskiness of the litigation. A plurality of the Court, consisting of Justices White, Powell, and Scalia, and Chief Justice Rehnquist said that § 304 of the Clean Air Act should not be construed to permit enhancement of a reasonable lodestar fee to compensate for an attorney's assuming the risk of loss and of nonpayment. *Id.* at 3088. Justice O'Connor concurred separately, asserting that Congress did not intend to foreclose consideration of contingency factors in setting a reasonable fee under § 304(d), but concurred that the district court had misused this approach in this case. *Id.* at 3089-91.

Dissenting Justices Blackmun, Brennan, Marshall, and Stevens argued forcefully that the plurality opinion disserved Congress' purpose in making attorney services available to public interest cases in otherwise nonlucrative litigation, especially litigation for injunctive or declaratory relief. The plurality's view, they argue, would place the entire burden of pursuing such litigation on the shoulders of the 600 public interest lawyers in the 90 public interest law centers in the country, to the exclusion of the other 400,000 lawyers who, it may be assumed, using a simple market analysis would choose to pursue private litigation in which they could obtain greater compensation for contingency factors. *Id.* at 3096.

See also *Smith v. Robinson*, 468 U.S. 992 (1984), which held that no attorneys' fees could be sought under § 1988 for a § 1983 action based on an Education for Handicapped Children Act (EHA) claim, since the EHA made no provision for attorneys' fees. The Court concluded that in passing the EHA subsequent to § 1988, Congress intended to take any right based on discrimination in educational placement of handicapped children out of the purview of § 1988, perhaps, speculated the majority, to save money. *Smith*, 468 U.S. at 1030-31. Justices Brennan, Marshall, and Stevens dissented, finding the majority's result inconsistent with Congressional intent. Congress disagreed with the majority's evaluation of what it had intended to do and moved swiftly—congressionally speaking—to pass remedial legislation to overrule *Smith*. See *The Handicapped Children's Protection Act of 1986*, Pub. L. No. 99-372, 100 Stat. 796 (1985); *infra* text accompanying notes 171-72.

134. The legislative history to the 1976 amendments to § 1988 is not helpful; there is no explicit discussion of whether fees were to be available for administrative proceedings. See *Webb*, 471 U.S. at 241 n.16, (citing S. REP. NO. 1011, *supra* note 36, at 2, 6; H.R. REP. NO. 1558, *supra* note 28, at 1) (purpose of § 1988 was to promote enforcement of civil rights through judicial process). The *Webb* majority's use of the legislative history is somewhat misleading. While it is indisputably accurate to say that a purpose of the legislation was to provide effective access to judicial enforcement of federal civil rights, one can hardly read the legislative history to suggest that Congress intended to abandon its traditional preference for administrative resolution of discrimination claims and voluntary compliance. See *supra* text accompanying notes 22-27. Further, the Senate Report, on a page not referred to in *Webb*, declares the purpose of § 1988 to be to "give the federal courts discretion to award attorneys' fees . . . to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency." S. REP. NO. 1011, *supra* note 36, at 1. The primary concern appeared to be the equalization of the opportunity to litigate, not the encouragement to use it. This purpose is reflected

that Congress failed to think about adequately.<sup>135</sup>

### A. *Reviewing Ambiguous Statutory Enactments—Generally*

How should the Court review an ambiguous congressional enactment? If Congress has not spoken clearly on the fee question, why should not the burden be on Congress to clarify any ambiguities, rather than on the Court to do what

in the passages cited by the *Webb* majority: the Senate report asserts that the potential of fee awards is "essential to a meaningful opportunity" to litigate the various actions encompassed by § 1988, because "in many cases . . . the citizen who must sue has little or no money to hire an attorney." *Id.* at 2. The Court's citation does not support its conclusion that § 1988 was designed to promote litigation, because, although the report mentions "private action through the courts," it states this will only be necessary "in some cases." *Id.* at 6. The conclusion that Congress' focus was on equal access, as opposed to affirmative encouragement of litigation, is especially compelling in light of the timing of the proposed legislation, following on the heels of the Court's decision in *Alyeska*, see *supra* notes 39-42 and accompanying text, which had effectively cut off the equal access Congress endeavored to restore. See *Crest*, 479 U.S. at 25 (Brennan, J., dissenting) ("The congressional purpose visible in the legislative history of § 1988 militates in favor of allowing an individual action for fees following success in an administrative proceeding to enforce one of the civil rights statutes covered by § 1988.").

As for the legislative history surrounding § 706(k), see *Carey*, 447 U.S. at 63 ("sparse" legislative history only has reference to lawsuits and judicial actions). Senator Humphrey, in his omnibus discussion of Title VII, characterized § 706(k) as a provision designed "to make it easier for a plaintiff . . . to bring a meritorious suit." 110 CONG. REC. 14,214 (1964) (emphasis added). The limited discussion by other senators followed a similar vein; to the extent § 706(k) was discussed, it was in terms of facilitating "lawsuits," and never in terms of nonjudicial proceedings. See, e.g., *id.* (remarks of Sen. Pastore).

See also *Parker v. Califano*, 561 F.2d 320, 333-39 (D.C. Cir. 1977) (attorneys' fees awardable under § 706(k) to federal employee for work done at administrative level) (Appendix). The Appendix discusses § 706(k)'s ambiguous legislative history. Perhaps the most damaging statement concerning whether § 706(k) applies to attorneys' fees for work done at the administrative level is from the 1972 debates to amend Title VII to give EEOC enforcement authority, made on the floor by Senator Mondale, who proposed a substitute amendment:

The underlying law, which is unchanged by the bill, provides that in any action or proceeding under this title, the court, in its discretion, may allow the prevailing party—other than the Commission or the United States—a reasonable attorney's fee as part of the cost; and the Commission and the United States shall be liable for the costs the same as a private person. The proposed substitute would liberalize that provision in two basic respects: First, it would add authority to award costs to the prevailing party with respect to the cost of a proceeding before the Commission. *The underlying law to which I have referred does not permit the awarding of fees with respect to proceedings before the Commission.* So it liberalizes the fee awarding powers in that respect . . . .

118 CONG. REC. at 1845 (emphasis added), cited in *Parker*, 561 F.2d at 337. The Appendix notes that Senator Mondale's understanding seemed to be at variance with that of Senator Gambrell, who made reference, in another context, to the Commission awarding fees:

Under the present law, as I understand it, [when a small businessman agrees to a consent order against him], the Commission could not allow expenses and attorneys' fees, because the respondent in the case would not have been a prevailing party. This amendment says that so long as he has conducted his defense in a manner consistent with the purposes of the act itself, he can and in fact must be paid his expenses and attorneys' fees.

118 CONG. REC. at 1833, cited in *Parker*, 561 F.2d at 337. The Appendix also points out that "legislative statements subsequent to passage of a given act do not deserve weight equal to that of statements made contemporaneously with passage." *Parker*, 561 F.2d at 339.

135. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 15 (1921):

"The fact is," says Gray in his lectures on the "Nature and Sources of the Law," [Sec. 370, p. 165] "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point, which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."

Congress failed to do? The answer is at least twofold. First, it is impossible for Congress to think about every aspect and ramification of a particular piece of legislation it enacts.<sup>136</sup> Courts must frequently undertake to fill in the interstices of a legislative scheme to implement congressional purpose.<sup>137</sup> Second, given the political realities of our legislative process, it is just plain difficult for any legislation to get passed, even when there appears to be a majoritarian consensus that it should be, and legislative correction of errant Supreme Court decisions is an event too rare to be counted on for interstitial clarification of extant legislation.<sup>138</sup>

This is not an instance in which the Court can defer to an administrative agency the question of whether fees should be available for cases resolved administratively. In cases where Congress has created an administrative agency to implement a statutory scheme, the Court has stated that reviewing courts should defer to a rational interpretation of an ambiguous statute by the agency, even if the interpretation changes from administration to administration, and even if the interpretation is influenced by current policy and informed by current political realities. In his concurring opinion in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>139</sup> Justice Rehnquist said that an agency appropriately may bend in the direction of the changing winds that elected its administration.<sup>140</sup> The majority in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>141</sup> suggested a similar approach when the Court is reviewing an agency interpretation of an ambiguous statute.<sup>142</sup> But whatever

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136. See Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 717 (1987) ("Congress cannot anticipate all of the situations in which a law may apply, and thus it cannot always specify in advance the precise remedy that justice requires.").

137. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) ("The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction.").

138. See Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1524 (1987) ("Political theory and experience suggest that because of the many procedural obstacles to legislation in our bicameral committee-dominated Congress, the tendency of interest groups to block rather than advance legislation, and the deference that legislators and their staffs will typically give to virtually any decision of the Supreme Court, such legislative correction will rarely occur.").

A recent example of this was the lengthy Congressional struggle to overturn the Court's decision in *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984), which held that the anti-discrimination laws applied narrowly to programs or activities that received federal funds, rather than to the institutions in which such programs or activities were located. Bills to restore the more expansive scope of the law, believed by most involved with the legislation to have reflected Congress' intent, were introduced into every session following the Court's decision. However, despite widespread support, none of these bills succeeded in passing both houses of Congress. Cohodas, *Senate Passes Civil Rights Bill That Rolls Back Abortion Rules*, CONG. QUART. WEEKLY REP., Jan. 30, 1988, at 213-14. In March 1988 Congress finally passed the Civil Rights Restoration Act of 1987, also known as the "Grove City bill," S. 557. President Reagan subsequently vetoed the bill. On March 22, both the House and Senate overrode his veto, and Pub. L. No. 100-259 became law. Willen, *Congress Overrides Reagan's Grove City Veto*, CONG. QUART. WEEKLY REP., Mar. 26, 1988, at 774-76.

139. 463 U.S. 29 (1983).

140. *Id.* at 59.

141. 467 U.S. 837 (1984).

142. *Chevron* presented judicial review of the Environmental Protection Agency's interpretation of the ambiguous undefined term "stationary source" in the Clean Air Act Amendments of 1977, 42

the appropriateness of judicial deference to an executive agency's interpretation of its own organic statute in light of changing political realities, such considerations are irrelevant to the issue of whether courts can award attorneys' fees for cases resolved administratively. It is not within the Court's province to conclude that the goals of the 1964 Act should yield to the current administration's agenda or current economic realities.<sup>143</sup> For the Court to implement what it perceives to be the Administration's agenda, especially in the face of contemporaneous congressional expressions to the contrary,<sup>144</sup> would threaten our constitutional balance of separation of powers.<sup>145</sup> If it is impossible to divine Congress' specific intent regarding fees for cases resolved administratively, because Congress had no such intent capable of divination, as appears to be the case here, the Court's role is to identify the goals of the statute and reach a result most consistent with those goals.<sup>146</sup> This it has not done. The inquiry the Court should have made in *Crest* was whether granting attorneys' fees to parties who prevail at the administrative level in Title VI actions was what Congress would have done had it thought about it.<sup>147</sup>

#### B. *How the Court Should Interpret Section 1988 and Section 706(k)*

Given the principles of statutory construction discussed above, how then should the Court review these particular congressional enactments—the attorney's fee provisions of sections 1988 and 706(k)? On one hand, one might argue that given the presumption laid down by the Court in *Alyeska* that each party to litigation bears its own attorney's fees unless Congress specifically states other-

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U.S.C. § 7502(b)(6) (1982). The Court held that when a term is ambiguous, a reviewing court should defer to the rational interpretation of the agency, even if such interpretation has changed from administration to administration. *Chevron*, 467 U.S. at 843-44, 865.

143. See A. BARAK, JUDICIAL DISCRETION 266 (forthcoming February 1989, Yale University Press) ("[W]here the law is unclear, ambiguous, or open-textured, the judge should interpret it according to fundamental principles, not according to the fleeting moods of society; according to the articles of faith of the nation . . . not according to the ever-changing balance of political forces.").

144. See *infra* notes 171-78 and accompanying text.

145. See Eskridge, *supra* note 138. While Eskridge advocates a doctrine of dynamic statutory interpretation, so that courts should interpret statutes "in light of their present societal, political, and legal context," *id.* at 1479, he affirmatively rejects any notion that such context should be dictated by the Executive branch. In fact, he criticizes the degree to which courts defer to agency lawmaking:

[B]ureaucrats, like judges, are not elected. To give them power to update statutes seems no more legitimate than to recognize a similar power in judges. If anything, judges who update statutes are more trustworthy. They are not only removed from the political process but are also in positions that give them few incentives to slant their interpretations, as bureaucrats often do, in favor of regulated groups.

*Id.* at 1534. Unfortunately, the Court's result in *Crest* is evidence of the danger of giving courts as much latitude in lawmaking as Eskridge would give them.

146. See *Evans v. Jeff D.*, 475 U.S. 717 (1986) (Brennan, J., dissenting).

[T]hat Congress did not specifically consider the issue of fee waivers tells us absolutely nothing about whether such waivers ought to be permitted. It is black-letter law that "[i]n the absence of specific evidence of Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind th[e] provision . . ."

*Id.* at 744 (quoting *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945)).

147. See Zeigler, *supra* note 136, at 717 ("when faced with congressional silence, a court should not ask simply whether Congress intended to create a private right of action on behalf of a particular plaintiff . . . it should also ask whether Congress, if it had considered this situation, would have wanted the plaintiff to have a private right of action").

wise, Congress' failure to state explicitly that fees should be available to litigants who succeed before filing suit justifies the Court's result in *Crest*. However, competing with the American rule's presumption against fee-shifting is the congressional mandate that remedies be liberally available to accomplish the goals of federal civil rights legislation.<sup>148</sup>

But are they really in competition? Both doctrines were designed to make litigation more accessible to plaintiffs. The justification for the American attorneys' fee rule is principally that plaintiffs might be discouraged from vindicating rights by the risk that losing would subject them to liability for their opponents' attorneys' fees.<sup>149</sup> Congress passed the civil rights fee-shifting statutes in order to provide an affirmative inducement to parties whose rights have been infringed by providing an effective means of seeking redress. While this does not answer the question whether the Court should hold that sections 1988 and 706(k) provide for fee-shifting in cases resolved administratively, it presents an important point of departure.

One must meet the argument that defendants who have contracted with the federal government by accepting federal financial assistance have agreed to abide by various obligation statutes such as Title VI, and that such agreement warrants judicial reluctance to clarify any ambiguities in favor of broadening the application of the fee-shifting statutes. If section 1988 is interpreted to apply to Title VI administrative proceedings, recipients of federal funds will face potentially greater net liability. Had they been aware of the potential for such liability, the argument goes, they might not have agreed to contract with the government.<sup>150</sup> The Court has expressed hesitation in recent cases to impose such liability in the absence of explicit expression of congressional intent to do so.<sup>151</sup> The Court's hesitation in such cases is misplaced. Congress' expressed desire to ensure redress for violations of the nondiscrimination statutes should outweigh any concern of unfairness to those who have violated the terms of their contracts by discriminating. Furthermore, extending section 1988 to Title VI cases resolved administratively is a small step compared to what the Court did when it held that the nondiscrimination statutes created a private right to sue and collect damages from recipients of federal funds.<sup>152</sup> Expanding the application of the

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148. "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." S. REP. NO. 1011, *supra* note 36, at 3. Congress explicitly considered attorneys' fees to be such a remedy. *Id.*

149. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1966).

150. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983) (opinion of White, J.) ("[T]he receipt of federal funds under typical Spending Clause legislation [such as Title VI] is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt."). This argument was made by the Justice Department in its amicus brief in *Crest* in support of its position that *Crest* was not entitled to fees for work done at the administrative proceedings. Brief for the United States as Amicus Curiae Supporting Petitioners at 25, *Crest*, 479 U.S. 6 (1986).

151. See, e.g., *Smith v. Robinson*, 468 U.S. 992, 1012, 1020-21 (1984) (no attorneys' fees under § 1988 for § 1983 claim based on violation of EHA rights); *Guardians Ass'n*, 463 U.S. at 598 (no action for damages where basis for claim is nonintentional discrimination); cf. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (no federal court jurisdiction to enjoin state institutions and state officials in absence of waiver of state's immunity).

152. See *supra* note 32 and accompanying text.

fee-shifting statutes to cases resolved at a stage earlier than judicial litigation creates a far smaller potential liability than establishing a private cause of action in the first place.

### 1. The Words Themselves

Two ambiguous aspects of section 1988 are muddled by the *Crest* majority: (1) whether one who has prevailed in a civil rights claim enumerated under section 1988 may sue solely to recover fees for the proceeding in which he has prevailed, and (2) "whether negotiations subsequent to the filing of a Title VI administrative complaint are, under § 1988, 'proceedings to enforce' Title VI."<sup>153</sup> The Court held in *Crest* that because it decided that section 1988 provides no independent action for fees in a case resolved before filing, it did not need to reach the question of whether the Department of Transportation's Title VI administrative proceedings were "proceedings to enforce" the civil rights statutes enumerated in section 1988.<sup>154</sup> But the Court resolved the former question by reference to the legislative history's use of the terms "judicial processes" and "courts" to describe the "actions or proceedings" contemplated by section 1988.<sup>155</sup> Since no one seems to dispute that one must file a judicial action<sup>156</sup> to assert one's legal right to recover attorneys' fees,<sup>157</sup> the *Crest* majority's decision not to decide the latter because it resolves the case based on the former makes little sense. The Court's reasoning that Congress intended attorneys' fee awards to be available only for cases in which a judicial action is filed<sup>158</sup> has obvious implications for whether the Department of Transportation's administrative proceedings in *Crest* were the kinds of proceedings contemplated by section 1988. Thus the *Crest* decision sheds darkness where the *Carey* decision seemed to shed some light on divining Congress' intent as to whether Title VI administrative proceedings come within the ambit of section 1988.

What about the *Crest* Court's construction of the "plain meaning" of the language in section 1988, "action or proceedings to enforce"? Does it mean that the fees must be sought within the same "action or proceedings to enforce," or, alternatively, that a court may award fees in a separate action for attorneys'

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153. *Crest*, 479 U.S. at 12.

154. *Id.*

155. *Id.*

156. This may be contrasted with those cases in which the defendant/respondent is a federal administrative agency. See 29 C.F.R. § 1613.271(c)(5)(d) (discriminating agency or EEOC may award attorneys' fees to prevailing party); *Smith v. Califano*, 446 F. Supp. 530, 534 (D.D.C. 1978) (agency has authority to award attorneys' fees to prevailing complainants); see also H. NEWBERG, ATTORNEY FEE AWARDS 269 n.46 (1986).

Courts were initially split over whether administrative agencies or the courts alone were authorized to make fee awards. The EEOC, successor to the Civil Service Commission's responsibility for employment discrimination monitoring in the federal government, responded to the conflict by promulgating regulations authorizing the discriminating agency to pay attorney's fees. 29 C.F.R. § 1613.271(c).

*Id.*

157. *Carey*, 447 U.S. at 66; *Crest*, 769 F.2d at 1033.

158. *Crest*, 479 U.S. at 14 ("The legislative history clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit.").



services rendered in the course of such enforcement action or proceedings? Notice how a simple rephrasing of the virtually identical language in section 706(k) in *Parker v. Califano*<sup>159</sup> affects the meaning:

Specifically, Section 706(k), 42 U.S.C. § 2000e-5(k) (1970), provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs . . . .

The effect of Section 717(d) [pertaining to federal employees] coupled with Section 706(k) is, therefore, to allow a federal court, in its discretion, to award reasonable attorneys' fees to a federal employee or applicant who is the prevailing party in "any action or proceeding" under Title VII.<sup>160</sup>

In other words, under this rephrasing, a court which had jurisdiction to hear the claim—and section 1331 general federal question jurisdiction would provide such jurisdiction to a federal district court<sup>161</sup>—could award, under a cause of action created by section 706(k) or section 1988, attorneys' fees to a party who had prevailed in a proceeding to enforce one of the civil rights laws enumerated in the fee-shifting provisions, whether that proceeding was administrative or judicial. Nothing in the majority's brief analysis in *Crest* persuades that its interpretation of the "plain language" of section 1988 is any more compelling than the above.

But did Congress mean "administrative" proceedings when it used the word "proceedings" in section 1988? The *Crest* majority's reading of the legislative history suggests that it did not. One cannot, however, make a principled argument that "proceedings" meant administrative proceedings in section 706(k), as *Carey* held, but not in section 1988. *Carey* demonstrates that Congress anticipated administrative proceedings by noting that the word "proceedings" is absent from Title II's comparable attorneys' fee provision, section 204(b), because Title II, unlike Title VI, relied exclusively on judicial enforcement.<sup>162</sup> When Congress patterned section 1988 on section 706(k), rather than on section 204(b), we can only assume, without evidence to the contrary, that it did so purposefully.<sup>163</sup> Even though the legislative history makes repeated references to "suits" and "courts" and "judicial process," and fails to refer explicitly to administrative processes, the absence of the latter should not be deemed adequate evidence that the word "proceedings" in section 1988 was "mere

159. 561 F.2d 320 (D.C. Cir. 1977) (upholding discretion of district court to award attorneys' fees to federal prevailing party for work done prefilng at administrative level).

160. *Id.* at 323.

161. 28 U.S.C. § 1331 (1982) ("The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.").

162. *Carey*, 447 U.S. at 61; accord *Parker*, 561 F.2d at 327-28.

163. In fact, Senator Helms introduced a printed amendment on the Senate floor to amend the bill which became § 1988 by deleting the words "or proceeding." It was defeated by a wide margin in a recorded vote. 122 CONG. REC. 32933 (1976) (Remarks of Sen. Helms).

Nor can "proceeding" in § 1988 mean only mandatory administrative proceedings, because none of the enumerated civil rights laws in § 1988 have mandatory administrative proceedings. See *infra* notes 247-56 and accompanying text.

surplusage."<sup>164</sup>

## 2. The Purpose of the Fee-shifting Statutes

Compounding the weakness of the *Crest* majority's reading of the statutory language of section 1988 is its failure to reconcile its holding with Congress' express purpose to encourage effective access to counsel in order to ensure a meaningful remedy for violations of the civil rights statutes enumerated in section 1988. Inasmuch as the fee-shifting provision is a tool to accomplish the nondiscrimination goals of Title VI, it makes little sense to allow fees for Title VI administrative proceedings occurring before the filing of a lawsuit, while disallowing fees for administrative proceedings which avoid the necessity of a lawsuit. A lawyer cannot possibly know at the point at which she agrees to take on a case whether she will be able to resolve a complaint short of a lawsuit. Since Congress provided for fee-shifting in order to encourage attorneys to provide representation in civil rights cases, then it likely wanted to offer an incentive which would affect the attorney's decision at the stage at which she decides whether or not to undertake representation.

If, as the Court suggested in *Crest*, Congress only wanted to shift fees should it be necessary to go to court, it makes no sense to award attorneys' fees for processes that occurred before that became necessary. Otherwise, compensation for administrative processes would be a windfall to the attorney who subsequently decided to file a lawsuit. However, while not providing fees for any work done at the administrative level might be a principled approach, it would frustrate Congress' plan that both formal and informal processes be utilized for resolution of civil rights complaints. In addition, it is inconsistent with the Court's reasoning and holding in *Carey*, as well as dicta in *Webb* and *Crest* that stated that fees could be recovered for work done at the administrative level necessary to the litigation.<sup>165</sup>

## 3. Congress' Understanding of the *Carey* Decision

Congress' response to the Court's decision in *Carey* provides an additional basis for criticizing the Court's decision in *Crest*. While the doctrine of legislative acquiescence in judicial construction of congressional enactments generally

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164. *Carey*, 447 U.S. at 61; see *Crest*, 769 F.2d at 1030-31. But see *Webb*, 471 U.S. at 241 n.16 ("the dominant characteristic of civil rights actions is that 'they belong in court'"); *Arriola v. Harville*, 781 F.2d 506, 510 (5th Cir. 1986) (holding nonadversarial preclearance process not proceedings within meaning of fee-shifting provision of Voting Rights Act).

165. *Carey* itself is an excellent example of the absurdity of the *Crest* majority's approach. In *Carey*, plaintiff filed a federal lawsuit only after she had prevailed at the state and federal administrative levels, while the case was on appeal in state court. Had she waited for the termination of state proceedings, it is extremely unlikely any federal suit would have been necessary (other than to recover attorneys' fees). Under the Court's *Crest* approach, she was entitled to fees for all work performed at the state and federal administrative level *because* she filed the federal suit; had her timing been otherwise, she would not have been. See *supra* notes 52-57 and accompanying text for expanded discussion of case history. But see *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988) (holding district court could award attorneys' fees for Title VII case resolved administratively even without previously filed federal suit on the merits).

supports only a weak inference of congressional intent,<sup>166</sup> the issue of attorneys' fees for cases resolved administratively presents "an unusually strong case"<sup>167</sup> for considering what has transpired in Congress since the Court's 1980 *Carey* decision.

In *Carey* a six-member majority of the Court stated unambiguously that attorneys' fees should be awarded under section 706(k) in a judicial action filed solely to recover fees for the successful resolution in separate proceedings of a Title VII complaint.<sup>168</sup> In 1982 the majority of the Court still understood this to be the meaning of *Carey*.<sup>169</sup> But if a majority of the 1986 Supreme Court believed the 1980 majority in *Carey* was simply wrong in its analysis, why should it compound its error by deciding *Crest* erroneously as well? The answer lies in Congress' response to *Carey*. First, if the Court were wrong when it decided *Carey* in 1980, Congress could have overturned the Court's decision. Not a single bill was ever introduced in Congress to do so.<sup>170</sup> The *Carey* Court, focusing to a degree Congress was never forced to on the question whether administrative proceedings should be covered under section 706(k), appropriately upheld the availability of attorneys' fees for such proceedings. Congress acquiesced in this expansion, not merely by never considering whether to enact legislation to overrule *Carey*, but also by using *Carey* in subsequent deliberations to support fee-shifting in other contexts.

Congress acted with uncharacteristic swiftness in responding to the Court's 1984 decision in *Smith v. Robinson*<sup>171</sup> interpreting the lack of an attorneys' fee provision in the Education of the Handicapped Act to preclude a section 1988 fee award for a section 1983 action brought to enforce the Act's requirements.<sup>172</sup> Both the wording of the Handicapped Children's Protection Act of 1986<sup>173</sup> overruling *Smith v. Robinson* and the Act's legislative history support the conclusion that Congress affirmatively approved of the *Carey* decision. Section 2 of the Act explicitly provides for attorneys' fees for administrative proceedings.<sup>174</sup> The committee report accompanying the Senate bill stated that section 2 should be interpreted consistently with the fee provisions of Title VII, "which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings,"<sup>175</sup> citing *Carey* as support. Senator Simon, in floor debate on the

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166. See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 205 (1983) (urging cautious use of post-enactment legislative history for interpreting statutory meaning).

167. Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) ("Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence.").

168. *Carey*, 447 U.S. at 61, 66.

169. *White v. New Hampshire Dep't of Empl. Sec.*, 455 U.S. 445, 451-52 n.13 (1982).

170. The only bill to amend either § 706(k) or § 1988 introduced after the *Carey* decision was H.R. 2170 (April 23, 1985), the import of which was to ensure immunity to members of the judiciary under § 1988. This bill was never referred out of the Judiciary Committee.

171. 468 U.S. 992 (1984).

172. *Smith*, 468 U.S. at 1021; see *supra* note 133.

173. Pub. L. No. 99-372, 100 Stat. 796 (1985).

174. Pub. L. No. 99-372, § 2, 100 Stat. 796 (to be codified at 20 U.S.C. § 1415(e)(4)(B)).

175. S. REP. NO. 112, 99th Cong., 1st Sess. 14, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1804.

bill,<sup>176</sup> stated that the language in S. 415 was purposefully identical to that in Title VII, and specifically referred to the Court's statement in *Carey* that one may sue solely to obtain an award of attorneys' fees for work done in state and local proceedings. This interpretation of Section 2 was made explicit in the House Report:

[I]f a parent prevails on the merits at an administrative proceeding . . . the parent may be awarded reasonable attorneys' fees, costs and expenses incurred in such administrative proceeding. Usually, the amount of such fees, costs, and expenses will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs, and expenses.<sup>177</sup>

Thus the legislative history shows that in 1985 Congress believed *Carey* held that Title VII authorized such suits for Title VII complainants who prevailed at the administrative level, and intended a similar authorization for fees for suits arising under the Education for Handicapped Children's Act. Despite the *Crest* Court's characterization as dictum its language in *Carey* that Title VII authorizes a suit solely to recover attorneys' fees, members of Congress approved that very language of the Court as a correct statement of the law in the months preceding the *Crest* decision.<sup>178</sup>

The foregoing provides additional support for concluding that the Court erred in *Crest* in not following the reasoning or result in *Carey*. "[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."<sup>179</sup> The correctness of the conclusion that section 1988 authorizes a suit solely to recover fees for a federal administrative resolution of a Title VI complaint is further bolstered by Congress' expressed policy of uniformity among its fee statutes.

#### 4. Consistency

A desire for consistency emerges as a theme throughout the legislative history of the federal civil rights fee-shifting statutes. The legislative history of section 1988 declares its purpose to be to "give the federal courts discretion to award attorneys' fees . . . to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency . . ."<sup>180</sup> Representative Drinan argued in the House that "by permitting fees to be recovered under those statutes, we seek to make

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176. 131 CONG. REC. 21,392 (1985).

177. H.R. REP. NO. 296, 99th Cong., 1st Sess. 5 (1985); see Schreck, *Attorneys' Fees For Administrative Proceedings Under the Education of the Handicapped Act: Of Carey, Crest Street and Congressional Intent*, 60 TEMPLE L. Q. 599, 639-50 (1987) (exploration of statutory history establishes Congress' intent that the 1986 amendments to the EHCA provided for suits *solely* to recover attorneys' fees to prevailing parties). Schreck points out that some controversy nonetheless exists as to whether the EHCA amendments were intended to apply to parties who prevailed at the administrative level. See *id.* at 601.

178. See Schreck, *supra* note 177, at 654-55.

179. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 658 (1982) (quoting *Brown v. General Servs. Admin.*, 425 U.S. 820, 828 (1976)); Wald, *supra* note 166, at 211.

180. S. REP. NO. 1011, *supra* note 36, at 1.

uniform the rule that a prevailing party, in a civil rights case, may, in the discretion of the court, recover counsel fees."<sup>181</sup> Congress' desire for uniformity among the fee-shifting statutes motivated the Fourth Circuit in *Crest* to adopt the same construction of identical language and interpret "proceedings" in section 1988 consistently with the *Carey* Court's interpretation of that word in section 706(k).<sup>182</sup>

Congress' desire for consistent interpretation of sections 1988 and 706(k) has been recognized frequently by courts that have based their holdings interpreting one of these statutes on cases interpreting the other statute.<sup>183</sup> The Court in *Crest* did not argue for inconsistent interpretation of the two statutes; rather, it apparently concluded that Congress had not provided under either statute for attorneys' fees to prevailing parties whose cases were resolved administratively before a federal lawsuit had been filed.<sup>184</sup> But such a result is not consistent with current Title VII practice and procedure. Courts, commentators and the EEOC have regularly interpreted *Carey* to allow for an award of attorneys' fees for cases resolved administratively.<sup>185</sup> Such a provision is made explicit in EEOC regulations regarding compensation for attorneys' fees<sup>186</sup> for charges made by federal employees under section 717(d) of the Act.<sup>187</sup> The EEOC regulations provide that the Commission or the respondent agency may pay the charging employee "reasonable attorney's fees or costs incurred in the process-

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181. 122 CONG. REC. 35,122 (1976); see also *id.* at 35,126 (remarks of Rep. Fish regarding filling in the "gap in the civil rights laws").

182. *Crest*, 769 F.2d at 1029.

183. See *Bartholomew v. Watson*, 665 F.2d 910, 913 (9th Cir. 1982) (§ 1988 attorneys' fee granted for prisoners' due process claim based upon analogy to § 706(k) cases); *Sullivan v. Pennsylvania Dep't of Labor*, 663 F.2d 443, 447 n.5; 449 n.7 (3d Cir. 1981) (§ 706(k) attorneys' fee allowed for successful union arbitration of sex discrimination claim based upon comparison to § 1988 cases).

184. The Court of Appeals for the Eighth Circuit rejected this conclusion recently in *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988). Based on *Carey*, the *Jones* court concluded that a party who prevailed in administrative proceedings pursuant to Title VII could bring a federal suit solely to recover attorneys' fees. The court distinguished § 1988 in a brief footnote based on the absence of a mandatory exhaustion provision in that statute and supported its conclusion with reference to *Crest*. *Id.* at 498 n.9. While I applaud the court's reading of Congress' purpose in enacting Title VII and its attorneys' fees provision, for reasons I suggest here and will discuss *infra* at text accompanying notes 247-63 I submit the court was wrong in both its reading of *Crest* and its analysis of the relevance of the mandatory/optional distinction between Title VII and other civil rights statutes.

185. See *Jones*, 857 F.2d at 496; *Mertz v. Marsh*, 786 F.2d 1578, 1580-81 (11th Cir. 1986) (no fees for work resolved before filing of administrative complaint); *Skinner v. E.E.O.C.*, 551 F. Supp. 333, 337 (W.D. Mo. 1982) (*Carey* makes clear "that, in a case where a party prevails on a discrimination claim at the administrative level and does not file a suit in federal court other than for the award of fees, that party is nevertheless entitled to fees under Title VII"); see, e.g., *Porter v. District of Columbia*, 502 F. Supp. 271, 273 (D.D.C. 1980), *rev'd and remanded on other grounds*, 673 F.2d 552 (D.C. Cir. 1982); see also H. NEWBERG, ATTORNEY FEE AWARDS 268 ("In *New York Gaslight Club v. Carey*, the Supreme Court held that Title VII may encompass a suit solely to obtain an award for legal work done in state and local proceedings pursuant to exhaustion of local and administrative remedies prior to requesting the Equal Employment Opportunity Commission to take action."); EEOC Policy Statement, April 2, 1986 (For cases otherwise precluded under Court's decision in *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), EEOC will issue right to sue notices to prevailing complainants seeking attorneys' fees only).

186. 29 C.F.R. § 1613.271(c) (1988).

187. 42 U.S.C. § 2000e-16(d) (1982) (incorporating the fee provisions of § 706(k)); see *Mertz*, 786 F.2d at 1580.

ing of the complaint or charge."<sup>188</sup>

Given Congress' desire for consistency, it is useful to examine the variety of fee-shifting statutes it has promulgated in recent years that provide for attorneys' fees for work done at the administrative level. The Equal Access to Justice Act<sup>189</sup> provides for attorneys' fees to parties who prevail in disputes with other federal agencies. Congress passed the Equal Access to Justice Act on finding that prohibitive costs and massive disparities in economic resources and expertise had deterred private parties from seeking to vindicate their rights in disputes with governmental agencies.<sup>190</sup> Its provisions apply to agency "adversary adjudications,"<sup>191</sup> although recovery is limited largely to hearings required by section 554 of the Administrative Procedure Act.<sup>192</sup> The agency itself determines the appropriate fee award,<sup>193</sup> but the Act provides for judicial review if the prevailing party is dissatisfied with such fee determination.<sup>194</sup>

Other statutes refer to administrative proceedings obliquely, creating a good deal of confusion and inconsistency in how the courts have interpreted the fees-for-administrative-proceedings question, not unlike the confusion manifested in the *Carey/Webb/Crest* line of Supreme Court opinions. Some of these statutes contain language similar to the "action or proceedings" language of section 1988 and section 706(k), while others make no reference to "proceedings." One fee-shifting statute in the latter category is the Age Discrimination in Employment Act.<sup>195</sup> The courts that have considered the question have split on whether fees may be allowed for work performed at the administrative level.<sup>196</sup>

188. 29 C.F.R. § 1613.271(d) (1988). "Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1613.214 and after the complainant has notified the agency that he or she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant." *Id.* § 1613.271(d)(iv).

189. 5 U.S.C. § 504 (1982).

190. H.R. REP. NO. 1418, 96th Cong., 1st Sess. 5-6 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984.

191. 5 U.S.C. § 504(a)(1), (b)(1)(C) (1982).

192. *Id.* § 504(b)(1)(C). Congress justified the limitations of the act, which included adjudications to fix rates or to grant or renew licenses, as "basic fairness" to the government, an attempt to keep costs down, and a desire to limit fees to situations where "concrete issues are at stake." H.R. REP. NO. 1418, *supra* note 190, at 12, 14. Accordingly, recovery was limited, almost completely, to adjudications contemplated in § 554, which includes "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). The Act contains other important limitations such as that no recovery will be awarded if the agency's position in the adjudication was "substantially justified." *Id.* § 504(a)(1).

193. *Id.* § 504(a).

194. *Id.* § 504(c)(2).

195. 29 U.S.C. §§ 621, 626(b) (1982). The Age Discrimination in Employment Act incorporates by reference the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216. The FLSA provides for "the court in such action" to allow a reasonable attorney's fee to be paid to the plaintiff. *Id.* § 216(b) (emphasis added).

196. Compare *D'Angelo v. Department of the Navy*, 593 F. Supp. 1307, 1309 (E.D. Pa. 1984); *Koyen v. Consolidated Edison*, 560 F. Supp. 1161, 1171 (S.D.N.Y. 1983); *Swain v. Secretary of the Navy*, 27 Fair Empl. Proc. Cas. (BNA) 1434, 1435 (D.D.C. 1982), *aff'd*, 701 F.2d 222 (D.C. Cir.), *cert. denied*, 464 U.S. 814 (1983); *Kennedy v. Whitehurst*, 509 F. Supp. 226, 232 (D.D.C. 1981), *aff'd*, 690 F.2d 951 (D.C. Cir. 1982) (recovery not allowed) with *Reichman v. Bonsignore*, *Brignati & Mazzotta P.C.*, 818 F.2d 278 (2d Cir. 1987) and *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236 (S.D. Ga. 1982) (recovery allowed).

The United States District Court for the District of Columbia in *Kennedy v. Whitehurst*<sup>197</sup> held that attorneys' fees are not awardable under the Age Discrimination in Employment Act for services performed at the administrative level when the underlying claim was settled without resort to district court litigation.<sup>198</sup> Plaintiffs, federal employees, had obtained a "no-fault" settlement of retroactive promotion before the EEOC and subsequently sued for attorneys' fees.<sup>199</sup> The court concluded that "the same factors which led to the conclusion that Title VII authorizes an award of fees for attorney's services at the administrative level counsels the opposite conclusion as to the ADEA."<sup>200</sup> First, it looked to the language of the Act, which did not contain any reference to "proceedings."<sup>201</sup> Second, it distinguished section 706(k) and the Court's decision in *Carey* providing for a suit for fees for administrative work by concluding that unlike Title VII, the Age Discrimination in Employment Act required no exhaustion of administrative remedies.<sup>202</sup> While the Act does have a prelitigation filing requirement, the court held that it was not the equivalent of Title VII's requirement that a plaintiff pursue administrative proceedings before filing suit in federal court.<sup>203</sup> Thus the court relied on the language of the statute and the mandatory/optional distinction rather than on the fact that plaintiff brought the litigation solely to recover attorneys' fees.<sup>204</sup>

The Second Circuit rejected the *Kennedy* court's analysis in *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*<sup>205</sup> In *Reichman*, plaintiff prevailed on her claim under the Age Discrimination in Employment Act in federal court, and sought attorneys' fees. Her employer contested fees for the time plaintiff's counsel spent in presenting her claim to state and federal administrative agencies, claiming that time was not compensable under the Act, based on the mandatory/optional distinction articulated in *Kennedy*. The court, however, rejected the distinction drawn by *Kennedy* between the filing requirements under Title VII and the Age Discrimination in Employment Act:

By requiring resort, where available, to administrative remedies for age

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197. 509 F. Supp. 226 (D.D.C. 1981), *aff'd*, 690 F.2d 951 (D.C. Cir. 1982).

198. *Id.* at 228, 231.

199. *Id.* at 227.

200. *Id.* at 230.

201. *Id.*

202. *Id.* at 230-31.

203. In relevant part, the Act provides: "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. § 626(d).

204. The Court of Appeals for the District of Columbia affirmed the district court, but not necessarily for the same reasons. *Kennedy v. Whitehurst*, 690 F.2d 951, 952 (D.C. Cir. 1982). Although *Kennedy* was a federal employee, the district court gave that no bearing in its analysis. *Kennedy v. Whitehurst*, 590 F. Supp. 226 (D.D.C. 1981), *aff'd*, 690 F.2d 951 (D.C. Cir. 1982). The circuit court, however, opined that there was evidence, including a recent Supreme Court case, *Lehman v. Nakshian*, 453 U.S. 156 (1981) (holding federal employees, unlike private plaintiffs, had no right to jury trial under ADEA), that the same procedural rights afforded to *private* individuals under the ADEA did not necessarily obtain to *federal* employees, so that it was not clear that attorneys' fees were available *at all* to prevailing federal plaintiffs under the ADEA. *Kennedy*, 690 F.2d at 956. The circuit court did agree however that the administrative scheme under the ADEA did not equal the importance of the administrative scheme under Title VII. *Id.* at 963-64.

205. 818 F.2d 278 (2d Cir. 1987).

discrimination prior to bringing a suit under the ADEA, Congress intended to give state agencies a significant role in combatting discrimination in the workplace, similar to the role given state agencies under Title VII.<sup>206</sup>

Consequently, the court affirmed the district court's award of fees for attorneys' services before the state and federal administrative agencies.<sup>207</sup> Inasmuch as the issue was not before it, however, the court reserved decision on whether a fee award would be appropriate when the age discrimination claim is completely resolved at the administrative level.<sup>208</sup> The court failed to address the relevance of the absence of the word "proceedings" in the Act's fee-shifting provision.<sup>209</sup>

In 1986, in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*,<sup>210</sup> the Supreme Court unanimously held that the absence of reference to "proceedings" in a statute is not determinative as to whether a prevailing party in litigation may recover for work done at the federal administrative level. Section 304(d) of the Clean Air Act provides: "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."<sup>211</sup> Plaintiffs claimed attorneys' fees from the defendant for hours spent in proceedings before the Environmental Protection Agency to enforce a previously litigated consent decree. The district court had found the work done at the administrative level sufficiently related to the litigation to be compensable.<sup>212</sup> The court of appeals agreed that plaintiffs' rights under the consent decree would have been impaired but for such administrative proceedings, relying on the "useful and ordinary" language in *Webb*.<sup>213</sup> The Supreme Court agreed, finding that "the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree."<sup>214</sup> The statute's failure to refer to administrative proceedings was not determinative. Defense counsel argued that when Congress meant for administrative proceedings to be covered in a fee-shifting statute, it knew how to so provide, as

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206. *Id.* at 282-83.

207. *Id.*

208. *Id.* at 283. The court refers explicitly to Justice Stevens' concurrence in *Carey*. *Id.*

209. See also *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236 (S.D. Ga. 1982). Unlike the Second Circuit, the *Bleakley* court did address the language difference between § 706(k) and § 216, but found that it was not critical to the Supreme Court's holding in *Carey*. The *Bleakley* court found the emphasis placed by the *Kennedy* court on the mandatory/voluntary distinction misplaced. "The more important focus [in *Carey*] was the federal-state enforcement scheme contemplated by Title VII." *Id.* at 243. Furthermore, it held that *Kennedy* was wrong in stating that state administrative proceedings were not important under the ADEA, citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979), in which the Court required an "aggrieved person to resort to appropriate state remedies before instituting a federal ADEA action." *Id.* at 244.

210. 478 U.S. 546 (1986).

211. 42 U.S.C. § 7604(d) (1982).

212. *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 581 F. Supp. 1412, 1423, 1429-30 (E.D. Pa. 1984), *aff'd*, 762 F.2d 272 (3d Cir. 1985), *aff'd*, 478 U.S. 546 (1986).

213. 762 F.2d 272, 277 (3d Cir. 1985), *aff'd*, 478 U.S. 546 (1986).

214. *Delaware Valley*, 478 U.S. at 558.



evidenced by the language of sections 1988 and 706(k). The Court disagreed. The fact that section 1988 refers to a "proceeding" as well as an action, said the Court, is not sufficient to prove that Congress did not mean administrative proceedings should be covered under the Clean Air Act as well, noting that the legislative history for the Act used the two words interchangeably.<sup>215</sup> More importantly, said the Court, the purposes behind both sections 304 and 1988 "are nearly identical, which lends credence to the idea that they should be interpreted in a similar manner."<sup>216</sup> Thus, relying on its earlier interpretation of sections 706(k) and 1988 in *Carey* and *Webb*, and given the common purpose of sections 304 and 1988 "to promote citizen enforcement of important federal policies," the Court concluded no reason existed to interpret the two provisions differently.<sup>217</sup>

Parties who prevailed on their claims at administrative proceedings under the Education for All Handicapped Children Act have litigated whether the relatively new attorneys'-fee provision of the Handicapped Children's Protection Act<sup>218</sup> applies to them, and the overwhelming majority of courts that have addressed the question have held that it does.<sup>219</sup> The one reported dissenting case, *Rollison v. Biggs*,<sup>220</sup> relies on *Crest* in reaching the conclusion that fees are not available for cases resolved before the filing of litigation. It rejects the indications in the legislative history that fees were to be available under the Handicapped Children's Protection Act for cases resolved administratively,<sup>221</sup> and focuses instead on Congress' desire that the Act be interpreted consistently with other fee-shifting statutes. Despite the powerful evidence in the legislative history<sup>222</sup> and the fact that the Court decided *Crest* several months after the passage of the Handicapped Children's Protection Act,<sup>223</sup> the *Rollison* court bootstraps Congress' desire for consistency and the *Crest* Court's narrow interpretation of section 1988 into a rationale for frustrating Congress' expressed in-

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215. *Id.* at 559 ("the lack of the phrase 'or proceedings' on the face of § 304(d) is not necessarily indicative of the intended scope of the section"); see S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970).

216. *Delaware Valley*, 478 U.S. at 559.

217. *Id.* at 560. The Court reserved judgment on "whether an award of attorney's fees is appropriate in federal administrative proceedings when there is no connected court action in which fees are recoverable," the issue it subsequently resolved in *Crest*. *Id.* at 560 n.5.

218. Pub. L. No. 99-372, 100 Stat. 796 (1986).

219. See, e.g., *Eggers v. Bullitt County School Dist.*, 854 F.2d 892, 895-98 (6th Cir. 1988); *Counsel v. Dow*, 849 F.2d 731, 741 n.9 (2d Cir. 1988); *Turton v. Crisp County School Dist.*, 688 F. Supp. 1535, 1539 (M.D. Ga. 1988); *Robert D. v. Sobel*, 688 F. Supp. 861, 866 (S.D.N.Y. 1988); *Chang v. Board of Educ.*, 685 F. Supp. 96, 100 (D.N.J. 1988); *Neisz v. Portland Public School Dist.*, 684 F. Supp. 1530, 1533 (D. Ore. 1988); *Unified School Dist. No. 259 v. Newton*, 673 F. Supp. 418, 422 (D. Kans. 1987); *School Board of Prince William County v. Malone*, 662 F. Supp. 999, 1001 (E.D.Va. 1987); *Burpee v. Manchester School Dist.*, 661 F. Supp. 731, 732 (D.N.H. 1987) (all holding or confirming that in EAHCA cases, counsel fees may be recovered in federal court for work done at the administrative level where underlying merits never reach the court). But see *Rollison v. Biggs*, 660 F. Supp. 875, 877 (D. Del. 1987); *Mitten v. Muscogee County School Dist.*, Civ. Action No. 87-76-COL (M.D. Ga. Mar. 11, 1988) (concluding that fees are not available for EAHCA cases resolved at the administrative level).

220. 660 F. Supp. 875 (D. Del. 1987).

221. *Id.* at 877.

222. See *supra* notes 173-78 and accompanying text.

223. See *Schreck*, *supra* note 177, at 654.

tent to specifically provide for "the award of reasonable attorneys' fees to prevailing parents in EHA civil actions and in administrative proceedings."<sup>224</sup> The weakness of the court's analysis in promoting Congress' desire for consistency, at the expense of ignoring Congress' intent to provide for attorneys' fees in cases resolved at the administrative level in the Handicapped Children's Protection Act, underscores the error of the Court's holding in *Crest*.<sup>225</sup>

The various cases attempting to construe the applicability of various fee-shifting provisions to a range of administrative processes show how Congress' desire for consistency has been frustrated and misused. The Supreme Court has failed to address the issue of fees for administrative proceedings in a consistently principled way, and the lower courts have inevitably followed its confusing lead. There is, nonetheless, a principled approach to be divined in interpreting sections 706(k) and 1988's applicability to attorneys' fees for cases resolved administratively.

#### 5. Which Proceedings? Distinguishing *Crest* and *Webb* Administrative Proceedings

Several dichotomies appear throughout the fee-shifting cases. One is the distinction between cases resolved before and after filing of litigation that the Court found determinative in *Crest*. Another is the distinction between statutory schemes which contain requirements that complainants first pursue administrative remedies and those that do not, which I refer to as the mandatory/optional dichotomy. Still another is the distinction between state and federal processes. The courts have consistently failed to make sense of the relevance of these dichotomies in deciding whether attorneys' fees are authorized for cases resolved administratively.

This Article has questioned earlier, and will further explore below, the *Crest* decision's logic in hinging the question of the availability of fees under sections 706(k) and 1988 on whether the prevailing party filed a lawsuit before it resolved its case before the agency, or whether it resolved its case, and then filed a suit to recover fees.<sup>226</sup> This Article will also challenge the logic of hinging fee awards on whether administrative proceedings are compulsory or merely encouraged.<sup>227</sup> This section will examine the category of "encouraged" procedures, and will explain why recovery of fees for such procedures—like those created by Title VI—should be distinguished from the kinds of state and local administrative procedures for which fees were denied in *Webb*. Fees should not necessarily be available for all optional federal administrative proceedings, nor should they necessarily be unavailable for optional state proceedings; rather, the court should look to how the proceeding and the service performed by the attorney fit into the enforcement scheme for vindication of the particular civil right

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224. S. REP. NO. 112, 99th Cong., 1st Sess. 2 (section-by-section analysis).

225. See *supra* notes 171-78 and accompanying text.

226. See *supra* note 151 and accompanying text, *infra* notes 264-91 and accompanying text.

227. See *infra* notes 247-63 and accompanying text.

for which fees are sought.<sup>228</sup>

Unlike the state and local proceedings for which fees were denied in *Webb*,<sup>229</sup> Title VI and Title VII administrative proceedings are integral components of Congress' plan for the enforcement of those statutes. The *Carey* Court clearly understood this,<sup>230</sup> as did the Fourth Circuit in *Crest*.<sup>231</sup> Congress' express desire that Title VII and Title VI rights be vindicated through federal administrative as well as judicial channels distinguishes such procedures from the optional state administrative procedures at issue in *Webb*.<sup>232</sup>

In addition, for reasons of comity, the federal and state procedures should be distinguished. Congress should tread carefully in providing federal remedies to state created rights; policies of federalism dictate that federal courts should not casually intrude into state processes. The mandatory state administrative proceedings at issue in *Carey* are easily distinguished, since they form an integral part of the federal Title VII enforcement scheme.<sup>233</sup> Only through the consent of the several states does the EEOC delegate primary enforcement of Title VII rights to state agencies.<sup>234</sup>

Recovery of fees for state proceedings under section 1988 for services rendered at the state level, when fees are not provided for by state law, should be allowed only when doing so furthers an important federal goal. In *Bartholomew v. Watson*,<sup>235</sup> a section 1983 action brought by inmates in an Oregon prison challenging certain prison practices and procedures, the district court abstained pending the state court's interpretation of Oregon law's application to certain new procedures. The parties stipulated that the Oregon judgment would not be

228. See *Crest*, 769 F.2d at 1029 ("Some of the substantive provisions listed in § 1988 explicitly contemplate civil actions in state or federal court, and some, such as Title VI, explicitly contemplate initial administrative proceedings with possible later judicial review.").

229. 471 U.S. at 241.

230. *Carey*, 447 U.S. at 64-65.

231. *Crest*, 769 F.2d at 1033. That court discerned a logic to the Supreme Court attorneys' fee cases preceding their decision that supported its conclusion which § 1988 provides for fees for Title VI cases resolved administratively:

In all three of the most pertinent Supreme Court cases—*Carey*, *Smith*, and *Webb*—the Court applied the attorney's fees statutes as written but examined the congressional enforcement scheme for the underlying rights involved to see if the particular proceedings for which fees were sought were part of those statutory schemes. The Court has concluded that certain state administrative proceedings do qualify under Title VII and that . . . optional state tenure proceedings do not qualify under §§ 1983 and 1988 . . . . [T]he enforcement scheme of Title VI aligns it solidly with Title VII rather than with § 1983. Resort to optional administrative proceedings that are creatures of state law cannot be linked to the congressional enforcement scheme under § 1983, so there is no apparent basis to infer that Congress intended to include them within § 1988 when it drafted that statute. In contrast, mandatory state procedures under Title VII and certain federal procedures under Title VI are important parts of the statutory enforcement scheme.

*Id.*

232. See *Crest*, 769 F.2d at 1030 n.12. ("[Title VI] applies to 'any program or activity receiving Federal financial assistance,' and, while it is certainly possible for the states to have administrative procedures that may be able to redress alleged violations of Title VI, those procedures are not mandated by Congress and presumably they can fare no better than the state-created procedures in *Webb*.").

233. See *Carey*, 598 F.2d at 1257.

234. See 42 U.S.C. § 2000e-5(c); 29 C.F.R. § 1601.13.

235. 665 F.2d 910 (9th Cir. 1982).

res judicata in the federal action. The state prevailed in the Oregon action; plaintiffs prevailed in the federal action, and the issue was whether fees were recoverable under section 1988 for plaintiffs' attorney's services in connection with the state court proceedings.<sup>236</sup> The court held that such fees were available, since the federal court had required plaintiffs to apply to the state forum for determination of whether a state law basis existed for vindicating the rights which were the subject of the federal section 1983 claim.<sup>237</sup> It relied on the reasoning in cases such as *Carey* and on legislative history evidencing an intent that the civil rights fee-shifting statutes be broadly construed to achieve their remedial purposes.<sup>238</sup>

The court in *Bartholomew* noted the importance of abstention in furthering federal/state cooperation. If fees were denied for state proceedings after abstention on federal civil rights claims, plaintiffs would attempt to avoid state proceedings, thus straining federal/state relations.<sup>239</sup> Therefore, in order to further the important federal interest in abstention, courts must allow fees for state proceedings in abstention cases whether or not such proceedings resolve the underlying federal civil rights claim.<sup>240</sup>

A further distinction should be drawn for purposes of analyzing when fees should be independently recoverable for cases resolved administratively. When the *Webb* Court acknowledged that district courts have discretion to award fees for a portion of work done at the state level of a type useful and ordinarily necessary to the success of the federal litigation, it did so not because such state proceedings were "actions or proceedings" within the meaning of section 1988. In fact, it expressly said otherwise.<sup>241</sup> Rather, it did so because it had held in

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236. *Id.* at 911-12.

237. *Id.* at 913-14.

238. *Id.* at 913 (citing *Carey*; *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) and S. REP. NO. 1011, *supra* note 36, at 3).

239. *Id.* at 913. The House Report accompanying § 1988 explicitly permits the award of fees when a court avoids resolution of a federal civil rights claim by deciding a pendent state claim, since courts may endeavor to avoid resolution of constitutional issues whenever possible. The report relied on the Supreme Court's decisions in *Hagans v. Lavine*, 415 U.S. 528 (1974), and *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). H. REP. NO. 1558, *supra* note 28; see *Exeter-West Greenwich Regional School Dist. v. Pontarelli*, 788 F.2d 47, 50 (1st Cir. 1986).

240. See *Pontarelli*, 788 F.2d at 51-52 (attorneys' fees awarded under § 1988 when plaintiffs who filed federal action prevailed upon certification to state court on state law question). The court cites *Bartholomew* with approval, *id.* at 51, and supports its holding with reference to the language in *Webb* that fees may be awarded for work done in state proceedings useful and ordinarily necessary to the successful outcome of the litigation. *Id.* at 52. "We have already noted that interpreting § 1988 to allow an award of attorneys' fees in a certification case will best harmonize *Pennhurst* with the *Pullman* abstention doctrine and Congress' intent in enacting § 1988." *Id.* at 54.

Of course such cases may be viewed as traditional "catalyst cases" since in each instance the federal litigation was filed *before* the state proceedings resolved the issue. See *Sullivan v. Pennsylvania Dep't of Labor*, 663 F.2d 443, 448 (3d Cir. 1981) (fees allowed where attorney's work in mooted Title VII action found to be catalyst to successful union arbitration), *cert. denied*, 455 U.S. 1020 (1982); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429 (8th Cir. 1970) (plaintiff considered prevailing party if "lawsuit acted as a catalyst which prompted [the defendant] to take action" to correct unlawful practice).

241. *Webb*, 471 U.S. at 241 ("Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983.").

*Hensley v. Eckerhart*<sup>242</sup> that plaintiffs should receive attorneys' fees for work related to the federal civil rights litigation, and district courts were entrusted to determine which work was so related. The *Webb* approach is therefore an appropriate one for analyzing whether a prevailing party should be compensated for work done at state proceedings that are related to the federal civil rights claim.<sup>243</sup> But it is not an appropriate approach for analyzing whether work done at a proceeding to enforce an enumerated section 1988 civil right, or a Title VII right, should be so compensated. Sections 1988 and 706(k) say explicitly that attorneys' fees are awardable in such instances. When the civil rights statute in question explicitly provides for an administrative mechanism for redress of a right created by that statute, then a proceeding pursuant to such administrative mechanism is an "action or proceeding to enforce" such civil right.<sup>244</sup> Thus

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242. 461 U.S. 424, 433-34 (1983) (holding that fees were to be awarded from onset of attorney-client relationship for work reasonably related to enforcement of federal civil rights).

243. Thus it would be appropriate for analyzing whether work done at a state or local proceeding related to the vindication of a Title VI claim should be compensated. A hypothetical example of this would be if North Carolina law had forbidden discrimination based on race in any program receiving state funding, and the *Crest* plaintiffs sought relief before the state agency or court charged with enforcing such right prior to filing a federal court suit under Title VI.

In *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), the court failed to make the distinction between *proceedings to enforce* a federal civil rights claim and proceedings *related to* a federal civil rights claim. In *Ciechon* the court affirmed the district court's award of attorneys' fees to a party who had prevailed in federal court for time spent by counsel representing plaintiff before the city personnel board. *Id.* at 524. The court based its holding on *Carey*, seeing no difference between the state proceedings under Title VII, and the local proceedings at issue here. *Id.* at 525. The court might have reached the same result through *Webb* reasoning, but not for the reasons it gave.

Two commentators argue that the *Carey* rule should extend to nonmandatory state administrative proceedings in furtherance of a § 1983 claim such as in *Blow v. Lascaris*, 523 F. Supp. 913 (N.D.N.Y. 1981), *aff'd*, 668 F.2d 670 (2d Cir.), *cert. denied*, 459 U.S. 914 (1982), thus allowing a suit under § 1988 *solely* to recover fees for a case resolved at an optional state administrative proceeding. Parness & Woodruff, *Federal District Court Proceedings to Recover Attorney's fees For Prevailing Parties on Section 1983 Claims in State Administrative Agencies*, 18 GA. L. REV. 83, 94 (1983). The authors argue that the contrary result would encourage complainants to bypass available state administrative remedies, in conflict with principles of comity and federalism. *Id.* at 95. Those who prevailed at the state agency level could "seek in federal court *additional* remedies for already proven violations of section 1983 because the primary determiners of the violations did not possess the authority to provide fully the remedies available under law," such as attorneys' fees. *Id.* at 97. "Plaintiffs like Blow do not seek to circumvent section 1983; they seek instead no more than the full remedies legally available for section 1983 claims on which they have already prevailed and for which they have not yet had the opportunity to petition." *Id.* at 98. The authors advocate that the full faith and credit clause would require federal courts to award fees based on successful state agency actions. *Id.* at 102. While not unprincipled, the position advocated is at odds with the Court's decision in *Webb*, and perhaps goes too far in involving federal courts in the vindication of state-created rights. Since there is no evidence that Congress preferred vindication of federal civil rights in state court proceedings, and much evidence that Congress intended to encourage the use of federal forums, see H.R. REP. NO. 1558, *supra* note 28, at 6; S. REP. NO. 1011, *supra* note 36, at 1, 3 n.1, it would seem an unwarranted interference with state processes and state rights to allow prevailing parties, who could have pursued their claim in federal courts but chose not to, to nonetheless file a federal lawsuit solely to recover attorneys' fees. Also, the authors fail to explain how the full faith and credit clause would apply to requests for fees in cases resolved in state court without judgment.

244. The Department of Transportation regulations under which plaintiffs filed their administrative complaint were specifically established to enforce federal rights created by Title VI [citing 2000d-1, which requires agencies to promulgate regulations to effectuate the provisions of Title VI], so we conclude as a matter of normal statutory interpretation that Congress meant to include them within § 1988's use of the term 'proceeding.' *Crest*, 769 F.2d at 1030.

Similarly, a state equal employment proceeding pursuant to a deferral agreement, since it is

a suit to recover fees under section 706(k) should lie in a Title VII case resolved at any federal administrative proceeding<sup>245</sup> or state proceeding that is part of the Title VII enforcement scheme. Similarly, a suit to recover attorneys' fees under section 1988 should lie in a Title VI case resolved before a federal agency charged with ensuring that recipients of federal funds do not discriminate based on race, ethnicity, or national origin.

#### IV. DISPELLING THE FALLACIES UNDERLYING A NARROW CONSTRUCTION OF SECTION 1988

The Court in *Crest* based its decision on the pre-versus post-filing dichotomy, holding that section 1988 created no cause of action for a suit filed solely to recover fees in a Title VI case resolved before the filing of the litigation. Opponents of expanding the applicability of fees to cases resolved administratively, including petitioners and the United States as amicus curiae in *Crest*,<sup>246</sup> have raised a number of additional arguments for denying fees in such cases, aimed in large measure at distinguishing fee claims under section 1988 from fee claims under section 706(k). These include the mandatory/optional distinction between Title VII and other civil rights statutes, the concern that attorneys' fee litigation will overburden the federal courts, and the apprehension that allowing fees would frustrate congressional intent as to how the federal administrative processes should function. None of these concerns compels the conclusion that fees should not be available under section 1988 for Title VI cases resolved administratively. Rather, exposing the fallaciousness of these assumptions establishes a foundation for the need for corrective legislation proposed in Part V.

##### A. *The Fallacy of the Mandatory/Optional Distinction*

Although it was not a distinction on which the Court relied in *Crest*, a number of cases have distinguished the claim for fees in *Carey* from other claims for fees based on the requirement of Title VII that a claimant first pursue administrative remedies prior to filing suit.<sup>247</sup> Why is there such a requirement in

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provided for by Title VII, would be a proceeding to enforce Title VII. *See Carey*, 447 U.S. at 61-62. Contrast this to work done on a grievance procedure, related to a civil rights claim which resolves a matter before an administrative complaint has been filed. *See Mertz v. Marsh*, 786 F.2d 1258 (11th Cir.) (no fees awarded for federal employee Title VII claim resolved in a prefiling grievance procedure), *cert. denied*, 479 U.S. 1008 (1986). In such a case, the *Webb* "ordinary and necessary" analysis may be appropriate.

245. Such proceedings would include both those before the EEOC, or, in the case of federal employees, before the agencies charged with the discrimination.

246. *See* Brief for Petitioners at 7, Amicus Brief of the United States at III, *Crest*, 479 U.S. 6 (1986) (No. 85-767).

247. *See Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988) (distinguishing claim for fees for Title VII claim resolved administratively from claim in *Crest*, based on mandatory prefiling requirement that parties submit claim to administrative agency); *Smith v. Robinson*, 468 U.S. 992, 1011 n.14 (1984) ("The difference between *Carey* and this case is that in *Carey* the statute that authorized fees, Title VII, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust administrative remedies before bringing a § 1983 suit."); *Eggers v. Bullitt County School Dist.*, 854 F.2d 892, 895-96 (6th Cir. 1988) (distinguishing fees for EHCA claim resolved administratively from *Crest* based on mandatory nature of administrative proceedings); *Sullivan v. Pennsylvania Dep't of Labor*, 663 F.2d 443, 453 (3d

Title VII and none in Title VI, and what difference does it make in analyzing the fee question? While the presence of the requirement in Title VII argues forcefully for applying section 706(k) to a request for attorneys' fees for a case resolved in a mandatory state or federal equal employment opportunity proceeding,<sup>248</sup> the absence of a similar requirement in Title VI does not support the conclusion that fees should not be available for a Title VI case resolved in an optional federal agency proceeding.<sup>249</sup> "The question," said the Second Circuit in *Carey*, "is whether section 706(k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court."<sup>250</sup> Section 1988 poses the same question. The question can not be answered simply by ascertaining whether the civil rights statute in question requires prior resort to administrative remedies.

The relevance in the attorneys' fee analysis of a requirement that a complainant first submit her complaint to an administrative agency is the bearing such a requirement has in revealing congressional purpose and intent regarding the use of such administrative processes. By enacting the Title VII exhaustion requirement, Congress explicitly expressed a preference for the prelitigation, informal resolution of equal employment discrimination complaints. By providing for administrative enforcement of Title VI, Congress expressed a preference for informal resolution of racial discrimination complaints as well.<sup>251</sup> The congruence of two factors explains the absence of any requirement in Title VI that a complainant first pursue administrative remedies before a federal lawsuit: Congress' intent that the threat of termination of federal financial assistance by the funding agency would be the primary tool for enforcing Title VI,<sup>252</sup> and the absence of an explicit provision in the statute for a private right of action.<sup>253</sup>

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Cir. 1981) (Adams, J., dissenting) (would disallow fees for Title VII case resolved through nonmandatory union arbitration), *cert. denied*, 455 U.S. 1020 (1982); *Kennedy v. Whitehurst*, 509 F. Supp. 226, 230 (D.D.C. 1981) (no attorneys' fees for ADEA action resolved administratively because of absence of exhaustion requirement), *aff'd*, 690 F.2d 951 (D.C. Cir. 1982). But see *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236, 243 (S.D. Ga. 1982) (allows fees for ADEA action resolved administratively because of importance of federal-state enforcement scheme under ADEA).

248. See *Carey*, 447 U.S. at 65.

249. The Supreme Court in *Crest* makes no mention of the mandatory/optional distinction, in all likelihood because it chooses to decide the case on the basis of the pre-/post-filing dichotomy. The Fourth Circuit in *Crest* rejected the relevance of the distinction. 769 F.2d at 1030.

250. *Carey*, 598 F.2d at 1257.

251. See *Crest*, 769 F.2d at 1027 n.4, 1030 (describing importance of administrative procedures in Congress' Title VI enforcement scheme, including specific Title VI regulations enacted by the Department of Transportation designed to encourage resolution of Title VI complaints through "voluntary means." 49 C.F.R. §§ 21.11(d)(1), 21.13(a) (1984)).

252. See *Silver*, *supra* note 2, at 522.

253. In fact, until recently, confusion abounded among the lower courts as to whether Title VI required exhaustion of administrative remedies. See, e.g., *Crest*, 769 F.2d at 1030 (unnecessary to decide exhaustion question); *NAACP v. Wilmington Medical Center, Inc.*, 689 F.2d 1161, 1163 (3d Cir. 1982) (district court had ordered the Office of Civil Rights to conduct an investigation, and operated on the premise that exhaustion was required), *cert. denied*, 460 U.S. 1052 (1983); see also *Silver*, *supra* note 2, at 510 n.176 (lower courts have differed in their conclusions as to whether exhaustion is required). This confusion was shared by HEW, the primary enforcement agency, which had claimed that it had primary jurisdiction over Title VI claims, see *Cannon v. University of Chicago*, 441 U.S. 677, 687-88 n.8 (1979), thus suggesting the strength of the federal interest in administrative resolution of civil rights complaints. In holding that a private right of action did lie

Until the Court's decision in *Cannon v. University of Chicago*,<sup>254</sup> the availability of a private right of action under federal antidiscrimination laws such as Title VI was in dispute.<sup>255</sup> Both Congress—through enactment of section 1988—and the Court have subsequently made clear that a private right of action is a necessary and appropriate means for redressing violations of Title VI and for providing remedies other than termination of federal funding to aggrieved individuals.<sup>256</sup> Congress' failure to require a plaintiff to pursue administrative remedies prior to filing a Title VI suit, however, is neither surprising, nor a basis for interpreting section 1988 to disallow fee-shifting for cases resolved administratively.

Given Congress' desire for consistent interpretation of its attorneys' fees provisions,<sup>257</sup> a simple hypothetical will demonstrate the illogic of allowing fees to a Title VII complainant who prevails before the EEOC, and disallowing fees to a complainant who resolves a comparable complaint with a federal funding agency. The EEOC and the Office for Civil Rights of the United States Department of Education (OCR) have concurrent jurisdiction, due to overlapping coverage in Title VII and Title IX of the Education Amendments Act of 1972 (Title IX), over employment discrimination on the basis of sex in educational programs receiving federal funds.<sup>258</sup> Jane Doe, an Associate Professor of Medicine at Malesonly Medical School, files a complaint with both the EEOC and OCR<sup>259</sup> alleging that Malesonly discriminated against her on the basis of sex in the terms and conditions of her employment. Specifically, she alleges that she receives less compensation and is required to accept more responsibilities than are her similarly situated male colleagues. Dr. Doe is represented by John Roe,

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under Title IX without any requirement that plaintiff first exhaust administrative remedies, *Cannon* did nothing to detract from the strength of the federal interest in federal enforcement.

254. 441 U.S. 677 (1979).

255. The legislative history . . . makes clear that the supporters of the [1976 attorneys' fee amendment to § 1988] did not intend it to amend Title IX to include an express cause of action where none existed before. Instead, they clearly only meant to provide attorney's fees in the event that that statute as it had always existed implicitly created a cause of action . . . . On the other hand, the language added . . . and the legislative history surrounding it, do indicate that many "members of Congress may have assumed that private suits were authorized under" Title IX and, more importantly, that many Members felt that private enforcement of title IX was entirely consistent with, and even necessary to, the enforcement of Title IX and the other statutes listed in § 1988.

*Id.* at 686 n.7 (quoting *Cannon v. University of Chicago*, 559 F.2d 1063, 1079 (1976)).

256. See *id.* at 717 (finding private right of action under Title IX); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (same under Section 504); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983) (same under Title VI). An additional explanation for the existence of a pre-filing requirement in Title VII and its absence in Title VI may be found in an examination of the primary purposes of the two statutes. As this author has written elsewhere, a primary purpose of Title VII was the resolution of employment discrimination *disputes* between individual employees and employers, while the primary purpose of Title VI was the *eradication* of discrimination throughout programs receiving federal funds. See Silver, *supra* note 2, at 521-24.

257. See *supra* notes 180-83 and accompanying text.

258. The allocation of investigation responsibilities has in fact been resolved through executive order and interagency agreement between EEOC and OCR. See Exec. Order No. 12,106, 3 C.F.R. 263 (1978); Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1155 (1982) and in 92 Stat. 3781 (1978); EEOC Compliance Manual (CCH) ¶ 1930 (field notes issued Jan. 3, 1986, and Mar. 3, 1986). The existence, however, of such an agreement entered into voluntarily by the agencies in question is irrelevant in analyzing the proper interpretation of congressional enactments, and thus the hypothetical following in the text is posed as if no such agreements existed.

259. Malesonly, we posit, is a recipient of federal financial assistance.



an attorney with the NOW Legal Defense and Education Fund. Roe assisted Doe in the preliminary investigation of her allegations and the drafting of her complaints.

Under the mandatory/optional analysis, Doe's right to recover attorneys' fees upon successful resolution of her complaint will turn on whether the EEOC or OCR is the first to reach an agreement between the parties. If the EEOC finds probable cause and successfully conciliates an agreement between the parties, Doe would be authorized, under the *Carey* Court's interpretation of section 706(k),<sup>260</sup> to file an action in federal court solely to recover her attorneys' fees. If, however, OCR completes its investigation before the EEOC completes theirs, makes a finding that Malesonly did discriminate on the basis of sex, and Malesonly agrees to make such changes as are necessary to remedy the violation, then, under the analysis of courts relying on the mandatory/optional distinction, attorneys' fees would not be available to Doe under section 1988, regardless of whether she had previously filed a Title IX claim in federal district court.<sup>261</sup>

Another fallacy of the mandatory/optional distinction emerges upon closer examination of Title VII's requirements concerning submission of a complaint to agency processes and the realities of EEOC practices and procedures. Title VII does not require a charging party to await the eventual outcome of EEOC proceedings before she files a lawsuit; rather, if the EEOC has not resolved the charge within 180 days of filing, or, in the case of a charge referred to a state or local agency, 240 days, the charging party is entitled to receive a notice of right to sue from the EEOC, enabling her to proceed immediately to federal court.<sup>262</sup> If fees were only awarded for attorneys' services during the first 180 or 240 days when proceedings were mandatory, then parties would abandon the administrative proceedings and file in federal court at the earliest possible moment in order to protect their right to fees. The *Carey* Court rejected the suggestion that if plaintiff failed to abandon her administrative remedies after 240 days she would be precluded subsequently from recovering all her fees under section 706(k). Since it is rare that complete relief could be provided within that period, disallowing fees for administrative proceedings after 240 days, said the court, "would undermine Congress' intent to encourage full use of state remedies."<sup>263</sup>

Thus the Court in *Carey* was moved less by the existence of the requirement that plaintiff first submit her claim to the state agency than by Congress' desire "to encourage full use of state remedies." Similarly, in order to ensure that Title VI complainants do not abandon administrative remedies that Congress in-

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260. It is important to keep in mind that we are focusing on the cases that have distinguished § 706(k) from § 1988 based on the mandatory/voluntary distinction, rather than on the *Crest* Court's suggestion that the distinction is whether a matter is resolved before or after federal litigation to enforce a civil rights claim has been filed.

261. Under the *Crest* Court's analysis, however, had she previously filed such a Title IX lawsuit, then, after the successful agency resolution of her complaint, she could petition the court for fees for her attorney's services at the agency proceedings. See *infra* note 275 and accompanying text.

262. 42 U.S.C. § 2000e-5(f). See *Webb*, 471 U.S. at 252-53 n.15 (Brennan, J., concurring in part and dissenting in part).

263. *Carey*, 447 U.S. at 66 n.6.

tended for them to use, attorneys' fees should be recoverable under section 1988 for Title VI cases resolved administratively.

### B. *The Fallacy of the Burden on the Courts and the Selfless Attorney*

While scholars and jurists may disagree on the extent to which federal courts are overworked,<sup>264</sup> none advocate inundating the federal courts with unnecessary litigation. Critics of expanding the applicability of section 1988 to cases resolved administratively have feared an explosion of fees litigation will so burden the federal dockets.<sup>265</sup> To the contrary, the Court's analysis in *Carey*,<sup>266</sup> the realities of practice, and common sense suggest that quite the opposite is true. Disallowance of fees for Title VI cases resolved administratively will likely result in the filing of more, not less litigation, either as protective litigation in conjunction with the filing of an administrative complaint, or as an alternative to such a complaint.

Both the majority in *Crest*<sup>267</sup> and *Webb*<sup>268</sup> and the dissent in *Carey*<sup>269</sup> profess a belief that civil rights attorneys are selflessly devoted to their clients, and would not make choices influenced by whether or not they may ultimately be able to recover attorneys' fees from losing defendants.<sup>270</sup> The problems with

264. See Silver, *supra* note 2, at 560 n.460.

265. See *Carey*, 598 F.2d at 1262-63 (Mulligan, J., dissenting) (allowing suit solely to recover fees "promotes the federal litigation which Congress intended to bypass . . . in the federal courts, where district judges are already inundated with calendars of increasing weight and complexity"); cf. *Sullivan v. Department of Labor*, 663 F.2d at 454-55 (Adams, J., dissenting) ("Because of today's ruling, employees aggrieved by discriminatory practices may well file Title VII claims as an adjunct to already-initiated arbitration proceedings simply to ensure the eventual award of a counsel fee." Judge Adams' objection extended to allowing fees for proceedings other than litigation whether or not a federal suit had been filed on the merits.).

266. 447 U.S. at 66 n.6.

267. 479 U.S. at 14-15.

268. Of course, competent counsel will be motivated by the interests of the client to pursue state administrative remedies when they are available and counsel believes that they may prove successful. We cannot assume that an attorney would advise the client to forgo an available avenue of relief solely because § 1988 does not provide for attorney's fees for work performed in the state administrative forum.

*Webb*, 471 U.S. at 241 n.15.

Yet, the majority in *Webb* argued that attorneys should be compensated for work done at the administrative level which contributed to the success of the subsequent litigation because "[a] contrary rule would provide an unwise incentive for every potential litigant to commence a federal action at the earliest possible moment in order to steer himself into § 1988's safe harbor." *Id.* at 249-50 (Brennan, J., concurring in part and dissenting in part). The Court notes that Congress was motivated to provide attorneys' fees for cases settled out of court so that "[a] 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." *Id.* at 252 n.13 (quoting H.R. REP. NO. 1558, *supra* note 28, at 7).

269. 447 U.S. at 71 (White & Rehnquist, JJ., dissenting based on dissenting opinion below of Mulligan, J., 598 F.2d at 1263-64).

270. See discussion of *Crest*, *supra* note 118-19 and accompanying text; see also *Carey*, 598 F.2d at 1264 (Mulligan, J., dissenting) ("Attorneys who have specialized in the civil rights field are zealous and dedicated. Their performance will not be affected by this decision one way or the other.") Justices White and Rehnquist dissented from the Court's decision in *Carey* based on the opinion of Judge Mulligan. But see Rowe, *The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics, Ethics and Ex Ante Analysis*, 1 GEO. J. OF LEGAL ETHICS 621, 631 (1988).

For any number of reasons, from pride to fear of disrepute or professional sanction, from conscientious adherence to ethical obligations to being adequately paid, attorneys may well perform in full accord with the requirements of zealous and competent representation. For

this are at least twofold. First, what is best for the client is also likely to be what is best for the attorney; the recoverability of attorneys' fees is in the client's interest no less than in the attorney's. Private attorneys, apart from whatever pro bono matters they may undertake, practice law to earn a living, and will not undertake representation in most instances where they cannot expect compensation.<sup>271</sup> The overriding purpose of the fee-shifting statutes was to provide access to counsel for those who could not afford to pay for counsel's services to redress suffered discrimination. In fact, if the client can afford to pay for the attorney's services, then the client profits more from the hope of eventually recovering such fees from the defendant than does her attorney. Public attorneys, who make up a large percentage of the civil rights bar,<sup>272</sup> face ever increasing cutbacks in funding.<sup>273</sup> Recovery of attorneys' fees may provide the only opportunity for expanding their representation to meet the needs of the civil rights community.<sup>274</sup> Second, an attorney's decision to pursue one avenue of relief over another, or both simultaneously, is neither unethical nor inappropriate. Such was the assessment of Justice Brennan in his *Crest* dissent:

As a practical matter, the Court's position will lead civil rights claimants to do the following: (1) file a federal civil action, (2) pursue the available administrative agency remedy, (3) obtain a stay from the fed-

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contrary reasons, singly or in combination, they also may fail to do so. . . . But the complexities of human motivation make it hard to justify the Court's ostensible presumption that attorneys will conduct themselves as the ethical canons dictate come what may.

*Id.*

271. See *Evans v. Jeff D.*, 475 U.S. 717, 758 (1986) (Brennan, J., dissenting) ("lawyers are in the business of practicing law, and . . . like other business people, they are and must be concerned with earning a living"); *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J. concurring in part and dissenting in part) ("the legislative history of § 1988 reveals Congress' basic goal that attorneys should view civil rights cases as essentially equivalent to other types of work they could do, even though the monetary recoveries in civil rights cases . . . would seldom be equivalent to recoveries in most private-law litigation . . . . As nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims."); see also *Evans*, 475 U.S. at 741 n.34 ("We are cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases [and] the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the 'effective access to the judicial process' for persons with civil rights grievances which the Fees Act was intended to provide.").

272. See *Evans*, 475 U.S. at 755 n.7. (Brennan, J., dissenting) (nonlucrative nature of civil rights practice has resulted in few private attorneys handling civil rights work; civil rights plaintiffs rely largely on legal aid organizations); see also *Pennsylvania v. Delaware County Citizens' Council for Clean Air*, 107 S. Ct. 3078, 3096 (1987) (Blackmun, J., dissenting) ("it is unrealistic to think that 600 public-interest lawyers in 90 public-interest law centers around the country would be able to pick up the slack from the rest of the bar, with its approximately 400,000 lawyers").

273. See *Hearings on Federal Funding for Legal Services Programs and the Effect of Federal Budget on Education Before the Subcommittee on Judiciary and Education, and Committee on the District of Columbia*, 97th Cong., 1st Sess. 1-2 (1981) (statement of Chairman Dymally regarding 25% reduction in appropriations for the Legal Services Corporation for Fiscal Years 1982-83); *Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1984: Hearings Before the Subcom. on Commerce, State, and the Judiciary Appropriation of the House Committee of Appropriations*, 98th Cong., 1st Sess. 527-76 (1983) (statement of David Landau, American Civil Liberties Union, regarding 28% reduction in the number of lawyers as a result of the 25% reduction in funding to the Legal Services Corporation).

274. See *Evans*, 475 U.S. at 755 n.7 (legal aid organizations are short of resources and depend heavily on statutory fees); *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) (stating that awards of fees against state defendants under § 1988 to state funded legal aid attorneys "permit replenishment of the funds available for the organization's work").

eral court to file a fee petition after prevailing before the agency. Under these circumstances, there will rarely be any doubt that some portion of the work before the agency was "both useful and of a type ordinarily necessary" to successful litigation of the case . . . . Consequently, some fee award should ordinarily be allowed.<sup>275</sup>

Furthermore, those concerned about a proliferation of fee litigation following successful resolution of civil rights cases at the administrative level should bear in mind that the existence of a right does not mean that litigation is necessary in order to satisfy the right.<sup>276</sup> Not everyone who is owed money need sue to recover it. The fact that a suit must be filed in order to compel fees does not mean that the parties will not usually agree short of litigation to a fee.<sup>277</sup> There is no evidence that a spate of section 706(k) attorneys' fee litigation for cases resolved administratively inundated the federal dockets after the Court's *Crest* decision.<sup>278</sup> The parties can find sufficient guidance as to how to calculate a reasonable fee<sup>279</sup> to enable them to do so with or without the assistance of the agency that helped resolve the underlying civil rights dispute<sup>280</sup> and without the assistance of a federal judge. Negotiations can frequently resolve disagreements

275. *Crest*, 479 U.S. at 23 n.5 (citing *Webb*, 471 U.S. at 243, other citations omitted). That attorneys will heed his advice is evidenced by a presentation at the 1987 Practising Law Institute on the subject of attorneys' fees: "perhaps, the most practical observations drawn from [*Crest*] are those of Justice Brennan in his dissent [quoting passage from Brennan]. While the [*Crest*] majority assumed that counsel would either file suit or seek administrative relief, Justice Brennan has provided a practice tip on how to do both." Berger, *Prevailing Party Concepts in Court Awards of Attorneys' Fees*, in COURT AWARDS OF ATTORNEYS' FEES LITIGATING ANITITRUST, CIVIL RIGHTS, PUBLIC INTEREST, AND SECURITIES CASES 41, 87 (PLI 1987).

If *Crest* applies as well to statutory schemes like Title VII with mandatory administrative proceedings, attorneys might decline to represent plaintiffs raising claims under such statutes out of concern that no fees would be recoverable should their clients prevail short of filing federal suit. See Note, North Carolina Department of Transportation v. Crest Street Community Council, Inc.: *The Supreme Court Disallows Attorneys' Fees for Administrative Enforcement of Civil Rights*, 2 ADMIN. L.J. 165, 187-88 (1988).

276. See B. CARDOZO, *supra* note 135, at 128 ("Most of us live our lives in conscious submission to rules of law, yet without necessity of resort to the courts to ascertain our rights and duties.").

277. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee."); *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984) ("Parties to civil rights litigation in particular should make a conscientious effort, where a fee award is to be made, to resolve any differences."); see also H.R. REP. NO. 296, 99th Cong., 1st Sess. 5 (1985) ("Usually, the amount of such fees . . . [under the Handicapped Children's Protection Act of 1985] will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees.").

278. In fact, research has revealed surprisingly few cases concerning suits for fees under § 706(k) resolved administratively. But see *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988). Apparently, counsel involvement at the administrative level in EEOC cases is not routine, and in those cases where charging parties are represented by counsel, the cases usually advance to litigation before they are resolved. Telephone conversation with Laurie Young, Associate General Counsel, EEOC District Office, Indiana, (November 20, 1987). Practically speaking, attorneys are not going to rush to represent complainants in most run of the mill Title VI complaints, because the magnitude of the cases, even with the availability of fees, will not make them worthwhile from a remuneration perspective. It is the big cases like *Crest* where good representation is most critical that will—and should—be affected.

279. The decisional law on this subject is legion, and ever growing. See, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078 (1987) (plurality opinion that § 304 of Clean Air Act does not permit enhancement of a reasonable lodestar fee to compensate for an attorney's assuming the risk of loss and of nonpayment).

280. While the EEOC has promulgated regulations on attorneys' fees for federal employees who

between the parties about fees, as well as disagreements about discrimination. Furthermore, even if the fee question were not resolved short of federal court litigation, such litigation would likely be less costly than the projected protective federal court litigation precipitated by the Court's holding in *Crest*.<sup>281</sup>

If fear of the proliferation of litigation is unable to justify the denial of fees for cases resolved administratively, then there is no logical reason to hinge the fee question on whether a case is resolved before rather than after the filing of litigation related to the administrative enforcement proceeding. Fees should be available not only for parties who prevail on Title VI claims in federal court, but also for parties who successfully avoid the need for federal litigation by reaching resolution at the administrative level. Recall Jane Doe and her claim of Title VII and Title IX employment discrimination.<sup>282</sup> Under the Court's reasoning in *Crest*, if Jane Doe's attorney files a Title IX action in federal court before the Office for Civil Rights reaches a successful resolution of her complaint, then she will be entitled to recover attorneys' fees.<sup>283</sup> If, however, her attorney fails to do so, then no action will lie for attorneys' fees once Malesonly Medical School has agreed to comply voluntarily. Under the *Crest* rule, the careful attorney, the "good lawyer," should routinely file a protective lawsuit. Were attorneys' fees recoverable for cases resolved administratively, the parties would file a federal lawsuit for Title IX cases resolved administratively only in those instances where the parties were unable to reach agreement on the fee question. Jane Doe and Malesonly might agree on a reasonable attorney's fee award as part of their settlement of her complaint. If they do not agree, then Jane Doe, under a rule contrary to that of *Crest*, could apply to federal court to fix a reasonable fee amount. But why trouble the court unless it becomes necessary?

### C. *The Fallacy that Fees Mean Formalization*

On one hand, the Court has failed to acknowledge the importance of Congress' interest in informal, negotiated resolutions of discrimination complaints in its narrow interpretation of the reach of section 1988.<sup>284</sup> The *Webb* Court even suggests that the 1964 Act's legislative history indicates Congress' preference for judicial enforcement as the means to redress civil rights violations.<sup>285</sup> On the

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have prevailed before the agency, *see infra* note 307, the agency has no policy guidance for fee-shifting in the resolution of charges brought by private parties.

281. *See supra* note 275 and accompanying text.

282. *See supra* text accompanying notes 257-61.

283. I recognize the possibility that *Crest* could be read more narrowly. The Court never says that fees will automatically be available for *all* work done by the attorney in connection with the administrative proceeding, merely because a federal lawsuit had been filed. However, given the holding in *Carey*, the reasoning in *Webb* that fees should be available for work usually necessary as part of the litigation, and the Court's focus on timing in *Crest*, it appears that the range of discretion available to the district court to award fees for administrative work, as long as a protective federal action has been filed, equals the district court's discretion in deciding generally what work is, and what work is not, compensable under § 1988.

284. *See supra* notes 25-27 and accompanying text.

285. *Compare Webb*, 471 U.S. at 241 n.16 (purpose of § 1988 was to promote enforcement of civil rights through judicial process) with *id.* at 251-52 (Brennan & Blackmun, JJ., dissenting in part and concurring in part) ("A rule requiring potential plaintiffs *absolutely* to bypass administrative proceedings if they wished to become eligible for attorney's fees would create skewed incentives that

other hand, the Court suggests in *Crest* that to allow fees for cases resolved administratively would create a disincentive to defendants to agree to resolve cases at the administrative level, a disincentive at odds with the purposes of the civil rights laws.<sup>286</sup> What the Court failed to understand is that allowing fees in such cases does not threaten administrative informality; it merely allows parties and their attorneys a choice between more or less formal approaches to resolving discrimination disputes, unencumbered by the fee issue.

### 1. The Fallacy that Fee-Shifting Will Discourage Administrative Settlement

The argument is that defendants will be discouraged from agreeing to comply at the agency level if such agreement means exposure for plaintiff's attorneys' fees. There are at least two problems with this position. First, even if this is sometimes so, it is also the case that as far as attorneys' fees are concerned, it is always less costly for the defendant to resolve a matter sooner rather than later.<sup>287</sup> Therefore, early compliance will likely be in the defendant's interest, if it is to comply voluntarily at all.<sup>288</sup> This is true whether the defendant is liable for fees from the moment the administrative complaint is filed, or whether liability only attaches upon the filing of a lawsuit. But a rule which does not require fees for cases resolved short of judicial litigation will provide no incentive for a defendant to agree to resolve a discrimination problem sooner rather than later in the administrative process. Further, not allowing fees for cases resolved at the administrative level reduces the incentive for plaintiffs to negotiate resolutions before the filing of a judicial complaint.<sup>289</sup>

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Congress could not possibly have intended . . . . Unless we are willing to conclude that Congress not only intended not to *require* reliance on state administrative proceedings, but positively to *discourage* resort to such proceedings in all circumstances in the § 1983 context, reasonable standards for limited recovery of fees should be fashioned."); see extended discussion *supra* note 134.

See also *Hensley v. Eckerhart*, 461 U.S. 424, 445-46 (1983) (Brennan, J., concurring in part and dissenting in part) ("Congress could, of course, have provided public funds or Government attorneys for litigating private civil rights claims, but it chose to 'limi[t] the growth of the enforcement bureaucracy,' Senate Report 4, by continuing to rely on the private bar and by making defendants bear the full burden of paying for enforcement of their civil rights obligations."); S. REP. NO. 1011, *supra* note 36, at 4 ("These fee-shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy.").

286. "Moreover, our holding creates a legitimate incentive for potential civil rights defendants to resolve disputes expeditiously, rather than risk the attorney's fees liability connected to civil rights litigation." *Crest*, 479 U.S. at 15.

287. See *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., concurring in part and dissenting in part) (§ 1988 "gives defendants strong incentives to avoid-arguable civil rights violations in the first place and to make concessions in hope of an early settlement").

288. There are, of course, other factors which might influence a defendant to delay settlement, separate and apart from the issue of attorneys' fees. See *Silver, supra* note 2, at 550-52. Yet the greater the exposure to attorneys' fees, the greater the incentive to settle. See, e.g., S. REP. NO. 112, 99th Cong., 2d Sess. 17 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 1798, 1806 ("the cap on publicly funded attorneys' fees would deter schools from settling cases expeditiously. Schools not faced with having to pay more substantial attorneys' fees at the fair market rate will have an incentive to draw judicial proceedings out in an attempt to force plaintiffs to abandon their cases").

289. Cf. *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) (upholding award of fees to plaintiffs whose suit prompted change in prison conditions).

Second, alternatives are available for dealing with the concern that respondents will refuse to settle cases where the merits may be unclear but the cost—other than attorneys' fees—would be negligible. If a respondent chooses to settle a complaint for its nuisance value, settlement could include an agreement of a fee waiver,<sup>290</sup> or otherwise minimize the cost of attorneys' fees. Furthermore, it is not at all clear that it furthers any legitimate goal for respondents to agree to settle cases having no merit. If respondents have not in fact engaged in any discriminatory practice, then it furthers no purpose other than avoiding the nuisance of further proceedings for them to agree to settle.<sup>291</sup> Thus, if allowing attorneys' fees for cases resolved administratively creates a disincentive to respondents to settle nonmeritorious cases, that is not especially troublesome. This is especially so as balanced against the importance to plaintiffs of allowing fees for meritorious cases resolved administratively.

## 2. The Fallacy that Private Attorneys Have No Place in Administrative Proceedings

Another objection frequently voiced to allowing attorneys' fees for cases resolved administratively is that the administrative agency obviates the need for private counsel, both because of the relative informality and less adversarial nature of its procedures<sup>292</sup> and because agency attorneys can adequately protect the interests of the complainant.<sup>293</sup> The problem with this suggestion is that it ignores the similarity between the judicial litigation process and the complaint

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[W]e are sympathetic to defendants' policy argument that fear of a significant attorney's fee award may force defendants to continue litigating an issue not because they wish to establish a legal principle or avoid meeting plaintiffs' concerns, but solely to escape if possible from onerous attorney's fees. But the argument cuts both ways. If defendants may refuse to settle a case and accept the cost of continued litigation to avoid paying attorney's fees, it is equally likely that plaintiffs' counsel, rather than receive no compensation at all for their efforts, would be willing to continue the litigation on the chance that they might cut if not eliminate their losses. We cannot decide this issue based on such honest but speculative concerns.

*Id.* at 281-82.

290. In *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Court held that defendants can condition settlement offers on the waiver of § 1988 attorneys' fees. There are numerous objections to allowing fee waivers in meritorious cases. See, e.g., *id.* at 754 (Brennan, Marshall & Blackmun, JJ., dissenting) ("It seems obvious that allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectations of receiving fees and decrease the willingness of lawyers to accept civil rights cases."); see also Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. PA. L. REV. 793, 795, 815-16 (1983) (arguing that conditional fee waivers frustrate goals of Fees Act); Note, *Evans v. Jeff D.: No Judicial Prohibition of Coerced Waivers of Attorney's Fees Under the Civil Rights Attorney's Fees Awards Act of 1976*, 24 Hous. L. REV. 1020, 1028-32, 1036-37 (arguing that fee waiver settlements impair civil rights enforcement). The Court's decision that they are allowable, however, discredits its suggestion in *Crest* that a contrary holding would decrease the incentive for defendants to resolve compliance problems voluntarily.

While it is beyond the scope of this Article, Congress might well decide to overrule the Court's holding in *Jeff D.*, see Note, *supra*, at 1035-36, perhaps simultaneously with overruling its holding in *Crest*. Concerns about creating possible disincentives for defendants to settle disputes of debatable merit could be addressed by Congress at that time. See *infra* note 311 and accompanying text.

291. See Silver, *supra* note 2, at 525-26.

292. See, e.g., *Parker v. Califano*, 561 F.2d 320, 324 n.14 (D.C. Cir. 1977) ("EEOC's procedures and authority usually make it unnecessary for an employee to use an attorney's services").

293. See, e.g., *Carey v. New York Gaslight Club, Inc.*, 598 F.2d 1253, 1261-63 (2d Cir. 1979)

resolution process at the agency level, and it assumes a function for agency attorneys which is not theirs to perform. The processes of discovery and informed negotiation are essential and often dispositive phases in litigation, and cases are frequently, if not usually, resolved without the necessity for a formal trial.<sup>294</sup> Few would suggest that clients can handle these preliminary phases of litigation satisfactorily without counsel. Similarly, most Title VI complaints are resolved during the investigative and negotiation phases of the administrative enforcement process.<sup>295</sup> Since important decisions are made and rights compromised at this juncture of the administrative process, the need for counsel is no less critical than at a similar juncture of the judicial process.<sup>296</sup>

The need for counsel is not satisfied by the existence of agency attorneys. Agency attorneys do not guard the interests of the complainant, as the Court recognized in *Carey*.<sup>297</sup> In a Title VI administrative proceeding, the agency attorney's client is the agency, not the complainant, and her responsibilities are to ensure that a complete and competent investigation leads to a well-founded conclusion as to whether a violation did or did not occur.<sup>298</sup> Since the agency attorney is not the complainant's advocate, she can not protect the complainant's interests over those of the respondent. Thus, without private counsel, there is no advocate to guard the complainant's interests in the negotiation process, espe-

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(Mulligan, J., dissenting) (division attorney adequately protects interests of charging party), *aff'd*, 447 U.S. 54 (1980).

294. See, e.g., Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1124 (1959) (majority of New York City negligence claimants receive settlements within a year after accident).

295. See Silver, *supra* note 2, at 571.

296. Cf. Parker v. Califano, 561 F.2d 320, 332 (D.C. Cir. 1977)

Settlement of the charge is possible at any stage of the proceedings and agreements may, accordingly, have to be negotiated and rights may be waived . . . Furthermore, the agency's representative is likely to be a lawyer, which can only serve to exacerbate a non-lawyer plaintiff's disadvantage. Any realistic assessment of Title VII administrative proceedings requires the conclusion that—despite the fact they are not strictly adversarial—an employee would often be ill-advised to embark thereon without legal assistance. Indeed, the services a lawyer may be called upon to perform at the administrative level are well illustrated by the instant litigation.

*Id.*

297. *Carey*, 447 U.S. at 69-70. The argument that private counsel were unnecessary because of the existence of Division of Human Rights attorneys was raised and rejected. The Court noted that the state agency had encouraged complainants to obtain private counsel due to resource problems in the agency. The Court further concluded that the agency attorney

has no obligation to the complainant as a client. In fact, at times the position of the Division may be detrimental to the interests of the complainant and to enforcement of federal rights. Representation by a private attorney thus assures development of a complete factual record at the investigative stage and at the administrative hearing. At both, settlement is possible and is encouraged. A Division employee cannot act as the complainant's attorney for purposes of advising him whether to accept a settlement. Retention of private counsel will help assure that federal rights are not compromised in the conciliation process.

*Id.* at 70. It is interesting to note that the United States appeared as amicus in *Carey* arguing for the need for fee recovery for private counsel in the administrative proceedings; however, in *Crest* it took the opposite position, see *infra* note 304.

298. See Silver, *supra* note 2, at 517 (OCR findings must be legally supportable); *Carey*, 598 F.2d at 1258 ("the [New York Human Rights Law] provides for Division lawyers to present the case 'in support of the complaint,' not in support of the plaintiff"); cf. Doe v. New York Univ., 511 F. Supp. 606, 609 (S.D.N.Y. 1981) (noting counsel's role in reviewing administrative findings).



cially if this process occurs before the investigation is completed.<sup>299</sup> Even if the investigation yields a finding of violation, the agency attorney's interests may diverge substantially from those of the complainant. The agency may conclude that the compliance problem can be resolved with less relief, or different relief, than the complainant is seeking.<sup>300</sup> The agency may even conclude that the violation can be remedied without the respondent providing any individual relief to the complainant.<sup>301</sup> The complainant's need for his own representative to protect his interests at each phase of the administrative enforcement process may approach his need for legal representation in the litigation process in federal court. The more complex the alleged violation, the more vital is the role of complainant's counsel.

The facts in *Crest* demonstrate the importance of private counsel in the Title VI administrative proceedings. The role played by *Crest's* attorney in the administrative proceedings, which included filing the seventeen page complaint setting forth the factual and legal bases of the Title VI violation,<sup>302</sup> providing extensive materials to the agency to document the violation and, after the agency's finding of probable cause, and with the agency's encouragement, conducting successful negotiations with the respondent to resolve the compliance issues,<sup>303</sup> belies any argument that the work performed by *Crest's* counsel was not critical to the favorable outcome of the administrative proceedings.<sup>304</sup>

I do not mean to overstate the case in order to refute the suggestion that attorneys are unnecessary at the administrative level and therefore their services

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299. In fact, the need for private counsel is even more compelling in the Title VI administrative proceedings than in a Title VII proceeding before the EEOC, because of the former's relative lack of protection of the complainant's rights throughout the agency's processes. See *Silver, supra* note 2, at 558, 559.

300. See *Silver, supra* note 2 at 558-59.

301. See *Cannon v. University of Chicago*, 441 U.S. 677, 707 n.41 (1979) (no guarantee that administrative proceedings will protect individual interests of complainant).

302. Joint Appendix 73-89, *Crest*, 479 U.S. 6 (No. 85-767).

303. Respondents' Brief at 34-36, *Crest*, 479 U.S. 6 (No. 85-767).

304. This evidence also discredits the argument made by amicus United States that the Title VI administrative process was not intended to protect private interests, and therefore a complainant is not a "party" to any such "proceedings," as required by § 1988 for purposes of recovering attorneys' fees. Amicus Brief at 12-15, *Crest*. The United States' argument has not received much credence in the courts. But see *Arriola v. Harville*, 781 F.2d 506, 510 (5th Cir. 1986) ("interested individuals and groups have none of the rights of parties" for purposes of Voting Rights Act fee-shifting provisions), *cert. denied*, 107 S. Ct. 84 (1986). The United States attempts to distinguish the status of the charging party in Title VII proceedings from that of the Title VI complainant who it describes as merely a deliverer of information to the Title VI enforcement agency, arguing that because Title VI is rooted in the spending power and requires the consent of the recipient of funds, the government's responsibility is to strike a balance between "protecting" its contractee and insuring nondiscrimination, and that granting party status to complainant would be incompatible with this role. While there are some differences between the focus of Title VII as compared to Title VI proceedings, see *Silver, supra* note 2, at 506-08, and while the Title VI agency is not compelled to allow a complainant to participate in its proceedings, see *Cannon v. University of Chicago*, 441 U.S. 677, 707 n.41 (1979), none of these differences compel the conclusion that a complainant's participation in Title VI administrative proceedings can never equal that of a party for purposes of § 1988. The Court in *Cannon* recognized the limitations on agencies' abilities to handle all aspects of nondiscrimination enforcement, 441 U.S. at 708 n.42, and the *Crest* case is an example of the agency's acceptance—if not need—for private counsel to play the major role in agency negotiations. See Respondents' Brief at 11, 34-36, *Crest*. Nor is there anything that would require a court to award fees if the agency, and not the complainant, were responsible for the success of the proceedings.

need not be compensated under section 1988.<sup>305</sup> Undoubtedly an individual who has no attorney has greater access to administrative enforcement processes than to federal court litigation because of the former's greater informality and because its processes are not dependent, as are those of the latter, on the expertise and cryptic rules of the bar. One purpose of having administrative agencies is to increase access to legal processes for those who do not have counsel. Nonetheless, to suggest that the utilization of the administrative processes is not dependent on the availability of personal counsel is insufficient refutation of the reality that a complainant may use such processes more effectively with counsel's assistance.

Overformalization of the administrative enforcement processes would not serve the goals of Title VI. I have elsewhere explored and justified the need for certain informal alternatives to formal litigation to resolve discrimination problems.<sup>306</sup> However, the suggestion that the availability of compensation under section 1988 for attorneys' services in Title VI administrative proceedings would undermine the goal of informal resolution of civil rights compliance problems is at best unpersuasive, at worse, duplicitous. As the risks increase for a defendant faced with administrative enforcement, its eagerness for early compliance will increase as well. If the only threat is one of litigation, then the defendant will have less incentive to respond sooner rather than later to the agency's enforcement mechanisms.<sup>307</sup> If the complainant's attorney's meter continues to tick throughout the administrative investigation and subsequent negotiations, the errant defendant may well be more responsive to reasonable settlement than were it to face no exposure for attorneys' fees until the complainant becomes a plaintiff and files suit.

The *Crest* majority opinion, by conditioning recovery of attorneys' fees for work done at the administrative level upon the fortuitous (or intentional) filing of a suit in federal court to enforce an enumerated civil rights law before the case is resolved administratively, undermines Congress' expressed interest in increasing access to effective counsel and encouraging the informal resolution of discrimination complaints. What the Court has wrought, let Congress now redress.

## V. THE TASK FOR CONGRESS

When the Court misinterprets a statute Congress can fix it. It did so when the Court in *Smith v. Robinson*<sup>308</sup> held that attorneys' fees were not available for claims under the Education of the Handicapped Act.<sup>309</sup> It should do so now to

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305. Justice Brennan was, I suggest, guilty of such hyperbole in his dissent in *Crest*, in suggesting that "[a]n indigent citizen who cannot afford to hire a lawyer to sue to enforce the civil rights laws is . . . unable to pursue relief before an administrative agency." *Crest*, 479 U.S. at 19 (Brennan, J., dissenting).

306. See Silver, *supra* note 2.

307. Under Title VI, compliance at *any* stage of the administrative process will avoid termination of federal financial assistance or other sanction. See Silver, *supra* note 2, at 552.

308. 468 U.S. 992 (1984).

309. 20 U.S.C. § 1400 (1982), amended by Handicapped Children's Act of 1986, Pub. L. No. 99-372; see *supra* notes 171-78 and accompanying text.

clarify that sections 1988 and 706(k) allow recovery of attorneys' fees for services rendered in connection with Title VI<sup>310</sup> and Title VII administrative proceedings, regardless of whether federal litigation is necessary to resolve the dispute. Parts I-IV of this Article have supplied the justification for such an amendment, by criticizing the Court's decisions in interpreting section 1988 and other fee-shifting statutes and demonstrating that allowing fees for cases resolved administratively fulfills the goals of federal nondiscrimination laws. Accepting the need for such an amendment, however, does not resolve issues of exactly what such an amendment should provide, and it is to an exploration of that question that this Article now turns.

Although I do not intend to suggest that the application of sections 1988 and 706(k) to agency proceedings is more properly accomplished by Congress than by the courts, Congress nonetheless now has the opportunity to contemplate and resolve certain questions about how the fee issue might be approached in a way less accessible to the courts. How specific should such a provision be? Should it provide for fees for attorneys' services rendered at certain stages of the administrative process, but not for others? Should it require a certain threshold showing of actual discrimination before such fees would be allowed pursuant to a settlement agreement? Or should it be stated in language as broad and general as the language currently in these two fee-shifting statutes?

If limits are to be sought, should Congress impose such limits, or should the agencies themselves? Perhaps Congress should make a provision for fees generally, leaving it up to the agencies to articulate through rulemaking the particulars of what services would be covered. Or, in the alternative, perhaps such issues should be left—as they are currently under sections 1988 and 706(k)—to the sound discretion of the trial court when requests for fees are presented. For the reasons developed below, I recommend that Congress amend sections 1988 and 706(k) to provide generally for suits for fees for administratively resolved cases, leaving it to the agencies to recommend, and the courts to define, the appropriate limits of discretion.<sup>311</sup>

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310. This assertion is limited to Title VI and the other comparable nondiscrimination statutes under § 1988, *see supra* note 17, because of the particular federal administrative mechanisms created to enforce these statutes. *See supra* notes 229-45 and accompanying text.

311. Such provisions might read as follows:

§ 1988: 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. *A court may award such fee to a party who has prevailed in an administrative proceeding brought to enforce a claim under title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964.* § 706(k): In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. *A court may award such fee to a party who has prevailed in any state administrative or judicial proceedings or proceedings before the Equal Employment Opportunity Commission brought to enforce a claim under this title.*

For consistency, it would then be necessary to amend the corollary provision of Section 504 of the Rehabilitation Act as well, 29 U.S.C. § 794a(b). *See supra* note 17.

### A. *How Particular a Statute?*

If Congress so chose, it could particularize the matters for which attorneys' fees would be available so as to reduce court discretion in setting fee awards. Congress might do so out of concern that the general availability of fees for attorneys' work done at the administrative level might encourage the unnecessary involvement of attorneys in relatively straightforward informal agency processes. For example, Congress could determine that fees should be available for all work done in connection with formal agency adjudicative proceedings, and not for work done at informal proceedings. Or Congress might provide fees for attorneys' services provided after an agency finding of cause or discrimination, but not for services provided before such a finding.

However, both of these distinctions would disserve congressional interest in informal, negotiated compliance. Any determination that attorneys' fees should not be available for a stage in an administrative proceeding comparable to a stage in litigation, such as investigation towards and preparation of the complaint, risks encouraging attorneys to file litigation rather than pursue administrative remedies.

While there may be legitimate need to draw some lines, Congress is probably not the best institution to draw them. The problems with having Congress make such distinctions are at least twofold. First, Congress is ill-equipped to engage in the investigation necessary to make such discriminations. Congress will be forced to explore the intricacies of the various agencies' processes and procedures in order to make intelligible distinctions. The more detailed the statute, the greater the invitation for debate and disagreement among the legislators about its particulars. The more debate and disagreement there is, the less likely it is that an intelligible statute will emerge.

Second, Congress lacks the necessary expertise to do the job well. Legislators are not our best experts on either administrative or judicial processes, or on which processes are appropriately compensable, and which are not. In promulgating previous fee-shifting statutes such as sections 1988 and 706(k), Congress painted with a broad brush, leaving the particulars to the sound discretion of the courts. For all the reasons that Congress frequently delegates to agencies and courts the responsibility and right to fill in the interstices of broad statutory schemes, Congress should do so here.

### B. *The Agencies as Line-Drawers*

At least in the first instance, the enforcement agencies themselves may appropriately suggest the limits of the courts' discretion in awarding fees.<sup>312</sup> Much as the EEOC has already done in particularizing the scope of the right to

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312. An alternative approach, and one with some merit, would be for Congress to grant to the agencies themselves the power to make attorneys' fee awards. This would, however, involve a more radical restructuring of agency powers and responsibilities than the one proposed herein, which leaves the ultimate authority to grant such awards with the courts. In addition to being less radical, my proposed amendments so empowering the courts take advantage of the expertise they have developed in fashioning fee awards in civil rights litigation generally.

recovery of fees in cases brought by federal employees against federal agencies,<sup>313</sup> the EEOC and the various civil rights arms of the federal funding agencies could promulgate interpretive regulations clarifying when fees are appropriately awardable under the corresponding fee-shifting statutes. These regulations would serve as guidance for the voluntary resolution of the attorneys' fee issue among the parties, as a basis for fee determinations "suggested" by the agency as part of a negotiated resolution, and, ultimately, as nonbinding guidance for the court should litigation on the attorneys' fees issue ensue.<sup>314</sup>

### C. *The Courts' Discretion*

Once Congress clarifies the power of the courts to award fees for civil rights cases resolved administratively, whether or not additional guidance is provided by the agencies, the courts are capable of executing that authority in a manner consistent with how they have done so previously in litigation arising under sections 1988 and 706(k). The courts have applied their expertise to judging whether a plaintiff was a "prevailing party,"<sup>315</sup> whether a settled claim was non-frivolous,<sup>316</sup> whether certain work was necessary to the success of the litigation.

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313. Title VII regulations provide for the possibility of an administrative award of attorneys' fees for all postfiling, postnotification work for complainants alleging violations of Section 717 of Title VII, 42 U.S.C. § 2000e-16, relating to discrimination against federal employees. 29 C.F.R. § 1613.271(d)(i) (1988). The regulations provide that "[a] finding of discrimination raises a presumption of entitlement to an award of attorney's fees." *Id.* When possible, fees are to be agreed upon by the charging party and the agency representative; if they are unable to agree, then the agency will make a determination. *Id.* § 1613.271(d)(2) (amount of awards).

As to the availability of fees for cases resolved short of formal finding, § 1613.271 provides as follows:

An informal adjustment of a complaint may include an award of . . . attorney's fees . . . . Where the parties agree on an adjustment of the complaint, but cannot agree on whether attorney's fees or costs should be awarded or on the amount of attorney's fees or costs, the issue of the award of attorney's fees . . . may be severed and shall be the subject of a final decision under § 1613.221(d).

Section 1613.221(d) provides for a determination under § 1613.271(c), adding "In the unusual situation in which the agency determines not to award attorney's fees or costs to a prevailing complainant, the agency shall set forth in its decision the specific reasons for denying the award."

314. While Title VI grants general substantive rulemaking authority to the federal funding agencies, 42 U.S.C. § 2000d-1, Title VII grants EEOC only authority to promulgate procedural regulations, 42 U.S.C. § 2000e-12. Although recovery of attorneys' fees may well be deemed procedural in nature, nonetheless, any agency regulations concerning attorneys' fees should be nonbinding on the courts. First, under the scheme I have proposed, such fees would be recoverable under § 1988 and therefore an agency's rulemaking authority arising under Title VI would be irrelevant to any authority under a different statute, even though such statute referred to Title VI. Second, it is inappropriate for the agencies to control what has traditionally—and appropriately—been an area protected through judicial discretion. While the agency's views on fee recovery as expressed in its regulations and other pronouncements would and should be highly persuasive, see *Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944), courts should be free to accept or reject an agency's view of the scope and limits of recoverability. See also *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) ("Legislative rules . . . grant rights, impose obligations, or produce other significant effects on private interests . . . . [N]on-binding action . . . expresses an agency's interpretation, policy, or internal procedures . . . . They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term . . . .").

315. See, e.g., *Hewitt v. Helms*, 107 S. Ct. 2672 (1987) (plaintiff, a prisoner who was released while litigation determining due process and substantive issues under § 1983 was going on, not entitled to fees as "prevailing party" for regulatory change made related to one of his claims regarding the use of confidential-source information in inmate disciplinary proceedings).

316. See, e.g., *Exeter-West Greenwich Regional School Dist. v. Pontarelli*, 788 F.2d 47, 52 (1st

tion,<sup>317</sup> as well as the appropriateness of the fee charged and the proper method for calculation of a fee award.<sup>318</sup> This same expertise can be brought to bear on similar issues that may arise in connection with claims asserted for attorneys' services at the administrative level.<sup>319</sup>

#### D. *A Final Note on Line-Drawing*

*Carey* established that because of the integral nature of the state and local enforcement scheme under Title VII, fees were appropriately awardable under section 706(k) for attorneys' services performed in connection with such proceedings. This Article previously distinguished the claim in *Webb* for compensation for state proceedings related to plaintiff's section 1983 claim from the claim in *Crest* based on the integral role of Title VI administrative proceedings in the Title VI scheme.<sup>320</sup> Does this suggest that fees should be awardable

Cir. 1986) (in order to recover fees, plaintiff must show that unadjudicated claim was not "frivolous, unreasonable, or groundless." (quoting *Nadeau v. Helgemoe*, 561 F.2d 275, 281 (1st Cir. 1978))).

317. See, e.g., *Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234, 243 (1985); *Hensley v. Eckhardt*, 461 U.S. 424, 435-36 (1983).

318. See, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1987) (holding district court erred in enhancing lodestar fee amount to compensate attorneys for risk of loss and nonpayment); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 770 (7th Cir. 1982) (holding that trial court erred in lowering rates customarily charged by plaintiffs' Washington, D.C. and New York civil rights lawyers to rates prevailing in South Bend, Indiana), *cert. denied*, 461 U.S. 956 (1983).

319. Courts have already engaged in this process. On assessing the relevance of work done at the administrative level for purposes of a § 706(k) award for a case ultimately resolved through arbitration, see *Sullivan v. Department of Labor*, 663 F.2d 443, 445-47, 451-52 (3d Cir. 1981).

On the issue of fee awards for cases resolved without a finding of discrimination, see, for example, *Brown v. Boorstin*, 471 F. Supp. 56, 56-58 (D.D.C. 1978). This claim arose under § 706(k). *Brown* filed both administratively and in federal court, charging racial discrimination. While personnel irregularities were found, no finding of discrimination based on race was ever made, or suggested other than by plaintiff. The court suit was dismissed upon a settlement stipulation disclaiming any liability for discrimination, and plaintiff applied for fees. *Id.* at 57. The court rejected the request for fees, holding that despite the liberality in the definition of "prevailing party," § 706(k) does require a threshold finding of some discrimination before a § 706(k) award is appropriate. *Id.* at 58; see *Grubbs v. Butz*, 548 F.2d 973, 975-76 (D.C. Cir. 1976) (denying interim award claim before discrimination established). Using similar reasoning, courts have declined to grant any award for negotiated settlements that concede no discrimination. *Goodall v. Mason*, 419 F. Supp. 980 (E.D. Va. 1976). *Brown* was not entitled to an award because "[n]either administrative proceedings nor the court-approved settlement reflects any discrimination or concession of discrimination by the defendant." *Brown*, 471 F. Supp. at 58. "To penalize employers for beneficially changing employment policies, when no administrator or court has found the practice eliminated by the new policy was in some fashion used to implement racial discrimination proscribed by Title VII, would carry the catalyst theory too far." *Id.*; cf. *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128, 134 (3d Cir. 1986) (defendant's claim of nuisance value settlement does not preclude award of fees; only exceptional case would not allow fee award). Since virtually all settlements—whether at the administrative or judicial level—entail a liability disclaimer, the *Boorstin* approach may go too far in burdening the plaintiff who agrees to settlement. However, legitimate concern about the relationship of fee-shifting to settlements, see *supra* notes 290-91 and accompanying text, might suggest that the presumption be in favor of awarding fees to a party when settlement occurs subsequent to an agency finding of discrimination, and the presumption be against awarding fees in cases resolved prior to that point. The latter presumption should be rebuttable upon a demonstration that the complainant's allegations of discrimination are well-grounded.

For a discussion of where appropriate lines should be drawn regarding the kind of work in administrative proceedings for which compensation should be awarded, see *Carey*, 447 U.S. at 71 (fees appropriately awardable for work done in connection with agency investigation and conciliation efforts).

320. See *supra* text accompanying notes 228-45.

under the federal civil rights fee-shifting statutes only when utilization of state or local proceedings is mandated by the particular civil rights act? For reasons similar to those suggested earlier in rejecting the mandatory/optional distinction between Title VII and Title VI, I suggest the answer should be no. However, whether there are any state or local proceedings which can currently be considered "administrative proceedings to enforce a claim under" Title VI is less clear.<sup>321</sup> Congress has created none. Nonetheless, if the agencies, through their own cooperative arrangements with the states, should embark on an agreement to share enforcement responsibilities in overlapping areas, and if such agreements are in furtherance of the policies behind the federal civil rights acts, then I perceive no reason to exclude the possibility of fee recovery under section 1988 for work done in connection with such proceedings.<sup>322</sup>

Some line drawing is inevitable and appropriate. For example, while allowing such fees might improve access, Congress should not confer jurisdiction on the courts to award fees to an attorney who never employed any administrative or judicial process in resolving a dispute.<sup>323</sup> But whatever lines Congress, the agencies, and the courts draw, they should draw them to recognize the civil rights enforcement agency for what it is: a less formal, potentially more expert and expeditious, congressionally endorsed alternative to our slow, overburdened, and expensive system of formal justice. Accordingly, attorneys' fees should be shifted in cases resolved in the administrative arena in a manner comparable to those resolved in a judicial forum.

### CONCLUSION

Congress passed civil rights legislation to eradicate discrimination and to provide effective redress for acts of discrimination. To help accomplish these goals, Congress created administrative enforcement agencies and encouraged them to employ informal processes in attempting to resolve disputes. In addition, Congress promulgated fee-shifting statutes such as sections 706(k) and 1988, so that those endeavoring to redress discrimination would have effective access to counsel. However, in its deliberations, Congress never focussed on whether such fee-shifting was to be available in cases successfully resolved dur-

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321. See *supra* note 311.

322. For just such reasons, I would neither make explicit reference to state and local administrative proceedings in an amended § 1988, nor limit its coverage to federal administrative proceedings. See *supra* note 311. Not every arrangement between the federal agency and the state agency will warrant a determination that the state proceedings should be treated as administrative proceedings pursuant to Title VI for purposes of awarding fees.

A number of years ago OCR entered into a Memorandum of Understanding with certain state agencies relating to compliance reviews conducted of vocational rehabilitation programs. Were any individual complaints to be resolved by the state or local agencies pursuant to such an arrangement, award of attorneys' fees might or might not be appropriate, depending on the relationship between the federal and the state proceedings, and whether the state proceedings were in furtherance of Title VI.

323. Regulations might provide that fees should only be awardable in cases in which a person has filed a complaint with the agency. See *Mertz v. Marsh*, 786 F.2d 1578, 1581 (11th Cir. 1986) (no fees awarded for federal employee Title VII claim resolved in prefiling grievance procedure), *cert. denied*, 479 U.S. 1008 (1987).

ing the administrative proceedings conducted by the agencies it created. By failing to allow the award of attorneys' fees in Title VI cases resolved in federal administrative proceedings, the Supreme Court has frustrated congressional purpose.

When the Court recognized in its 1980 *Carey* decision that fees should be available under Title VII for attorneys' services in Title VII proceedings at the state administrative and judicial level whether or not a subsequent court action was filed, it well served the goals of the 1964 Act. The Court's decision in *Carey* appropriately facilitated access to attorneys' services for vindication of valued rights through both formal and informal processes. By allowing the award of attorneys' fees for cases resolved administratively, the Court encouraged informal resolution of discrimination complaints without sacrificing effective access to counsel irrespective of the stage at which such proceedings were resolved.

The Court in *Crest* failed to think about the problem in a manner consistent with its analysis in *Carey* or with Congress' goals in creating the civil rights statutes. Had it thought about what Congress would have done had Congress thought about fees for cases resolved administratively, the Court would have concluded in *Crest* that section 1988 empowered a district court to award attorneys' fees to a plaintiff who had prevailed on a Title VI complaint filed with a federal agency charged with enforcing that statute.

Given the Court's failure, and limited hope that it will correct its own error, the task falls to Congress to amend sections 1988 and 706(k) to provide explicitly for fee-shifting in Title VI and Title VII cases resolved administratively. By doing so, Congress will ensure that both informal as well as formal avenues to redress discrimination are open to those aggrieved and that the uphill struggle to eradicate discrimination based on invidious characteristics such as race, sex, handicap, and religion, is not hindered further.



