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The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement

Marjorie A. Silver*

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Introduction

In the past decade there has been dramatic movement towards greater use of alternative dispute resolution (ADR)¹ devices. Modern federal civil rights statutes and regulations have always provided for enforcement alternatives to formal litigation.² In recent years federal agencies have shown greater interest in employ-

1. Throughout this Article, dispute resolution is distinguished from other law enforcement goals such as the eradication of discrimination. The term "dispute" refers to an identifiable controversy between two or more identifiable persons or institutions. A "problem," such as the problem of racial discrimination, may be more pervasive and elusive in scope and manifestations. For example, suppose a black employee is fired. The employer says the reason is the employee's pattern of frequent tardiness and absence. The employee says the reason is the employer's racial prejudice. Thus, they have a dispute between them that needs to be resolved. The dispute, however, may be a manifestation of a problem, the problem of pervasive, systemic racial discrimination. If the employee was fired because of racial discrimination, it is possible that other employees are receiving similar treatment due to racial discrimination. This problem also needs to be addressed.

2. This Article is structured around the dichotomy between formal and informal procedures. Although it is misleading to separate the cadre of available procedures in this way, as they form a continuum of "formalism" rather than separate, clearly delineated stages, one cannot fully appreciate what we mean by "alternative dispute procedures" without appreciating the processes to which they are an alternative. By formal procedures, I mean what we commonly consider our traditional dispute resolution techniques, specifically, our system of judicial litigation coupled with formal agency adjudicative procedures. ADR techniques or procedures, then, are all those procedures less formal than the traditional procedures used to resolve disputes. This Article focuses on mediation, negotiation during agency investigation, and negotiation after agency findings of discrimination.

ing more varied dispute resolution mechanisms than their organic statutes mandate or than what is set forth in the agencies' substantive regulations. The use of such alternatives raises numerous questions as to what procedures are appropriate in which circumstances. Do less confrontational, adversarial approaches improve the quantity and quality of civil rights compliance? Can more justice, more extensive compliance with the law's requirements, more relief for aggrieved complainants, be achieved through the use of mediation and other informal mechanisms than through the use of formal, postfindings negotiation? Are there some cases in which at least an administrative law judge and perhaps a federal court should be involved? And as to those cases best resolved through informal techniques, are there protections, either legislatively, judicially, or administratively created, that might better assure achievement of the desired goals?

This Article will analyze the various procedures used by the Office for Civil Rights of the United States Department of Education (OCR) and the Equal Employment Opportunity Commission (EEOC) to resolve discrimination complaints.³ By analyzing those procedures in terms of a number of articulated values, this Article will suggest approaches and procedures suitable to achieving the purposes behind these nondiscrimination schemes. Part I reviews historical and contemporary discrimination and the measures Congress has taken to address such discrimination over the last quarter of a century. Part I also surveys the ADR movement from the 1976 Pound Conference to the present day, discussing the government's role in promoting ADR and the Reagan Administration's views on the use of informal processes. Part II discusses the agency as an ADR device and describes and compares the procedures used by OCR and EEOC. Part III organizes for exploration the formal and informal procedures available to OCR and EEOC, ranging from litigation and formal administrative adjudication to mediation, negotiation during investigation, and conciliation after agency findings. Part IV identifies a set of desired values and goals for civil rights enforcement, including justice and statutory intent; procedural fairness; expedience, efficiency and cost-effectiveness; and finality and enforceability of the result. Part V suggests the kinds of cases that are likely to come before the agencies. Part VI explores whether, and the extent to which, the various formal and informal procedures can achieve the identified values. The Conclusion discusses recommendations for change and sug-

3. Some civil rights advocates argue that complaint processing is among the least efficient or productive approaches to eradicating discrimination, especially discrimination against members of the underclass who rarely take advantage of such administrative mechanisms. See C. Brown & J. Reid, *Twenty Years On: New Federal & State Roles To Achieve Equity in Education* 108-09 (Jan. 1987) [hereinafter *Brown Draft*] (unpublished manuscript) (copy on file at the *George Washington Law Review*). My intent is solely to examine the various methods used in the complaint resolution process; I take no position on whether complaint resolution is the best means of eradicating discrimination, in specific instances or in general.

gests steps to be taken by each of the three branches of government.

I. Discrimination and Dispute Resolution: Background

A. Discrimination: An Unsolved Problem

1. History of Modern Federal Civil Rights Legislation

The passage of the Civil Rights Act of 1964 (1964 Act)⁴ marked a turning point in this country's political commitment to the eradication of discrimination against women and minorities.⁵ One hundred years had passed since President Lincoln issued the Emancipation Proclamation.⁶ Ten years had passed since the Supreme Court's landmark decisions in *Brown v. Board of Education*⁷ declared that separate was not equal⁸ and that segregated schools should be eliminated "with all deliberate speed."⁹ As state, local, and private efforts proved grossly insufficient to achieve nondiscrimination, attention focused on federal leadership to help realize the promise of *Brown*.¹⁰ The civil rights community had grown impatient: marches, protests, and vigils were held nationwide in the hope of actualizing the promise of equality.¹¹ On May 2, 1963, the nation witnessed, on its television screens, Bull Connor descending with billy clubs, police dogs, and fire hoses on marchers led by Martin Luther King, Jr. in Birmingham, Alabama.¹² On June 19, 1963, President John F. Kennedy submitted proposed legislation to Congress¹³ with a plea to set aside partisan differences¹⁴ and to enact what would become the 1964 Act.¹⁵

The various components of the 1964 Act responded to a series of concerns, the nucleus of which was unequal treatment of persons, in critical aspects of their lives, based on immutable characteristics

4. Pub. L. No. 88-352, 78 Stat. 241.

5. As used in this Article, the term "minority" refers to racial and ethnic minorities. For a description of the social climate prior to and at the time of the Civil Rights Act of 1964, see C. WHALEN & B. WHALEN, *THE LONGEST DEBATE* (1985) [hereinafter WHALEN].

6. Proclamation No. 17, reprinted in 12 Stat. 1268 (1863).

7. 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

8. *Brown I*, 347 U.S. at 495.

9. *Brown II*, 349 U.S. at 301.

10. See WHALEN, *supra* note 5, at xv-xx.

11. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 18, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2393.

12. WHALEN, *supra* note 5, at xviii-xix.

13. H.R. 7152, 88th Cong., 1st Sess., 109 CONG. REC. 11,252 (1963); S. 1732, 88th Cong., 1st Sess., 109 CONG. REC. 11,081-82 (1963); S. 1731, 88th Cong., 1st Sess., 109 CONG. REC. 11,075-81 (1963).

14. See H.R. DOC. NO. 124, 88th Cong., 1st Sess. 14 (1963).

15. 42 U.S.C. §§ 2000a-2000h (1982).

such as the color of their skin.¹⁶ Although the scope of the 1964 Act reached more broadly, Congress responded primarily to the “glaring . . . discrimination against Negroes which exists throughout our Nation.”¹⁷ Title VI prohibited discrimination based on race, color, or national origin by recipients of federal funds.¹⁸ Even though Title VI applied to all recipients of federal funds,¹⁹ the primary impetus behind its promulgation was discrimination against minority schoolchildren in the nation’s public schools.²⁰

Although all federal agencies were obligated to enforce Title VI,²¹ Congress placed major responsibility for insuring compliance with the Department of Justice (DOJ)²² and the Department of Health, Education and Welfare (HEW).²³ In 1967 a separate Office for Civil Rights (OCR) was created within HEW in response to congressional pressure for centralized responsibility and more intensive initiatives to enforce Title VI.²⁴ Thirteen years later, when Congress split HEW into the Department of Health and Human Services and the Department of Education, the legislation

16. See *id.* § 2000a (Title II, Public Accommodations: prohibition against discrimination or segregation in places of public accommodation); *id.* § 2000b (Title III, Public Facilities: civil actions may be brought by the Attorney General; government funds and facilities will be provided); *id.* § 2000c (Title IV, Public Education: desegregation of public schools); *id.* § 2000d (Title VI, Federally Assisted Programs: prohibition against discrimination based on race, color, or national origin by recipients of federal financial assistance); *id.* § 2000e (Title VII, Equal Employment Opportunities: prohibition against discrimination in employment based on race, color, national origin, sex, or religion); *id.* § 2000f (Title VIII, Registration and Voting Statistics: survey for compilation of statistics to include breakdowns by race, color, and national origin); *id.* § 2000g (Title X, Community Relations Service: establishment of relations service); *id.* § 2000h (Title XI, Miscellaneous Provisions).

17. H.R. REP. NO. 914, *surpa* note 11, at 18, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2393.

18. Section 601 of the 1964 Act provides that “[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1982). However, Section 604 explicitly exempted discriminatory employment practices from the coverage of Title VI, unless the primary purpose of the federal assistance was to provide employment. *Id.* § 2000d-3.

19. See Brown Draft, *supra* note 3, at 1-2.

20. See G. ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* vii (1969). For a comprehensive analysis of the political and administrative struggle to implement Title VI, see generally *id.*

21. Section 602 provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1 (1982).

22. Section 602 further provides that “[n]o such rule, regulation, or order shall become effective unless and until approved by the President.” *Id.* The President delegated this authority to the Attorney General. Exec. Order No. 11,764, 3 C.F.R. 124 (1974) (revoked by Exec. Order No. 12,250, 3 C.F.R. 298, 300 (1981), *reprinted in* 42 U.S.C. § 2000d-1 app. at 23-24 (1982)).

23. See 1980 OCR FIRST ANN. REP. 7.

24. See G. ORFIELD, *supra* note 20, at 320-21, 328-32.

creating the new Department of Education²⁵ provided specifically for an Office for Civil Rights, headed by an Assistant Secretary for Civil Rights with responsibilities for reporting to Congress.²⁶ OCR's authority extended to investigating complaints of discrimination, conducting periodic compliance reviews of recipients of federal education funds, and attempting to secure voluntary compliance of violations it found.²⁷ If attempts to achieve voluntary compliance proved unsuccessful, OCR would either commence formal administrative enforcement proceedings to terminate federal assistance or refer the case to DOJ for appropriate federal litigation.²⁸

The eradication of invidious discrimination in employment was the thrust of Title VII, the coverage of which extended to all persons within the jurisdiction of the United States working for, or seeking employment with, private employers of more than fifteen employees.²⁹ Title VII sought to eliminate, through the utilization of formal and informal remedial procedures, discrimination based on "race, color, religion, sex, or national origin."³⁰

The administrative machinery to accomplish these goals was vested in the Equal Employment Opportunity Commission (EEOC), which had the power to investigate complaints of discrimination filed by an employee or initiated by a Commission member, and to attempt to eliminate the unlawful practice by "informal methods of conference, conciliation, and persuasion."³¹ Initially, however, EEOC lacked any authority to institute civil actions or otherwise to enforce its findings.³² If EEOC was unable

25. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (1979) (codified as amended at 20 U.S.C. §§ 3401-3510 (1982)).

26. 20 U.S.C. § 3413(a), (b) (1982).

27. 34 C.F.R. § 100.7 (1986).

28. *Id.* § 100.8 (1986).

29. 42 U.S.C. § 2000e(b) (1982). Originally Title VII applied to employers of more than 25 employees. The number of employees was changed to 15 by the 1972 amendments. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(b) (1982)). Title VII was originally geared to eradicating employment discrimination in the private sector. Section 11 of the 1972 amendments extended Title VII's applicability to government employees. *Id.*, 86 Stat. 111 (codified as amended at 42 U.S.C. § 2000e-16 (1982)).

30. 42 U.S.C. § 2000e-2 (1982); *see also* H.R. REP. NO. 914, 88th Cong., 2d Sess. 26, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2401. It is interesting to note that the word "sex" was not originally in the Title VII bill. The contemplation of women's equality in the work force was still a volatile subject, too volatile for Congress. Counting on this and hoping to quash sufficient support for passage, Senator Howard Smith, one of the bill's opponents, moved to add the word "sex" to Title VII's language. Senator Smith, however, was hoisted by his own petard when no violent reaction to the addition was forthcoming and his filibustering effort only increased the resolve of the bill's supporters. *See generally* WHALEN, *supra* note 5, at 115-16.

31. 42 U.S.C. § 2000e-5 (1982).

32. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 287, 310.

to resolve a finding of discrimination through informal processes, its only recourse was either to issue a notice of right to sue to the party who made the charge of discrimination, thereby authorizing that person to commence suit under Title VII, or to refer the matter to the Attorney General for appropriate federal litigation.³³ In 1972, amendments to Title VII transferred authority from the Attorney General to EEOC to initiate civil actions in federal court to enforce the provisions of Title VII if attempts at conciliation failed.³⁴

Although discrimination against women in the marketplace may not have been a critical focus in 1964,³⁵ it soon became apparent that such discrimination was widespread. Debate surrounding the Education Amendments of 1972³⁶ stressed the problem of sex discrimination in employment in educational institutions that had been left unaddressed by the 1964 Act.³⁷ Title IX³⁸ was introduced by Senator Birch E. Bayh in response to this concern³⁹ and enacted as part of the 1972 amendments. It parallels Title VI in that its provisions extend only to recipients of federal financial assistance.⁴⁰ By regulation, the procedures and practices used in the enforcement of Title VI are incorporated into Title IX.⁴¹ Unlike Title VI, Title IX applies only to educational programs and activities,⁴² but its coverage exceeds that of Title VI in that it extends to discriminatory employment practices.⁴³ The United States Commission on Civil Rights later observed that "congressional debate [during the 1972 hearings] reflected an awareness that opportunity for women was restricted throughout American education and, further, that denying women equal educational opportunity also

33. *Id.*

34. 42 U.S.C. §§ 2000e-5, 2000e-6 (1982). Although the 1972 amendments extended coverage to public employees, authority to pursue litigation against public employees remained with the Attorney General. *Id.* § 2000e-5(f).

35. *See supra* note 30.

36. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 236.

37. H.R. REP. NO. 554, 92d Cong., 2d Sess. 51-52, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2511-12.

38. 20 U.S.C. § 1681 (1982).

39. 118 CONG. REC. 5807 (1972); *see also* Cannon v. University of Chicago, 441 U.S. 667, 674 (1979).

40. 20 U.S.C. § 1681(a) (1982).

41. 34 C.F.R. § 106.71 (1986).

42. 20 U.S.C. § 1681(a) (1982).

43. For many years there was heated litigation on the issue of whether Title IX was intended to incorporate section 604's exclusion of employment discrimination. *See supra* note 18. This issue was laid to rest by the Supreme Court in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982). Although the gap in employment coverage may have been a strong motivation behind the adoption of Title IX, this gap was eliminated by the 1972 amendments to Title VII, which extended its provisions to public employees. *See supra* note 29. Thus, EEOC and OCR have concurrent jurisdiction; the issue of who shall investigate which cases has been resolved through executive order and interagency understandings between EEOC and OCR. *See* Exec. Order No. 12,106, 3 C.F.R. 263 (1979); Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* 5 U.S.C. app. at 1155 (1982), *and in* 92 Stat. 3781 (1978); EEOC Compl. Man. (CCH) ¶ 1930 (field notes issued Jan. 3, 1986 and Mar. 3, 1986).

denies them equal opportunity in employment."⁴⁴

One year later Congress responded to the concerns of another previously disadvantaged minority group, the disabled. The Rehabilitation Act of 1973⁴⁵ expanded employment opportunities for the handicapped. Section 504, modeled after Title VI and Title IX, provided that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ."⁴⁶ In 1978, to clarify any doubt, Congress explicitly provided that the "remedies, procedures, and rights set forth in Title VI" were incorporated into Section 504 of the Rehabilitation Act.⁴⁷

The Age Discrimination Act of 1975⁴⁸ extended similar, though more limited, protection against discrimination based on age in federally funded programs and activities.⁴⁹ Unlike Title VI, Title IX, and Section 504, however, the Age Discrimination Act refers specifically to "conciliation" in providing that each funding agency is to publish appropriate regulations providing for "investigative, conciliation, and enforcement procedures."⁵⁰

44. U.S. COMM'N ON CIVIL RIGHTS, ENFORCING TITLE IX 1 (1980) [hereinafter ENFORCING TITLE IX].

45. 29 U.S.C. §§ 701-796 (1982).

46. *Id.* § 794.

47. *Id.* § 794(a)(2). As with Title IX, challenges proliferated as to whether Section 504 extended to discrimination against the handicapped in employment; the argument was that the 1978 Amendment, *id.*, intended to incorporate the Section 604 employment exclusion of Title VI, 42 U.S.C. § 2000d-3 (1982). Many of those challenges were successful. See, e.g., *United States v. Cabrini Medical Center*, 639 F.2d 908, 910 (2d Cir. 1981). Again, as with Title IX, the Supreme Court rejected this limitation in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632-33 (1984), finding it completely inconsistent with congressional intent to increase employment opportunities for the handicapped in enacting the Rehabilitation Act of 1973. *But see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) (stating that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the states).

48. 42 U.S.C. §§ 6101-6107 (1982).

49. For example, the Act excepts from its coverage any practice that "reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity," and does not apply to "any program or activity established under authority of any law which (A) provides any benefits or assistance to persons based upon the age of such persons; or (B) establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms." *Id.* § 6103(b)(1)(A), (b)(2).

50. *Id.* § 6103(a)(4). None of these civil rights statutes or provisions was self-implementing. They required interpretation and development through the promulgation of substantive rules and regulations to give particular application and force to their intent. The process of enacting substantive regulations was generally a slow one. The groups that had pressured Congress to enact the laws then had to pressure the agencies to give flesh to the congressional enactments. HEW's Title VI regulations were published in 1964, 29 Fed. Reg. 16,298 (1964); Title IX regulations in 1975, 40 Fed. Reg. 24,128 (1975); Section 504 regulations in 1977, 42 Fed. Reg. 22,676 (1977); and the general Age Discrimination Act regulations in 1979, 44 Fed. Reg. 33,768

Thus, by 1979 a comprehensive set of statutes and regulations was in place that prohibited discrimination based on race, national origin, sex, handicap, and age in programs and activities receiving federal financial assistance.⁵¹ In 1979 the President transferred responsibility for enforcing the Age Discrimination in Employment Act (ADEA)⁵² and the Equal Pay Act (EPA)⁵³ to EEOC from the Department of Labor.⁵⁴ Since 1979 there have been no significant amendments to these statutes and regulations.⁵⁵

2. *Discrimination Today*

One year after the passage of the Civil Rights Act of 1964, President Lyndon Johnson addressed an audience at Howard University about what he hoped the Act might achieve:

[I]t is not enough just to open the gates of opportunity. All of our citizens must have the ability to walk through those gates. This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity — not just legal equity but human ability — not just equality as a right and a theory, but equality as a fact and as a result.⁵⁶

The position that discrimination is no longer the systemic problem it once was is not without its following,⁵⁷ and movements to eliminate certain institutions and requirements aimed at improv-

(1979). Many funding agencies still have not published final regulations. See L. SINGER & R. SCHECHTER, *MEDIATING CIVIL RIGHTS: THE AGE DISCRIMINATION ACT* 8 (1986) (report to the National Institute for Dispute Resolution by the Center for Community Justice).

51. Unless otherwise indicated, references to Title VI in this Article should be considered as referring as well to Title IX, Section 504, and the Age Discrimination Act. The procedures used in implementing these nondiscrimination statutes are identical, except for the Age Discrimination Act, discussed *infra* note 434.

52. 29 U.S.C. § 621 (1982).

53. *Id.* § 206.

54. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), reprinted in 5 U.S.C. app. at 1155 (1982), and in 92 Stat. 3781 (1978). Because the procedures used under these statutes are not identical to Title VII procedures, references to Title VII should not be deemed to refer to these statutes unless otherwise indicated. Certain EEOC statistics discussed in this Article aggregate complaints received under the various statutes.

55. A bill to extend Title VII's coverage to include discrimination against the handicapped was introduced in 1979, but eventually died. S. 446, 96th Cong., 1st Sess., 125 CONG. REC. 3053-55 (1979).

The creation of the Department of Education in 1980 did not affect the substantive statutory obligations of recipients of educational funds. Any significant changes have been the products of administrative policy and judicial decisions. *E.g.*, *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Grove City College v. Bell*, 465 U.S. 555 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

56. Address by President Lyndon B. Johnson, Howard University (June 4, 1965), reprinted in J. FRANKLIN & I. STARR, *THE NEGRO IN TWENTIETH CENTURY AMERICA* 226 (1967).

57. Note, for example, the Reagan Administration's opposition to racial preference in private sector employment. Taylor, *Mostly Unsuccessful Reagan Attack on Race Quotas Goes to High Court*, N.Y. Times, Aug. 6, 1985, at B7, col. 1; see also Address by U.S. Attorney General Edwin Meese, Dickinson College (Sept. 17, 1985), quoted in Shenon, *Meese Sees Racism in Hiring Goals*, N.Y. Times, Sept. 18, 1985, at A16, col. 4 ("The idea that you can use discrimination in the form of racially preferential quotas, goals and set asides to remedy the lingering social effects of past discrimination makes no sense in principle; in practice, it is nothing short of a legal, moral and constitutional tragedy.").

ing the situation of previously "protected" groups are widespread;⁵⁸ yet there is ample proof that discrimination based on immutable characteristics is still a terribly serious problem in this country.⁵⁹

There is no question that the 1964 Act and its progeny have been responsible for major improvements in the plight of women, minorities, and the handicapped in this nation.⁶⁰ But the job begun in 1964 has not been finished. The problems that remain are generally more intractable and difficult to solve, partially because they are less overt⁶¹ and partially because they are integrally re-

58. There is currently substantial debate over whether Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) (as amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970)), which requires federal contractors to take affirmative steps to hire and promote women and minorities who are underrepresented in the workforce, should be repealed or amended substantially. See *The U.S. Constitution Was Never Color-Blind*, N.Y. Times, Nov. 27, 1985, at A22, col. 3 (letter to the editor from Benjamin Hooks, Executive Director, NAACP, criticizing proposal to amend Exec. Order No. 11,246). The Chairperson of the U.S. Commission on Civil Rights, Clarence M. Pendleton, Jr., said that he might favor abolition of the Commission when it comes up for congressional reauthorization in 1989. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS UPDATE 8 (July-Sept. 1985) ("[Chairperson Pendleton] said that he questioned whether [the Commission] would have any work left to do by 1989 . . .").

59. See, e.g., Wilkerson, *Campus Race Incidents Disquiet U. of Michigan*, N.Y. Times, Mar. 9, 1987, at A12, col. 1; *Face Facts About Civil Rights*, N.Y. Times, Oct. 8, 1986, at A34, col. 1.

60. For a discussion of the progress made in education, see Brown Draft, *supra* note 3, at 2-3. As to progress in employment, see Blumrosen, *Employment Opportunity After a Reagan Victory in 1984*, 18 SUFFOLK U.L. REV. 581, 583 (1984); Elder, *Disabled View Their Gains*, N.Y. Times, May 21, 1986, at C14, col. 4.

61. *A Defense of the Reagan Administration's Civil Rights Policies*, NEW PERSP., Summer 1984, at 34, 37 (interview with William Bradford Reynolds, United States Assistant Attorney General for Civil Rights); Address by Judge Bruce Wright, New York Supreme Court, First Judicial District, at New York Law School (Apr. 20, 1985) (stating that "what was once blatant has now become flagrantly subtle"). Although Judge Wright's remarks related primarily to ongoing *intentional* discrimination, other forms of discrimination of a more unconscious, though no less troubling, nature persist. See generally, Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing unconscious racial motivation as a product of cultural experience and therefore neither intentional nor unintentional). For example, many so-called objective tests used for admissions to or placement in educational institutions, hiring, and promotion, have been shown to be culturally or racially biased, thus contributing to grossly disproportionate minority passing scores. See *Larry P. v. Riles*, 495 F. Supp. 926, 952 (N.D. Cal. 1979) (stating that "[w]hile many think of the I.Q. as an objective measure of innate, fixed intelligence, the testimony of the experts overwhelmingly demonstrated that this conception of I.Q. is erroneous"), *modified*, 793 F.2d 969 (9th Cir. 1984); Smothers, *Coalition Cites 'Cultural Bias' in Police Tests*, N.Y. Times, June 13, 1986, at B3, col. 6. Although there may be no intent to make such tests biased, test writers tend to be white middle-class individuals who may unknowingly incorporate into the tests their own biases and preconceptions. U.S. COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE 40 (1969).

Similarly, women and minorities fail to gain tenure at colleges and universities at the same rate as their male counterparts. See *Langland v. Vanderbilt Univ.*, 589 F. Supp. 995, 1004 (M.D. Tenn. 1984), *aff'd*, 772 F.2d 907 (6th Cir. 1985). Again, there may be no conscious, overt intent to exclude them; rather, tenure committees tend to

lated to economic and class problems.⁶² Major discrepancies remain in the achievements of minorities and women as compared to those of white males.⁶³ Minority enrollment in institutions of higher education is on the decline.⁶⁴ The gap between the earning power of women and that of men, which was nearly as low in 1977 as in 1939,⁶⁵ has not been much further ameliorated⁶⁶ and is expected to improve only slowly for years to come.⁶⁷ The debate over Title VII and comparable worth may be viewed as an attempt by its proponents to use nondiscrimination statutes to solve economic problems undoubtedly tied to discrimination against wo-

be composed of primarily white males who are affected unconsciously by biases against those who are different, or in favor of those who are similar. Cf. Lawrence, *supra*, at 343 (stating that "[e]ven the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influenced [an employer's] decision"); Johnson, *New York Judge Faces Dual Challenge*, N.Y. Times, June 8, 1986, § 1, at 51, col. 1 (comment of Judge Kathryn A. McDonald that much of the sex bias in New York City's Family Court is unconscious); Pear, *Court Cases Reveal New Inequalities in Women's Pay*, N.Y. Times, Aug. 21, 1985, at C1, col. 1 ("Federal judges and other Government officials report that employers have found new, more subtle ways to justify paying women less than men."); *Study of Black Females Cites Role of Praise*, N.Y. Times, June 25, 1985, at C10, col. 3 (discussing a report concluding that teachers unconsciously fail to encourage black females early in elementary school to become achievers).

Recently, however, the incidence of eruption of violent manifestations of racial animosity has increased greatly. See, e.g., Freedman, *New York Race Tension is Rising Despite Gains*, N.Y. Times, Mar. 29, 1987, at 1, col. 1, 28, col. 1 ("Blacks say discrimination has not only continued but also in some ways has become more overt in the recent past.").

62. Brown Draft, *supra* note 3, at 3-4 (stating that children of low-income minority families are substantially overrepresented in dropout rates, in not attending college, and in being misclassified as mentally or emotionally disabled); see also Gamarekian, *40 Years Fighting for Rights*, N.Y. Times, Oct. 23, 1985, at A20, col. 6.

63. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), Justice Brennan stated that the gap between the number of minorities and the number of whites in medicine in 1970 was wider than it had been in 1950; the percentage of blacks in the country increased from 10% to 11.1% while the number of blacks in medicine remained frozen at 2.2%. *Id.* at 369-70 (Brennan, J., concurring in part and dissenting in part). Justice Marshall, in a separate opinion added: "The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro." *Id.* at 395 (Marshall, J., concurring in part and dissenting in part); see also *id.* at 395-96 (giving general statistics on discrepancies between blacks and whites). For other evidence of such discrepancies, see Blinkin, *Brown's Blacks: Racism and Resentment on Campus*, NEW REPUBLIC, July 15 & 22, 1985, at 17, 18 ("The number of blacks receiving master's degrees has dropped from 20,345 in 1976 to 17,133 in 1981, a trend that is beginning to affect the number of black Ph.D.s."). See generally Clauss, *Keynote Address, Colloquium: Employment Discrimination in the 1980's*, 13 N.Y.U. REV. L. & SOC. CHANGE 225 (1984-1985).

64. Fiske, *Minority Enrollment in Colleges Is Declining*, N.Y. Times, Oct. 27, 1985, at A1, col. 3 (stating that enrollment of blacks in four-year institutions rose from 3% in 1972 to 10.3% in 1976, but leveled off to 9.6% by 1982).

65. ENFORCING TITLE IX, *supra* note 44, at 1-2.

66. See generally 1 U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S: A CONSULTATION OF THE U.S. COMMISSION ON CIVIL RIGHTS (1984) (discussing the earnings gap between women and men); O'Hara, *An Overview of the Theory of Comparable Worth*, 22 Educ. L. Rep. (West) 1073 (1985) (stating that women's salaries are now 64% of men's).

67. Marton, *Women's Near-Liberation*, N.Y. Times, June 12, 1985, at A27, col. 4 ("[B]y the year 2000, [women] will still lag behind, and . . . will earn only 74 percent of men's income.").

men in the job market.⁶⁸ Although the 1964 Act and its progeny may not be capable of solving all of the remaining inequities, the gains of the past twenty years could vanish quickly without a strong federal presence insisting upon equal treatment of women and minorities.⁶⁹

There has been no serious suggestion that the 1964 Act has become obsolete and should be repealed. Continued commitment to the goals of that Act and the nondiscrimination obligations it has parented, however, require more than passive acceptance. It requires continued attention to the adequacy of the enforcement agencies' resources and to the procedures used by the agencies in fulfilling their statutory mandates.⁷⁰ This Article focuses on those procedures, specifically on the less formal procedures used in the enforcement of Titles VI and VII.

B. *The Alternative Dispute Resolution (ADR) Movement*

1. *General Trend Towards ADR*

The past decade has witnessed a massive movement towards the use of ADR procedures throughout our legal system.⁷¹ Spurred by inquiries such as the Pound Conference,⁷² lawyers, jurists, and

68. See, e.g., *American Fed'n of State, County, and Mun. Employees v. Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985) (holding that reliance on a market-based system in which jobs occupied primarily by women are compensated at a lower rate than dissimilar jobs of comparable worth does not constitute a violation of Title VII).

69. See *Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations for Fiscal Year 1985: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 98th Cong., 1st Sess. 402 (1984) (statement of EEOC Chairperson Clarence Thomas) ("It is clear . . . that the need for strong commitment to the enforcement of equal employment rights is as compelling now as it ever was. To a certain extent, it is even more compelling today as proving discrimination has become more difficult and the issues have become more complex.").

70. See HOUSE COMM. ON GOVERNMENTAL OPERATIONS, INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE OFFICE FOR CIVIL RIGHTS AT THE DEPARTMENT OF EDUCATION, H.R. REP. NO. 458, 99th Cong., 1st Sess. 30-31 (1985). The Committee found that despite insufficient resources and understaffing, which caused the agency to miss court-imposed deadlines, see *infra* text accompanying notes 113-18, OCR had failed to spend more than 7% of its appropriations (\$20,152 million out of \$272,064 million) between fiscal years 1980 and 1985. *Id.*; see also *Investigation of Civil Rights Enforcement By the Department of Education: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 198 (1985) [hereinafter 1985 *Hearings on OCR*] (statement of Rep. Conyers) (stating that enforcement may be the biggest problem encountered with civil rights since 1964).

71. See NATIONAL INST. FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION: REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY 1-2 (Oct. 1983) (prepared for the United States Department of Justice, Office of Legal Policy, Federal Justice Research Program).

72. 70 F.R.D. 79 (1976). Chief Justice Warren Burger convened the Pound Conference to commemorate the 70th anniversary of Roscoe Pound's famous address, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A. REP. 395 (1906). In the conclusion to that address, Pound stated:

scholars turned their attention towards what was perceived as an overburdened court system, unable to respond to the legal disputes of the less wealthy in our society. Many perceived that the problems had become exacerbated since the 1906 speech by Dean Roscoe Pound, in which he called for new solutions to our overburdened, inefficient system of justice.⁷³ Solutions were sought that would provide accessible justice to those who could not afford the cost of litigation.⁷⁴ In addition to unclogging the courts⁷⁵ and affording remedies to those who otherwise had none, many believed ADR procedures would increase the autonomy of the disputants by placing control over the dispute in their hands and deemphasizing the importance of both governmental control and government-imposed norms.⁷⁶ Putative reformers focused much energy and attention on ensuring that the alternatives that were developed would achieve the goals of justice and fairness, so that whatever change they effectuated would be constructive.⁷⁷

[O]ur system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court . . .

Id. at 408-09.

The purpose of the Conference was to examine whether Pound's concerns had been met and, if not, to determine what remained to be done. The Conference recommended that there be further exploration of alternatives to traditional dispute resolution. See Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 280 (1978). It based this recommendation on perceptions that courts were so overburdened that they could no longer give requisite attention to individual cases and should be free to address matters of greater import, that other procedures might afford greater expertise in given substantive areas, and that alternatives would be less expensive and less time consuming. *Id.* at 280-81. A Pound Conference Follow-Up Task Force was formed, which recommended the increased use of mechanisms already in place (small claims courts, arbitration, and administrative hearings) and the creation of one new approach, neighborhood justice centers. *Id.* at 281. For a detailed description of neighborhood justice centers, see D. MCGILLIS & J. MULLEN, *NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS* (1977).

73. See, e.g., Levi, *The Business of Courts: A Summary and a Sense of Perspective*, 70 F.R.D. 212 (1976); see also Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 MO. J. DISPUTE RESOLUTION 9.

74. See *Dispute Resolution*, 88 YALE L.J. 905, 906 (1979). Legal services attorneys saw the potential for freeing up legal services resources for litigation with wider potential impact. See Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569, 569 (1979). Ms. Singer observed that although there was little supporting data, it appeared that low-income disputants, whose claims otherwise would not have gone to court, were taking advantage of many alternative forums and procedures. *Id.* at 573. She also observed that alternative mechanisms, such as arbitration, mediation, and small claims courts, were more expedient than either judicial or formal administrative proceedings. *Id.* at 572.

75. See *Chief Judge Urges Greater Use of Arbitration*, N.Y. Times, Aug. 23, 1985, at A21, col. 1.

76. *Dispute Resolution*, *supra* note 74, at 907-08.

77. Chief Justice Warren Burger stressed this in his keynote address to the Pound Conference by stating that "[t]here are [those], however, with a passion for reform, which can be a valuable asset, but like all passions it needs to be regulated and channeled if we are to avoid hasty and ill-considered change." Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 83, 89 (1976). The Chief Justice also stated that "[e]fficiency — like the trial itself — is not an end in itself. It has as

As the movement towards ADR has expanded in the private sector, many have criticized federal, state, and local government agencies as being overly laden with highly bureaucratized and time-consuming procedures,⁷⁸ and they have encouraged attempts at reform and experiments using alternative procedures.⁷⁹ The Ford Foundation, for example, has funded experiments in mediation of environmental disputes.⁸⁰ Congress has included provisions for mandatory informal dispute settlement mechanisms in a number of recent enactments.⁸¹ The agencies themselves, without congressional compulsion, have perceived the need to reduce backlogs, save resources, and avoid litigation⁸² through resort to less formal procedures.⁸³

its objective the very purpose of the whole system — *to do justice*. Inefficiency drains the value of even a just result either by delay or excessive cost, or both." *Id.* at 93.

Other participants in the Pound Conference echoed these concerns. Professor Frank Sander suggested that an issue that complicated dispute resolution among individuals and organizations was "how to find a way to equalize the vast disparity in expertise and power between the individual and the organization, so that any dispute resolution mechanism that is established will have the confidence and the trust of the affected individuals." F. SANDER, AMERICAN BAR ASSOCIATION REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION, MAY 1977 at 17 (1978).

Responding to these concerns, Congress passed the Dispute Resolution Act of 1980, 28 U.S.C. app. §§ 1-10 (1982), to provide financial incentives to the states and the private sector to explore innovative approaches to dispute resolution. Congress, however, has never funded this statute and therefore its passage ultimately was an empty gesture. *See* J. AUERBACH, JUSTICE WITHOUT LAW? 136-37 (1983).

78. *See, e.g.*, Harter, *Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1394 (1983-1984) (stating that agencies have become slow, bureaucratized, and part of the problem that they were designed to eliminate); Fuerst & Petty, *Agencies Can Drown in Due Process*, N.Y. Times, June 30, 1985, at 25, col. 2 (positing that the due process revolution has hurt those it was designed to help).

79. *See* Singer, *supra* note 74, at 571; *see also* Harter, *supra* note 78, at 1403; *Local Conciliation Plans Praised in Study by U.S.*, N.Y. Times, Dec. 29, 1986, at A17, col. 5.

80. *See, e.g.*, A. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION (1983).

81. For example, the Magnuson-Moss Warranty Act requires the FTC to promulgate rules establishing procedures for informal dispute settlement, which must be exhausted prior to any litigation under the Act. 15 U.S.C. § 2310 (1982). Other such statutes are the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D) (1982) (arbitration), the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1401(a) (1982) (arbitration), and the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9612 (1982) (claim settlement procedures). *See* P. HARTER, POINTS ON A CONTINUUM: DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS 31 (1986) (report to the Administrative Conference of the United States).

82. Professor Stewart claims that regulatory disputes settle less frequently once in litigation because of factors such as the complexity of the matters involved, the amount in controversy, and the general unpredictability of the outcome. Thus, he perceives the need for alternative solutions as acute. Stewart, *The Limits of Administrative Law*, in THE COURTS: SEPARATION OF POWERS 82 (B. Goulet ed. 1983).

83. *See, e.g.*, 18 C.F.R. §§ 385.601-604 (1986) (Federal Energy Regulatory Commission rules encouraging offers of settlement). The Supreme Court has held that the agencies, and not the reviewing courts, are to determine what procedures are appropriate for what purposes, subject to the limited constraints of explicit congressional

2. *The Reagan Administration's Commitment to Nonconfrontation*

The use of less formal dispute resolution mechanisms has received substantial impetus from the current administration.⁸⁴ Along with improving the efficiency and reducing the expense of government, the Reagan Administration professes commitment to a nonconfrontational approach to regulation and dispute resolution.⁸⁵ Whether this takes the form of negotiated agency rulemaking⁸⁶ or informally resolved discrimination complaints,⁸⁷ the proffered rationale is that less confrontation will mean an amelioration of the so-called heavy hand of government and greater acceptance by the electorate of ultimate results.⁸⁸

3. *Critical Concerns*

Not surprisingly, the movement towards greater and more extensive use of ADR procedures has not gone uncriticized. Criticism ranges from Professor Owen Fiss's virtually unqualified

dictates and due process. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-24, 542-45 (1978).

For a description of a number of informal approaches used at the federal level, see Camper, *Quiet Victories on the Mediation Front*, 15 PERSP.: CIV. RTS. Q. 36 (1983).

84. See, e.g., Molotsky, *It Sometimes Seems Like the Federal Tirade Commission*, N.Y. Times, June 3, 1984, § 4, at E5, col. 1. According to Molotsky:

Mr. Miller [then-Chairman of the F.T.C.] said the F.T.C. is doing a better job because it is avoiding unnecessary litigation. "You spread your resources farther by negotiating," he said. "Not everything has to go to court." The problem now, Mr. Pertschuk [former Chairman of the F.T.C.] said, is that too little goes to court. With conservatives in ascendance, he said, "We have become a debating society instead of a law enforcement agency."

Id.

85. See Smith, *supra* note 73, at 9. The former United States Attorney General perceives litigation as causing unnecessary antagonism between government and private parties, resulting in a public view of "the government as an adversary, rather than a servant of the public interest." *Id.* at 11. He concludes with a plea for the development of incentives and procedures to encourage increased use of ADR throughout the federal government. *Id.* at 21-23; see also Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-June 1981, at 82 (suggesting that business and government should limit the role of intermediaries in the regulatory process); Perl, *Corporate Experience Can Be Hazardous to Your Health*, Wash. Post, Sept. 8, 1986, at 33, col. 1 (national weekly ed.) (noting OSHA director's support to the Reagan Administration's commitment to nonconfrontational approaches).

In spite of its encouragement of informal dispute resolution, the Reagan Administration has nonetheless issued guidelines for executive departments and agencies that restrict their discretion to enter into settlement agreements or consent decrees, particularly when the government is a defendant. See Department of Justice Guidelines, 54 U.S.L.W. 2492 (Apr. 1, 1986).

86. See Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985).

87. See, e.g., 1981 U.S. DEP'T OF EDUC. ANN. REP. 77 (stating that "in accordance with administration objectives" voluntary compliance was achieved in 98% of the violations found).

88. See Smith, *supra* note 73, at 10-11. But see Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668-69 (1986) ("It has also been suggested that some of those people who promote ADR as a means to serve the poor and oppressed in society are in fact principally motivated by a desire to limit the work of the courts in areas affecting minority interests, civil rights, and civil liberties.").

disapproval of alternatives to litigation⁸⁹ to the more cautious concerns of those who fear that such alternatives will be applied to certain controversies and problems that require a judicial airing.⁹⁰

89. Professor Fiss has stated:

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is capitulation to the conditions of mass society and should be neither encouraged nor praised.

Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Fiss is especially concerned with the inequality of bargaining power that frequently exists between parties to a negotiation, where the financial resources of an institutional litigant far exceed those of the putative plaintiff. As to the argument that inequality of resources affects the outcome of litigated judgments as well, Fiss responds:

Of course, imbalances of power can distort judgment as well: Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory. We count, however, on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities. He can, for example, supplement the parties' presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici. These measures are likely to make only a small contribution toward moderating the influence of distributional inequalities, but should not be ignored for that reason. Not even these small steps are possible with settlement. There is, moreover, a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities. Judgment aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.

Id. at 1077-78 (footnote omitted); see also Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1672 (1985) (quoting McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665 n.33 (citing a discussion McThenia and Shaffer had with Professor Milner Ball)) (stating that ADR is "just another assault upon the activist state, 'another form of the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of community norms'").

Professor Anthony Amsterdam also has criticized the use of ADR:

[Professor Auerbach] notes what many of us think who have closely watched the past decade's flowering of alternative dispute resolution mechanisms advocated for, but not by, the poor and underprivileged: namely, that the fertilizers of this flowering have been a hostile backlash against the preceding decade's judicial development of legal rights of the disadvantaged and a desire to deal with court-congestion problems by dumping poor folks' controversies back in the ghetto where they came from.

A. Amsterdam, Remarks at the 44th Judicial Conference of the D.C. Circuit (May 21-22, 1984), reprinted in 105 F.R.D. 280, 291 (1984) (referring to J. AUERBACH, JUSTICE WITHOUT LAW? (1983)); see also Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 119, 159 (R. Abel ed. 1982); Sarat, *Informalism, Delegalization, and the Future of the American Legal Profession* (Book Review), 35 STAN. L. REV. 1217, 1227 (1983) (reviewing R. ABEL, THE POLITICS OF INFORMAL JUSTICE (1982)).

90. See, e.g., Howard, *Five Men in a Bar: Judicial Review in a Democratic Soci-*

Additionally, when the government is a party, a special set of concerns arises.⁹¹

Unfortunately, despite numerous experiments during the past several years, a dearth of empirical evaluation exists on the appropriate procedures for resolving disputes, particularly with regard to the use of alternative procedures by governmental agencies.⁹² Even among the most staunch advocates of ADR techniques, there is general agreement that some alternatives are more appropriate than others for resolving particular types of disputes and that more study is needed to make such determinations.⁹³ Even in the absence of empirical studies, however, if we can identify our desired goals, we can begin to evaluate the appropriateness of various procedures in reaching those goals.

It is against this backdrop of reform and criticism that this Article analyzes the increasing use of less formal procedures in federal civil rights enforcement by OCR and by EEOC. As an OCR attorney for many years, I observed the movement towards less formal approaches with cautious optimism and qualified approval. While the mission of the agency had always been one of achieving non-litigated solutions to civil rights compliance problems by educational recipients of federal financial assistance,⁹⁴ recent years have witnessed a deformatization of already relatively informal procedures.⁹⁵

ety, in *THE COURTS: SEPARATION OF POWERS* 11 (B. Goulet ed. 1983) (keynote address to the 1983 Chief Justice Earl Warren Conference on Advocacy); Edwards, *supra* note 88, at 676; *Dispute Resolution*, *supra* note 74, at 908-09 (1979).

91. For example, in the area of environmental mediation, some critics have articulated concerns that private agendas supplant the public interest. See, e.g., Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453, 1466 (1983). In the civil rights area, others doubt whether there can be successful mediation against a backdrop of weak enforcement. See Camper, *supra* note 83, at 39 (stating that the selective enforcement of civil rights laws by the Reagan Administration "encourages skepticism about the value of mediation in such a hostile climate").

92. See, e.g., NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 25; PROJECT ON EQUAL EDUC. RIGHTS (PEER), NOW LEGAL DEFENSE AND EDUCATION FUND & SRI INTERNATIONAL, *THE SETTLEMENT SOLUTION: ASSESSING MEDIATION AS A TOOL IN THE ENFORCEMENT OF CIVIL RIGHTS* 120 (1980) [hereinafter PEER STUDY] ("No agency we visited had attempted to make a rigorous comparison of the benefits obtained on similar cases handled in different ways . . ."); see also L. SINGER & R. SCHECHTER, *supra* note 50, at 2-3 (studying the use of mediation by the Federal Mediation and Conciliation Service and concluding that due to problems with available information, the results were inconclusive). Although the study raises questions regarding inequality of bargaining power, see *infra* text accompanying notes 371-72, the suitability of using mediation in cases raising problems of systemic discrimination, see *infra* text accompanying notes 278 & 313, and whether justice, or achieving the goals of the statute, is a goal of mediation, see *infra* text accompanying notes 354-92, it does not attempt to answer them. Furthermore, the authors failed to explore the quality of the settlements reached, as well as what likely resolutions would have occurred had the responsible agency conducted an investigation and made findings of violation.

93. See, e.g., Harter, *supra* note 78, at 1402.

94. See, e.g., 42 U.S.C. § 2000d-1 (1982); 34 C.F.R. § 100.7(d) (1986).

95. See, e.g., 1981-1982 OCR SECOND ANN. REP. 2; see also *infra* text accompanying notes 124-38, 152-56.

II. The Agencies

A. Agencies as ADR Devices

One may view the creation of administrative agencies for resolving disputes as a forerunner of the ADR movement.⁹⁶ Agencies are, indeed, an alternative to the frequently slow, overburdened, and nonexpert judicial system. Even the formal adjudicatory procedures provided by the Administrative Procedure Act⁹⁷ are somewhat less formal than those used in federal court. If agencies themselves can be viewed as alternatives to traditional dispute resolution mechanisms, then what are the implications of having alternatives to the alternatives? Might dispute resolution become so distanced from ultimate judicial authority that it will lack the respect of the parties necessary for success?

Although formal adjudication at the agency level may be less formal than traditional judicial process, for purposes of analyzing the movement towards use of informal procedures in civil rights enforcement, formal agency adjudication is not significantly different than litigation.⁹⁸ But among the other procedural alternatives, the range of formality or informality is substantial.⁹⁹

Given the burgeoning of administrative agencies over the past fifty years,¹⁰⁰ the increasing formalization of agency adjudicatory procedures,¹⁰¹ and the magnitude of the workload of many agencies,¹⁰² the agencies themselves, frequently under congressional mandate or encouragement,¹⁰³ searched for alternatives to the formal administrative hearing process for resolution of controversies.¹⁰⁴ The original (and still extant) mandate of Title VI of the 1964 Act requires enforcement agencies, upon discovery of non-compliance with the law, to attempt to achieve voluntary compliance prior to proceeding, through formal procedures, to

96. See, e.g., Harter, *supra* note 78, at 1393-95; Smith, *supra* note 73, at 16.

97. 5 U.S.C. §§ 554, 556 & 557 (1982).

98. See *infra* text accompanying notes 186-205.

99. See Sarat, *supra* note 89, at 1221.

100. See, e.g., S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 7-8, 29-30 (2d ed. 1985) (outlining the growth of government agencies in a variety of areas); K. DAVIS, ADMINISTRATIVE LAW TEXT 8 (3d ed. 1972) (acknowledging the rapid development of administrative agencies during the New Deal era).

101. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) (outlining minimum procedural requirements to be followed prior to termination of governmental benefits); see also Fuerst & Petty, *Agencies Can Drown in 'Due Process'*, N.Y. Times, June 29, 1985, at 25, col. 2 (arguing that the use of informal proceedings would increase agencies' effectiveness without adversely affecting the disposition of a case).

102. See, e.g., S. BREYER & R. STEWART, *supra* note 100, at 1-2 (referring to the increasing responsibilities of administrative agencies).

103. See *supra* text accompanying notes 81-83.

104. See *supra* notes 84-85 and accompanying text.

termination of federal financial assistance.¹⁰⁵ Thus the most important civil rights law ever passed by Congress embraced informal resolution of discrimination problems.¹⁰⁶ It is under this mandate that OCR has been operating since its inception.

Similarly, EEOC, under its original mandate, had the power *only* to investigate and attempt to conciliate compliance problems.¹⁰⁷ It not only lacks any formal administrative hearing mechanism for enforcement, or authority to issue judicially enforceable cease and desist orders,¹⁰⁸ but until the amendments made to the 1964 Act in 1972,¹⁰⁹ it lacked the power to bring suit itself.¹¹⁰ Thus, EEOC was conceived as an agency entrusted with a mission to achieve, if possible, informal resolution of discrimination problems.¹¹¹

Nonetheless, the lack of formality built into these statutory schemes by Congress does not necessarily mean that the more informal the mechanisms that are used, the better. This Article will explore what limitations on informality might be appropriate in the context of federal civil rights enforcement by OCR and EEOC.¹¹²

105. 42 U.S.C. § 2000d-1 (1982).

106. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 364 n.38 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

107. See H.R. REP. NO. 238, 92d Cong., 1st Sess. 17, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2182.

108. See *infra* note 151 and accompanying text.

109. See *supra* notes 32-34 and accompanying text.

110. See H.R. REP. NO. 238, *supra* note 107, at 17, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2182.

111. See, e.g., Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 901 & n.77 (stating that federal courts have been hospitable to informal resolution measures employed as a means of dealing with employment discrimination problems); see also *United Steelworkers v. Weber*, 443 U.S. 193, 206-07 (1979) (holding that Congress did not intend Title VII to prohibit voluntary affirmative action efforts by private business).

112. A number of other federal agencies also are charged with enforcing nondiscrimination laws. These include the Departments of Justice, Health and Human Services, Housing and Urban Development, and the Office of Federal Contract Compliance within the Department of Labor. They face the same choices regarding procedures to be employed as do OCR and EEOC. In fact, many, if not most, of the issues involved are not only pertinent to civil rights enforcement, but might be addressed just as well to the enforcement of consumer, environmental, or other rights, which traditionally do not enjoy the economic leverage of the interests to which they are opposed.

Furthermore, I do not wish to suggest that the issues in civil rights compliance and procedures are necessarily different at the state and local level. To the contrary, many of these innovative procedures were first developed at the local level. Mediation was first used by the New York City Commission on Human Rights in 1975 under then-Commissioner Eleanor Holmes Norton, who moved on to EEOC in 1977, bringing procedural innovations with her. PEER STUDY, *supra* note 92, at 6-7.

Nonetheless, the examination of the various procedures of OCR and EEOC is particularly appropriate for a number of reasons. They are lead agencies in civil rights enforcement within the federal government. EEOC has lead responsibility among all federal agencies for achieving equal employment opportunity in both the public and the private sectors. See Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1155, *and in* 92 Stat. 3781 (1978), as modified and implemented by Exec. Order No. 12,106, 3 C.F.R. 263 (1978), *reprinted in* 42 U.S.C. § 2000e-4 (1982); Exec. Order No. 12,144, 3 C.F.R. 404 (1980), *reprinted in* 42 U.S.C. § 2000e-4 (1982); see also

B. A Brief Description of OCR Complaint Processing Procedures

Since 1977, OCR has operated under a court-ordered consent decree that dictates the procedures it uses in the investigation and resolution of complaints of discrimination, as well as the timeframes allocated to each stage of the process.¹¹³ The agency must acknowledge complaints within fifteen days of receipt,¹¹⁴ and complete investigations of complaints within the following ninety days.¹¹⁵ If OCR finds discrimination, it must attempt to obtain voluntary compliance from the recipient within another ninety days.¹¹⁶ If efforts to achieve voluntary compliance fail,

Exec. Order No. 12,067, 3 C.F.R. 206 (1978), *reprinted in* 42 U.S.C. § 2000e (1972) (giving EEOC responsibility for eliminating duplication, conflict, and inconsistencies in federal EEO programs and activities). Although the Justice Department now has coordinating responsibility for Title VI, IX and Section 504, Exec. Order No. 12,250, 3 C.F.R. 298 (1980), *reprinted in* 42 U.S.C. § 2000d-1 (1982), the Office for Civil Rights for the Department of Education, and its predecessor of the Department of Health, Education and Welfare, *see* H.R. REP. NO. 914, *supra* note 11, at 2392, historically played the major role in developing regulations — both general and specific — and is responsible for more enforcement activity under these statutes than any other federal agency. *See* Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV. C.R.-C.L. L. REV. 1, 3 n.10 (1983).

EEOC pioneered the use of a variety of informal mechanisms for resolving discrimination problems at the federal level. It implemented its rapid charge processing system on a pilot basis shortly after Eleanor Holmes Norton became Chairperson in the summer of 1977. 1977-1978 EEOC 12TH-13TH ANN. REP. 3. The program was implemented nationwide in 1979. 1979 EEOC 14TH ANN. REP. 2.

An exploration of OCR procedures, some of which were adopted from EEOC, raises questions about the borrowing of procedures by agencies with different problems and different missions. *See* PEER STUDY, *supra* note 92, at 30. The study cites *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *Whitaker v. Board of Higher Educ.*, 461 F. Supp. 99 (E.D.N.Y. 1978) to support the proposition that unlike EEOC, OCR's major mission is to end system-wide discrimination by recipients of federal funds, not to adjudicate individual complaints. *See infra* text following note 276.

OCR began using mediation on an experimental basis in June 1978, six months after the consent decree was signed in *Adams v. Califano*, *see infra* note 113 and accompanying text; PEER STUDY, *supra* note 92, at 41. It implemented early complaint resolution nationwide in 1981. 1981-1982 OCR SECOND ANN. REP. 16. At the time of nationwide implementation, it no longer had the backlog of cases that OCR had when it first began the experiment in response to the *Adams* consent decree, and as the EEOC had throughout the period 1977-1979. *See* PEER STUDY, *supra* note 92, at 7-8, 187.

113. Consent Decree, *Adams v. Califano* (D.D.C. 1977) (No. 3095-70) [hereinafter *Adams Order*] (copy on file at the *George Washington Law Review*). Although the *Adams Order* also addressed OCR's conduct of compliance reviews, *see id.* ¶¶ 18-24, we are concerned here only with the investigation of complaints.

114. *Id.* ¶ 15(a). Upon receipt of a complaint, OCR must first determine whether it has jurisdiction — whether the complaint has been timely filed, and whether it alleges facts which, if true, would constitute a violation of one of the statutes that OCR enforces. This includes a determination of whether the program or activity in which the alleged discrimination occurred is one that receives or benefits from federal financial assistance. *See* *Grove City College v. Bell*, 465 U.S. 555 (1984).

115. *Adams Order*, *supra* note 113, ¶ 15(b)(1).

116. *Id.* at ¶ 15(b)(2).

OCR has thirty days within which to commence administrative enforcement proceedings by issuing to the recipient a notice of opportunity for a hearing before an administrative law judge,¹¹⁷ or to refer the case to DOJ to commence suit in federal district court.¹¹⁸

Traditionally, a letter of findings (LOF) marked the conclusion of the investigation.¹¹⁹ Were a recipient found not to have violated any of the applicable civil rights statutes or regulations, the LOF would so indicate.¹²⁰ Were discrimination found, however, the LOF would explain the basis for the finding and invite the recipient to come into compliance voluntarily to avoid the ultimate sanction, termination of federal financial assistance.¹²¹ Sometimes, the compliance required would be obvious;¹²² in other situations, OCR might encourage the recipient to choose among a variety of alternative remedies, with the agency always offering technical assistance.¹²³

In recent years, however, two new "official" alternatives have joined the traditional procedures in OCR's arsenal. The first, known as early complaint resolution (ECR), is OCR's own brand of mediation.¹²⁴ It is a purely voluntary procedure, offered at the discretion of the particular regional office, but subject to certain limitations.¹²⁵ ECR enables the recipient and the complainant, prior to any investigation, to attempt to resolve the dispute between them,¹²⁶ regardless of whether or not the recipient is in fact out of compliance with its civil rights obligations¹²⁷ and regardless of whether any agreement reached between the parties would actually remedy a civil rights violation if it were found to exist.¹²⁸ An equal opportunity specialist (EOS), whose primary responsibilities involve complaint investigation, serves as a mediator between the parties.¹²⁹ OCR will conduct an investigation only if efforts at

117. See *id.*; see also 34 C.F.R. § 100.8(c) (1986).

118. See *Adams Order*, *supra* note 113, ¶ 15(b)(2); see also 34 C.F.R. § 100.8(a) (1986). Such a referral may be for purposes other than termination of federal financial assistance. See *Block*, *supra* note 112, at 9.

119. See *Adams Order*, *supra* note 113, ¶ 11; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., INVESTIGATION PROCEDURES MANUAL 53 (1980) [hereinafter OCR, 1980 INVESTIGATION PROCEDURES MANUAL].

120. See *Adams Order*, *supra* note 113, ¶ 11; OCR, 1980 INVESTIGATION PROCEDURES MANUAL *supra* note 119, at 53-54.

121. *Adams Order*, *supra* note 113, ¶¶ 11-12; OCR, 1980 INVESTIGATION PROCEDURES MANUAL, *supra* note 119, at 53-55.

122. For example, if OCR found female students had been excluded from a class in auto mechanics because of their sex, the remedy would be to admit them into that class or program. If a wheelchair-bound student could not enter a building because the door was not wide enough, the logical remedy would be to widen the door.

123. See 1983 OCR THIRD ANN. REP. at v.

124. See OFFICE OF CIVIL RIGHTS, U.S. DEP'T EDUC., 1985 INVESTIGATION PROCEDURES MANUAL 18 [hereinafter OCR, 1985 INVESTIGATION PROCEDURES MANUAL].

125. For example, it is not to be used for class complaints. *Id.* app. J at 2.

126. *Id.* app. J at 1.

127. *Id.* app. J at 5.

128. *Cf. id.* app. J at 9.

129. *Cf. id.* app. J at 9.

mediation fail.¹³⁰

The other alternative to traditional procedures is known either as predetermination settlement procedures¹³¹ or pre-LOF settlement procedures.¹³² It is afforded to recipients after completion of the investigation, but before issuance of the LOF.¹³³

ECR was commenced, at least on a pilot basis, during the Carter Administration,¹³⁴ primarily in an attempt to help resolve the substantial backlog of complaints required to be eliminated pursuant to the *Adams* Order.¹³⁵ Pre-LOF negotiation procedures were instituted under the Reagan Administration in an explicit effort to take a less confrontational approach to resolving civil rights compliance problems.¹³⁶

In addition to these acknowledged procedures, OCR will frequently resolve a complaint during the pendency of an investigation, through what it deems an "administrative closure."¹³⁷ This may occur for a variety of reasons, including the complainant's withdrawal of the complaint or the recipient's agreement to make the requested changes.¹³⁸

130. *Id.* app. J at 1. The specialist who served as mediator would not, however, be assigned to the subsequent investigation. *Id.* app. J at 9.

131. See Office for Civil Rights Final Annual Operating Plan for Fiscal Year 1984, 48 Fed. Reg. 57,588, 57,590-91 (1983).

132. See Office for Civil Rights Final Annual Operating Plan for Fiscal Year 1985, 49 Fed. Reg. 48,599, 48,600 (1984).

133. See 1983 OCR THIRD ANN. REP. 20 ("The pre-LOF negotiation phase ends when a remedial action plan is agreed upon and signed by OCR and the recipient, when the determination is made that negotiations have failed, or when the 90-day investigation period ends."). In fact, the likelihood of an investigation being completed so as to allow sufficient time within the 90 days to attempt pre-LOF negotiation is slim at best. The original *Adams* Order, see *supra* note 113, did not contemplate this pre-LOF procedure. Attempts to have the order vacated or amended to accommodate the new procedure have proved unsuccessful. On March 10, 1983, Judge John H. Pratt of the District Court for the District of Columbia rejected the government's attempt, in response to a contempt motion filed by the plaintiffs, to vacate or modify the *Adams* timeframes in a manner that would have facilitated the use of these new procedures. *Adams v. Bell* (D.D.C. 1983) (No. 3095-70). On review from Judge Pratt's order, the Court of Appeals for the District of Columbia Circuit, on September 14, 1984, vacated Judge Pratt's order and remanded for a determination of whether the plaintiffs had standing and whether the district court had jurisdiction over the matter. *Women's Equity Action League v. Bell*, 743 F.2d 42, 44 (1984). The government's motion to dismiss the *Adams* case in its entirety, filed July 1, 1985, is currently pending before Judge Pratt. See Kurtz, *Civil Rights Documents Backdated*, Wash. Post, Mar. 30, 1987, at A1, col. 4.

134. See PEER STUDY, *supra* note 92, at 41.

135. *Id.* OCR has offered additional rationales for ECR including facilitation of continuing relationships, expedited resolution of disputes with minimal cost, and maintenance of control over the process. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 1, 16.

136. 1981-1982 OCR SECOND ANN. REP. 28.

137. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 45.

138. *Id.* at 48-49.

C. A Brief Description of EEOC Complaint Processing Procedures

EEOC's procedures are even more complicated than those of OCR, and a full explanation of all the variations goes beyond the purposes of this Article.¹³⁹ The 1964 Act sets up the basic framework.¹⁴⁰ Upon receipt of a complaint (or charge) under its jurisdiction, EEOC conducts an investigation to determine whether reasonable cause exists to believe that the charge is true.¹⁴¹ If no discrimination is found, the charge is dismissed.¹⁴² The charging party will be issued a notice of right to sue, authorizing him to file his own suit should he choose to reject the findings of the Commission.¹⁴³ No private lawsuit may be filed without this right to sue notice.¹⁴⁴ EEOC must issue such a letter if it makes a no-cause finding or, upon request of the charging party, if it fails to bring suit itself within 180 days of the filing of the charge.¹⁴⁵ If cause is found, EEOC attempts to resolve the discriminatory practice "by informal methods of conference, conciliation, and persuasion."¹⁴⁶ The remedy sought through conciliation will be the same remedy that would be sought upon successful prosecution of the charge in court.¹⁴⁷ If conciliation is successful, the terms of the agreement are written and signed by the EEOC representative as well as by the parties.¹⁴⁸

If EEOC is unable to resolve the complaint through such means, it may commence a civil suit.¹⁴⁹ In the alternative, it may issue a

139. For example, although most cases prior to 1984 were routed through EEOC's rapid charge process, *see infra* text accompanying notes 152-55, cases might have been referred for EEOC's early litigation identification (ELI) processing. This may occur because the particular respondent has been the subject of many complaints, or perhaps because the issues by their very nature tend to affect large numbers of people. A case may proceed through the "systemic charge process" if the respondent employs more than 500 employees. For a good description of these alternatives, see U.S. COMM'N ON CIVIL RIGHTS, PROMISES AND PERCEPTIONS: FEDERAL EFFORTS TO ELIMINATE EMPLOYMENT DISCRIMINATION THROUGH AFFIRMATIVE ACTION 19-25 (1981). Under the current policy, EEOC thoroughly investigates more cases than previously and processes fewer cases through the rapid charge process. *See infra* notes 157-59 and accompanying text.

Another complication to understanding the EEOC scheme involves the relationship of state and local employment discrimination laws to the Title VII enforcement scheme. *See* 42 U.S.C. § 2000e-5(c), (d) (1982); Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U.L. REV. 797 (1983). This, too, is beyond the scope of this Article.

140. 42 U.S.C. § 2000e-5(b) (1982); *see* EEOC v. Pierce Packing Co., 669 F.2d 605, 607 (9th Cir. 1982).

141. 42 U.S.C. § 2000e-5(b) (1982).

142. *Id.*; 29 C.F.R. § 1601.19(b) (1986); EEOC Compl. Man. (CCH) ¶¶ 321-337 (Feb. 1985).

143. 29 C.F.R. § 1601.28(b)(3), (e)(1) (1986).

144. *See, e.g.,* Love v. Pullman, 404 U.S. 522, 523 (1972); Cox v. United States Gypsum Co., 409 F.2d 289, 291 (7th Cir. 1969).

145. 42 U.S.C. § 2000e-5(f)(1) (1982); 29 C.F.R. § 1601.28(a) (1986).

146. 42 U.S.C. § 2000e-5(b) (1982); 29 C.F.R. § 1601.24(a) (1986).

147. 42 U.S.C. § 2000e-5(g) (1982); 29 C.F.R. § 1601.24(a) (1986).

148. 29 C.F.R. § 1601.24 (1986).

149. 42 U.S.C. § 2000e-5(f)(1) (1982); 29 C.F.R. § 1601.27 (1986). If the respondent is the government or a governmental agency, then EEOC refers the case to the Attorney General to commence suit. 42 U.S.C. § 2000e-5(f)(1) (1982); 29 C.F.R. § 1601.29 (1986).

notice of right to sue to the charging party, authorizing that person to commence an individual suit under Title VII.¹⁵⁰ EEOC has no authority or mechanism for formal administrative adjudication.¹⁵¹

In 1979, in order to address its staggering backlog of unresolved complaints,¹⁵² EEOC instituted what it called its "rapid charge processing system."¹⁵³ Modified mediation is the basic approach to the rapid charge process. Early in the process, the parties participate in a fact-finding conference designed to help the parties clarify the issues and explore the potential for a negotiated settlement.¹⁵⁴ If rapid charge does not result in a resolution that is mutually acceptable to the parties, the case may be referred for continuing investigation, if that is necessary to reach a determination on cause.¹⁵⁵

EEOC's regulations allow for a predetermination negotiated settlement at any stage of the investigation:

Prior to the issuance of a determination as to reasonable cause, the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. . . . When the Commission agrees in any negotiated settlement not to process that charge further, the Commission's agreement shall be in consideration for the promises made by the other parties to the

150. 42 U.S.C. § 2000e-5(f)(1) (1982); 29 C.F.R. § 1601.28(b)(1), (e) (1986). In *Moore v. Devine*, 767 F.2d 1541 (11th Cir. 1985), the circuit court held that a district court was neither required to enforce, nor to address, a prior EEOC finding of probable cause. *Id.* at 1551.

151. At the time of the congressional debates that preceded the enactment of the Equal Employment Opportunity Act of 1972, the committee bill, H.R. 1746, 92d Cong., 2d Sess., 117 CONG. REC. 31,981-85 (1971), provided the Commission with authority to issue judicially enforceable cease and desist orders, a scheme similar to that under the Federal Trade Commission Act, 15 U.S.C. § 45 (1982). H.R. REP. NO. 238, 92d Cong., 1st Sess. 10, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2145. The minority view, which would give EEOC the power to go directly into court itself, see generally *id.* at 118-27, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2167-76, ultimately prevailed. However, the proceedings in court would then be *de novo*, rather than merely a review under the more limited substantial evidence standard of agency factual findings. *Id.* at 59, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2168.

152. See GENERAL ACCOUNTING OFFICE, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 9 (1976) [hereinafter 1976 GAO REPORT].

153. See *supra* note 112 and accompanying text. The procedures are detailed in EEOC Compl. Man. (CCH) ¶¶ 521-533 (Oct. 1984). See 29 C.F.R. § 1601.20 (1986) (concerning negotiated settlement procedures).

154. 29 C.F.R. § 1601.15(c) (1986); EEOC Compl. Man. (CCH) ¶ 529 (Oct. 1984).

155. Before the recent shift in policy, see *infra* notes 157-59 and accompanying text, the vast majority of cases were processed through rapid charge. See 1977-1978 EEOC 12TH-13TH ANN. REP. 17 ("Only cases which need further evidence and investigation before cause or no cause is found are referred to the [continued investigations and conciliations (CIC)] unit. A relatively small number, about 15 percent, of all cases is designated for CIC handling.").

agreement.¹⁵⁶

The current EEOC Administration has implemented a somewhat different approach to case processing from that of its predecessors, which the Commission describes as a change in emphasis.¹⁵⁷ Fewer cases than previously will be referred for rapid charge processing,¹⁵⁸ while more cases will be fully investigated, with an eye towards possible litigation.¹⁵⁹ Normally, EEOC will emphasize prefinding negotiated settlements only in cases processed through rapid charge; it will settle prefinding cases referred for extended investigation only in special circumstances.¹⁶⁰ Furthermore, EEOC will consider for litigation any case finding discrimination that it is unable to conciliate successfully.¹⁶¹

D. Generalizations About Procedures Used by the Two Agencies

Preliminarily, a number of observations may be noted about the similarities and differences in the procedures used by OCR and EEOC. Both agencies have a wide range of informal procedures in their arsenals, ranging from having the complainant or charging party withdraw the complaint to institutionalized mediation, to efforts at voluntary compliance after a finding of discrimination is made. Furthermore, both agencies also have the ultimate threat of formal enforcement available to them if attempts at voluntary resolution should fail. The mandate that each should attempt to resolve any compliance problems through voluntary means comes from the enabling legislation of both agencies.

There are also important differences between the agencies. The enabling statutes for the two agencies have somewhat different focuses, which may suggest something about the procedures to be

156. 29 C.F.R. § 1601.20(a) (1986). The negotiated settlement may sometimes take the form of an agreement by the charging party to withdraw the charges in exchange for some promise by the respondent. *Id.* § 1601.20(b) (providing that a claimant may withdraw pursuant to 29 C.F.R. § 1601.10 (1986) in a settlement between the parties).

157. See OFFICE OF PUB. AFFAIRS, EEOC, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S NEW CHARGE PROCESSING APPROACH 2 (Apr. 16, 1984) [hereinafter APRIL 16 POLICY STATEMENT]. For text of the policy, see *infra* note 361.

158. APRIL 16 POLICY STATEMENT, *supra* note 157, at 2.

159. *Id.* at 3; see also Address by Chairperson Clarence Thomas, EEO Law Seminar, Pittsburgh, Pa. (May 2, 1985). Congressional hearings were held in response to concern about the new policy and its relationship to the civil rights policies of the Reagan Administration. See *EEOC Hearings on the Equal Employment Opportunity Commission's Enforcement Policies Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 3 (1985) [hereinafter 1985 EEOC Hearings] (remarks of Rep. Gunderson) (stating that the Commission's new policies met with opposition because of the administration's lack of credibility regarding its commitment to civil rights enforcement); see also *id.* at 3-4 (remarks of Rep. Henry) (suggesting that given public concern about the Reagan Administration's commitment to civil rights legislation, the new policy understandably has met with considerable skepticism).

160. 1985 EEOC Hearings, *supra* note 159, at 13 (EEOC, GUIDANCE ON MODIFICATION OF THE ADMINISTRATIVE CHARGE PROCESS (Exhibit A to prepared statement of EEOC Commissioner Fred W. Alvarez)).

161. EEOC, STATEMENT OF ENFORCEMENT POLICY 1 (Sept. 11, 1984). Chairperson Clarence Thomas described this as a major departure from prior practice. Address by Chairperson Clarence Thomas, *supra* note 159.

utilized. The language and legislative history of Title VII suggest that the primary focus of this legislation was to resolve disputes between employers and employees arising from discrimination based on race, sex, religion, and national origin.¹⁶² The Title VI scheme, on the other hand, suggests that the primary focus was not the resolution of disputes arising from prohibited discrimination, but rather the eradication of discrimination itself.¹⁶³ For example, the very nature of the investigative process removes control from the complaining party and vests it in OCR, both in terms of how the investigation is conducted and, if a violation is subsequently found, how it is to be remedied. The statutes that OCR enforces have recently been interpreted to allow the allegedly aggrieved individual to file a private right of action based on the prohibited discrimination,¹⁶⁴ but the individual's ability to control the process is limited to such private rights of action.¹⁶⁵

Individual control is not lost through EEOC's procedures. At each step of the process, the charging party helps to fashion an appropriate remedy. This may be inherent in the distinction between "compliance . . . secured by voluntary means," the language from Title VI, and "conciliation," the language in Title VII.¹⁶⁶ In addition, the requirement that a charging party exhaust administrative procedures prior to bringing litigation, in contrast to the right of the individual aggrieved under Title VI to bypass the ad-

162. See *infra* notes 269-76 and accompanying text.

163. See *infra* notes 261-68 and accompanying text.

164. See *infra* notes 175-76 and accompanying text.

165. An exception to this is OCR's early complaint resolution procedures. See *supra* notes 124-30 and accompanying text. The individual's inability to obtain individual relief in the administrative process, or through formal proceedings conducted by the government to terminate federal financial assistance, was a primary reason for the Supreme Court's determination that private rights of action to enforce these non-discrimination laws were in fact the intent of Congress. See *Cannon v. University of Chicago*, 441 U.S. 677, 703-08 (1978).

166. Note the following passage from *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038 (7th Cir. 1982):

The legislative history of the 1972 amendments indicates Congress' commitment to the legal force of conciliation agreements. Senator Javits introduced the amendment substituting the present language of section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976), which calls for a "conciliation agreement" in place of the language of the 1964 Act referring to attempts to "obtain voluntary compliance," Pub. L. 88-352, 78 Stat. 260 (July 2, 1964), § 706(e), with the following explanation:

One problem is that the words 'voluntary compliance' are not words of art such as are used in this field. The words I have used in the amendment are 'conciliation agreement.' These are words of art, and they also are executive words, in the sense that an agreement has to be entered into, signed, sealed, and delivered; whereas 'voluntary compliance' is a kind of amorphous proposition which may consist of a combination of acts, letters, telephone calls, and so forth. So, in the first place, the amendment is desirable in terms of precision.

Id. at 1042.

ministrative process should he so choose, also suggests that the former scheme focuses more on the individual complainant than does the latter.¹⁶⁷ Another example is the focus on the use of compliance reviews under the Title VI scheme to uncover discrimination. No such provision for compliance reviews exists under Title VII.¹⁶⁸

III. The Alternatives

In general there are any number of ways to describe the continuum of alternatives from most to least formal.¹⁶⁹ The range of possible procedures available to EEOC and OCR runs from the most formal — litigation resulting in judgment in federal court,¹⁷⁰

167. This is not to undermine EEOC's legitimate role as a law enforcement agency; nonetheless, the interests of the individual employee are emphasized in the Title VII scheme. See 1985 EEOC Hearings, *supra* note 159, at 25. Representative Martinez, while questioning Commissioner Alvarez concerning EEOC's new policy to seek complete relief in all cases in which cause is found, stated:

People are getting strung out and sometimes ending up with nothing when they could end up with something if the wording wasn't so rigid. . . .

One of the things that we have to understand is that, unlike a criminal case, where a complaint has been lodged by an individual, then the . . . Justice Department . . . is required by law to pursue whether that person wants to withdraw that complaint or not.

That is not the case here, which is for the satisfaction of that person who has been discriminated against for relief from that discrimination. It should be up to the victim to say when enough litigation is enough, despite how the EEOC feels about it.

Id.

168. EEOC does conduct compliance reviews under its other jurisdictional statutes, the Equal Pay Act, 29 C.F.R. § 1620.19 (1986), and the Age Discrimination in Employment Act, *id.* § 1626.15. See also 1981 EEOC 16TH ANN. REP. 3 (discussing the results of EEOC's 1981 compliance review procedures under the Age Discrimination in Employment Act and the Equal Pay Act).

169. See, e.g., Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 338 (1971) (stating that the various processes that contribute to social ordering are legislation, adjudication, administrative direction, mediation, contractual agreement, and customary law); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 134 (1974) (noting adjudication — connoting actual judgment, litigation, appended settlement systems, exit remedies/self help, and inaction — "lumping it"); Susskind & Madigan, *New Approaches to Resolving Disputes in the Public Sector*, 9 JUST. SYS. J. 179, 180 (1984) (describing unassisted negotiation, facilitated policy dialogue, collaborative problem solving, passive or traditional mediation, active mediation or mediated negotiation, nonbinding arbitration, binding arbitration, and adjudication); see also NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 5. Obviously, all of these characterizations have intended application far broader than what I have undertaken to describe, that is, they are descriptions of either all "social ordering" or all dispute resolution. The descriptions are not limited to characterizations of relevant procedures in federal civil rights enforcement.

170. It is an open question whether Title VII cases may be brought in state court. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 479 n.20 (1982). Compare *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 436 (9th Cir. 1984) (holding that federal courts have exclusive Title VII jurisdiction) with *Greene v. County School Bd.*, 524 F. Supp. 43, 44-45 (E.D. Va. 1981) (holding that federal courts have concurrent Title VII jurisdiction). There is no indication in Title VI that federal court jurisdiction is exclusive, see 34 C.F.R. § 100.8(a)(2) (1986), and state courts have from time to time assumed jurisdiction over such cases. See, e.g., *Rowe v. Pittsgrove Township*, 153 N.J. Super. 274, 379 A.2d 497 (1977), *rev'd on other grounds*, 172 N.J. Super. 209, 411 A.2d 720 (1980); *McDonald v. Hogness*, 92 Wash. 2d 431, 598 P.2d 707 (1979); cf. *Board of Educ. v. Ambach*, 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982), *aff'd*, 60 N.Y.2d 758, 457 N.E.2d 775,

— to the least formal — mediation.¹⁷¹

A. Formal Procedures

The formal procedures under our scheme are court litigation — disputes that are resolved through consent decrees and those that proceed to final judgment — and formal administrative enforcement.

1. Litigation in Federal Court

The most formal of available procedures is litigation in federal court. In OCR's enforcement scheme, litigation is used infrequently.¹⁷² For example, during fiscal years 1981 and 1982, OCR referred only two cases to DOJ for federal litigation.¹⁷³ Those were cases OCR was unable to resolve voluntarily and for which they chose not to commence administrative proceedings;¹⁷⁴ this does not reflect all the private litigation brought under the statutes that OCR enforces.¹⁷⁵ Litigation is available under the Title VI scheme not only to OCR (if it fails to resolve a matter voluntarily through less formal mechanisms and chooses to refer the mat-

469 N.Y.S.2d 669 (1984) (claiming jurisdiction under Section 504 of the Rehabilitation Act of 1973). Nonetheless, this Article is limited to a discussion of federal courts; I do not suggest that federal litigation is more (or less) formal than state litigation.

171. From certain perspectives, mediation may not in fact be the least formal. Because both rapid charge and ECR are governed by fairly elaborate procedures, see *supra* notes 125-27 and accompanying text, this may suggest they are in fact *more* formal than is the informal resolution of a complaint during the pendency of an investigation, which frequently results in an agreement by the complainant to withdraw her complaint in exchange for some change by the respondent. See *supra* note 138 and accompanying text.

172. See 1984 OCR FOURTH ANN. REP. 21.

173. See 1981-1982 OCR SECOND ANN. REP. 29-30. OCR referred only one case to DOJ in calendar year 1980. 1980 OCR FIRST ANN. REP. 27. OCR referred seventeen cases in fiscal year 1983, 1983 OCR THIRD ANN. REP. 32, and three cases in fiscal year 1984, 1984 OCR FOURTH ANN. REP. 32.

174. See 1984 OCR FOURTH ANN. REP. 21 ("Historically, very few investigations result in termination of funds or referral to DOJ. Most cases are voluntarily settled by negotiated compliance agreements. No recipient had funds terminated during FY 1984.").

175. See *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (establishing a private right of action under Title IX); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983) (establishing a private cause of action under Title VI); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (establishing a private right of action to redress employment discrimination under Section 504 of the Rehabilitation Act of 1973). A recent lower court decision held that Title IX affords no direct remedy to victims of employment discrimination; the sole remedies available are those under Title VII. *Storey v. Board of Regents*, 604 F. Supp. 1200, 1205 (W.D. Wis. 1985); cf. *Smith v. Robinson*, 468 U.S. 992, 1013 (1984) (stating that plaintiff cannot circumvent limitations on remedies under the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1461, by resort to Section 504); Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIGATION 219, 279 (1986) (concluding that complainants who file private causes of action have little chance of obtaining relief).

ter to DOJ rather than to proceed to formal administrative enforcement) but also to individuals who choose to pursue a private right of action instead of the administrative process.¹⁷⁶

Title VII requires an individual to exhaust all administrative remedies before filing suit, and to obtain a notice of right to sue from EEOC in order to proceed.¹⁷⁷ If EEOC fails to resolve a matter through its informal mechanisms, having unsuccessfully attempted conciliation, it can either issue a right to sue notice or commence suit in federal court.¹⁷⁸

The incidence of litigation brought by EEOC is far more substantial than that brought by DOJ on referral from OCR.¹⁷⁹ Yet here too, most actions have been brought by individuals.¹⁸⁰ One significant difference between the two agencies is the exhaustion

176. Although the cases cited in *supra* note 175 suggest that there is no exhaustion requirement before an individual can file suit under Title VI, Title IX, and Section 504, the lower courts have differed in their conclusions. Compare *Smith v. United States Postal Serv.*, 742 F.2d 257, 258 (6th Cir. 1984) (requiring exhaustion under Section 504) and *Doe v. New York Univ.*, 442 F. Supp. 522, 524 (S.D.N.Y. 1978) (ruling that exhaustion of administrative remedies is required) with *Whitaker v. Board of Higher Educ.*, 461 F. Supp. 99, 108 (E.D.N.Y. 1978) (holding that exhaustion is not necessarily a prerequisite to a private suit under Section 504).

177. See *supra* note 144 and accompanying text.

178. Regardless of who brings suit or whether EEOC finds probable cause, the court will hear the case *de novo*. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973).

179. In fiscal year (FY) 1980, EEOC filed 200 Title VII cases and a total of 326 under all three of its jurisdictional bases; in FY 1981, it filed 229 and 368; in FY 1982, 101 and 164; in FY 1983, 82 and 195; and in FY 1984, 130 and 310. OFFICE OF PUB. AFFAIRS, EEOC, EEOC LITIGATION ACTIVITIES 1976-1984 (1984). Although these numbers demonstrate the greater incidence of litigation by EEOC as compared to OCR, the decrease in filings under the Reagan Administration has generated substantial criticism. See, e.g., *1985 EEOC Hearings*, *supra* note 159, at 59 (statement of Nancy Kreiter, Research Director, Women Employed Institute) ("This administration's lack of commitment to strong enforcement can also be seen in its litigation record. In the first half of fiscal year 1985, 109 cases were filed in court by the EEOC, 40.8 percent fewer on an annual basis than in fiscal year 1981 when 368 cases were filed. This year, [1985], only 91 cases were approved by the Commission for litigation, a decrease of 50 percent on an annual basis compared to fiscal year 1981 when 364 cases were approved."). Recently released statistics suggest, however, that filings have risen substantially. See Williams, *Equal Employment Opportunity Commission: Harnessing the Horses on Job Discrimination*, N.Y. Times, Feb. 8, 1987, § 1, at 54, col. 3 (stating that the agency filed 444 lawsuits in 1985 and 526 in 1986).

180. During the twelve-month period ending June 30, 1985, 8,082 employment discrimination cases were filed in federal district courts nationwide. 1985 DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 140 (Table 19). Contrast this with the 310 cases filed by EEOC in fiscal year 1984. OFFICE OF PUBLIC AFFAIRS, EEOC, *supra* note 179. EEOC's relatively recent change in policy may have a significant impact on the ratio of government to privately filed litigation. See *supra* note 161 and accompanying text. The following excerpt from a letter written by Chairperson Clarence Thomas to Representative Augustus Hawkins on April 23, 1985 is interesting in this connection:

In the past, the victims of unlawful discrimination were largely ignored by the EEOC. Even when the Commission found that discrimination had occurred, only rarely did it commence litigation — individual or class actions — to secure relief for the victim(s). In the overwhelming majority of cases, the Commission decided that the violation was not 'litigation-worthy,' and the victim was left no better off than if the EEOC had never been created. Last September, however, the Commission adopted a "Statement of Enforcement Policy," which provides, in essence, that the Commission considers all unlawful discrimination 'litigation-worthy,' and will bring in-

requirement under Title VII, so that individual lawsuits are brought after the less formal administrative processes have been attempted and have failed to resolve the charge.

Before the 1972 amendments, EEOC lacked authority to bring suits in its own name. EEOC's choices upon unsuccessful attempts at conciliation were either to issue a notice of right to sue to the charging party or to refer the case to DOJ. The 1972 changes were intended to place the decisionmaking authority as to whether to proceed to litigation within the hands of the agency with the expertise on employment discrimination.¹⁸¹

OCR is still plagued by lack of control as to which cases will proceed to litigation. Numerous cases referred to DOJ in past years have never been acted upon.¹⁸² Thus, one overriding problem with litigation by OCR is the lack of decisionmaking authority as to whether litigation is to be pursued.

Litigation as a procedural category may be divided further. There is litigation that results in judgment and litigation that results in negotiated settlement, which, in most civil rights litigation, takes the form of a consent decree, at least where prospective relief is involved.¹⁸³

If litigation is commenced by or on behalf of the agency, there is substantial probability that the case will be resolved before judgment. If the case is resolved between the parties without any judicial imprimatur, then the negotiated solution is in most respects no different than if the parties had reached such a resolution before filing suit, except that additional time has passed and additional costs have been incurred. If, however, as is the more common case, the matter is settled pursuant to a consent decree signed by the judge, then it will borrow some features from judgment and

dividual or class actions, as appropriate, to secure relief for each and every victim of such discrimination.

Critics of the current administration, however, remain doubtful. *See 1985 EEOC Hearings, supra* note 159, at 58-60 (statement of Nancy Kreiter).

181. This new authority does not apply, however, in the case of employers who are governments, governmental agencies, or political subdivisions. As to those entities EEOC still makes referrals to DOJ for violations of Title VII. 29 C.F.R. § 1601.27 (1986). A 1981 report by the General Accounting Office on EEOC found that DOJ routinely refused to file suit on such cases and recommended that Congress amend Title VII to authorize EEOC to sue directly when DOJ fails to act within forty-five days after referral. COMPTROLLER GENERAL, FURTHER IMPROVEMENTS NEEDED IN EEOC ENFORCEMENT ACTIVITIES 24 (1981) [hereinafter 1981 GAO REPORT].

182. *See* H.R. REP. NO. 458, *supra* note 70, at 3. Of the 24 cases referred to DOJ by OCR between 1981 and July 1985, the committee found that 16 remained idle, 5 were returned to OCR, 1 was involved in a pending suit, and 2 were resolved by consent decrees. *Id.*

183. *See* Schwarzschild, *supra* note 111, at 894-95.

some from a negotiated settlement.¹⁸⁴ It is beyond the scope of this Article to examine thoroughly the comparative merits of a formal judgment versus those of a negotiated consent decree.¹⁸⁵

2. Formal Administrative Proceedings

As stated earlier, EEOC has no formal administrative procedures. Congress made a deliberate choice that enforcement should be through the judicial rather than the formal administrative process.¹⁸⁶ OCR, on the other hand, has the choice of either referring an unresolved compliance finding to DOJ to file suit, or to commence administrative enforcement by issuing a notice of opportunity for hearing to the respondent.¹⁸⁷ As with litigation, very few cases actually end up in administrative enforcement proceedings.¹⁸⁸ If OCR decides to proceed through administrative enforcement, the matter might also be resolved between the agency and the respondent prior to a recommended decision by the administrative law judge, or conceivably at any other stage of the process. However, any resolution would have to remedy the discrimination that was found and bring the respondent into compli-

184. See *Local No. 93 of the Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3074 (1986).

185. Although most filed cases do not go all the way to judgment, the filing of a lawsuit frequently may be necessary to facilitate the use of other dispute resolution mechanisms. See NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 11; see also Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163.

186. See *supra* note 151.

187. 34 C.F.R. §§ 100.8(a), (c), 100.9(a) (1986). The House Committee on Government Operations has recommended that OCR develop guidelines for deciding which enforcement procedure is appropriate for particular cases. H.R. REP. NO. 458, *supra* note 70, at 32-33. "Referring matters to DOJ that [it] does not consider worthy of enforcement is a pointless and inefficient exercise." *Id.* at 33.

188. Between 1971 and 1980, OCR commenced a total of approximately 57 administrative enforcement actions; only one resulted in fund termination. 1980 OCR FIRST ANN. REP. 27. In 1980 it commenced one such action, which was subsequently settled. In fiscal years 1981 and 1982, OCR commenced administrative enforcement proceedings against four recipients; only one of those resulted in fund termination. 1981-1982 OCR SECOND ANN. REP. 29-30. In fiscal year 1983, OCR commenced two administrative enforcement actions. 1983 OCR THIRD ANN. REP. 32. In fiscal year 1984, OCR commenced administrative proceedings against 21 recipients; there were no fund terminations. 1984 OCR FOURTH ANN. REP. 21, 32.

The House Committee on Government Operations made the following observations:

The two methods of enforcement are rarely used by the OCR. From 1981 to July 1985, the OCR found 2,000 violations of law, but issued only 27 notices of opportunity for hearing, and referred just 24 additional cases to DOJ. A large majority of violations are corrected voluntarily at one of four stages of the investigative process.

H.R. REP. NO. 458, *supra* note 70, at 3. Similarly, the *House Report* stated: "'After the 1983 Adams order set deadlines for securing compliance in pending cases, the OCR took 23 cases to administrative law judges and referred 18 cases to the Department of Justice. That order generated more enforcement proceedings than had occurred in all of the previous decades.'" *Id.* at 7 (quoting *Investigation of Civil Rights Enforcement by the Department of Education: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 12 (1985) (statement of Julius Chambers, Director, NAACP Legal Defense and Education Fund)).

ance with Title VI.¹⁸⁹

The procedural safeguards of the OCR administrative hearings are basically the same as those provided for formal adjudication under the Administrative Procedure Act.¹⁹⁰ They provide for notice,¹⁹¹ the presentation of both evidence and argument,¹⁹² cross-examination,¹⁹³ an impartial decisionmaker,¹⁹⁴ and a decision with findings of fact and conclusions of law.¹⁹⁵ An administrative law judge presides over the hearing¹⁹⁶ and renders an advisory opinion,¹⁹⁷ which becomes final if it is not appealed by either the government or the respondent.¹⁹⁸

The parties at the hearing are the government and the recipient(s) of federal assistance;¹⁹⁹ complainants have no right to participate as litigators in these proceedings.²⁰⁰ Either party may file exceptions to all or part of the administrative law judge's decision, in which case the reviewing authority²⁰¹ will review the administrative law judge's decision and issue its own decision thereafter.²⁰² The Secretary of Education provides another administrative level of appeal beyond the reviewing authority.²⁰³

After the final decision of the Secretary, judicial review is available.²⁰⁴ As with virtually all review of formal administrative action, the court's role on review is limited to ascertaining whether substantial evidence supported the Secretary's decision, or

189. Nevertheless, OCR may not always fulfill its legal obligation to correct any violations of law it finds. See H.R. REP. NO. 458, *supra* note 70, at 11-18, 33. The *Report* stated:

Thirteen of the 27 administrative enforcement cases begun between January 1, 1981, and mid-1985 were settled and closed. In most of the cases — 22 of 27 — enforcement started in response to an *Adams* court order. The subcommittee's examination of the settlements found that many of them did not adequately address the issues raised by OCR's investigations.

Id. at 13. The Committee recommended that "OCR should develop guidelines which require that violations of law be corrected before any settlements are accepted." *Id.* at 33.

190. See 5 U.S.C. §§ 551-559, 701-706 (1982); 34 C.F.R. § 100.9 (1986).

191. 34 C.F.R. §§ 100.9(a), 101.51 (1986).

192. *Id.* §§ 101.72-78.

193. *Id.* § 101.79.

194. See *id.* § 101.61.

195. *Id.* §§ 101.102, .104.

196. *Id.* § 101.61.

197. *Id.* § 101.102.

198. *Id.* § 101.104(a).

199. *Id.* § 101.21.

200. *Id.* § 101.23.

201. *Id.* § 101.103 ("['R]eviewing authority' means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 100.10(a)-(d).").

202. *Id.* §§ 101.103, .104.

203. *Id.* § 101.106.

204. 42 U.S.C. § 2000d-2 (1982); 34 C.F.R. § 100.11 (1986).

whether the decision was in some way inconsistent with law.²⁰⁵

B. Informal Procedures

1. Mediation

Mediation is the first stage in attempted resolution of a complaint or charge; it may or may not be the most informal.²⁰⁶ The theory of mediation is that the agency will explore with the parties any basis for a resolution with which both parties can live, irrespective of whether the agency would subsequently make a finding of discrimination or, if the agency did find discrimination, what the remedy for that violation would be.²⁰⁷ Each side gives up something to receive something.²⁰⁸ The complainant relinquishes the right to pursue claims against the institution; the institution agrees to some change or restitution. The enforcement agency agrees not to pursue the complaint or charge further.²⁰⁹

The mediation practices of OCR and EEOC differ markedly. The difference can be understood as two points along the continuum between passive and active mediation.²¹⁰ OCR's process is almost completely passive. The goal of early complaint resolution (ECR) is to facilitate an agreement between the two parties to resolve the dispute between them.²¹¹ ECR is completely separate from the investigative process;²¹² if ECR is unsuccessful, the case will be reassigned to a different equal opportunity specialist (EOS) to proceed with the formal investigation.²¹³ Matters discussed at ECR sessions remain confidential and do not become part of the investigative file.²¹⁴ If ECR is successful, OCR requires the com-

205. See 5 U.S.C. § 706 (1982) (Administrative Procedure Act).

206. See *supra* note 170.

207. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 1; EEOC Compl. Man. (CCH) ¶¶ 547, 553 (Mar. 1987).

208. See PEER STUDY, *supra* note 92, at 4.

209. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 7-8; EEOC Compl. Man. (CCH) ¶¶ 547, 553 (Mar. 1987).

210. See Susskind & Madigan, *supra* note 169, at 182. The authors describe the distinction as follows:

Traditional (or passive) *mediation* is much like collaborative problem solving; both processes try to generate solutions (not just statements of concern) and rely heavily on the assistance of a "facilitator" or "mediator." Passive mediation is, however, quite different from *active mediation*. In the former, the mediator is only concerned with process issues, working hard to ensure that the process is fair and unbiased in the eyes of the parties at the table. The active mediator, in contrast, is concerned with the process and the quality of the outcome. The active mediator works hard to ensure that the process is fair, unbiased and open to all parties affected by the outcome, whether or not they sit at the negotiating table. In addition, the active mediator seeks to ensure that the outcome is (1) viewed as fair by the community-at-large, (2) reached in as efficient a manner as possible, and (3) remains stable after the parties leave the bargaining table.

Id. (citations omitted).

211. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 1.

212. *Id.* at 5 (stating that the mediator is not to conduct fact-finding or make efforts to determine the merits of the complaint).

213. *Id.* at 9.

214. *Id.* at 7.

plainant to withdraw the complaint.²¹⁵ OCR will neither endorse the terms of the agreement nor be a signatory to it.²¹⁶ OCR will, however, encourage (but not require) the parties to put the agreement in writing.²¹⁷

EEOC's rapid charge process, on the other hand, is integrated into the investigative process. It commences with a fact-finding conference,²¹⁸ one purpose of which is to allow the parties to develop an appreciation of each other's positions, "which in turn provides a realistic atmosphere conducive to serious settlement discussions."²¹⁹ To facilitate this process, the EOS who presides over the fact-finding conference will attempt to resolve disputed factual issues.²²⁰ If attempts at settlement are unsuccessful at this juncture, "the facts developed at the conference may be sufficient to allow an early decision that the case does not have merit or that reasonable cause should be found."²²¹ If the information gathered up to that point is insufficient to make a determination, then the same EOS who conducted the fact-finding conference is to obtain whatever additional information is required to make a finding of cause or no cause.²²² If a negotiated resolution is reached, the specialist will require the parties to put the terms in writing, and usually the agreement will be signed by a representative of the Commission as well as by the parties.²²³

One question that arises in comparing OCR's passive approach to mediation with EEOC's relatively more active approach²²⁴ is whether one should prefer the agency to know more about the case before it encourages a negotiated settlement, or, instead, to know as little as possible. The less the investigator knows of the merits, perhaps the greater her ability to explore impartially a compromise with which both parties can live; otherwise, she might be influenced by whether the merits of the case should dictate a result more favorable to one party than another. Need we be any more concerned about the amount of discretion vested in the investigator in one procedure as opposed to the other?

215. *Id.* at 8.

216. *Id.* at 9.

217. *Id.* at 8.

218. EEOC Compl. Man. (CCH) ¶ 529 (Oct. 1984).

219. 1977-1978 EEOC 12TH-13TH ANN. REP. 17.

220. EEOC Compl. Man. (CCH) ¶ 531 (Sept. 1984).

221. 1977-1978 EEOC 12TH-13TH ANN. REP. 17; EEOC Compl. Man. (CCH) ¶ 532 (Sept. 1984).

222. EEOC Compl. Man. (CCH) ¶ 532 (Sept. 1984).

223. *See id.* ¶ 1262 (Mar. 1979). EEOC will not be a party to an agreement that contains any unlawful provisions or that appears to approve of an employment practice EEOC has not investigated. *Id.* ¶ 548 (Mar. 1987).

224. *But see* APRIL 16 POLICY STATEMENT, *supra* note 157, at 2 ("The Commission's role in the process is primarily that of a facilitator.").

2. *Negotiated Voluntary Compliance Before Findings*

OCR does not promote publicly a policy of encouraging negotiated resolutions during the pendency of the investigation.²²⁵ Nonetheless, many occur. If, during the investigation, a recipient agrees to some change that satisfies the complainant and meets "minimal OCR compliance standards," the complaint may be closed as a predetermination settlement.²²⁶ The change may have been a spontaneous gesture by the recipient or may have been suggested by the OCR investigator. It is difficult to know whether investigators encourage complainants to accept what the recipient is offering, perhaps suggesting either that they would do no better should OCR ultimately find a violation, or that the information at that time suggests a likelihood of OCR's finding no violation.²²⁷

EEOC may continue its attempts to negotiate a settlement throughout the investigatory process.²²⁸ It will encourage the parties to settle at any time before EEOC makes a compliance determination.²²⁹ The nature of EEOC's negotiated settlement process is basically the same as the process that occurs during the fact-finding conference; in contrast, OCR's approach to negotiating a resolution during its investigation differs markedly from its ECR procedures.

3. *Negotiated Voluntary Compliance After Informal Findings*

OCR's relatively recent innovation, first called "predetermination" and now called "pre-LOF," attempts to achieve settlement before the issuance of formal findings.²³⁰ Its intended purpose was to improve OCR's performance under its *Adams* timeframes²³¹

225. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 49. Little or no mention is made of such a procedure in OCR's annual reports or annual operating plans.

226. *Id.*

227. Under OCR policy and procedures, the investigators lack the discretion to make these determinations on their own; attorneys, supervisors, the regional director, and sometimes even headquarters, must be involved in the process. An investigator may have an incentive to encourage complainants to withdraw because if they do, the investigator need not prepare an investigative report, and the case can be closed administratively. See *id.* at 45 (stating that predetermination closure can occur only before submission of investigative report to regional director).

228. EEOC Compl. Man. (CCH) ¶ 542 (Mar. 1987); see 1977-1978 EEOC 12TH-13TH ANN. REP. 20.

229. See EEOC Compl. Man. (CCH) ¶ 545 (Mar. 1987). Revised policy, however, would suggest less emphasis on settlement for cases assigned to extended investigation. See 1985 EEOC Hearings, *supra* note 159, at 13.

230. See 1981-1982 OCR SECOND ANN. REP. 28. According to OCR, the new procedure was first used in 1981 to resolve intercollegiate athletics complaints. "After successfully resolving compliance problems found during several investigations, the use of the procedure was expanded in October 1981 to cover complaint investigations and compliance reviews where the law and policy are clear on the issues involved." *Id.*

231. It is less than clear how it improves performance under the *Adams* Order timeframe requirements, given that OCR must issue an LOF no later than the 105th day after receipt of the complaint. See *supra* text accompanying notes 113-18 for a discussion of the *Adams* Order. See also OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 59.

and "to minimize unnecessary confrontation between OCR and recipients of Federal assistance."²³² OCR's procedures require that before any negotiations to remedy discrimination occur, the responsible staff must conclude the investigation and prepare an investigative report demonstrating that there exists a legally supportable finding of discrimination.²³³ However, the agency only sends an LOF to the recipient officially apprising it of the violation after it has offered the recipient the opportunity to discuss the violation with OCR officials, in an attempt to resolve the violation without the stigma or publicity that frequently attends the issuance of a violation LOF.²³⁴ If attempts to resolve the matter at this juncture succeed, OCR issues a "Compliance LOF."²³⁵ This letter contains OCR's findings, the steps the recipient has taken or has agreed to take to remedy any noncompliance, and notification that a finding of compliance is contingent on the recipient's completion of the remedial action.²³⁶ If attempts to resolve the compliance problems at this stage are unsuccessful — or if such attempts cannot be completed consistent with the *Adams* Order timeframes — then OCR issues a violation LOF, as described below.²³⁷

EEOC has no similar procedure. Once EEOC has completed the investigation, negotiated resolution is generally inappropriate.²³⁸ If a matter before EEOC proceeds to a cause determination, EEOC's procedures require that the Commission attempt to resolve the charge through persuasion and conciliation, as discussed below.²³⁹

4. *Negotiated Voluntary Compliance After Formal Findings*

If OCR determines that a recipient is out of compliance and pre-LOF negotiations are unsuccessful or there is insufficient time under the *Adams* Order timeframes to attempt pre-LOF negotiations, then OCR will issue an LOF, citing the recipient for violations of applicable laws and regulations. This letter sets forth general guidelines for developing a remedy and offers assistance

232. 1981-1982 OCR SECOND ANN. REP. 28.

233. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 50-53. If OCR determines that no discrimination has occurred, then it issues a no violation LOF. *See id.* app. Q at 1.

234. 1984 OCR FOURTH ANN. REP. 20.

235. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 58.

236. *Id.* at 55-56. The requirements that the recipient must meet are not intended to differ from those that would obtain once a violation LOF is issued. *See supra* text accompanying note 121.

237. *Id.* at 59.

238. EEOC Compl. Man. (CCH) ¶ 542 (Mar. 1987); 1985 EEOC Hearings, *supra* note 159, at 13.

239. *See infra* text accompanying notes 244-47.

to the recipient in its remedial efforts.²⁴⁰ The remedy sought by OCR must be sufficient to cure the violation, although the recipient may be able to choose from among a range of alternatives that will bring it into compliance. Note that OCR need not afford the complaining party any say in what remedy it will accept.²⁴¹ Although the complainant might pursue other legal remedies if she is dissatisfied with the negotiated resolution, OCR will nonetheless close the case once the recipient has agreed to take steps to meet all regulatory requirements.²⁴² Any remedy agreed upon must be in writing, with appropriate specificity; it might consist of an exchange of letters between OCR and the recipient.²⁴³

Once EEOC has made a determination of cause, it is statutorily mandated to attempt to resolve the discriminatory violation through "informal methods of conference, conciliation and persuasion."²⁴⁴ EEOC, through its conciliation procedures, will engage the participation of the charging party.²⁴⁵ In fact, there can be no conciliation agreement unless the charging party consents.²⁴⁶ If conciliation efforts are successful and EEOC obtains an agreement that both resolves all compliance problems and is satisfactory to the charging party, the agreement will be reduced to writing and signed by the parties and by a designated EEOC representative.²⁴⁷

For both agencies, these attempts to resolve compliance problems by informal means are mandated by statute.²⁴⁸ Recipients of federal financial assistance are on notice that failure to resolve such matters at this juncture will result in formal enforcement proceedings.²⁴⁹ EEOC has stated that it will consider

240. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 59, 64.

241. *Id.* at 66.

242. *Id.*

243. *Id.* at 65.

244. 42 U.S.C. § 2000e-5(b) (1982). Although EEOC is obliged to seek nothing less than full compliance at this juncture, *see supra* text accompanying note 147, the Commission currently recognizes a degree of flexibility. *See 1985 EEOC Hearings, supra* note 159, at 23. Regarding the new policy of seeking "full relief," Commissioner Frank Alvarez stated:

But we do recognize that we have a statutory and a practical obligation to conciliate cases, and the remedies policy itself contains very flexible language about conciliations, because we have an obligation to both from a statutory standpoint and an operational standpoint.

So it is not an inflexible policy. . . .

In settlements . . . they need to keep their eye on those issues, but engage in reasonable compromises with the opposing party, between what the most we could ask for and the least we could get. And that is what the conciliation process is all about.

Id.

245. EEOC Compl. Man. (CCH) ¶¶ 1263 (Mar. 1979), 1265-1266 (Nov. 1979).

246. *Id.* ¶ 1262 (Mar. 1979). However, in some circumstances EEOC will close a case in which the respondent has offered what the agency deems to be a satisfactory resolution of the violation, whether or not it is acceptable to the charging party. *See id.* ¶ 255 (Sept. 1984).

247. *Id.* ¶ 1262.

248. 42 U.S.C. §§ 2000d-1, 2000e-5(b) (1982).

249. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 66.

for litigation any case that is not resolved by conciliation.²⁵⁰ In either case, a respondent might face a private right of action by the complaining party.²⁵¹

IV. *The Values*

The process of determining which procedure is preferable in a given case or kind of case is complicated because different procedures will be preferred for different reasons. There are a number of competing values at play, each of which may be desirable in and of itself, but any two or more of which may not be consistent with one another.²⁵² Thus, no one procedure is likely to serve all values satisfactorily. It is essential, therefore, to identify the values involved in choosing among procedural alternatives in federal civil rights enforcement. This Article examines the different procedures used by OCR and EEOC in terms of (1) justice and statutory intent; (2) procedural fairness; (3) expedience, efficiency and cost-effectiveness; and (4) finality and enforceability of the result.²⁵³

The preference for a particular procedure might well vary with the value hierarchy of the affected party; the procedure that might be preferred by a given complainant, might not be preferred by the respondent, or the agency, or — to the extent it can be ascertained — the public. This may suggest a need for some choice among the available procedures.²⁵⁴

250. See *supra* note 161 and accompanying text.

251. If conciliation is unsuccessful and EEOC decides not to proceed to litigation, it will issue a notice of right to sue to the charging party, enabling that party to file her own lawsuit. See *supra* text accompanying note 150.

252. See, e.g., NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 30 (observing that the absence of a constraint to decide according to preexisting rules may be advantageous when seeking resolution of a dispute at hand, but may operate as a disadvantage when seeking to set a precedent for the resolution of large numbers of claims).

253. Naturally there are other ways of characterizing the relevant values than the categories used in this Article. See NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 16-17 (establishing criteria for assessing resolution mechanisms: accessibility, protection of rights of disputants, efficiency, fairness, finality and enforceability of decision, credibility, and expression of the community's norms of justice); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111, 113 n.7 (1976) (suggesting the following criteria for determining the effectiveness of dispute resolution mechanisms: cost, speed, accuracy, credibility, and workability); see also Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 845-59 (1984) (stating that "valued features" for analyzing different models of reconsideration or review include (1) litigants' autonomy, (2) litigants' persuasion opportunities, (3) decision makers' power, (4) diffusion and reallocation of that power, (5) decisionmakers' impartiality and visibility, (6) rationality and norm enforcement, (7) ritual and formality, (8) finality, (9) revisionism, (10) economy, (11) consistency, and (12) differentiation among disputes). The choice of values used in this Article, while not likely to be controversial, is a subjective one.

254. See Singer, *supra* note 74, at 577.

A. Justice and Statutory Intent

To determine whether an alternative to formal litigation or enforcement serves the cause of justice,²⁵⁵ we first must define "justice."²⁵⁶ In the context of civil rights enforcement, justice might be defined as the achievement of a discrimination-free society. To a progressive, justice might require rectification of historical inequities in the treatment of minorities, women, the handicapped, and the aged. A more conservative individual might assert that justice cannot be defined in the abstract; one must look to the goals of Title VI, Title VII, and other relevant civil rights statutes. In other words, one might equate achieving justice with achieving statutory goals.

From the latter perspective, strict compliance with the law will best serve the interest of justice in most circumstances. But, even those who generally equate justice with conformity to the letter of the law will recognize certain circumstances in which strict compliance may not ultimately achieve the desired goal. If there is strong majoritarian resistance to full compliance with the law, a compromise solution — even one falling short of full compliance — might be preferable. For example, in a New York City transit case concerning access to certain subway stations by the physically disabled, the parties reached a settlement that provided that some, but not all, subway stations would be made accessible.²⁵⁷ Strict compliance with state law would have required all new and modernized stations to allow full access by those in wheelchairs.²⁵⁸ However, city officials deemed the accommodations for the handicapped to be needlessly expensive.²⁵⁹ Had the case gone to judgment, majoritarian pressure might have persuaded the legislature to repeal this progressive legislation. For those seeking increased access, the settlement providing for *some* accessibility might have come as close as possible — given the political realities — to achieving "justice."

On the other hand, if one's view of justice is *less* flexible, as is the view of Professor Fiss, then any compromise is inherently *less* just than attaining the ideal.²⁶⁰ In the subway case, if the ideal is physical access to all subway stations — because that is what the

255. See Edwards, *supra* note 88, at 684 (stating that "the overarching goal of alternative dispute resolution is to provide equal justice to all").

256. Scholars and philosophers have devoted tomes to defining justice. Cf. Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 779-82 (1985) (discussing individualism, justice, and contract as means to achieving justice). That is not my purpose here; rather it is to explore the relationship between certain procedures and justice as described by scholars such as John Rawls. See J. RAWLS, A THEORY OF JUSTICE 85-87 (1971).

257. See Eastern Paralyzed Veterans Ass'n v. Metropolitan Transp. Auth., 117 Misc. 2d 343, 458 N.Y.S.2d 815 (Sup. Ct. 1982); Daley, *Subway Access for the Disabled Voted by M.T.A.*, N.Y. Times, July 26, 1984, at B3, col. 6.

258. See 117 Misc. 2d at 353, 458 N.Y.S.2d at 821.

259. See Daley, *supra* note 257, at B3, col. 6 (quoting the mayor and a member of the transit authority); see also 117 Misc. 2d at 351, 458 N.Y.S.2d at 820 (discussing dispute over cost of accommodations for the handicapped).

260. See Fiss, *supra* note 89, at 1085-86.

statute provides — then justice is only achieved, in the view of Professor Fiss, when all subway stations are accessible. Compromise would not be just.²⁶¹ If the legislature repealed the requirement for total accessibility, then, arguably, it would be just for subway stations to be inaccessible. Thus, whether one defines justice in absolute as opposed to relative terms, objectively as opposed to subjectively, may influence one's preference for certain procedures.

1. *Statutory Intent*

Regardless of one's position, an understanding of the legislative intent behind Titles VI and VII is essential in evaluating how various procedures serve the goal of justice. Although Congress enacted both Title VI and Title VII to eliminate discrimination, the legislative history of the Civil Rights Act of 1964 suggests that the acts had somewhat different focuses. Title VI focused primarily on achieving system- or program-wide nondiscrimination, whereas Title VII focused primarily on redressing individual violations.

a. *Title VI*

The legislative history and language of Title VI suggest a two-fold purpose: taxpayers should not support institutions that discriminate *and* individuals should be protected from discriminatory conduct by recipients of federal assistance.²⁶² However, the rights established under Title VI are distinct from the remedies enacted to redress those rights. Although Title VI establishes the right to be free from racial discrimination in programs receiving federal funds, its administrative machinery does not guarantee any individual remedy for the infringement of that right. The only remedy Title VI specifically provides is termination of federal financial assistance. Thus, in *Cannon v. University of Chicago*²⁶³ the Supreme Court's analysis of this dichotomy between right and remedy led it to conclude that Congress intended to cre-

261. Cf. McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664-65 (1985) ("Fiss comes close to equating justice with law. . . . We do not believe that law and justice are synonymous. . . . Justice is what we discover — you and I, Socrates said — when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from.").

262. Senator John O. Pastore indicated that "the purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination." 110 CONG. REC. 7062 (1964). Representative John V. Lindsay stated, however, that "[e]verything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals." *Id.* at 1540. See generally *Cannon v. University of Chicago*, 441 U.S. 677, 704 n.36 (1979) (quoting comments of Pastore, Lindsay, and others).

263. 441 U.S. 677 (1979).

ate a private right of action.²⁶⁴

In fact, the threat of losing federal financial assistance provided a deterrent to ensure that recipients of federal funds would comply voluntarily in virtually all cases in which the agency found a violation.²⁶⁵ Congressional debates on the 1964 Act contain numerous assurances that termination of funds would not be too drastic a remedy, because it would provide an incentive for voluntary compliance.²⁶⁶ By providing that the agency must attempt to achieve voluntary compliance, Congress intended to limit the possibility of administrative recklessness in terminating assistance.²⁶⁷ The thrust of Title VI was not to terminate funds to federally assisted programs, but rather to end discrimination in those programs.²⁶⁸

b. Title VII

The voluntary compliance component of Title VI was intended to avoid what many in Congress perceived as the draconian remedy of fund termination; in contrast, the voluntary compliance component of Title VII was intended as a means of redressing a violation of the aggrieved party's rights.²⁶⁹ By providing for Title

264. *Id.* at 703; see also *Whitaker v. Board of Educ.*, 461 F. Supp. 99, 109 (E.D.N.Y. 1978) (holding that plaintiff may initiate an action under Section 504 of the Rehabilitation Act of 1973 without exhausting his administrative remedies because the process did not provide an adequate remedy to vindicate his rights).

265. Note the recent testimony of Julius Chambers, Director of the NAACP Legal Defense Fund: "There has been bipartisan anathema to employing even the threat of fund termination by initiating the administrative enforcement process when voluntary negotiations fail. But it is only the willingness to use the stick of Title VI that makes the carrot — voluntary compliance — effective." H.R. REP. NO. 458, *supra* note 70, at 6-7 (quoting *Investigation of Civil Rights Enforcement by the Department of Education: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 11 (1985)).

266. See, e.g., 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey) (commenting that the agency's attempts to ensure voluntary compliance are among the "number of procedural restrictions" placed on its authority to cut off funds); *id.* at 1520 (remarks of Rep. Celler) ("The title requires that an effort be made to secure compliance by voluntary means before any enforcement mechanism is invoked."); see also H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 25, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2487, 2512 ("Section 602 prescribes that assistance must not be terminated unless efforts to end discrimination by voluntary means fail.").

267. See 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey) ("the authority to cut off funds is hedged with a number of procedural restrictions" including, among others, administrative adoption of a nondiscrimination requirement, attempts to achieve voluntary compliance, thirty-days notice, a hearing, and judicial review); see also H.R. REP. NO. 914, *supra* note 266, pt. 2, at 25, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2512 (preaching that care must be taken by federal administrators "to not punish the innocent along with the guilty").

268. See, e.g., 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey) ("[T]he purpose of Title VI is not to cut off funds, but to end racial discrimination. . . . In general, cutoff of funds would not be consistent with the objectives of the Federal assistance statute if there are available other effective means of ending discrimination."); see also *id.* at 1520 (remarks of Rep. Celler); *id.* at 1538 (remarks of Rep. Rodino); *id.* at 7101 (remarks of Rep. Ribicoff); *id.* at 8920 (remarks of Rep. Williams). The opponents of Title VI never mentioned the voluntary compliance component, while the proponents of it promoted its inclusion to counter the fear of possible arbitrary action by the executive and concern that the act would be used as a punitive tool.

269. See, e.g., 118 CONG. REC. 590 (1972) (statement of Sen. Humphrey) (emphasiz-

VII's conciliation process, Congress intended to resolve compliance problems to the satisfaction of the charging party.²⁷⁰ EEOC need not proceed to court enforcement whenever it finds discrimination; it has the option of giving the charging party a notice of right to sue.²⁷¹ Furthermore, the charging party retains a key role in the process, since no conciliation agreement can be approved without her consent. If she withholds consent to an agreement that EEOC finds an adequate remedy, the agency will issue a notice of right to sue and proceed no further.²⁷²

At the time of enactment, employment discrimination was generally viewed as a series of isolated events, due primarily to the ill will of some identifiable individuals or organizations.²⁷³ Thus, a scheme that stressed conciliation rather than compulsory processes was thought to be a more appropriate resolution of the problem.²⁷⁴ During the 1972 debates, however, many observers perceived employment discrimination as a far more complex and pervasive problem than had been thought previously, and believed that the emphasis on voluntary compliance had proven detrimental to the success of the statute.²⁷⁵ Thus, the 1972 amendments increased the weapons in EEOC's arsenal for eradicating employment discrimination. For the first time, EEOC was granted the right to bring litigation in its own name to redress violations of the Act that it was unable to conciliate successfully. Nonetheless, the agency's focus has been on dispute resolution, rather than on systemwide eradication of discrimination.²⁷⁶

ing the importance of the charging party's right to pursue a claim even if the Commission found no cause).

270. See *supra* text accompanying notes 245-46.

271. 42 U.S.C. § 2000e-5(f)(1) (1982); see also 118 CONG. REC. 1068 (1972) (statement of Sen. Javits) (supporting an amendment that would give an aggrieved party, who does not enter a conciliation agreement, the right to sue).

272. See 29 C.F.R. § 1601.24(c) (1984) (preserving the right to proceed in court); *id.* § 1601.28 (setting forth the procedures for the issuance of a notice of right to sue).

273. H.R. REP. NO. 238, 92d Cong., 2d Sess. 8, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2143-44.

274. *Id.*, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2143-44.

275. See, e.g., H.R. REP. NO. 554, 92d Cong., 1st Sess. 64, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2462, 2511-12 (on H.R. 92-318); see also *Oversight Hearings on the Federal Enforcement of Equal Employment Opportunity Laws: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 18 (1983) [hereinafter 1983 *Oversight Hearings*] (prepared statement of Prof. Herbert M. Hill) (citing structural defects in the law and serious organizational problems in EEOC, resulting in haphazard enforcement efforts in the early 1970s).

276. An examination of recent annual reports supports this observation of the agency's emphasis. Note, for example, the *Annual Report* for fiscal year 1981:

Through the Commission's compliance and litigation activities, victims of employment discrimination received nearly \$112 million in monetary benefits, the largest amount in the Commission's 16-year history.

Most of these settlements were achieved through the Commission's no-

Thus, the emphasis of the legislative history of Title VI is quite different than that behind Title VII — as to both the original act and the 1972 amendments. In addition to an entirely different focus as to what remedy was available in both instances, the thrust of the mandate is different. Under Title VI, the statute *requires* — and the courts have echoed the requirement²⁷⁷ — that the agency proceed to terminate federal funding if compliance cannot be achieved. Under Title VII, if EEOC attempts to resolve a charge and is unsuccessful, it has the option of sending the charging party on her way with a notice of right to sue. Thus, although one purpose of both statutes is to eliminate discrimination, the emphasis under Title VI is to eradicate discrimination in programs receiving federal assistance, whereas the emphasis under the Title VII scheme is to resolve, or facilitate the resolution of, disputes involving employment discrimination.

This raises the question whether informal dispute resolution interferes with the eradication of discrimination. Does the focus on resolving individual controversies pose the danger of clouding a pervasive picture of discrimination? Potential claimants may lack the incentive to discover others who might share their complaint. In addition, due to the facility of informal procedures, agency officials might fail to uncover larger patterns of discrimination, the eradication of which demands governmental intervention.²⁷⁸ If, as

fault settlement procedures and were voluntarily negotiated and agreed to by charging parties and employers.

Over \$16 million in backpay was obtained through litigated suits. Over \$3 million more accrued to individuals as a result of the Commission's systemic program.

1981 EEOC 16TH ANN. REP. 3 (emphasis added).

The focus may be shifting. A 1984 EEOC press release stated: "The Commission is confident that the new charge processing procedures better fulfill the agency's mission — *the elimination of employment discrimination.*" APRIL 16 POLICY STATEMENT, *supra* note 157, at 3 (emphasis added). The *Annual Report* for fiscal years 1977 and 1978 stated:

In the past, EEOC's two basic case objectives — to resolve individual charges of employment discrimination and to eliminate systemic discrimination against entire groups of employees in a company — have often been merged and confused. The agency tried to accomplish both objectives at once by combining its investigation of individual charges with its class action activities, most often by expanding individual charges to encompass group concerns without reference to any criteria to assure the effectiveness of the individual charge as a class vehicle. This approach, unfortunately hindered the achievement of both goals.

1977-1978 EEOC 12TH-13TH ANN. REP. 21.

This conclusion is supported by Professor Herbert M. Hill's comments in 1983: "In my view, the 1972 amendments should have fundamentally transformed the Agency from a conciliation agency into a litigation agency. But it did not do so because the agency never accepted the perspective." 1983 *Oversight Hearings*, *supra* note 275, at 23.

277. See *Adams Order*, *supra* note 113.

278. See Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 289 (R. Abel ed. 1982).

Although this guarantee of confidentiality is justified in the name of process, its effect is to isolate grievants from one another and from the community, inhibiting the perception of common grievances. Without the possibility of aggregation, of some greater impact, even the most committed grievant will burn out and "lump" the complaint. . . . [T]hose who hear

suggested above, eradication of discrimination is necessary to the attainment of justice,²⁷⁹ then concern with justice requires critical exploration of the use of less formal procedures.

2. Norm Articulation

Another value tied to the notion of justice is the articulation of norms.²⁸⁰ Courts, as law-making bodies, announce normative principles to guide future behavior.²⁸¹ Agencies, too, through rulemaking and adjudication, make law and announce policy, thereby articulating normative principles.²⁸² Because these statutes are general in their terms, leaving vast room for confusion and disagreement over their meaning, norm articulation that extends beyond the words of the statute is essential.²⁸³ Thus, another measure of the justness of a procedure is whether and how well it clarifies the statute's meaning and articulates standards for future behavior.

3. Substantive Fairness

Still another dimension of justice is the notion of fairness.²⁸⁴ To the extent our conception of justice derives from the substantive intent of the statutes, fairness might be defined as a result consistent with that intent. For example, it is not the purpose of Title VI or Title VII that employers who have not engaged in discrimination should make reparations. To the extent that informal procedures might compel settlement of insubstantial charges, they

the complaints may lack an incentive to aggregate. Enormous caseloads (and the pressure to increase them) generate pressure to move the cases with the least possible effort. . . . Informal institutions often lack the records that would permit the perception of common patterns. The use of amateur or paraprofessional mediators, who handle disputes infrequently and display high turnover, also hinders aggregation, for they, like the disputants themselves, experience everyone as a first offender.

Id. (citations omitted).

279. See *supra* text following note 256.

280. See NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 17.

281. See Edwards, *supra* note 88, at 679-80.

282. See generally S. BREYER & R. STEWART, *supra* note 100, at 257-373.

283. See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980) (interpreting the Secretary of Labor's promulgation of specific standards in accordance with the Occupational Safety & Health Act of 1970).

284. In outlining the components of justice, this Article distinguishes substantive fairness, that is, a fair or correct result, from procedural fairness. Obviously, the central goal of fair procedures is to achieve a fair result, see Rosenfeld, *supra* note 256 (discussing Rawls' position that a procedure that achieves one's view of justice constitutes "perfect procedural justice"). Judge Newman suggests, however, that our obsession with procedures has hindered our ability to obtain fair results. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985). Procedural fairness warrants separate examination. See *infra* text accompanying notes 285-89.

might be less “just” than formal, take-all-or-lose-all litigation or administrative enforcement proceedings where such an “innocent” party — at least in theory — would prevail.

Similarly, procedures that increase the likelihood of the charging party achieving what she is entitled to under the statute will be more substantively fair than procedures less likely to do so.

B. Procedural Fairness

Certainly one justification for ADR is that litigation is too costly for the segment of our population so often in need of the law's protection. On the other hand, informal procedures are, as Anatole France would say,²⁸⁵ available to rich and poor alike. Professor Richard Abel suggests that this may serve to reinforce the ways in which our system favors the advantaged over the disadvantaged.²⁸⁶ If procedures are used tactically, not to achieve a just result, but rather to wear a party into acquiescence,²⁸⁷ then they cannot be viewed as fair.

The procedural fairness of a given dispute resolution mechanism may be measured in various ways.²⁸⁸ One may be how the particular procedure fits into the entire scheme of available procedures. Perhaps the greater the choice that a complainant or respondent has as to what procedure will be used, the greater the degree of procedural fairness. From this perspective, mandatory mediation may not be as fair as optional mediation.²⁸⁹ Further, in judging procedural fairness, one cannot view a procedure in isola-

285. “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.” A. FRANCE, *THE RED LILY* 95 (W. Stephens trans. 1922).

286. Abel, *supra* note 278, at 297.

If informalism grants additional offensive weapons to those already endowed with disproportionate legal resources while depriving the legally disadvantaged of the protection of formal defenses, it also denies the latter the sword of formality while assuring the former that they can continue to invoke formality as a shield. For the disadvantaged, informal institutions are a substitute not a supplement.

Id.

287. This may be true whether the worn down party is disadvantaged generally, or disadvantaged in relation to the government. The Chairperson of EEOC has said: In recent years, EEOC's enforcement methods have gone too far and have become what conservative economist Thomas Sowell calls ‘undue process’. . . . The process itself becomes a punishment for employers. We'll drag you through endless discovery and bankrupt you if you don't do what we want. I can't go for that kind of blackmail. Even the most discriminatory employer has rights. At the same time, when we find a problem, that employer should pay whatever penalty is involved and not lollygag around.

See Prentice-Hall Interview with EEOC Chairman Clarence Thomas, New EEOC Chairman Sees Agency Management Reforms as Way to Improve Basic Civil Rights Enforcement (Equal Employment Compliance Report Manual Bulletin No. 5, 1982) (copy on file at the *George Washington Law Review*).

288. See Rosenfeld, *supra* note 256, at 781-82.

289. The value of having one's day in court, whether constitutionally mandated or not, is precious to our system of jurisprudence. Cf. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538-39 (1958) (stating that trial by jury serves an essential federal constitutional function).

tion, but one must take into account what other procedures will be available should the particular procedure fail to resolve the matter satisfactorily. Procedural fairness also involves the protections afforded the parties by each procedure. Are parties given sufficient notice of their rights and responsibilities? Do they have a reasoned basis on which to evaluate their options? If another entity or person is rendering a decision, are they given reasons for that decision?

C. *Expedience, Efficiency, and Cost Effectiveness*

One of the most commonly proffered justifications for ADR procedures is that they are faster and less expensive than more formal alternatives.²⁹⁰ This was a major objective of the rapid charge procedures initiated in 1979 at EEOC, as well as the ECR procedures used at OCR. Although the cost and time involved are legitimate concerns, it does not necessarily follow that the least expensive, most rapid procedure is to be preferred.²⁹¹ At least two questions arise when alternative procedures are introduced to save time or money or both, or to improve the efficiency of a statutory scheme, for example, by clearing up EEOC's backlog of uninvestigated charges. Are these savings needed? Do the procedures employed achieve the desired savings?

D. *Finality and Enforceability of the Result*

Closely related to considerations of efficiency and savings is the question of whether the chosen procedure is likely to end the controversy or dispute. If attempts at mediating a resolution to a problem are seldom successful, and the investigative process is delayed until after such attempts, then the use of such procedures will increase the time, and likely the cost, involved in resolving the discrimination complaints. Similarly, even if a mediated agreement is reached, its value is diminished if it is subsequently broken, requiring that proceedings be resumed or further avenues of relief sought. A procedure may be preferred, therefore, if it is likely to resolve a dispute once and for all.

Moreover, as to those agreements subsequently breached, the enforcement mechanism available is relevant to measuring the value of the procedure. If the complainant cannot easily hold the respondent accountable for breach, or if a breach requires that the investigatory process begin anew, then the procedure's unenforceability undermines its value.

290. See, e.g., Smith, *supra* note 73, at 21; NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 1.

291. See Edwards, *supra* note 88, at 669, 679.

E. Other Goals

Other values to be considered include the value of a compromise, as opposed to an "all or nothing" resolution,²⁹² the value of autonomy and individual control,²⁹³ the value of amicable solutions, which might facilitate continuing relationships,²⁹⁴ and the value of nonconfrontation.²⁹⁵

V. The Cases

In assessing the desirability of the various available procedures, it will be helpful to have in mind some concrete examples of typical complaints, or charges, that are filed with OCR and EEOC, as well as some notion of the practical constraints that must be appreciated and accommodated in the process.

A. Typical Complaints

An appreciation of the range of actionable individual complaints of discrimination that might be filed with OCR and EEOC is useful for assessing the appropriateness of available procedures. The following is a limited but representative sample of various types of cases.

1. Section 504 of the Rehabilitation Act of 1973

Complaints of discrimination under Section 504 might include (1) an allegation that a hospital worker was fired because he tested positive for AIDS antibodies; (2) an allegation that a school refused to admit a blind student because of his disability; or (3) an allegation that a secondary school failed to make a building physically accessible to a wheelchair-bound student.

Although each of these three cases arises under Section 504, each differs markedly. The AIDS example suggests the specter of irrational fear with which society has not yet come to terms.²⁹⁶ The second example may be based on unwarranted perceptions about the capability of blind students to participate meaningfully in a regular academic environment. The third example may be merely a product of oversight or lack of funding. The same procedure may not be equally appropriate for each type of complaint.²⁹⁷

292. See *infra* notes 590-92 and accompanying text.

293. See *infra* text accompanying notes 593-600.

294. See *infra* text accompanying and following note 601.

295. See *infra* notes 602-05 and accompanying text.

296. This is manifest in DOJ's recent policy statement on AIDS. Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Ronald E. Robertson, General Counsel, Department of Health and Human Services (June 1986) (suggesting that a person testing positive for AIDS antibodies, without more, is not handicapped within the meaning of Section 504, and, thus, would have no claim under that section for unlawful termination, even if he were terminated on the basis of the employer's irrational fear of communicability of the disease).

297. It is important to bear in mind that there may be alternative ways to resolve each (assumingly legitimate) complaint. In the third example, it might be acceptable

2. Title IX

The following complaints might arise under Title IX: (1) an allegation that the only woman faculty member of a department was denied tenure;²⁹⁸ (2) an allegation that a female student was offered a higher grade if she submitted to her professor's sexual advances; or (3) an allegation that a female athlete was not allowed to try out for the school's only volleyball team, which was all male.

The first example presents a conflict: If the allegations are true, they may reflect the kind of invidious discrimination that calls for more formal resolution procedures. On the other hand, the parties may wish to continue in an ongoing relationship, making a more informal, amicable resolution a better alternative.

The second example may call for use of the least formal procedures. In fact, it may be preferable for the college to handle the matter without any governmental intervention, if possible.²⁹⁹ This kind of overt problem — as opposed to some of the less obvious but nonetheless real manifestations of sexual harassment — is unlikely to be condoned by the educational institution any more than by the federal agency; thus it may best be approached through internal grievance mechanisms at the college. On the other hand, the college may be willing to ignore the problem for the sake of its (and the teacher's) reputation, thereby necessitating the agency's involvement.

The third example, if true, would violate Title IX regulations,³⁰⁰ but the violation may well be unwitting. The school may not have realized that the regulations required that the female student be allowed to compete for the team. In such a case, it may be less important that the resolution be formal. On the other hand, a formal resolution might notify other recipients of their responsibilities in this area and might encourage this school to have its lawyer advise it of its legal responsibility under the regulations. There

to either install an elevator or rearrange classes so that all of the student's classes are taught on a ground floor. In many cases, such as this one, there will be little controversy over the facts; the only real issue is how might the school comply given its limited resources. The availability of alternative solutions may bear on which procedures are preferable. Under either ECR procedures or in a private suit, the complaining party would have a substantial say in choosing the remedy. Once the case is under investigation by OCR, on the other hand, the complainant would have, at best, a consultative role. Ultimately, if OCR finds a violation, the recipient would be able to choose which measures to take, as long as such measures would resolve the violation.

298. Under current procedures, OCR might well refer such a complaint to EEOC for investigation. *See supra* note 43.

299. *See Bates Ponders Sexual Assault*, N.Y. Times, Mar. 8, 1987, at A46, col. 5 (reporting that Bates College held a day-long seminar on sexual harassment after campus incident).

300. 34 C.F.R. § 106.41(a), (b) (1986).

may be no incentive for self-enforcement if the agency exacts no price for noncompliance.

The choice of procedure is also important from the recipient's perspective, for example, if the regulations are in fact challengeable as *ultra vires* the statute. If the price of compliance is minor, there may be little incentive for a recipient to make an otherwise appropriate challenge. Do we want the agency to be operating *ultra vires* its authority? Perhaps the answer depends on how close the call or how important the issue. For important matters, some recipients will likely hold out and challenge the regulation or policy. Perhaps we should be less concerned about the agencies overreaching in relatively minor areas than about overburdening the courts by requiring them to second guess such decisions.

3. *Title VI*

Title VI complaints might include (1) an allegation that a black elementary school student was punished repeatedly for fighting with white classmates while the white classmates, who started the fights, were not punished or were merely reprimanded; (2) an allegation by a black high school student that his classmates called him "nigger" and his teacher ignored the situation; or (3) an allegation that a school placed a recent Hispanic immigrant in a lower grade because of difficulty with English, without affording any special remedial language assistance.

As the first two examples might suggest, it is difficult to identify examples of individual Title VI complaints that would not have systemic overtones.³⁰¹ This is, perhaps, a function of the very nature of racial discrimination. The question becomes whether it is preferable to use formal procedures, thereby raising the specter of invidious (frequently subconscious) prejudice, which results in discriminatory treatment, or whether it is preferable to address the problem through less confrontational approaches.

The problem is, perhaps, somewhat different in the third example. When denial of remedial education results in discriminatory treatment,³⁰² the problem is generally less one of prejudice and more one of ignorance or lack of resources, as in the example above on the lack of wheelchair accessibility. A number of approaches might remedy the problem.³⁰³

4. *Title VII*

Typical Title VII cases might include (1) an allegation that an employer threatened a female employee with dismissal if she refused to submit to his sexual advances; (2) an allegation that an

301. See *infra* note 316.

302. See *Lau v. Nichols*, 414 U.S. 563 (1973) (holding that the failure of the San Francisco school system to provide English language instruction to students of Chinese ancestry denied them equal educational opportunity, in violation of section 601 of the Civil Rights Act of 1964).

303. See *supra* note 297 and accompanying text.

employer fired a black employee for racial reasons; or (3) an allegation that an employer passed over a Hispanic woman for promotion in favor of a less qualified white male.

On one hand, the ability of these individuals to continue in their place of employment may be jeopardized by formal, confrontational proceedings. On the other, a systemic problem, which may exist in any of these examples, may require a public airing through formal procedures.

B. Policy Clarification

Specific cases or complaints under any of these jurisdictional bases may raise questions of policy or interpretation not yet clarified by the agency. For many years, OCR struggled over its Title IX athletics policy. Did it violate Title IX for a university to pour thousands of dollars into its intercollegiate football team, an income-producing enterprise, while allocating substantially fewer resources to its athletics programs for women? If a woman wanted to play football, could the university both bar her from the men's team and refuse to establish a football team for women? What was required to assure equal educational opportunity to women in sports offerings?

While the agency pondered these important and difficult questions, would it have been preferable to have an informal resolution of the cases that had arisen, or was there a need for norm articulation through more formal processes?³⁰⁴ It would have been far more expedient to resolve these matters before developing policy — it took OCR years to come up with its athletics policy while hundreds of cases languished³⁰⁵ — but do we want to encourage settlements when there are no norms? Without norms, there is an inherent likelihood of inconsistent results, creating worrisome problems of fairness. How does the agency know whether it is achieving nondiscrimination if it has not yet defined what constitutes discrimination in this area? There is, of course, always a possibility that informal agreements may ignore established norms;³⁰⁶ however, that problem — assuming it is a problem — is more easily addressed than the problem of abuse of discretion when the limits of discretion have not yet been defined.³⁰⁷

304. Even the issuance of an LOF would require that a policy decision be made.

305. 1981-1982 OCR SECOND ANN. REP. 35-36.

306. See, Edwards, *supra* note 88, at 676-79.

307. For example, OCR has a quality assurance program to monitor the appropriateness of the basis on which a particular case is closed, one aspect of which is whether any remedy agreed to conforms to the applicable law and policy. See 1985 *Hearings on OCR*, *supra* note 70, at 259-60. If policy has not yet been developed, it would be impossible to assess appropriateness on this basis. The effectiveness of

C. Nonviolations — Absolute or Unprovable

One important category of complaints is those which, if the agency were to make a finding, would result in a finding of nonviolation. This may be divided into two subcategories: the absolute nonviolation and the unprovable violation. Although one may doubt whether agency personnel can accurately predict at the intake stage whether a given complaint, if investigated through to finding, would fall within either of these subcategories,³⁰⁸ it is still a reality that many complaints filed with EEOC and OCR are at best unprovable as violations and, not infrequently, lack merit.³⁰⁹

For example, let us suppose that Cora College files a complaint with OCR alleging that she was not admitted to Howe University on account of her race. Let us suppose further that Ms. College is black; that preliminary inquiry reveals that her grade point average (GPA) and Scholastic Aptitude Test (SAT) scores are significantly below the average scores of students admitted to Howe University that year; that Howe University admits into the school a significantly higher percentage of minorities than exist in the applicable qualified applicant pool; and that most of the minority students admitted have GPA and SAT scores substantially higher than those of Ms. College.

Contrast this with a complaint by Sarah School against Stowe University, again alleging denial of admission due to race. Suppose Ms. School is also black, and preliminary inquiry reveals that her GPA and SAT scores, while below the average for Stowe students, exceed those of a number of minority and nonminority students admitted to the school, and that the number of minorities admitted to Stowe approximates their representation in the quali-

OCR's quality assurance program, however, has been called into question. See H.R. REP. NO. 458, *supra* note 70, at 18-22.

308. This assumes, of course, that the complaint states a violation on its face, a prerequisite to agency jurisdiction under Title VI or Title VII.

309. The following table compares the number of violation LOFs with no-violation LOFs issued in fiscal years 1980-1984:

Fiscal Year	Violation LOFs	No-Violation LOFs
1980	349	650
1981	538	1067
1982	338*	852
1983	527*	640
1984	380*	596

* Figures include violation, violation corrected, and violation not corrected LOFs. See summary print-out data dated June 20, 1985 provided to author by OCR in response to a FOIA request dated February 14, 1985 (copy on file with the *George Washington Law Review*).

What are the implications of mediating or negotiating a settlement to a complaint that would result in a finding of no violation (or no cause, to use EEOC terminology), if the agency were to investigate the complaint to finding? Should a distinction be made between the two subcategories described above? Is it possible that we would value settlement in the subcategory of cases where there exists suspicion of unprovable but nonetheless actual discrimination? Should we ever condone settlement when discrimination has not in fact occurred, assuming we can ever know with any degree of certainty? Or, perhaps, does the fallacy of such an assumption render this point moot?

fied applicant pool (approximately fifteen percent). Let us suppose further that Ms. School listed on her application to Stowe that she is a member of a number of black service organizations, had been the President of the Black Students organization in her high school, and wrote her application essay on "The Responsibilities of Black Americans to Third World Nations."

In the first case, it appears highly unlikely that Ms. College was actually denied admission on account of her race, because the known facts objectively suggest that the actual reason for denial was that Ms. College did not measure up to the academic standards of Howe University.

In the latter case, however, we might have a strong suspicion that racial discrimination was in fact a motivating factor in the denial of Ms. School's application to Stowe, but in the absence of a "smoking gun" — for example a statement by the admissions director that Sarah was not admitted for fear of racial agitation at their conservative institution — it is highly unlikely, given the statistical profile of the school, that OCR could ever prove that such discrimination occurred.³¹⁰

An additional question, then, as we explore the alternative procedures and the values they promote or diminish, is whether we would wish to see different procedures used to resolve these two different complaints, or, in other words, whether our view of the merits of a particular case should have any bearing on the procedures used to resolve it.

D. Individual vs. Class Complaints

Another factor that may affect the choice of procedures is whether complaints are individual or class. Class complaints might be styled as such, or they might be individual complaints, the details of which suggest a systemic problem. A complaint may describe patterns and practices of discrimination resulting, for example, in segregated schools, segregated classes within schools (by race or by handicap), unequal athletic opportunities for men and women, sex-segregated physical education classes, or, in the case of employment, differential treatment of women or minorities in

310. The measure of proof referred to is a preponderance of the evidence standard, the standard that would apply either in court proceedings or in formal administrative proceedings. It is the standard that OCR requires, at least in theory, to conclude that a finding is legally sufficient. *Cf. 1985 Hearings on OCR, supra* note 70, at 240-66 (portions of material submitted for the Record by Harry M. Singleton, Assistant Secretary for Civil Rights, U.S. Department of Education). The *PEER Study* found that one reason OCR equal opportunity specialists liked ECR was because of their frustration with the formal investigative process and the difficulty they encountered in making and supporting a finding of discrimination under the formal system. *PEER STUDY, supra* note 92, at 69-70.

salary, promotion, tenure, or job categorization. A class complaint might suggest a problem that is both systemic and invidious, or one that is systemic but innocent in nature. In the latter case, the resolution is unlikely to meet substantial resistance once the enforcement agency clarifies the compliance problem. For example, a rural school with separate classes for physically handicapped students might not understand that federal law requires schools receiving federal funding to provide education for handicapped children in the least restrictive environment;³¹¹ upon clarification of the federal requirements, the school might have no objection to complying. Another noninvidious, systemic problem might exist if failure to comply with federal law is due to inadequate funding or human resources.³¹²

The question, then, is whether the nature of class complaints suggests that certain procedures are more appropriate than others. Should invidious, systemic problems be handled differently than noninvidious, systemic problems? Should lack of funding cases, which are generally a function of a legislature's resistance to increased expenditures, receive more formal treatment than other kinds of noninvidious problems?

Under OCR policy, ECR will not be used for class complaints; those filed by one individual but implicating systemic allegations are excluded as well.³¹³ EEOC, on the other hand, encourages the use of its rapid charge process for such complaints.³¹⁴ Both agencies use different procedures to govern withdrawal of complaints, depending on whether the complaints are individual or class.³¹⁵

Virtually any of the class complaints described above might be filed as an individual complaint;³¹⁶ yet it is important to consider whether guidelines for informal resolution should be different if only an individual complaint is involved. Should the agency proceed with an individual remedy if a class problem remains?

E. Retrospective and Prospective Remedies

Many cases require only retrospective remedies for proven violations, such as damages or the opportunity for a previously excluded student to try out for a team, either of which may be implemented immediately. Other remedies, such as desegregation of schools or classes, making structural changes to a building to allow access by the physically handicapped, or increasing the number of women and minorities in the workforce, must be im-

311. 34 C.F.R. § 104.34 (1986).

312. See, e.g., *Yaris v. Special School Dist.*, 558 F. Supp. 545, 559 (E.D. Mo. 1983) (holding that inadequacy of funds does not relieve a state of its obligation to handicapped students).

313. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 2.

314. See EEOC Compl. Man. (CCH) ¶ 566 (Mar. 1979).

315. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 48-49; EEOC Compl. Man. (CCH) ¶¶ 341-345 (Sept. 1984).

316. Some individual complaints, such as an allegation that a student was being educated in a segregated school, depend upon a class violation.

plemented over time. There may be less concern about breach of the negotiated agreement in the former case, where compliance can be promptly verified, than there is in the latter, where ongoing monitoring will be necessary. This may suggest that more formal procedures are preferable when relief is prospective, to facilitate enforcement upon breach. Whether or not this matters may depend on the mechanisms in place for enforcement of whatever form the disposition on the complaint or charge might take.³¹⁷

Both the type, nature, and specific problems raised by the cases the agencies investigate add a separate dimension to an appreciation of the procedures used in their resolution. An understanding of such cases is necessary for a thorough evaluation of the appropriateness of the available procedures in achieving the desired values.

VI. *Testing the Procedures Against the Values*

Having identified the procedures available to EEOC and OCR to resolve discrimination complaints,³¹⁸ as well as the values we seek to achieve,³¹⁹ this Article will examine the likely success of each procedure in achieving the desired values. As the previous section demonstrated, the choice of procedures or goals may vary depending on the nature of the case.³²⁰

A. *Justice and Statutory Intent*

1. *Formal Procedures*

a. *Litigation*

On one hand, litigation has been championed as the guardian of the rights of the underprivileged and oppressed; on the other, it has been criticized as the enemy of truth and justice. Dean Robert B. McKay has described courts as "the social conscience in matters

317. In other words, this might not be an issue if we could convince the courts or the legislatures that ECR and rapid charge agreements should be enforceable by the agencies under their organic laws. *See infra* text accompanying notes 554-82.

318. *See supra* text accompanying notes 169-251.

319. *See supra* text accompanying notes 252-95.

320. *See supra* text accompanying notes 289-317. I undertake this analysis mindful of the appropriate warning in *Paths to Justice*:

One must be wary of ascribing particular attributes to one or another method of dispute resolution, however. Litigation is not always final, although that is a commonly perceived benefit; mediation may not enable parties to work together in the future, as is often suggested; arbitration may not always be less expensive than pursuing a case in court.

NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 9; *see also id.* at 30 ("[W]e must avoid false comparison between the ideal functioning of one institution and the actual functioning of another.").

relating to public education (desegregation, discipline, finance, bilingual instruction, and education of the handicapped), prisons, mental institutions, environmental concerns, industrial safety, legislative redistricting, and affirmative action. . . ."³²¹ At the 1976 Pound Conference, Judge A. Leon Higginbotham quoted the conference's namesake by stating that "in discouraging litigation we encourage wrongdoing * * * of all people in the world we ought to have been those most solicitous for the rights of the poor, no matter how petty the causes in which they are to be vindicated."³²² Recognizing that at the time Roscoe Pound gave his famous address there were no major governmental agencies, Judge Higginbotham emphasized that the massive expansion of government created a new imperative for the courts to serve as the watchdogs over the relationship between expanded government and its citizenry.³²³ Discrimination against black people was a virtual institution at the time of Pound's address and for decades thereafter; it remained in less obvious but no less invidious forms throughout our nation at the time of Judge Higginbotham's remarks,³²⁴ demanding judicial attention. As to this and other forms of discrimination, Judge Higginbotham criticized the proponents of ADR mechanisms for failing to realize "that while there is an essential place for nonjudicial forums in resolving disputes, the cutting edge of the move to remedy the results of this dehumanization must have a sharp judicial component."³²⁵

One presumption behind such positions is that courts, especially federal courts,³²⁶ as compared to other institutions, have particular expertise in and inclination toward protecting the rights of minorities. Historically this has been true. Whether it remains true today and for the future is less clear given recent judicial trends, especially under the Supreme Court's lead.³²⁷

321. McKay, *Civil Litigation and the Public Interest*, 31 U. KAN. L. REV. 355, 369 (1983).

322. Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 135 (1976) (quoting R. POUND, *THE SPIRIT OF THE COMMON LAW* 134 (1921)).

323. *Id.* at 139.

324. *See id.* at 140-46.

325. *Id.* at 146; *see also* Howard, *supra* note 90, at 11 (suggesting that cases involving "a fundamental individual right, or powerless or unpopular minorities" should be resolved by courts); McKay, *supra* note 321, at 358 (presuming that courts are "guardians of a valued way of life, standing as buffers between free citizens and their government").

326. The presumption that state courts do not guard civil rights and liberties as well as do federal courts may not be as legitimate as it once was. *See generally* Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A.L. REV. 1249 (1987).

327. *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1852 (1986) (striking down minority preferences in collective bargaining agreements regarding layoffs); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984) (striking down court-ordered consent decree on minority preferences during layoffs); *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984) (defining narrowly "program or activity" receiving federal financial assistance for purposes of Title IX coverage). *But see* *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1457 (1987) (holding that a county agency can appropriately take into account sex as one factor in determining job promotion); *United States v. Paradise*, 107 S. Ct. 1053, 1067-70 (1987) (approving one-

In any discussion on the success of litigation in achieving justice, a distinction should be drawn between cases in which the only dispute is whether the respondent in fact took the action or engaged in the practice complained of, and cases in which the question is whether the defendant's conduct legally constitutes prohibited discrimination under the Constitution or the relevant statute or regulations.³²⁸ If the inquiry is factual, the issue is whether litigation is superior to the alternatives as a fact-finding device.³²⁹ Judge Marvin Frankel suggests that as a truth-finding device, litigation under our adversary system has serious shortcomings: "If history can never reproduce the past with total fidelity, one wonders often whether we could not miss by margins much narrower than those marked in courtrooms."³³⁰ In contrast to Judge Higginbotham's view, Judge Frankel concurs with other scholars that "[i]n an ideal adversary system, the less skillful antagonist is expected to lose, which under the laissez-faire notion is the proper outcome."³³¹ Judge Learned Hand saw litigation as an object of dread "beyond almost anything else short of sickness and death,"³³² and Judge Frankel refers to Professor Jerome Frank's focus on "the utter chanciness of factual determinations as the main reason why lawsuits are gambles too often and routes to justice more seldom than they should be."³³³

If the concern is not truth-seeking as much as norm-articula-

black-for-one-white quota requirements to eliminate the effects of long-term pervasive discrimination); *Local No. 93 of the Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986) (upholding consent decree benefitting individuals who are not actual victims of discriminatory practices); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3034 (1986) (holding that statutory provision does not prohibit, in appropriate circumstances, court from ordering race-conscious relief for past discrimination).

328. See generally W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 251-56 (7th ed. 1979) (discussing distinction between questions of fact and questions of law).

Of course, as with many distinctions, this one is not clean. A case that arises as a "fact case" may well end up reforming the law.

329. See Edwards, *supra* note 88, at 680.

330. M. FRANKEL, *PARTISAN JUSTICE* 13 (1980).

331. *Id.* at 18 (quoting Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L.F. 123, 162 (1974)). Contrast this with Dean McKay's explanation of the basic premise of the adversary system:

The concept is that the best device in the search for truth is to test the opposing views of disputants by putting each to the proof of his or her claim. Thus, since each litigant is presumed to be equally motivated to investigate the facts and to present the case through able lawyer spokesmen, the theory is that truth will emerge to the extent it is discoverable.

McKay, *supra* note 321, at 361.

332. Address by Judge Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Association of the Bar of the City of New York (Nov. 17, 1921), reprinted in 3 ASSOCIATION BAR CITY OF NEW YORK LECTURES ON LEGAL TOPICS 1921-1922 at 87, 105 (1926).

333. M. FRANKEL, *supra* note 330, at 19.

tion, and perhaps norm-development, then the usefulness of the courts in resolving discrimination cases must be viewed somewhat differently.³³⁴ From the perspective of Professor Fiss, "courts exist to give meaning to our public values, not to resolve disputes."³³⁵ Thus, they serve to articulate the norms and the standards by which we, as citizens of a democratic republic, are expected to govern our behavior. In cautioning that the purpose of the Pound Conference was not to suggest that courts get out of the business of civil rights litigation, Simon Rifkind drew a distinction between dispute resolution and problem solving, suggesting that, in new and burgeoning areas of the law, courts were necessary to resolve disputes concerning "new rights — newly acknowledged and only recently enjoyed,"³³⁶ but that courts were not equipped to solve problems requiring broad formulation of social policy.³³⁷

Although there is legitimate controversy over the judicial system's ability to solve massive social problems,³³⁸ there has been some consensus that the courts are an effective, if not essential, instrument for the articulation of new and developing individual rights.³³⁹

To the extent that our focus in achieving justice is to eradicate prohibited discrimination, we must further distinguish between litigation brought by the agency itself and private litigation, especially individual rather than class litigation. Individual private litigation inevitably will focus more on dispute resolution than on the eradication of discrimination.³⁴⁰

334. See Edwards, *supra* note 88, at 679-80 (arguing that "[w]e must also be concerned lest ADR becomes a tool for diminishing the judicial development of legal rights for the disadvantaged. . . . Imagine, for example, the impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated. . . . Many cases . . . may require nothing less than judicial resolution.").

335. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979).

336. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 100 (1976) (stating that "[i]f that momentum is to proceed without the artificial impediment of overlaid courts, we must relieve the courts of burdens that do not require their special expertise").

337. According to Rifkind,

It is one thing for judges to decide bi-party controversies and, in so doing, pronounce principles which may contribute to the solution of the underlying problem, or sometimes unhappily become part of the problem. It is another for the courts to be burdened with the responsibility for the solution of the problems. . . . In my perspective I see a great difference between the two roles. On one side, I see a court which tries to determine: was Jones unlawfully excluded from the University of State X, and which, having answered the question in the affirmative, fashions a decree designed to bring an end to the denial of the plaintiff's rights. On the other side, I see a court which, bidden or unbidden, undertakes to solve the problem of unequal education in State X.

Id. at 103-04.

338. See, e.g., Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 439 (1982); Rifkind, *supra* note 336, at 103. But see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313-16 (1976) (suggesting that the traditional concept of litigation should be modified to accommodate the public law model of litigation).

339. See Edwards, *supra* note 88, at 679; NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 10.

340. For a discussion of private rights of action, see *supra* note 165 and accompany-

Litigation provides a context against which the desirability of informal resolutions may be judged. On one hand, litigated decisions provide the norms by which future behavior is governed, and the resolution of informal disputes guided.³⁴¹ In addition, the potential expense and delay of litigation may induce negotiated settlements.³⁴² Thus, once the courts have articulated the relevant norms, less cumbersome processes may be able to accommodate the interests of justice.³⁴³ In the context of civil rights enforcement this means that court resolution may be needed if the law is not clear, or if a new statutory scheme is involved and the rights it creates and protects are relatively inchoate. Once the courts fully establish the principles, some less formal process may suffice.

b. Administrative Enforcement Proceedings

Another alternative is formal administrative proceedings. Do they serve the interests of justice better than, as well as, or worse than court proceedings? On one hand, administrative agencies may have specific expertise. In the case of OCR, however, this is a less compelling argument than it might be for other agencies. First, as already discussed, courts have traditionally played a role in protecting minorities from majoritarian discrimination, and therefore possess the requisite expertise. Second, the administrative law judges (ALJs) who preside over OCR's formal hearings are borrowed from other agencies and therefore lack any particular expertise.³⁴⁴ Further, given the infrequency of hearings held by OCR,³⁴⁵ it is unlikely that the ALJs would develop significant

ing text. In *Cannon v. University of Chicago*, 441 U.S. 677 (1978), the Court distinguished the remedy sought by the individual from the interest of the government when it proceeds against a recipient. *Id.* at 704-06; see also *Storey v. Board of Regents*, 604 F. Supp. 1200, 1204 (W.D. Wis. 1985) (finding no private right of action under Title IX to seek termination of federal financial assistance).

341. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978). Fuller describes adjudication not merely as a method of settling controversies or disputes, but rather "as a form of social ordering, as a way in which the relations of men to one another are governed and regulated. . . . Even if there is no statement by the tribunal of the reasons for its decision, some reason will be perceived or guessed at, and the parties will tend to govern their conduct accordingly." *Id.*

342. See Singer, *supra* note 74, at 572. But see Edwards, *supra* note 88, at 678 (stating that "private settlements are troubling when we have no assurance that the legislative- or agency-mandated standards have been followed, and when we have no satisfactory explanation as to why there may have been a variance from the rule of law").

343. See Sander, *supra* note 253, at 118.

344. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS: STATISTICAL REPORT FOR 1976-1978, at 21 (1980); cf. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, MANUAL FOR ADMINISTRATIVE LAW JUDGES 2 n.7 (1974) (noting that the OSHA Review Commission has its own corps of ALJs).

345. See *supra* note 188 and accompanying text.

expertise. As a group, given that neither their status nor their remuneration is equal to that of federal judges, it is unlikely that ALJs would surpass the federal bench in their ability to see that justice is done.³⁴⁶

Administrative proceedings also play a less significant role in norm-articulation. Administrative decisions have less precedential value than those of the federal courts. Moreover, these opinions are not published regularly as court opinions are.³⁴⁷ Because administrative opinions are not as widely accessible and known to the public, they are not as likely as court opinions to influence voluntary behavior, or to form the basis for voluntary resolution of other compliance problems.

However, in the Title VI scheme, the existence of such proceedings provides a very significant impetus for compliance with the civil rights laws. Because the sole remedy for a finding of violation after such a proceeding is termination of federal financial assistance,³⁴⁸ the very threat of such proceedings is sufficient inducement to the vast majority of recipients of federal funds to comply voluntarily with their statutory and regulatory obligations.³⁴⁹

2. *Informal Procedures*

The two strongest concerns about the effect of informal dispute resolution mechanisms on the attainment of justice are the ad hoc, nonsystemic applicability of most informal mechanisms, and the inability to develop coherent policy through their use.

For an agency whose mission is to eradicate discrimination, resolving cases through mediation or other informal negotiation is much like putting out small brush fires without ascertaining what is causing those fires. Are they caused by a number of unrelated incidents (or coincidences), or is there an arsonist methodically setting those fires, the capture and imprisonment of whom would end the fires more effectively than any other means? When cases are resolved ad hoc, there is the risk that the individual complaints are not merely a collection of unrelated happenings, but rather suggest a larger, deeper problem that warrants close and careful attention and concerted action.³⁵⁰

There is also the question of the "presence" of the enforcement agency and how that affects, in a preventive way, what happens in

346. Cf. S. BREYER & R. STEWART, *supra* note 100, at 875-78 (suggesting that the ALJ system "prevents intelligent selection and adequate compensation of the finest judges, deters voluntary departures of the worst, and erodes incentive all along the way") (quoting Scalia, *The ALJ Fiasco — A Reprise*, 47 U. CHI. L. REV. 57, 79-80 (1979)).

347. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 344, at 8.

348. This only occurs, however, if the recipient refuses to cease the violative practice or practices. See *infra* note 413 and accompanying text.

349. See *supra* notes 265-68 and accompanying text (discussing Title VI legislative history); see also Block, *supra* note 108, at 36-37.

350. See Singer, *supra* note 74, at 576-77.

the regulated entity's operation. Knowing that there will be ample opportunity to resolve discrimination compliance problems quietly, nonconfrontationally, with a minimum of adverse publicity, and with no admission or even official accusation of wrongdoing, a school may be less cautious initially in avoiding discrimination than it would be if it expected a complaint, a full investigation, and the possibility of formal findings of wrongdoing with accompanying media attention.³⁵¹

An additional concern exists when agency policy on a particular issue is still in a formative, or otherwise transitional, stage. As discussed earlier, using the development of OCR's athletics policy as an example, resolving cases in the absence of norms³⁵² creates a risk of inconsistent results.³⁵³ Without norms, there would have been greater problems of significant and substantial inconsistency in what each university was required to undertake. Without norms, without a definition of discrimination in this context, we cannot measure whether justice, particularly in the sense of non-discrimination, is being achieved.

a. Mediation

Unlike some other informal procedures, mediation is perhaps the least dependent on the existence of external norms. Its thrust is not to bring the employer, or the school, into compliance with the civil rights laws; rather it seeks to find a solution that is mutually agreeable to the complainant and respondent, regardless of whether the solution would constitute full compliance with the applicable laws.³⁵⁴ Professor Fuller describes mediation as "directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves."³⁵⁵ He probably did not have procedures employed by civil rights enforcement agencies in mind. Rather, he most likely was speaking to norms in terms of mutually acceptable behavior which, if acceptable to the parties involved in the mediation, might well be acceptable to others. Such grassroots norm-development may be satisfactory in some common law areas, but is not appropriate in the develop-

351. Cf. 1985 EEOC Hearings, *supra* note 159, at 7 (statement of Commissioner F. Alvarez) ("We expect that predictable enforcement should promote more compliance and conciliation.").

352. The word "norm" refers to a standard or principle which, especially in the context of civil rights enforcement, may or may not reflect a majoritarian view.

353. See *supra* text accompanying notes 304-07.

354. See L. SINGER & R. SCHECHTER, *supra* note 50, at 15-16 ("[T]he mediators [in their age discrimination study] generally did not perceive themselves as hampered by the ambiguities of the statute, because they saw their role as facilitating settlements, not deciding right or wrong."); 1985 Hearings on OCR, *supra* note 70, at 259-60.

355. Fuller, *supra* note 169, at 308 (citation omitted); see also J. AUERBACH, *supra* note 77, at 98 (stating that ADR was a movement toward justice).

ment of nondiscrimination law and policy in which history has shown that society, if left unregulated, will not itself move towards nondiscrimination.³⁵⁶

Statistics suggest that agencies that use mediation effect some change for more complainants than agencies that do not.³⁵⁷ Without knowing the merits of the claims in such cases, however, it is impossible to assess whether justice is being achieved merely because more persons obtain change through mediation than through more formal procedures. It does seem apparent that introducing mediation into an enforcement agency's repertoire tends to transform the nature of the agency from one of law enforcement into one of dispute resolution.³⁵⁸ This may undermine Congress's intent in establishing the agency and its mission. OCR was charged with enforcing Title VI not to satisfy every individual who perceives herself wronged, but to insure that institutions that receive federal funds operate in a nondiscriminatory manner. An agency that focuses on resolving such disputes may fail to aggressively and affirmatively pursue and resolve systemic problems of discrimination.

This concern has already emerged at EEOC, largely in response to the aggressive rapid charge process implemented by former Chairperson Eleanor Holmes Norton.³⁵⁹ Early on in the implementation of rapid charge processing, former Vice Chairperson Daniel E. Leach, while proudly describing the success of the program in terms of achieving substantial relief for numerous complainants in record time, acknowledged concerns that rapid charge might cause the agency to lose sight of its mission to eradicate endemic discrimination.³⁶⁰ Several years later, in response to such concerns, current Chairperson Clarence Thomas criticized the automatic use of rapid charge procedures and announced new policy and procedures to require the full investigation of more charges.³⁶¹

A related concern is that mediated agreements may exact con-

356. See Edwards, *supra* note 88, at 677.

357. See PEER STUDY, *supra* note 92, at 89-97; cf. 1985 EEOC Hearings, *supra* note 159, at 58-59 (prepared statement of Nancy Kreiter, Research Director, Women Employed Institute) (noting a dramatic decrease in the number of charges settled since the decline in use of rapid charge procedures).

358. See PEER STUDY, *supra* note 92, at 9-10 (concluding that increased use of mediation may, over time, change the basic focus of the agency from law enforcement to dispute resolution).

359. See *id.* at 7.

360. Speech by Daniel E. Leach, Eighth Annual Institute on Equal Employment Opportunity Compliance (PLI), New York City (March 27, 1979).

361. See APRIL 16 POLICY STATEMENT, *supra* note 157, which states:

The rapid charge process encourages quick settlement. It does not necessarily eliminate all vestiges of discrimination or secure full relief for victims of discrimination. . . .

....

Despite the benefits of the rapid charge process, it was felt the agency became too reliant on this method and it had compromised the Commission's principal role as a law enforcement agency. . . . The change is best characterized as a shift of emphasis. . . . [M]ore charges will now undergo a full, comprehensive investigation.

Id. at 2.

cessions from respondents who in fact have not discriminated. This was one of the primary criticisms in a General Accounting Office (GAO) report on EEOC presented to Congress in 1981.³⁶² An earlier GAO report, issued in 1976, had faulted EEOC for its inordinate backlog of cases.³⁶³ In response, EEOC instituted its rapid charge process, which it claimed had been successful in resolving fifty percent of the charges filed with the agency.³⁶⁴ GAO's assessment of the cases that EEOC had resolved through rapid charge was that EEOC had obtained numerous settlements without a reasonable basis to believe that the charges were true. In addition, many of the so-called settlements had little if any substance; therefore EEOC's statistics on the changes obtained were misleading.³⁶⁵ As a result, both employers and charging parties felt they were pressured into settlements that failed to accord justice — employers because they believed they made concessions in the absence of cognizable wrongdoing; charging parties because receiving some settlement led them to believe that their charges must have merit, but that the settlement was inadequate.³⁶⁶ GAO recommended to Congress that EEOC *not* settle cases that would be closed as no cause absent a settlement.³⁶⁷ EEOC's response was that one does not know whether a charge has merit until a full investigation has been conducted, that the purpose of rapid charge was to avoid the necessity of a full scale investigation, and that instances of pressured agreements were rare and the agency would take measures to minimize such incidents even further.³⁶⁸

GAO's criticisms have not gone unheeded by EEOC Chairperson Thomas, who has accused the rapid charge system of being unfair to employers and employees alike.³⁶⁹ The changes previously described in EEOC practice and procedure appear to be geared towards resolving the concerns expressed by GAO.³⁷⁰

362. 1981 GAO REPORT, *supra* note 181, at 11-19; see also *Equal Employment Opportunity Commission Update: Policies on Pay Equity and Title VII Enforcement: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 73 (1985) [hereinafter *EEOC Update Hearings*] (statement of Clarence Thomas, Chairperson, EEOC) ("The [rapid charge] system also made a sham of the notion that our ultimate goal is to address and remedy discrimination.").

363. 1981 GAO REPORT, *supra* note 181, at 6.

364. *Id.* at 8.

365. *Id.* at 12-15. GAO found that 31 of 120 sample charges in one district office appeared to lack reasonable cause. The report describes in some detail the specific cases involved and how GAO concluded that no cause existed under Title VII. *Id.*

366. *Id.* at 17-19.

367. *Id.* at 26.

368. *Id.* at 15, 27.

369. See *EEOC Update Hearings*, *supra* note 362, at 73.

370. Although he makes no explicit reference to the GAO reports, the criticisms offered by Chairperson Thomas in the statements previously discussed, as well as the solutions proffered to resolve those criticisms, appear to echo many of the criticisms and suggestions made by GAO. See 1981 GAO REPORT, *supra* note 181, at 26-29. How-

An inevitable downside to mediation before investigation and findings is that one cannot know the *appropriateness* of the settlement as measured against the applicable laws without knowing the strengths and weaknesses of both sides' cases. Assuming equality of bargaining power and sophistication, this might not be a handicap; one could assume the parties would competently bring out the competing strengths and weaknesses of their respective arguments. But such equality can hardly be assumed in the typical discrimination complaint situation. On one hand, there is the risk that a respondent who has engaged in no wrongdoing may agree to a settlement for nuisance value.³⁷¹ On the other, there is the very real danger that a charging party with a legitimate complaint of unlawful discrimination may settle for far less than that to which she would have been entitled had the matter gone through investigation, findings, and resolution.³⁷² Whether the gains warrant the risks involved is similar to, but not the same as, the approach to answering such questions for private disputes in general. Lawyers regularly apply cost/benefit analyses to decisions on whether and for how much to settle a case.³⁷³ Questions of the protection of basic human rights, however, which look not only backward to past events, but forward to the goals of a nondiscriminatory society, do not lend themselves to purely economic evaluation. It is the responsibility of the civil rights enforcement agency to insure that such goals are kept in focus.

This was one conclusion of a study commissioned by OCR in 1979 to evaluate its pilot ECR program to make recommendations on expanding the program to all ten regions, abandoning it, or modifying it.³⁷⁴ The independent study was undertaken by the Project on Equal Education Rights (PEER), an offshoot of the National Organization for Women Legal Defense and Education Fund.³⁷⁵ PEER observed that although some cases resolved through ECR produced remedies comparable to what might have been expected after an investigation finding discrimination, others produced little or no remedy, and a few produced a remedy substantially below what could have been expected after investigation.³⁷⁶ In addition, PEER found that a few complainants who refused settlement offers would have fared better if they had accepted the offers because the investigation of their complaints ended in a finding of no discrimination.³⁷⁷ PEER also concluded that in the studied cases, mediation provided adequate relief more

ever, GAO was not the only source of such criticism. See *1983 Oversight Hearings*, *supra* note 275, at 10 (prepared statement of Professor Herbert Hill) (concluding that EEOC functions as a claims adjustment bureau and not as an enforcement agency).

371. See *EEOC Update Hearings*, *supra* note 362, at 73.

372. *Id.*; see also Speech by Daniel E. Leach, *supra* note 360.

373. See, e.g., 1 M. BELL, *MODERN TRIALS* § 109 (1954) (discussing economic aspects of decisions to settle).

374. PEER STUDY, *supra* note 92, at 1-2.

375. *Id.* at i.

376. *Id.* at 51.

377. *Id.*

often on class issues than it did for the individual complainants who claimed to be personally aggrieved.³⁷⁸ Unlike the GAO study, PEER made no attempt to assess the merits of the cases considered. Rather, it based its evaluation on what remedy would likely have been obtained had the allegations of the complaint been sustained as true.³⁷⁹

As to whether the procedure furthered the goal of justice and nondiscrimination, PEER's primary concern was that widespread use of mediation would distort agency priorities and cause the agency to lose sight of one of its primary missions, the eradication of discrimination among educational recipients of federal financial assistance. PEER recognized that remedying individual instances of discrimination was only one of several goals of OCR's enforcement program and feared that individual dispute resolution, if expanded, would take precedence over all other agency goals.³⁸⁰ It feared that the tool of planned compliance reviews would be utilized too infrequently to compensate for the loss of a comprehensive complaint investigation process.³⁸¹ Further, PEER was concerned that ECR would deprive the agency of the raw information that evolved through investigations necessary for the development of broad policy,³⁸² and that the loss of publicized findings of discrimination would mean the loss of an effective tool against discrimination by parties other than the respondent in the case at issue.³⁸³ In addition, PEER echoed the concerns expressed in the GAO report: When complainants get something even though their charges lacked merit, "this cannot be considered success by any standard of justice based on the merits of the charges."³⁸⁴

There is a substantial question whether ECR is consistent *at all* with OCR's obligations under Title VI and the *Adams Order*.³⁸⁵

378. *Id.* When OCR expanded ECR to all 10 of its regions, it specifically excluded class complaints from those categories of complaints for which ECR was available. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 2.

379. *See* PEER STUDY, *supra* note 92, at 20; *cf. id.* at 51.

380. PEER identified the goals of OCR as follows: (1) to remedy instances of individual discrimination; (2) to reduce and prevent discrimination generally; (3) to promote actively nondiscriminatory practices; and (4) to insure that federal funds do not support institutions that discriminate. *Id.* at 124.

381. *See id.* at 72. PEER voiced the additional concerns that by using ECR, OCR lost opportunities to remedy class discrimination and that the failure to get at the root of the discrimination problem might mean "the proliferation of identical charges against the same respondent," each addressed only on an ad hoc basis. *Id.* at 129.

382. *Id.* at 135.

383. *Id.* at 136-38.

384. *Id.* at 144.

385. H.R. REP. NO. 458, *supra* note 70, at 27-29 ("OCR's current use of ECR may be illegal, may not protect the rights of complainants, and may jeopardize future litigation involving violations of civil rights laws."). The House Committee noted that long after DOJ and OCR's quality assurance staff had raised concerns, OCR established a task force to review the legality of its ECR procedures. *Id.* at 28-30. Nonetheless, it

Upon receipt of information that discrimination has occurred, OCR is required to investigate the allegations, reach a determination, and, if discrimination is found, attempt to negotiate voluntary compliance. If such attempts fail, OCR is obligated to commence administrative enforcement action or refer the matter to the Department of Justice to commence suit in federal district court.³⁸⁶ Nothing in either the statutes or the regulations for Title VI, Title IX, or Section 504 — in contrast to the regulations promulgated under the Age Discrimination Act of 1975³⁸⁷ — contemplates anything like mediation to resolve complaints. The pressure to meet the *Adams* timeframes and alleviate its backlog of old cases encouraged OCR to use procedures short of full investigation of every complaint that alleged discrimination.³⁸⁸ Nothing Congress has said or done, however, has suggested its acquiescence in such an approach.³⁸⁹ Certainly *Adams v. Richardson*,³⁹⁰ which removes any discretion from OCR in deciding whether to pursue a complaint,³⁹¹ may be read as precluding an approach that fails to ascertain and fully remedy any underlying discrimination. Thus, if OCR is viewed as having not only the right to investigate complaints of discrimination — which it forgoes upon successful mediation — but the responsibility to investigate, then the whole premise of OCR-conducted mediation through its ECR program is on shaky legal grounds.³⁹²

b. Negotiated Voluntary Compliance Before Findings

If the analysis above is correct, OCR lacks authority to resolve any complaints without a full investigation; any informal procedure short of negotiation after investigation and findings would violate its mandate. Even assuming no legal bar to the use of such procedures, however, features of some alternatives are less conducive to attaining justice than are others. From this perspective, perhaps the most troublesome of all the alternatives is OCR's use

recommended "that OCR develop guidelines to be used to ensure that such settlements are in accord with civil rights laws and [Department of Education] regulations." *Id.* at 33.

386. See *supra* notes 117-18 and accompanying text.

387. 45 C.F.R. §§ 90.43, 91.43 (1986).

388. See *supra* text accompanying notes 134-35.

389. See H.R. REP. NO. 458, *supra* note 70.

390. 480 F.2d 1159 (D.C. Cir. 1973).

391. *Id.* at 1163.

392. See 34 C.F.R. § 100.7(c) (1986). A somewhat more conservative position is taken by Robert Silverstein, whose legal opinion supplements the *PEER Study*. He concluded that mediation was "neither *per se* consistent nor inconsistent with the . . . statutory frameworks." *PEER STUDY*, *supra* note 92, at B21 (Silverstein addendum). However, he concluded that once OCR knows sufficient facts to establish that a violation has occurred, it can accept nothing short of a full remedy in an agreement between the complainant and recipient. *Id.* at B21-23, B28.

Regardless of the merits of these legal arguments, Judge Pratt, in his oversight of the *Adams* Order, has done nothing to prevent OCR from using informal procedures as long as the procedures used do not delay the entire process if they prove unsuccessful. See *supra* note 133.

of negotiated voluntary compliance before findings which, unlike ECR, occurs after the commencement of the investigation.

As discussed previously, OCR's published rules and policies do not discuss negotiated voluntary compliance before findings.³⁹³ Nonetheless it may occur during the course of the investigation if the complainant is persuaded to withdraw her complaint because of some change offered by the respondent or for some other reason. One other reason may be, though there is no empirical data to prove it, that the investigator or Equal Opportunity Specialist (EOS) has persuaded the complainant that the investigation will end in a finding of no discrimination, and that the complainant might prefer to withdraw rather than have this occur, especially if there are other forums in which the complainant might seek relief.

From the perspective of achieving justice this tactic raises problems of the lack of accountability and assurance that the EOS's discretion is not in fact abused. The authority to decide whether or not a violation has occurred has not been delegated to the EOS. To the contrary, the EOS conducts an investigation, discusses the results with his supervisor and the agency attorney, and, if consensus is obtained, makes a recommendation to the regional director as to whether or not a violation exists. A finding of no violation may be approved by the regional director; a finding of violation must be approved by the Assistant Secretary for Civil Rights in headquarters.³⁹⁴

Yet it is the EOS, and frequently the EOS alone, who has personal contact with the complainant and the recipient. The EOS is pressured to close cases in a timely fashion and will be evaluated accordingly, thereby creating an incentive to find shortcut solutions to resolving cases. If the complainant withdraws her complaint during the course of the investigation, the EOS need not write an investigative report; his chances of closing the case within the ninety days provided under the *Adams* Order are greatly enhanced. Although OCR does not officially sanction these procedures as ways to expedite cases, such incentive creates strong pressure to act outside of the dictates of OCR's published rules.³⁹⁵

A related type of predetermination closure may occur when OCR determines that the issues raised in the complaint have been resolved satisfactorily prior to a determination *and* the complain-

393. See *supra* note 225 and accompanying text.

394. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 60.

395. See PEER STUDY, *supra* note 92, at 108-09. PEER finds that mediation offers a number of advantages over these kinds of informal procedures which tempt the investigator to cut a deal or to cut down the amount of record-keeping, thus eluding quality control. *Id.* at 109.

ant agrees to withdraw the complaint.³⁹⁶ OCR procedures provide that “[i]f the complaint raises systemic issues, the resolution achieved must provide a remedy for all injured parties, including those unnamed or unknown.”³⁹⁷ Once again, however, this procedure does not require the preparation of an investigative report. Although the concurrence of an agency attorney is required to assure “that the resolution meets minimal OCR compliance standards,”³⁹⁸ it is questionable whether the attorney, without the results of a thorough investigation, could determine that the resolution fully resolves the issues raised.

In our hypothetical involving Sarah School, for example,³⁹⁹ suppose that Stowe University, during the pendency of the investigation, agrees to accept Sarah for admission, and that Sarah agrees to this resolution. If Sarah’s complaint had alleged that she, as an individual, had been denied admission on the basis of race, there is little question that this resolution would meet “minimal OCR compliance standards” and that the case would be closed by the agency. If Sarah had alleged that the school was discriminating against blacks in general, OCR would be required to seek more action from the school. Without a thorough investigation, what would be appropriate? A statement that the school would not discriminate on the basis of race in admissions? Obviously, the school is already under an obligation not to discriminate. Without an investigation, it cannot be determined whether such discrimination exists and, if so, what its dimensions may be. Our hypothetical established that blacks were adequately represented from a statistical perspective in the Stowe University student body. Suppose that the school’s policies operated to exclude only blacks who might be considered political or racial activists. How could this be determined without an investigation? Additionally, if the school had not discriminated at all, but agreed to admit Sarah solely to avoid the nuisance of a full investigation and possible adverse administrative findings, how is justice served by accepting this resolution?

Unlike OCR, which recognizes a clear demarcation between its ECR procedures and the investigative process,⁴⁰⁰ the procedures used by EEOC tend to merge mediation and investigation.⁴⁰¹ Rapid charge processing takes place initially in the context of a so-called fact-finding conference, the very name of which suggests a process designed to ascertain the probative value of the charge. If attempts at resolving the complaint are unsuccessful at this juncture, EEOC will continue to encourage a negotiated resolution at

396. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 49.

397. *Id.*

398. *Id.*

399. See *supra* text preceding note 310.

400. If mediation fails and an investigation is undertaken, facts uncovered during the course of ECR are not made available to the OCR investigator. See *supra* notes 212-14 and accompanying text.

401. See *supra* notes 218-22 and accompanying text.

every stage of the investigation that follows, up until the actual findings.⁴⁰² Before findings, EEOC will accept any resolution to which the parties may agree as a basis for terminating the investigation of the charge.⁴⁰³

Although EEOC procedures, which are officially sanctioned, afford some assurance that the agency's devices for monitoring its staff's compliance to ensure quality performance will serve as some check on the abuse of discretion by the investigative staff, there is reason for concern that the potential for abuse in OCR's prefinding closure procedures is not absent here.⁴⁰⁴ The parties might be pressured into settlements inconsistent with what their legal rights should dictate. The difference between a negotiated prefinding resolution and a true mediated resolution is that in the former all parties are likely to know more about the strengths and weaknesses of their respective cases than in the latter. It is not entirely clear if this is an advantage or a disadvantage in moving towards a just resolution. In the hands of a competent investigator, additional information may yield a more realistic assessment of the eventual outcome of the case if it proceeds to findings. He also may be more competent in identifying both the dimensions of that violation and, consequently, an appropriate remedy. If this assessment is used to encourage the parties to settle for something resembling what the eventual outcome would be, the cause of justice will not be impaired any more than if other informal procedures were used — perhaps less so. The question then becomes whether negotiated voluntary compliance before findings is more advantageous than a procedure that results in a finding of cause or no cause.

c. Negotiated Voluntary Compliance After Informal Findings

As stated earlier, EEOC recognizes no procedure such as negotiation after informal findings. In other words, EEOC acknowledges a shift in its responsibilities upon the determination of cause — it will then accept no remedy short of a full resolution of the

402. See generally EEOC Compl. Man. (CCH) ¶¶ 521-533 (Sept. 1984), 545 (Oct. 1984).

403. However, EEOC itself will not be signatory to any agreement that contains an unlawful provision. See *id.* ¶ 548 (Mar. 1987). After findings, EEOC is constrained to accept a resolution only if it will be a complete remedy to any discrimination found. See *supra* note 244 and accompanying text.

404. See, e.g., 29 C.F.R. § 1601.19(e) (1986) (providing that EEOC may dismiss a charge if the respondent makes a settlement offer that the complainant refuses to accept, if the settlement offer would afford full relief); cf. PEER STUDY, *supra* note 92, at 109.

charges.⁴⁰⁵

OCR, on the other hand, has undertaken a major initiative to attempt to resolve compliance problems before formal findings. This informal procedure is different than mediation or negotiation before findings in that there is no longer uncertainty as to whether a compliance problem exists — at least as far as the regional office is concerned. If the completed investigation reveals no violation, OCR will send a letter so stating and will close the case. If the investigation reveals a violation,⁴⁰⁶ OCR will call in the recipient before sending the letter of findings and will attempt to resolve the case at that juncture.

The primary thrust of this procedure is to avoid the antagonism and confrontation that frequently accompanies the formalization of the process. In theory, OCR will accept nothing less than full compliance, the same standard that would have governed if OCR had sent a letter of findings. Only full compliance by the recipient will avoid an enforcement recommendation. Whether this is true in practice — and, once again, no empirical proof is available — is questionable. First, the regional office may be concerned that headquarters will reject its finding. This may consciously or unconsciously encourage the region to accept a resolution short of what might be required if headquarters were to endorse the region's findings. Second, the recipient may challenge the findings; since the agency is not yet formally committed to its findings, it may be more likely to acquiesce in the recipient's position than otherwise. This is not necessarily undesirable if the recipient's position has merit. But it is possible that the recipient's powers of advocacy may sway the agency negotiator more than the merits of the "defense" objectively would warrant.⁴⁰⁷ If the findings have been reduced to a written, public communication, that concern is alleviated.

d. Negotiated Voluntary Compliance After Formal Findings

A negotiated resolution after the issuance of formal findings — whether in the form of a cause determination by EEOC or a letter of findings by OCR — still qualifies as an "informal" procedure when compared to litigation and administrative enforcement. Nonetheless, because it requires a complete remedy to identified discrimination, it is more effective in achieving justice than the other informal alternatives.

If this procedure falls short of ensuring a just resolution, it is

405. See 29 C.F.R. §§ 1601.20, .24 (1986).

406. The investigation reveals a violation if the investigative report substantiates a compliance problem to the satisfaction of the EOS, his supervisor, the attorney assigned to the case, and the regional director. In fact, only the regional director need reach such a determination, but it is rare that he would find a violation in the absence of the concurrence of the other staff involved in the investigation and determination.

407. Cf. H.R. REP. NO. 458, *supra* note 70, at 17. The House Committee criticized then-OCR Director Harry Singleton for accepting a remedy offered by a school district that fell short of OCR compliance standards. *Id.*

because the savvy respondent can anticipate a long road between the agency's official finding and judicial affirmance of that finding. Before EEOC's relatively recent change in policy,⁴⁰⁸ the employer with the financial means might have resisted the findings of EEOC, knowing that except in the most egregious case, EEOC would do no more than confer upon the charging party the right to file her own action in court, a right that was clearly expensive to enjoy.⁴⁰⁹ Even if EEOC did pursue the matter, any ultimate determination may be years away,⁴¹⁰ during which time the employer might hope for a change in the administration's philosophy that would lead EEOC to abandon the lawsuit, or for some other happening that would affect the employer's exposure.⁴¹¹

The recipient who receives a letter of findings from OCR and refuses to settle may well believe that the agency's position lacks merit and that the agency will not prevail upon review in a formal forum.⁴¹² Or if the remedy is of sufficient consequence, the recipi-

408. See EEOC, STATEMENT OF ENFORCEMENT POLICY (Sept. 11, 1984) (providing that all cases in which conciliation has failed will be considered for litigation).

409. This problem was noted by critics in 1983. See, e.g., 1983 *Oversight Hearings*, *supra* note 275, at 12 (prepared statement of Prof. Herbert M. Hill) (criticizing EEOC's failure to utilize the litigation powers granted by Congress in 1972); see also 1985 *EEOC Hearings*, *supra* note 159, at 3 (1985) (remarks of Rep. Gunderson) ("[I]f the Commission's policy [to litigate individual cases of employment discrimination] is seen as one of certainty and predictability in acting on cases, many more respondents will be willing to participate in a conciliation as they know litigation happens to be a real threat.").

410. Cf. Oreskes, *Human Rights Panels Are Faulted in Survey*, N.Y. Times, July 14, 1986, at B1, col. 5 (finding that the deterrent value of state civil rights commissions is reduced because of enormous backlogs and delays which make settlement negotiations on behalf of a complainant almost impossible).

411. An example of such a change in political philosophy occurred when the Reagan Administration attacked affirmative action plans that had been formulated during previous administrations to redress past discrimination. See *Justice Dept. Presses Drive on Quotas*, N.Y. Times, Apr. 3, 1985, at A16, col. 1 (announcing DOJ's position that "56 cities, counties and states must modify affirmative action plans so as to end the use of numerical goals and quotas designed to increase employment of women, blacks or Hispanic Americans"). For a discussion of this development, see Rosenfeld, *Affirmative Action, Justice and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 846-47 (1985). This attempt has been frustrated by the Supreme Court. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053 (1987); *Local No. 93 of the Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986). The Supreme Court has denied certiorari in other cases that have rejected DOJ's position. See, e.g., *United States v. NAACP*, 779 F.2d 881 (2d Cir. 1985) (upholding the district court's ruling ordering prospective rather than make-whole relief to minority and female police officers and firemen), *cert. denied*, 106 S. Ct. 3333 (1986); *Massachusetts Ass'n of Afro-American Police v. Boston Police Dep't*, 780 F.2d 5 (1st Cir. 1985) (denying police officers' motion to intervene in a Title VII case attacking a decree that contained affirmative action provisions designed to increase the number of black officers promoted to sergeant), *cert. denied*, 106 S. Ct. 3334 (1986).

412. On the other hand, a recipient might yield to OCR even if it believes it has not violated the law in order to avoid cut-offs of federal funds. See *Caulfield v. Board of*

ent may choose to forestall the inevitable. At *any* stage of the administrative process, or upon subsequent action by DOJ, a recipient may avoid termination of federal financial assistance through compliance; there is no punitive or retroactive operation of the sanction.⁴¹³

However, most OCR — and many EEOC — respondents accept the agencies' findings and agree to a remedy at this stage.⁴¹⁴ Thus, these concerns do not prevent negotiation after formal findings from being compatible with the pursuit of justice.

This procedure serves the ends of justice by officially pronouncing the existence of discrimination. When the enforcement agency takes a formal position that there exists a violation of the law, it proclaims not only that a problem exists, but that the enforcement agency is prepared to solve that problem, albeit preferably through informal means. It may cause public embarrassment to the respondent, but that embarrassment has in large measure been earned by actions taken — or not taken — inconsistent with the respondent's legal obligations to ensure a nondiscriminatory program or activity. It reminds the relevant community, including other employers or other recipients of federal financial assistance, that such actions are illegal and will not be tolerated. It ensures that the agency will accept nothing less than full compliance with the law, not only from the respondent who has been "caught," but also from others within the agency's jurisdiction.⁴¹⁵

B. Procedural Fairness

1. Formal Procedures

a. Litigation

The elaborate system of procedural rights established by the Due Process Clause and the Federal Rules of Civil Procedure is one of the virtues of our adversarial system of litigation,⁴¹⁶ as well

Educ., 449 F. Supp. 1203, 1221 (E.D.N.Y.) (*Caulfield I*) (stating that the Board of Education had no realistic choice but to agree to Memorandum of Understanding in the face of massive cut-offs of federal financial assistance), *rev'd on other grounds*, 583 F.2d 605 (2d Cir. 1978).

413. Although a recipient in formal administrative proceedings might face deferral of new funds, this power has been used infrequently in recent years.

414. See *infra* text accompanying notes 507-17.

415. Recently, EEOC reaffirmed its commitment to provide complete remedies through the process of conciliation:

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. . . . Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

EEOC, POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION § 5 (Feb. 5, 1985).

416. M. FRANKEL, *supra* note 330, at 6-7.

as one of the primary reasons why alternatives are sought in order to expedite the process of dispute resolution. More procedures, however, do not necessarily mean more procedural fairness.⁴¹⁷ The inevitable problem of inequality of power arises when one party lacks the resources or sophistication of the other party. Some complainants would rather pursue administrative remedies than litigate in federal court, for fear that the respondent — generally an institution — will have astute counsel who will practice procedural calisthenics, including lengthy and costly discovery and interlocutory motions, perhaps legitimate under the federal rules, but directed to tire the weary complainant rather than to ascertain “truth.”⁴¹⁸ Such concern may or may not be compensated by the hope that the judge will protect the underrepresented (or unrepresented) plaintiff, thus equalizing the parties’ leverage.⁴¹⁹

These observations bear little relevance, however, to litigation between the agency and the employer or the recipient of federal funds. Generally, the inequality of resources will not be an issue. Occasionally, the government’s virtually limitless staying power in litigation might wear down a resource-limited defendant. Or, if counsel for the defendant is somewhat green in civil rights litigation, she might be at a tactical disadvantage in an adversarial contest with expert, specialized government counsel.⁴²⁰ Usually, each side will be represented and funded adequately to sustain the adversarial contest.

In private litigation, class actions frequently present concerns involving the fairness to parties not actually participating in the litigation. The issues and the approaches to resolving those issues are generally no different in civil rights litigation than in any

It may be perceived almost *a priori* — and there is a beginning of empirical data to demonstrate — that some fairly elemental needs are satisfied by the adversary process. The right to be heard, the fact of being reckoned with, being considered and respected, are all part of the satisfactions. However much they are separate from, or merely reflective of, the service of crasser interests, spiritual demands like these add significantly to the values of the structured contest between professionally represented combatants.

Id.

417. See Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985).

418. See, e.g., A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (Federal Judicial Center Education and Training Series, 1984).

419. See *supra* text accompanying notes 321-24.

420. Sometimes, however, the reverse will be true, and the government runs the risk of being worn down by sophisticated and expensive private counsel. Always present in our adversarial system is the risk that one counsel will be less competent than another, although this problem occurs less frequently when large corporate interests are involved.

other kind of litigation where different class members may have competing concerns and interests.⁴²¹ In an article on Title VII consent decrees, Professor Maimon Schwarzschild discusses the problematic dichotomy between Title VII class action litigation and Title VII cases in which EEOC is the plaintiff.⁴²² In the former, class members are afforded a "fairness hearing" before the court approves any consent decree. When EEOC is the plaintiff, there is no assurance that the purported beneficiaries of the action will have an opportunity to be heard. Similarly, because Title VI enforcement actions are between the government and the recipient, there is no assurance that the agency or the court will consider the competing or inconsistent interests of the original complainant, other affected beneficiaries of the federal financial assistance, or other affected groups, such as unions in cases of teacher reassignment.⁴²³

b. Administrative Enforcement Proceedings

Although the procedures available under section 554 of the Administrative Procedure Act and Title VI regulations for the conduct of formal administrative proceedings are somewhat more relaxed than under the rules governing federal litigation, the benefits and detriments of the adversarial process are rather similar. Differences such as the relative informality of some proceedings,⁴²⁴ the admissibility of otherwise inadmissible hearsay evidence,⁴²⁵ and the lack of subpoena power,⁴²⁶ are unlikely to present serious problems of procedural unfairness when, as here, the parties involved are the government and the recipient of federal financial assistance.

421. See, e.g., *Bustop v. Superior Court*, 69 Cal. App. 3d 66, 70, 72, 137 Cal. Rptr. 793, 795-96 (1977) (discussing intervention requirements for party whose interest would not otherwise be represented). This is not, however, to suggest that other distinctions are absent in settling civil rights discrimination cases as contrasted with other kinds of suits. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 30 (1983) (discussing a study that revealed that 31% of litigants with discrimination problems sought "justice" as well as compensation through litigation; the same was true of only 4% of litigants with "serious problems" and 2% with neighborhood problems).

422. Schwarzschild, *supra* note 111, at 914; see also Zimmer & Sullivan, *supra* note 185 (examining the dichotomy between public and private interests in consent decree settlements).

423. Nor is there any requirement that complainants be allowed to participate as parties in administrative proceedings brought against recipients of federal financial assistance. See *supra* text accompanying note 241; cf. *Caulfield v. Board of Educ.*, 583 F.2d 605, 612-15 (2d Cir. 1978) (rejecting district court's holding that intended beneficiaries be allowed to participate in the process of fashioning a remedial compliance agreement).

424. See Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 31 (1973).

425. See *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971).

426. See *Low Wah Suey v. Backus*, 225 U.S. 460, 470-71 (1912); *DeLong v. Hampton*, 422 F.2d 21, 25 (3d Cir. 1970). But cf. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 8.05 (3d ed. 1972) (stating that due process may be violated if strong prejudice results to a party as a result of lack of subpoena power).

2. Informal Procedures

Generally, the lack of elaborate procedures allows informal dispute resolution mechanisms to resolve matters more efficiently and expeditiously than their due process-laden counterparts. Whatever the procedures are, however, it is an important goal that they be fair, that they not work to the benefit of one party over another, and that they assure that an individual is aware of her rights and how to vindicate them.

a. Mediation

One advantage mediation has over some of the informal alternatives is that its methodology and goals are clearly articulated: to bring the parties together, in an informal arrangement, with a neutral third party who will attempt to facilitate a mutually agreeable resolution. When offered as a purely voluntary option to parties of substantially equal sophistication and bargaining power,⁴²⁷ with full disclosure of the risks and benefits of the process,⁴²⁸ mediation affords a reasonable measure of procedural fairness. Unfortunately, in the typical EEOC or OCR mediation, one or more of these elements is missing.

To the extent that procedural fairness hinges on notice to the parties of the procedures to be followed, there is no particular problem with either EEOC or OCR procedures. EEOC particularizes its procedures in its *Compliance Manual*,⁴²⁹ a public document, and includes them on the notices sent to the charging party and the respondent.⁴³⁰ Although OCR's *Investigation Procedures Manual* is somewhat less readily available because it is not in most law libraries, OCR requires that each party acknowledge in writing that she has read and understood the ECR procedures.⁴³¹

Another component of procedural fairness is the ability of the parties to make an informed choice on whether to *attempt* to set-

427. Disparities in bargaining power between parties can be reduced by providing advocates and technical experts. See Singer, *supra* note 74, at 576.

428. Advising parties of their legal rights under the applicable substantive law, however, poses a different ethical question. See *id.* at 581 (stating that such advice may facilitate or prevent a settlement). The *PEER Study* found that civil rights enforcement agencies seldom apprise complainants of what would constitute a full remedy if a violation were found after investigation. PEER STUDY, *supra* note 92, at 120. A report on the use of mediation in age discrimination cases found that neither the community conciliators employed by the Federal Mediation and Conciliation Service (FMCS), nor the FMCS mediators "considered it appropriate to provide . . . information [on the parties' rights under the law] within the mediation context." L. SINGER & R. SCHECHTER, *supra* note 50, at 15.

429. See EEOC Compl. Man. (CCH) ¶¶ 521-556 (Sept. 1984) (outlining the procedures for rapid charge processing and negotiating settlements).

430. *Id.* ¶ 535 (Nov. 1984).

431. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J.

tle a dispute and, if the attempt is made, on whether to settle and for how much. Under that criterion, there is less assurance that either agency's mediation procedures are fair.

EEOC neither gives the parties the choice of whether or not to attempt mediation, nor requires the parties to reach a mediated agreement. Rather, by incorporating mediation into the investigative process, EEOC encourages the parties to reach agreement between themselves. If the determination is made that a fact-finding conference is warranted, the parties are required to attend.⁴³² The Commission determines whether settlement is to be discussed at the conference.⁴³³ OCR's early complaint resolution process is purely voluntary. If one or both of the parties choose not to participate, no mediation is attempted.⁴³⁴

OCR's stated procedures require that the mediator inform the parties of their rights and responsibilities, and of the complete voluntariness of the procedure.⁴³⁵ Nonetheless, as with EEOC, there is seldom equality of bargaining power between the parties. A complainant may be "persuaded" to attempt mediation and further "persuaded" to agree to a mediated solution, without adequate appreciation of her legal rights and the remedies that might be available if OCR were to conduct a full investigation and issue a finding of violation.

This may occur because of the ambivalence of the OCR mediator. On one hand, the mediator's goal is to obtain a settlement of the case. On the other, because of the inherent inequality of bargaining power between the parties, the OCR mediator may view her job as requiring that she look out for the interests of the complainant, so that the complainant does not "get a completely raw deal."⁴³⁶ If the complainant perceives the mediator to be protecting the complainant's rights, she may be vulnerable to accepting the mediator's suggestions regarding settlement.⁴³⁷ It is also difficult to ensure that the mediator, who will get credit if a successful agreement is reached, will apprise the complainant fully of the remedy that would be available if an investigation determines that a violation has occurred. Rather, the mediator may stress that control of the result rests with the parties during mediation, but that if OCR commences an investigation, the agency, not the parties, will decide the investigation's content and results. This warning may cause an individual concern about the autonomy she might sacrifice if mediation fails.

Both agencies' mediation procedures provide for notification to

432. EEOC Compl. Man. (CCH) ¶¶ 530 (Sept. 1984), 535 (Nov. 1984).

433. *Id.* ¶ 530 (Sept. 1984).

434. In contrast, the regulatory scheme OCR enforces under the Age Discrimination Act requires the parties to submit to conciliation efforts through the Federal Mediation and Conciliation Service for up to 60 days prior to investigation. See 45 C.F.R. § 90.43(c)(3) (1986); L. SINGER & R. SCHECHTER, *supra* note 50, at 8-9, 11-14.

435. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 5-6.

436. PEER STUDY, *supra* note 92, at 56.

437. *Id.*

the parties of their right to have counsel present at the mediation sessions. The attorney may counsel the client during the sessions, but may not speak on the client's behalf.⁴³⁸ The presence of counsel is likely to mitigate the effects of the complainant's lack of sophistication and inequality of bargaining power. The risk is substantial, however, that the employer/recipient will be accompanied by an attorney and the complainant, with limited resources, will not.⁴³⁹ This may exacerbate an already unbalanced situation to the complainant's detriment. The requirement that the parties must speak for themselves may partially offset such concerns, but is inadequate to ensure that the imbalance will not create procedural unfairness.

The agencies' ability to prolong the investigative process, however, may create a "procedural" burden on the employer/recipient, thereby compelling it to acquiesce in a settlement to terminate the process. It is, then, not the mediation process itself, but mediation in the hands of a powerful enforcement agency, that may result in procedural unfairness.⁴⁴⁰

b. Negotiated Voluntary Compliance Before Findings

For EEOC there is virtually no difference between procedural fairness in the process used at the commencement of the investigation and that used in subsequent stages of the investigation. The investigator will continue to attempt to persuade the parties to reach a compromised solution. The only difference is that the longer the investigation proceeds, the more likely the investigator will have an assessment of the merits of the case. This, in turn, may influence her to suggest a more or less substantial remedy to the respondent, depending on her evaluation of the likelihood that the case will result in a cause finding. Similarly, if the charging party's case does not appear to be strong, she may attempt to persuade the charging party to agree to minimal relief. Whether or not we believe this to be "fair" may well depend on the degree of faith we have in the frontline personnel of the agency to accurately assess the merits of the case. The issue, then, concerns justice rather than procedural fairness.⁴⁴¹

OCR has no formally recognized process for negotiating the resolution of cases during the pendency of the investigation. Although OCR recognizes such "predetermination" closures, its

438. EEOC Compl. Man. (CCH) ¶ 535 (Nov. 1984); OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 5-6.

439. L. SINGER & R. SCHECHTER, *supra* note 50, at 18.

440. These concerns have, in part, motivated the current EEOC to modify its use of the rapid charge process. See *EEOC Update Hearings*, *supra* note 362, at 73.

441. See *supra* text accompanying and following notes 400-04.

manual gives little guidance as to the procedures to be used in obtaining such prefinding resolutions.⁴⁴² The lack of articulated procedures for obtaining negotiated agreements prior to agency findings causes serious concern about what procedures the agency is using and whether the parties might be pressured inappropriately into accepting settlements.⁴⁴³ For these reasons, there is less guarantee of procedural fairness here than there is among any of the alternatives.⁴⁴⁴

c. Negotiated Voluntary Compliance After Informal Findings

The OCR complainant is virtually shut out of the negotiations at this stage.⁴⁴⁵ OCR has reached a conclusion that a violation has occurred, and the respondent is called in to discuss how the violation may be cured by the least confrontational of approaches. This process affords the respondent the greatest degree of flexibility in fashioning a remedy and perhaps even persuading the agency either that its finding was erroneous, or that the extent of its finding should be tempered due to circumstances either unknown to or not considered by the agency. At this juncture the respondent may — and generally will — be represented by counsel.⁴⁴⁶

The concept of “procedural fairness” is different at this point. Fact-finding has been accomplished and the agency has determined that a violation of law exists. This is the remedy phase and procedural fairness consists of the opportunity to participate in fashioning an appropriate remedy and drafting the agreement. By

442. *The Investigation Procedures Manual* provides:

Pre-determination settlements may occur after the initiation of the investigation and prior to the review of the draft Investigative Report by the Regional Director. At some point in the investigative process, a resolution of the complaint issue is achieved which is satisfactory to the complainant and meets minimal OCR compliance standards. At this point, the investigation can be terminated and the complaint closed if the complainant also withdraws the complaint. . . . OCR's determination that the resolution meets minimal OCR compliance standards should be reviewed by the Attorneys' Unit.

OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 49.

443. *See supra* text accompanying notes 393-95.

444. Compare this lack of procedures to what EEOC provides:

The Role of the EOS — It is important that the EOS maintain a neutral position during settlement discussions. The EOS should thoroughly explore settlement possibilities, while keeping the parties fully informed of all potential outcomes of continued administrative processing of the charge should a negotiated settlement not be reached. Under no circumstances should attempts be made to coerce either party to settle the matter(s) at issue

EEOC Compl. Man. (CCH) ¶ 546 (Oct. 1984).

445. OCR's procedures require only that “OCR . . . consult with the complainant as necessary to obtain information needed to develop an appropriate remedy,” OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 63, and that “OCR will maintain contact with the complainant during the negotiation process to keep the complainant informed of the status of the negotiations as they apply to the remedy being sought for correction of the violation (see *Adams Order*, Part II-B, ¶ 10).” *Id.* at 64.

446. *See id.* at 65.

this definition, the recipient's rights are fully protected. The complainant will be notified of the content of the remedy, but her ability to have meaningful input into its content and design is substantially limited by OCR procedures.

d. Negotiated Voluntary Compliance After Formal Findings

One component of procedural fairness is a written decision by the decisionmaker, supported by a statement of reasons.⁴⁴⁷ In this regard, the procedures of EEOC and OCR in achieving compliance after formal findings appear to be satisfactory. EEOC's determination letter⁴⁴⁸ and OCR's letter of findings⁴⁴⁹ explain the factual and legal basis for each conclusion.

If EEOC has determined that there is reasonable cause to believe that a violation of Title VII has occurred, it issues a cause letter of determination to the parties and begins its conciliation process.⁴⁵⁰ The procedures to be followed are explicitly set forth in the Compliance Manual.⁴⁵¹ The charging party must be notified that the remedy sought is to be coextensive with what a federal court might order upon successful litigation,⁴⁵² that the charging party retains the right to sue if she does not accept the relief agreed to by the respondent and found sufficient by EEOC,⁴⁵³ and that EEOC will be a signatory to the agreement.⁴⁵⁴ Both the charging party and the respondent have opportunities to influence the content of the conciliation agreement.⁴⁵⁵

The OCR complainant, on the other hand, is not a formal party in the postfinding negotiation phase.⁴⁵⁶ The procedures at OCR differ from efforts at voluntary compliance after informal findings only in that at this juncture OCR will have sent a formal letter of findings to the recipient and to the complainant. Even though the complainant is not included in the negotiations, OCR procedures provide that she be consulted "as necessary to obtain information needed to develop an appropriate remedy."⁴⁵⁷ Further, if the complainant is dissatisfied, she may pursue any other available legal remedies.⁴⁵⁸

447. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

448. EEOC Compl. Man. (CCH) ¶¶ 256 (Sept. 1984), 1064 (Nov. 1985).

449. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 54.

450. 29 C.F.R. § 1601.21(b) (1986); EEOC Compl. Man. (CCH) ¶¶ 1061-1064, 1070 (Nov. 1985).

451. EEOC Compl. Man. (CCH) ¶¶ 1221-1298 (Jan. 1986).

452. *Id.* ¶ 1265 (Mar. 1979).

453. *Id.* ¶ 1283 (Mar. 1979).

454. *Id.* ¶ 1298 (Jan. 1986).

455. *Id.* ¶¶ 1265-1267 (Nov. 1979), 1293-1297 (Jan. 1986).

456. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 63.

457. *Id.*

458. *Id.* at 66.

In sum, although the degree of procedural fairness varies among the informal dispute resolution techniques, fewer concerns exist when the agencies clearly and publicly articulate the procedures they use. Although procedural protections under such alternatives are limited in comparison to formal procedures, procedures with clearly understood governing rules are preferable to procedures employed ad hoc. Even though procedural fairness is not the value that would justify the use of informal procedures, neither would it necessitate their abandonment.

C. Expedience, Efficiency, and Cost-Effectiveness

1. Formal Procedures

a. Litigation

Saving time and money is seldom considered an attribute of litigation.⁴⁵⁹ To the contrary, the move towards ADR processes has been, in large measure, a direct response to our overburdened court systems and to the time and delay facing litigants.⁴⁶⁰ The well-worn adage that justice delayed is justice denied is no less true in civil rights enforcement than in any other type of litigation. It is perhaps more true when the plaintiff seeks affirmative relief than when eventual monetary relief may provide complete redress. Monetary compensation five or ten years later will not sufficiently compensate a fifteen-year-old handicapped student who is denied an appropriate educational program; nor will Stowe University adequately compensate Sarah School⁴⁶¹ by paying her damages for denying her admission and forcing her to attend an institution that lacked the prestige and quality of Stowe. In addition, the prohibitive costs of most litigation prevent it from being a viable alternative for most civil rights complainants.⁴⁶²

Similarly, a cost/benefit analysis is unlikely to justify litigation by EEOC or OCR of any particular controversy. The attractiveness of a litigation approach will rarely be that it is more expedient or less costly than the alternatives. The agency's limited resources, like those of the individual, will affect its ability and

459. See NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 11.

460. See, e.g., Edwards, *supra* note 88, at 676 (quoting address by Chief Justice Warren E. Burger, Minneapolis, Minnesota 4 (Aug. 21, 1985)) (stating that "there is some form of mass neurosis that leads many people to think courts were created to solve all the problems of mankind"). Commentators, however, take issue with the purported truism that litigation has mushroomed and that the courts are overwhelmed by oppressive case loads. See D. TRUBEK, J. GROSSMAN, W. FELSTNER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT pt. A, at S-17 (1983) [hereinafter CIVIL LITIGATION RESEARCH PROJECT]; Galanter, *supra* note 421, at 62; see also Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 811-12 (1984) (suggesting that the Supreme Court's docket is poorly managed and that the Court is not overburdened with an unmanageable caseload).

461. See *supra* text preceding note 310.

462. See Block, *supra* note 112, at 12 (arguing that given these burdens of de novo litigation, more use should be made of civil rights contract actions).

willingness to litigate.⁴⁶³ However, the ultimate cost-effectiveness of litigation, as opposed to an alternative approach, cannot be judged merely by looking at the discrete case.⁴⁶⁴ One lengthy piece of litigation, clarifying and establishing norms and rights generally, will expedite the subsequent resolution of similar cases in less formal forums. Consider, for example, the result of *North Haven Board of Education v. Bell*,⁴⁶⁵ which established that Title IX prohibits employment discrimination in programs and activities receiving federal financial assistance.⁴⁶⁶ Although the litigation spanned many years and may have cost hundreds of thousands of dollars — arguably far in excess of the value of the particular controversy involved — it saved the time and cost of subsequent argument and debate over Title IX's coverage.

The Civil Rights Division of the Department of Justice has at times employed a procedure whereby its attorneys would file a signed consent decree along with a complaint in federal district court.⁴⁶⁷ Obviously, a consent decree entered into at the commencement of litigation and subsequently endorsed by the court has many of the advantages of a judicial decree without the disadvantages of excessive costs and delays.⁴⁶⁸ Any complete analysis of the cost effectiveness of litigation would entail a separate examination of cases that resulted in judgment⁴⁶⁹ and those that resulted in postfiling settlements, taking into consideration the stage of the proceeding at which the agreement was reached.

b. *Administrative Enforcement Proceedings*

It is difficult to justify formal administrative proceedings under an efficiency analysis. Depending on the outcome of the hearing,

463. EEOC's revised policy to consider for litigation all cases in which conciliation fails to obtain complete and full relief has generated concern that the agency's effectiveness may diminish. See, e.g., *1985 EEOC Hearings*, *supra* note 159, at 35 (statement of William Robinson, Executive Director, Lawyers' Committee for Civil Rights Under Law) ("EEOC simply doesn't have the capability of litigating every case in which reasonable cause is found and conciliation has failed. That is obvious from the number of cases that they are litigating now, or that the agency has ever been able to litigate."); *id.* at 26-28 (remarks of Rep. Henry) (stating that he feared that if the situation was such that one could not negotiate informal settlement agreements, then everything could be forced into formal litigation).

464. See Resnik, *supra* note 338, at 416, 422.

465. 456 U.S. 512 (1982).

466. *Id.* at 535-36.

467. See, e.g., *United States v. Board of Educ.*, 744 F.2d 1300, 1301 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *United States v. South Bend Community School Corp.*, 511 F. Supp. 1352, 1354 (N.D. Ind. 1981), *aff'd*, 692 F.2d 623 (7th Cir. 1982).

468. See Schwarzschild, *supra* note 111, at 894-95.

469. Cases might be divided further according to whether or not an appeal is taken by the losing party. An analysis of the time and cost involved in litigation is well beyond the scope of this Article. For a more detailed discussion of this area, see CIVIL LITIGATION RESEARCH PROJECT, *supra* note 460, pt. A.

and assuming a finding of noncompliance, the time spent reaching a final resolution, given the numerous layers of review, may exceed the time spent on a case initiated in district court.⁴⁷⁰ Although some of the transactional costs may be reduced due to the somewhat lower level of formality involved, attorneys' fees, witnesses' fees, and discovery costs are still substantial. Further, there may be less likelihood of cost-saving norm articulation when a case is resolved through the administrative process; administrative determinations have less precedential import⁴⁷¹ and are subject to a narrow scope of judicial review.⁴⁷² As with litigation, administrative cases settled early will fare better under a cost/benefit analysis than those that proceed to judgment; the case's cost-effectiveness will depend on the stage at which it is ultimately resolved, whether through settlement or otherwise.⁴⁷³

2. *Informal Procedures*

The values of efficiency and cost-effectiveness are most frequently touted to recommend informal over formal procedures. An informal procedure may well resolve a particular dispute in a fraction of the time required for formal procedures. A compelling force behind the adoption by EEOC and OCR of some of their less formal procedures was the desire to resolve matters expeditiously, thereby alleviating backlogs and freeing up resources for other purposes.

a. *Mediation*

EEOC instituted rapid charge procedures to reduce the inordinate backlog of cases for which the agency suffered much criticism.⁴⁷⁴ This streamlined process was directed towards resolving discrimination disputes in the shortest possible time while utilizing the fewest resources.

From this perspective, EEOC enjoyed considerable success. While still in its pilot phase, rapid charge processing resolved from 65% to 75% of the charges filed in the regions where it was used.⁴⁷⁵ In fiscal year 1980, the first year of full operation of the rapid

470. Cf. Resnik, *supra* note 253, at 959.

471. See *supra* note 347 and accompanying text.

472. A court's affirmation of an agency action that is supported by substantial evidence or that is not arbitrary or capricious, or otherwise contrary to law, is likely to have less precedential value than a determination made de novo in a judicial forum.

473. This analysis is beyond the scope of this Article. For agency-by-agency and government-wide statistics on federal administrative law judge hearings, see ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS: STATISTICAL REPORT FOR 1976-1978 (1980).

474. See *supra* notes 152-53 and accompanying text.

475. 1977-1978 EEOC 12TH-13TH ANN. REP. 17. Even GAO's generally critical report on the EEOC acknowledged the remarkable changes brought about through the rapid charge process: Between July 1, 1972 and March 31, 1975, negotiated settlements constituted 11% of the resolutions that occurred and took an average of about two years to achieve. From January 29 through September 30, 1979, 50% of 8,819 charges closed were negotiated settlements; resolutions took an average of 44 days. 1981 GAO REPORT, *supra* note 181, at 8-9.

charge process, EEOC resolved Title VII charges in an average of four months, compared to a previous average of more than two years.⁴⁷⁶ EEOC was able to reduce its backlog in fiscal year 1980 by 65%, closing 10,000 more cases than it received that year.⁴⁷⁷ This success accelerated in fiscal year 1981, when EEOC closed 34% more Title VII cases through rapid charge processing than it had the year before, and continued to reduce its backlog substantially.⁴⁷⁸ By the end of fiscal year 1982, only 7% of the original backlog of 99,000 cases remained.⁴⁷⁹ There is concern among some critics of the current EEOC administration that the policy announced in December 1983 to route fewer cases through the rapid charge system will increase the agency's backlog of cases.⁴⁸⁰

A primary reason for undertaking a mediation approach at OCR was the hope that an experience similar to that at EEOC might occur.⁴⁸¹ When OCR began experimenting with ECR, it also had a large backlog of cases and was under court order to eliminate the backlog and to keep its investigations current under the terms of the *Adams Order*.⁴⁸² During its pilot project, however, OCR, through other means, substantially reduced its backlog, so that by the time the decision was made to implement ECR throughout the regions, the backlog could no longer serve as justification for the decision.⁴⁸³

476. 1981 EEOC 16TH ANN. REP. 3.

477. *Id.* at 3, 5. This included 31,744 new charge closures and 17,609 backlog closures for a total of 49,353 in 1980, *id.* at 5, compared to 39,915 in 1979, 1979 EEOC 14TH ANN. REP. 26.

478. 1981 EEOC 16TH ANN. REP. 8.

479. 1982 EEOC 17TH ANN. REP. 3. *But see* PEER STUDY, *supra* note 92, at 101-02 (suggesting that a number of major changes were instituted at EEOC simultaneously with rapid charge processing, so that it is difficult to assess the impact of mediation techniques alone).

480. According to Nancy Kreiter, Research Director, Women Employed Institute, the current administration has actually reversed the pace of reduction of the backlog: "There were 33,417 backlogged cases remaining in fiscal year 1982; by fiscal year 1984, there were 36,903 cases backlogged. Moreover, the EEOC itself currently estimates that it will have 65,474 unresolved charges in fiscal year 1986 — a 96 percent increase in four years." 1985 EEOC Hearings, *supra* note 159, at 59.

481. *See, e.g.*, 1981-1982 OCR SECOND ANN. REP. 16 (proposing that ECR would eliminate the need for an OCR investigation by providing complainants with an early opportunity to resolve complaints voluntarily).

The PEER Study had concluded that ECR, when successful, saved a great deal of time, and when unsuccessful caused the whole process to take longer. Nonetheless, the study found that approximately two-thirds of the cases in which ECR was attempted resulted in agreements, so that overall, the process was cost effective. PEER STUDY, *supra* note 92, at 60-61, 81-83, 105-06. The study does raise one quandary, however. To the extent that mediation turns out to be much less expensive per case, it may cause problems in the budget process. "The budget process assumes that the least cost method is the best, and provides funds accordingly." *Id.* at 140.

482. *See* PEER STUDY, *supra* note 92, at 8, 41; H.R. REP. NO. 458, *supra* note 70, at 6.

483. The PEER Study emphasizes that OCR had a huge backlog when it first un-

The elimination of the backlog can in no way be attributed to the ECR experiment. In fact, the number of complaints received by OCR plummeted after fiscal year 1980.⁴⁸⁴ The receipts in fiscal year 1982 represented a 47% decline from the 1980 receipts,⁴⁸⁵ which themselves were lower than previously.⁴⁸⁶ As of October 1, 1979, OCR had a pending caseload of 1,401 complaints.⁴⁸⁷ The pending caseload five years later, as of September 30, 1984, was 861.⁴⁸⁸ On the other hand, the number of cases being closed each year by OCR reflect no dramatic increase.⁴⁸⁹

dertook its pilot mediation program, but that within two years, the backlog was eliminated and the case load per investigator was quite manageable. PEER STUDY, *supra* note 92, at 104. As of March 1980, OCR had only 259 "backlogged," or "carryover," complaints, most of which were being held up for lack of policy. "Thus, mediation makes sense for OCR only if the agency feels that mediation offers some critical values for the agency clientele that cannot be secured through traditional means, and that those values outweigh the likely losses." *Id.* at 187.

484. The expected number of receipts at OCR for fiscal year 1980, based on experience, was 5,855 complaints. Annual Operating Plan (AOP) for 1980, 44 Fed. Reg. 76,864, 76,865 (1979). The actual number of complaints received was 3,497. 1980 OCR FIRST ANN. REP. 21. Statistics obtained by the author through a FOIA request (on file at the *George Washington Law Review*) indicated 3,381 complaints received. Although there are some discrepancies between the figures in the published reports and those furnished through the FOIA request, the discrepancies do not affect the conclusions to be drawn. Where the numbers differ, they will be indicated thus: (3,381-FOIA). The number of expected complaints for 1981 was 4,090. AOP for 1981, 46 Fed. Reg. 5034, 5036 (1981). Actual complaints received totaled 2,876 (2,890-FOIA). AOP for 1982, 47 Fed. Reg. 9900, 9901 (1982); *see also* 1981 U.S. DEP'T OF EDUC. ANN. REP. 77. *But see* 1981-1982 OCR SECOND ANN. REP. 17 (indicating that 2,887 complaints were received in fiscal year 1981). The expected number of receipts for fiscal year 1982 was 3,592. AOP for 1982, *supra*, at 9902. In fact, OCR received only 1,840 complaints (1,841-FOIA). 1981-1982 OCR SECOND ANN. REP. 17.

485. 1981-1982 OCR SECOND ANN. REP. 17.

486. This phenomenon prompts some explanation. EEOC has experienced no similar dramatic decline in charge receipts. Since 1980, EEOC receipts have climbed from 45,343 to 56,228 in 1981, 54,145 in 1982, 70,252 in 1983, and 63,874 in 1984. See summary data prepared by EEOC in response to author's FOIA request (copy on file at the *George Washington Law Review*). Although EEOC has experienced occasional decreases in charge receipts, the comparison to OCR's experience is striking. State and local human rights commissions continue to receive more cases than they can comfortably handle. *See Oreskes, supra* note 410, at B4, col. 3. Although some might be tempted to credit the differences to a decrease in discrimination in educational programs, it appears more likely that the decrease reflects a perception on the part of potential OCR complainants that they will be unlikely to obtain a satisfactory remedy by filing with the current OCR. *See* Letter from former Assistant Secretary for Civil Rights Cindy Brown to Marjorie A. Silver (Aug. 27, 1985) (copy on file at the *George Washington Law Review*). The United States Commission on Civil Rights has been hesitant to venture an opinion on the decline. *See* U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS COMMITMENTS: AN ASSESSMENT OF ENFORCEMENT RESOURCES AND PERFORMANCE 211 n.24 (Nov. 1983) [hereinafter *FEDERAL CIVIL RIGHTS COMMITMENTS*].

OCR complaint receipts stabilized somewhat after 1982. In 1983, OCR received 1,950 complaints. 1983 U.S. DEP'T OF EDUC. ANN. REP. 97. In 1984, the number of complaints received was 1,928. AOP for 1985, 49 Fed. Reg. 48,599, 48,600 (1984); *see also* 1984 OCR FOURTH ANN. REP. 22. An increase has occurred in the past two fiscal years. In fiscal year 1985, OCR received 2,199 complaints, the highest number since 1982. AOP for 1986, 50 Fed. Reg. 48,624, 48,625 (1985). OCR received 2,648 complaints in 1986, AOP for 1987, 54 Fed. Reg. 45,935, 45,936, a substantial increase over 1985.

487. AOP for 1980, *supra* note 484, at 76,865.

488. AOP for 1985, *supra* note 486, at 48,602. The pending caseload rose to 1,009 cases by the end of fiscal year 1985, AOP for 1986, *supra* note 486, at 48,625, but declined again to 887 by the close of 1986. AOP for 1987, *supra* note 486, at 45,936.

489. The agency closed 2,877 cases in fiscal year 1980 (2,712-FOIA). 1980 OCR

In fact, because of the declining numbers of complaints received over the period of time in which OCR attempted a number of procedural innovations, there existed no dramatic *need* for alternatives to the traditional procedures, certainly not as compared to the need that had existed at EEOC when it instituted the rapid charge process. One problem with the traditional procedures, however, was the inadequacy in many cases of the time allowed for complaint processing under the terms of the *Adams* Order. Thus, no matter how manageable the *number* of cases might be, the demand that a case be investigated and a finding made within 105 days of receipt created an impetus to short circuit the process.⁴⁹⁰

ECR, implemented system-wide in fiscal year 1982, was one such approach.⁴⁹¹ A case resolved through ECR created no *Adams* problems. Of course, if the agency attempted ECR and failed, the time already passed would make compliance with the *Adams* timeframes that much more difficult. To address this problem, OCR specified a period of time during which ECR might be attempted. Day-by-day procedures were set forth,⁴⁹² and efforts at ECR were to be terminated after the twenty-fifth day from receipt of the complaint, unless the regional director granted a maximum ten-day extension.⁴⁹³

Available data suggest that ECR has had little impact on achieving the goals of expedience and cost effectiveness. In OCR's *Annual Report* for fiscal years 1981 and 1982, the agency stated that initial analyses showed that in more than half the cases in which ECR was attempted, the parties reached a voluntary agreement.⁴⁹⁴

FIRST ANN. REP. 2. It closed 3,329 in 1981 (3,303-FOIA), 1981 U.S. DEP'T OF EDUC. ANN. REP. 77; 2,267 in 1982 (2,272-FOIA), AOP for 1983, 48 Fed. Reg. 1789, 1792 (1983); 2,273 in 1983 (2,263-FOIA), 1983 U.S. DEP'T OF EDUC. ANN. REP. 97 (1984); 1,976 in 1984 (1,964-FOIA), AOP for 1985, *supra* note 486, at 48,600; and 2,040 in 1985, AOP for 1986, *supra* note 486, at 48,625. 1986 may be an exception; the agency closed 2,788 in that year. AOP for 1987, *supra* note 486, at 45,936. OCR reported that the average age of pending complaints had decreased impressively, from a high of 1,297 days at the close of 1982 to 229 days at the close of 1984. 1984 OCR FOURTH ANN. REP. 22.

490. See 1985 *Hearings on OCR*, *supra* note 70, at 120-21. During a question and answer session between Representative John Conyers and Assistant Secretary for Civil Rights, Harry Singleton, Mr. Singleton claimed that despite a surplus of funding and adequate resources, it was impossible for OCR to consistently meet *Adams* timeframes because such timeframes "are just unworkable." *Id.* at 121. According to some agency officials, OCR personnel have resorted to backdating documents to make it appear that they had complied with the *Adams* timeframes. Kurtz, *supra* note 133, at A1, col. 4. As a result, a House subcommittee has asked DOJ to investigate the matter. Williams, *Meese Investigation of Education Dept. Requested*, N.Y. Times, Apr. 28, 1987, at A19, col. 1.

491. See AOP for 1982, *supra* note 484, at 9901.

492. See OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 10-11.

493. See *id.* app. J at 11.

494. 1981-1982 OCR SECOND ANN. REP. 17. In its 1983 Final Annual Operating

In fiscal year 1983, OCR reported that the parties agreed to attempt ECR in 62% of the cases in which the agency offered it and that 64% of those reached successful resolution.⁴⁹⁵ No information, however, was given as to the number of complaints involved.⁴⁹⁶ For fiscal year 1984, OCR reported that it offered ECR in 246 complaints; it was accepted in 175, and successful in 104.⁴⁹⁷ The report gave no information as to the duration of the process.⁴⁹⁸ Nonetheless, the number of complaints for which resolution was even attempted through ECR procedures is a small fraction of the number of complaints handled annually by OCR.⁴⁹⁹ It is probably fair to assume that if the ECR effort were significantly valuable in achieving the goal of cost-effectiveness, the agency's reports would so indicate.

*b. Negotiated Voluntary Compliance Before Findings*⁵⁰⁰

Compared with the more formal alternatives, a case that is successfully resolved during the pendency of an investigation will save time and resources. But for such informal resolutions, OCR would probably have more difficulty in meeting its obligations under the *Adams* Order.⁵⁰¹ The frequency of negotiated voluntary compliance, however, is difficult to assess. Because a case closed in this manner does not require an investigative report or letters

Plan, which apparently was issued before the 1981-82 *Annual Report*, OCR boasted a 95% success rate during the first three months that ECR had been implemented, with an average duration of 22 days per complaint. AOP for 1983, *supra* note 489, at 1792.

495. AOP for 1984, 48 Fed. Reg. 57,588, 57,590 (1983).

496. *Id.* Another source indicates that ECR was offered in approximately 10% of all complaints received. 1983 U.S. DEP'T OF EDUC. ANN. REP. 98. Additionally, 66% of all ECR starts were mediated successfully, an 8% increase over the fiscal year 1982 figures. *Id.* Summary data provided to this author in response to a FOIA request showed that ECR was offered in 204 cases in fiscal year 1983, that it was accepted in 135, and of those was successful in 83, that is, in 61.5% of the cases in which it was offered.

497. AOP for 1985, *supra* note 486, at 48,602; 1984 OCR FOURTH ANN. REP. 47. Again, these figures vary somewhat from those provided in response to this author's FOIA request. (In 1984, ECR offered in 240 cases, accepted in 170, and successful in 112). The Annual Operating Plan for 1986 reported that for 1985, ECR was offered in 238 cases, accepted in 138, and successful in 101. AOP for 1986, *supra* note 486, at 48,625. The Annual Operating Plan for 1987 reported that for 1986, ECR was offered in 177 cases, accepted in 94, and successful in 61, AOP for 1987, *supra* note 486, at 45,935, thus evidencing a greater decline in the success of ECR than in any previous year.

498. The information OCR provided in response to the FOIA request states that the average length of a case *resolved* through ECR was 21 days in fiscal year 1983 and 17.5 days in fiscal year 1984.

499. In 1986, for example, OCR received 2,648 complaints. This resulted in ECR being offered in only 6.7% of all complaints received, attempted in 3.5%, and successful in 2.3%. See *supra* note 497. For suggested reasons as to why attempts at ECR fail, see PEER STUDY, *supra* note 92, at 46.

500. As for EEOC, since its "mediation" procedures and its "negotiated compliance before determination" are merged in its rapid charge procedures, see EEOC Compl. Man. (CCH) ¶¶ 542, 545 (Oct. 1984), no separate analysis as to cost-effectiveness of efficiency is warranted.

501. Under the *Adams* Order, OCR has 105 days from receipt of the complaint to complete its investigation and make a formal determination of compliance. See *supra* note 113. Thus, any resolution reached during the investigation will assist in meeting the *Adams* timeframes.

of findings, there inevitably will be a savings in the agency's time and resources.⁵⁰²

c. Negotiated Voluntary Compliance After Informal Findings

OCR has presented no statistics to demonstrate the cost-effectiveness of its pre-LOF negotiation procedures.⁵⁰³ Again, if the agency achieves a resolution at this stage, rather than after it issues an LOF, some time and perhaps some money will be saved. If OCR fails to achieve a resolution, the entire process will take longer; after the informal negotiations break down, OCR will send out an LOF and recommence negotiations to attempt voluntary compliance.⁵⁰⁴ By the terms of the *Adams* Order, OCR has only 105 days from receipt of the complaint to make a final determination. If OCR's investigation uncovers a violation, OCR must attempt its pre-LOF negotiations; and, if such negotiations fail, issue a violation LOF, all within the same 105 days.⁵⁰⁵ Understandably, OCR has considerable difficulty in accomplishing this task within such a short period of time.⁵⁰⁶ Thus, its pre-LOF negotiation procedures are, at best, of negligible value in improving the efficiency of its case processing.

d. Negotiated Voluntary Compliance After Formal Findings

Again, it is a reasonable assumption that negotiating compliance

502. This does not suggest that the approach used by OCR is necessary to fulfill the agency's legal obligations, and, as the previous discussions on justice and fairness suggest, this approach may well be counterproductive towards those ends.

503. The Annual Operating Plans for 1985 and 1986 discuss the results of the ECR initiative, but say nothing about the success rate of pre-LOF negotiations. Data provided in response to the author's FOIA request, *see* Table 2, *infra* note 506, suggest that most cases in which a violation is found are now being resolved before sending the LOF. However, for those cases that are not resolved at this stage, the amount of time that passes before the issuance of an LOF can be counted in years rather than days. Although OCR's statistics for 1985 show distinct improvement in the age of cases on the LOF issuance date, the average age of cases is still far in excess of what is required by the *Adams* Order.

504. *See* OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 57.

505. Once the LOF is sent, OCR has another 90 days to attempt voluntary compliance with the recipient. *See supra* notes 113-16 and accompanying text. These time frames may seem skewed; they are under current procedures. They were designed to accommodate the pre-1982 approach when OCR sent out a violation LOF upon completion of an investigation, before any attempts at negotiating voluntary compliance. OCR's attempts to persuade the court to adjust the timeframes to reflect the new procedures have been unsuccessful. *See supra* note 133.

506. OCR has difficulty meeting these timeframes in all cases in which LOFs are sent, whether they result in findings of no violation, violation, or violation corrected. The following tables, extrapolated from summary data provided by OCR to the author in response to a FOIA request, demonstrate that although the average (median) age of *all* cases approaches the requisite *Adams* timeframes, the average (median) age of cases in which LOFs are issued is much greater.

after formal findings, when successful, is more cost effective than litigation or formal administrative enforcement, and less cost effective than successful attempts at negotiating resolutions before findings. Both statutes mandate that the agency engage in this process, but is there justification from a cost/benefit perspective for such requirements? That is, if such attempts were to fail more often than not, perhaps it would be more cost effective for the agency to proceed to formal litigation or administrative enforcement immediately upon findings of violations.

In fiscal year 1977, EEOC made 6,419 cause determinations, successfully conciliated 2,108 cause findings, and failed to conciliate 4,390.⁵⁰⁷ Thus, approximately one out of every three cases in which EEOC attempted conciliation was resolved successfully. In the following fiscal year, EEOC made findings of cause in only 2,560 cases; conciliation was successful in 1,425 cases and failed in

Table 1: Average Age of All Cases at Closure

<u>Fiscal Year</u>	<u>No. of Cases</u>	<u>Average Age at Closure</u>
1980	2,712	93 days
1981	3,303	116 days
1982	2,272	148 days
1983	2,263	147 days
1984	1,964	105 days

Table 2: Average Age of Cases When LOFs Are Issued

<u>FY 1980</u>	<u>No. of Cases</u>	<u>Average Age</u>
no violation	650	120 days
violation	349	259 days
<u>FY 1981</u>	<u>No. of Cases</u>	<u>Average Age</u>
no violation	1067	153 days
violation	538	329 days
<u>FY 1982</u>	<u>No. of Cases</u>	<u>Average Age</u>
not classified	3	1399 days
no violation	852	189.5 days
violation	303	425 days
violation corrected	34	386.5 days
violation not corrected	1	1760 days
<u>FY 1983</u>	<u>No. of Cases</u>	<u>Average Age</u>
no violation	640	211 days
violation	25	1254 days
violation corrected	465	288 days
violation not corrected	37	962 days
<u>FY 1984</u>	<u>No. of Cases</u>	<u>Average Age</u>
no violation	596	140 days
violation corrected	356	175.5 days
violation not corrected	24	603.5 days

Note that the average age listed in Table 1 is until *closure*; the age in Table 2 is until LOF issued, which, for violations not corrected is not the end of the process.

507. 1977-1978 EEOC 12TH-13TH ANN. REP. 58.

806.⁵⁰⁸ Thus, in fiscal year 1978, the ratio flipped; conciliation was successful in more than three out of five cases.⁵⁰⁹ From the time the rapid charge system was instituted in fiscal year 1979, through fiscal year 1984, however, successful conciliations under Title VII have never approached the number of unsuccessful conciliations; in fact, the number of successful conciliations never exceeded 27.5% of the total attempts.⁵¹⁰ There are, however, a number of reasonable explanations for this result. Apart from the vagaries of how agency statistics are maintained,⁵¹¹ the number of cases resolved through predetermination procedures grew enormously between fiscal years 1977 and 1983, with only minor exceptions.⁵¹² In

508. *Id.*

509. I have discovered no explanation, reasonable or otherwise, for the 1978 statistics.

510. Table 3 shows the number of Title VII conciliation attempts, successful and unsuccessful, and the percentage of attempts that were successful by fiscal year:

Table 3

<u>Fiscal Year</u>	<u>Total</u>	<u>Successful</u>	<u>Unsuccessful</u>	<u>% Success.</u>
1977	6,498	2,108	4,390	32%
1978	2,231	1,425	806	64%
1979	2,105	480	1,635	19%
1980	1,520	308	1,212	20%
1981	2,020	500	1,520	25%
1982	1,469	338	1,131	23%
1983	2,178	403	1,775	18.5%
1984	1,906	525	1,381	27.5%

See EEOC Annual Reports for years 1977-1983; summary data in response to FOIA request; EEOC Public Affairs transmittals entitled "Compliance Activities 1976-1984."

511. Comparing the data reported in EEOC's annual reports is frequently frustrating. For example, in fiscal year 1978, EEOC included withdrawals without settlement in its totals for predetermination closures. For all other years reported, such withdrawals were treated as administrative closures. It is frequently unclear whether reported statistics pertain to all jurisdictions enforced by EEOC, or only its Title VII jurisdiction. Complaints alleging multiple bases for jurisdiction are sometimes reported as Title VII complaints, sometimes under the other jurisdictions, sometimes under both.

512. Table 4 shows the number and percentage of predetermination closures compared to the total number of closures, for all jurisdictions:

Table 4

<u>Fiscal Year</u>	<u>Total Closures</u>	<u>Predetermination Closures</u>	<u>%</u>
1977	48,922	3,216	6.5%
1978	52,715	7,425	14%
1979	39,915	9,663	24%
1980	49,225	15,780	32%
1981	71,690	20,719	29%
1982	67,052	19,705	29%
1983	74,441	19,474	26%
1984	55,034	11,460	21%

See *supra* note 510.

Note the decline in numbers in 1984. A likely explanation is that the shift in em-

no year since fiscal year 1977 has the number of cause determinations approached the 1977 level.⁵¹³

Since the advent of rapid charge processing, the number of unsuccessful conciliations each year has ranged from 25% to 40% of the number of unsuccessful conciliations that occurred in fiscal year 1977.⁵¹⁴ It is therefore likely that the rapid charge system reduced the number of cases formerly resolved only after a cause finding. Available statistics demonstrate that although the number of predetermination resolutions has decreased greatly since the December 1983 change in policy,⁵¹⁵ there has been a less dramatic increase in the number of cases successfully conciliated.⁵¹⁶

In general, OCR boasts extremely impressive statistics in resolv-

phasing away from the use of rapid charge processing towards fuller investigation has resulted in fewer predetermination closures as well as fewer total closures. 1984 is the first year since 1977 that the number of receipts exceeded the number of closures; in fact, by a far wider margin than ever before, as demonstrated by Table 5:

Table 5: Comparison of Total Receipts to Total Closures

Fiscal Year	Total Receipts	Total Closures	(+/-)
1977	57,562	48,922	+ 8,640
1978	37,390	52,715	- 15,325
1979	35,279	39,915	- 4,636
1980	45,382	49,225	- 3,843
1981	56,228	71,690	- 15,462
1982	54,145	67,052	- 12,907
1983	70,252	74,441	- 4,189
1984	68,874	55,034	+ 13,840

See *supra* note 510.

513. In fact, the percentage of cause determinations in 1977 is 3.5 times greater than the average percentage of cause determinations in the other seven fiscal years for which there is data. Table 6 demonstrates the number and percentage of cause determinations as compared to total closures under all jurisdictions:

Table 6

Fiscal Year	Total Closures	Total Cause Determinations	%
1977	48,922	6,498	13%
1978	52,715	2,231	4%
1979	39,915	2,115*	5%*
1980	49,225	1,520*	3%*
1981	71,690	2,020*	3%*
1982	67,052	1,970	3%
1983	74,441	2,565	3%
1984	55,034	2,128	4%

* Since EEOC has not furnished statistics on the total cause determinations for the years in question, these figures represent the sum of successful and unsuccessful conciliation attempts, which approximate, but are in all likelihood less than, the total number of cause determinations.

See *supra* note 510.

514. See Table 3, *supra* note 510.

515. Although Table 3, *supra* note 510, shows only a 5% to 11% decrease in predetermination closures as a percentage of total closures in FY 1984, Table 4, *supra* note 512, demonstrates that the total number of closures dropped dramatically in FY 1984.

516. See Table 3, *supra* note 510. EEOC successfully conciliated between 25 and 213 more cases in fiscal year 1984 than in any other year since the aberrant year 1978; the percentage of successful conciliations compared to the total number of cases in

ing compliance matters without formal processes. Most cases in which a violation is found are resolved by this stage.⁵¹⁷ However, while few cases necessitate additional processes, from the time of the filing of the complaint through the resolution of a case in which a violation LOF has been issued, frequently years have transpired.⁵¹⁸

One may make some general observations about the cost effectiveness of informal administrative procedures as opposed to that of the formal alternatives. A complainant faced with the choice of filing a private right of action under Title VI or a complaint with OCR,⁵¹⁹ most likely will choose the latter, largely because she anticipates that the process will be far less costly than litigation. Given the variety of informal mechanisms available to the agency to resolve the complaint prelitigation, it will also likely take less time than if she were to litigate.⁵²⁰

D. Finality and Enforceability of Result

1. Formal Procedures

a. Litigation

It is perhaps axiomatic that the most enforceable of all dispute resolutions is the judicial decree.⁵²¹ Finality is bounded only by the right to appeal to a higher court,⁵²² and enforceability is bounded only by the solvency of the defendant. Thus, cases that

which conciliation was attempted increased by 2.5% to 9% over the previous four years.

517. Until the advent of pre-LOF negotiations, most violations were corrected at this stage. For example, the U.S. Department of Education reported that voluntary compliance was achieved in 368 out of 377 complaints in which initial findings of violation were made, a 98% success rate, which the Department considered to be "in accordance with administration objectives." 1981 U.S. DEP'T OF EDUC. ANN. REP. 77; see also 1983 OCR THIRD ANN. REP. 21 ("[V]ery few investigations result in termination of funds or referral to DOJ. Most cases are voluntarily settled by negotiated compliance agreements."). The bulk of violation cases are now resolved at the pre-LOF stage. See Table 2, *supra* note 506.

518. See Table 2, *supra* note 506.

519. This choice is not available to the EEOC complainant who must first exhaust her administrative remedies, see *supra* text accompanying note 177, although after the expiration of 180 days, she may choose to have EEOC continue its investigation, or obtain a notice of a right to sue, see *supra* text accompanying note 145.

520. It is quite likely that the average complainant, if the administrative mechanisms were unavailable, would choose the option of not making a claim or "lumping it," to use Professor Galanter's term. Galanter, *supra* note 169, at 134. In fact, studies indicate that informal mechanisms tend to attract new cases rather than to divert cases from the traditional processes. See Singer, *supra* note 74, at 577.

521. This is not, however, meant to minimize the difficulty plaintiffs and courts face in monitoring and enforcing structural injunctions. See Lottman, *Paper Victories and Hard Realities*, in PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 93, 98-104 (V. Bradley & G. Clarke ed. 1976).

522. See Resnik, *supra* note 253, at 865-70.

end in judgment further the values of finality and enforceability better than any other procedural alternative.

The same is not necessarily true for consent decrees, as is illustrated by the Supreme Court's controversial decision in *Firefighters Local Union No. 1784 v. Stotts*⁵²³ and the cases that have followed. In *Stotts*, the Court rejected the Sixth Circuit's decision that the strong policy favoring voluntary settlement of Title VII actions permitted encroachment on an otherwise valid seniority system.⁵²⁴ The issue was whether minorities that were recently hired pursuant to a consent decree could validly be protected against last-hired lay offs under the seniority system provided for in the collective bargaining agreement.⁵²⁵ The majority suggested that if any of the recently hired minorities had been specifically identified in the consent decree⁵²⁶ as victims of past, intentional discrimination, that might have been sufficient to override the seniority system as to lay offs.⁵²⁷ Justice Blackmun's dissent emphasizes the paradox of the majority's position:

The whole point of the consent decree in these cases — and indeed the point of most Title VII consent decrees — is for both parties to avoid the time and expense of litigating the question of liability and identifying the victims of discrimination. . . . Any suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce, of course, the incentives for entering into consent decrees. Such a result would be incongruous, given the Court's past statements that "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."⁵²⁸

The Court's recent decision in *Local No. 93 of the International Association of Firefighters v. City of Cleveland*⁵²⁹ limits the reach of the *Stotts* decision. It holds that a court is not barred from approving a consent decree that resolves a Title VII compliance problem merely because the decree provides for remedies — in this case promotional goals for minorities — that may be broader than what the court could have ordered after trial.⁵³⁰

In addition to the problems raised by collateral attack of consent decrees by nonconsenting parties,⁵³¹ the finality and enforceability of the decrees may be compromised by the parties to the original action. Professor Fiss suggests that the court is at a loss when the original parties return to court seeking modification of the consent

523. 467 U.S. 561 (1984).

524. *Id.* at 578.

525. *Id.* at 566-68.

526. Because there was no trial, there were no findings of fact. *Id.* at 579.

527. *Id.* (citing *Teamsters v. United States*, 431 U.S. 324, 367-76 (1977)).

528. *Id.* at 615-16 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)).

529. 106 S. Ct. 3063 (1986).

530. *Id.* at 3077. The court made clear, however, that the "consent decree does not purport to resolve any claims the Union might have," either under the Constitution or by contract. *Id.* at 3080.

531. See *United States v. Jefferson County*, 720 F.2d 1511, 1517-18 n.16 (11th Cir. 1983); Zimmer & Sullivan, *supra* note 185, at 165-68.

decree: "[The judge] has no basis for assessing the request. He cannot, to use Cardozo's somewhat melodramatic formula, easily decide whether the 'dangers, once substantial, have become attenuated to a shadow,' because, by definition, he never knew the dangers."⁵³²

According to Professor Fiss, although the plaintiff may return to court to seek a contempt citation, charging that the defendant abridged the decree, courts are reluctant to invoke the draconian remedy of contempt. "Courts do not see a mere bargain between the parties as a sufficient foundation for the exercise of their coercive powers."⁵³³ Thus, questions concerning finality and enforceability of consent decrees — as with all the informal procedures discussed below — are not insubstantial.

b. Administrative Enforcement Proceedings

If an administrative determination, made after opportunity for a hearing, was appealed through all available levels of review, both administrative and judicial, the results would be as conclusive and as enforceable as a judicial decree. If OCR terminated federal financial assistance, and the recipient had not availed itself of all avenues of review but nonetheless sued to enjoin the termination, it is unlikely that the court would consider the merits *de novo*; the doctrines of exhaustion of administrative remedies and collateral estoppel would likely bar further consideration of the merits.⁵³⁴ Thus, we have little reason to prefer litigation over administrative enforcement if our concerns are finality and enforceability of the result.⁵³⁵

532. Fiss, *supra* note 89, at 1083 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)).

533. *Id.* at 1084. Nonetheless, the remedy of civil contempt has been used for violations of consent decrees. See, e.g., *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3033 (1986); *United States v. Board of Educ.* 744 F.2d 1300, 1308 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

534. See *McGee v. United States*, 402 U.S. 479, 491 (1971). A parallel issue arises when a complainant, who loses before the agency, then elects to pursue her private right of action in federal court, when she has fulfilled the exhaustion requirement or when there was no exhaustion requirement. The Supreme Court is increasingly willing to apply preclusive effect to the administrative determination, thus barring further litigation on the discrimination charge. See *University of Tenn. v. Elliott*, 106 S. Ct. 3220, 3224-27 (1986) (holding that unreviewed state administrative proceedings are entitled to preclusive effect for reconstruction civil rights statutes claims but not for Title VII claims); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466-85 (holding that state court review of administrative determinations is entitled to preclusive effect), *reh'g denied*, 458 U.S. 1133 (1982); see also Resnik, *supra* note 253, at 978 ("Kremer suggests a future in which agencies, not courts, will issue decisions that bar future litigants.").

535. Nonetheless, our concerns regarding expedience and efficiency might move us in the direction of preferring litigation. See text accompanying note 470.

2. Informal Procedures

Finality and enforceability of the result of any informally negotiated resolution to a civil rights complaint are critical concerns in evaluating the desirability of one procedure over another. No matter how just, fair,⁵³⁶ or expedient a mechanism may be, most, if not all, of the benefit gained through the procedure will be lost if the result can be ignored and has no effect in a court of law, or if either party continues to pursue the matter in other forums.⁵³⁷

When the remedy is purely retrospective or capable of being implemented immediately (for example, back pay or allowing a female student to try out for a team), the issues of whether an agreement is enforceable, where it is enforceable, and by whom, are of far less concern. The reason is not because the case is less important, but because the likelihood of breach is less when the remedy can be implemented immediately. In many civil rights cases, however, a component of the remedy will take effect over time — such as desegregation of classes or schools, or the making of structural changes to a physical plant for wheelchair accessibility. The question of enforceability then becomes critical. The issue arises as to whether such resolutions, which are far more susceptible to breach, suggest the use of formal agreements to promote enforceability. Or, can the question of enforceability be separated from the procedures used to reach a negotiated agreement? Would it be sufficient to require that informal agreements be reduced to writing and signed by all parties, including the enforcement agency, and to make the agreements enforceable by the agency upon breach in federal court? Might formal procedures discourage subsequent breaches more than informal procedures? Would employers and universities be more likely to gamble — given limited resources and the necessity of setting priorities — that there would be fewer suits for breach of informal settlements, where there had been no actual finding or determination of discrimination by the agency, than for breach of decisions or agreements derived from the formal process?⁵³⁸

Both EEOC and OCR have suffered substantial criticism for inadequate monitoring of cases they have resolved.⁵³⁹ The agencies'

536. Of course the parties' perception that the procedures used were fair might well result in more willing acceptance of the outcome and therefore finality. See NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71, at 17.

537. See Resnik, *supra* note 253, at 854-55.

538. This raises the question of whether we want government enforcement of agreements where there exists no actual finding of discrimination and, therefore, reason to be concerned that perhaps there was no provable discrimination. See *supra* text following note 284.

539. See 1981 GAO REPORT, *supra* note 181, at 36. The report mentions that although EEOC was required to monitor compliance with conciliation agreements and consent decrees, the procedures used were inadequate for assessing employer compliance. *Id.* at 38. In 1983 EEOC again came under criticism for failure to monitor conciliation agreements. See 1983 Oversight Hearings, *supra* note 275, at 12 (prepared statement of Professor Hill). EEOC recognizes the need for close monitoring of the expected increase in conciliation agreements under the December 1983 revised policy.

limited resources and the pressure to eliminate backlogs and keep current with incoming cases give monitoring a low priority.⁵⁴⁰ When the original complainant or another specific party is injured by the respondent's perceived breach, that person usually will bring the matter to the agency's attention.

If complainant and respondent have entered into an agreement, the aggrieved complainant would have a common law action for breach to enforce the agreement or contract in state court, whether or not the agency is a party to the agreement. However, for the same reasons that many complainants go to the agency in the first place, namely limited resources and hope of an expeditious resolution and expert assistance, the common law action will seldom be a satisfactory solution.⁵⁴¹ Thus, the critical inquiry is what action, if any, the agency will take on behalf of the complainant.⁵⁴²

a. Mediation

If an agreement between the complainant and the respondent is consensual, noncoerced, and thus acceptable to both parties, there arguably will be a greater likelihood of compliance with its terms.⁵⁴³ Were mediation to succeed in achieving this end — especially in complicated civil rights cases that might otherwise be the subject of ongoing structural injunctions⁵⁴⁴ — the finality that would result would go far in recommending it as an alternative procedure. Nonetheless, concern remains regarding available remedies for breach of the agreement.⁵⁴⁵

See EEOC, GUIDANCE ON MODIFICATION OF THE ADMINISTRATIVE CHARGE PROCESS, reprinted in 1985 EEOC Hearings, *supra* note 159, at 11, 14.

As to OCR's monitoring of such agreements, see H.R. REP. NO. 458, *supra* note 70, at 31-32, 33-34; Block, *supra* note 112, at 14.

540. See FEDERAL CIVIL RIGHTS COMMITMENTS, *supra* note 486, at 33-35.

541. An action may exist in a small claims court, but it is unlikely that the jurisdiction of a small claims court would extend beyond rather limited monetary relief; frequently, if not usually, the complainant will seek relief in excess of the maximum jurisdictional amount of the small claims court. Moreover, the relief sought may be injunctive in nature. See R. SPURRIER, INEXPENSIVE JUSTICE 16-19 (1980); cf. F. SANDER, *supra* note 77, at 3-9.

542. Similar issues arise when there is an agreement between the agency and the respondent but no specific agreement between the complainant and the respondent, for example, with an OCR negotiated voluntary resolution occurring after commencement of the investigation. Again, the issue is what options are available to the agency, and what action the agency actually will take.

543. See generally NATIONAL INST. FOR DISPUTE RESOLUTION, *supra* note 71.

544. See, e.g., Resnik, *supra* note 338, at 393-95.

545. Compare *Parsons v. Yellow Freight Sys.*, 741 F.2d 871, 874 (6th Cir. 1984) (holding that a party to a settlement agreement cannot seek enforcement in state court without again exhausting Title VII procedures through EEOC) with *Eaton v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1508 (11th Cir. 1985) (stating that there is no exhaustion requirement for enforcement of conciliation agreements and, therefore, either EEOC or the aggrieved parties may go directly to court).

A number of recent cases have addressed whether an agreement reached through EEOC's rapid charge procedures is enforceable by the agency in federal court under Title VII.⁵⁴⁶ Although EEOC conciliation agreements have generally been held enforceable under Title VII, the enforceability of negotiated settlements under rapid charge has been somewhat controversial. In 1982, in *EEOC v. Pierce Packing Co.*,⁵⁴⁷ the Ninth Circuit rejected EEOC's claim that an employer's breach of a settlement agreement was enforceable just as a conciliation agreement would be, holding that the process of charge, notice, investigation, and determination of reasonable cause were prerequisites under Title VII to any action brought by EEOC.⁵⁴⁸ Two years later, in *EEOC v. Henry Beck Co.*,⁵⁴⁹ without specifically rejecting the holding in *Pierce Packing*,⁵⁵⁰ the Fourth Circuit held such an agreement to be enforceable. The court could find no satisfactory reason for distinguishing between the enforceability under Title VII of a conciliation agreement and a negotiated settlement, finding that "[b]oth promote the statutory goal of voluntary compliance and neither subverts other provisions of Title VII."⁵⁵¹ According to the Fourth Circuit,

Enforcement of the settlement agreement in this case will not involve litigation of the underlying unfair employment practice charge; it will be limited to issues of contract law. Federal jurisdiction is extended to this case not because it involves a violation of Title VII but because it is essential to preserving the EEOC's function as an efficient conciliator, a function that is central to Title VII's statutory scheme.⁵⁵²

Thus, the Fourth Circuit recognized that enforceability legitimates the process under Title VII and, concomitantly, that the process of voluntary resolution without enforceability would undermine the congressional scheme of Title VII to eradicate, and compensate for the effects of, employment discrimination.

In *EEOC v. Safeway Stores, Inc.*,⁵⁵³ the Fifth Circuit described one of the ways in which nonenforceability might undermine the Title VII scheme. Although the decision addressed the enforceability of a conciliation agreement, it speaks to issues that are also

546. See, e.g., *EEOC v. Henry Beck Co.*, 729 F.2d 301, 305-06 (4th Cir. 1984) (holding that EEOC may enforce voluntary agreement by filing suit in district court under Title VII); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-09 (9th Cir. 1982) (ruling that EEOC may not seek judicial enforcement of agreement without independent investigation and reasonable cause determination); cf. *Parsons*, 741 F.2d at 874.

547. 669 F.2d 605 (9th Cir. 1982).

548. *Id.* at 608.

549. 729 F.2d 301 (4th Cir. 1984).

550. *Id.* at 305.

551. *Id.*

552. *Id.* at 306; cf. *EEOC v. Liberty Trucking*, 695 F.2d 1038, 1044 n.7 (7th Cir. 1982) (stating that the court did not decide whether "a distinction should be made between conciliation agreements, which are statutory creatures and which follow an EEOC investigation and determination of reasonable cause, and settlement agreements which are a device created by the EEOC to resolve complaints prior to investigation"). The court based its holding of enforceability on "the voluntary nature of conciliation agreements and not upon any administrative finding of reasonable cause." *Id.*

553. 714 F.2d 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

true of prefinding negotiated resolutions. The employer, Safeway Stores, argued that EEOC's only cause of action was to sue to establish the underlying charge of discrimination. The court noted that the essence of this argument was that the conciliation agreement entered into by EEOC was without legal effect, and could therefore be violated with impunity.

Were we to accept Safeway's position, an employer would be free to enter into a conciliation agreement, bide its time for so long as it benefited from doing so, and then breach the agreement with no fear of sanction. The employer would have lost nothing. It would then face only the same prospect of suit on the underlying discrimination charge it would have faced prior to its entering the conciliation agreement. The EEOC and the aggrieved employees, on the other hand, would have suffered serious prejudice. The suit would be possible only after the Commission learned an employer or a union would not fulfill its obligations. Suit undertaking to prove discrimination would have been substantially delayed. Such delay would potentially result in difficulty in proving other violations of the Act. Witnesses might no longer be available, memories would have faded, and crucial documents might not have been preserved. Conciliation, instead of being a means of enforcing the law, could well become a dilatory tactic which could be used to make enforcement of Title VII less effective.⁵⁵⁴

The court in *Safeway*, however, drew a critical distinction between the enforceability of the conciliation agreement, and the legitimacy of a provision of that agreement that frustrated collective bargaining agreement provisions regarding seniority.⁵⁵⁵ Echoing the Supreme Court's holding in *W.R. Grace and Co. v. Local Union 759*,⁵⁵⁶ the Fifth Circuit held that absent consent by the union,⁵⁵⁷ a conciliation agreement entered into among the agency, the employer, and the charging parties could not alter the enforceability of a valid collective bargaining agreement.⁵⁵⁸ In *Grace*, the union had *declined* an invitation to participate.⁵⁵⁹ Nonetheless, the Court held that nothing short of a judicial decree could alter the terms of the collective bargaining agreement without the union's consent.⁵⁶⁰ However, the Court in *Grace* did not invalidate

554. *Id.* at 573 (footnote omitted).

555. *Id.* at 576-80.

556. 461 U.S. 757 (1983).

557. The union had been invited to participate in the negotiations, but had declined. 714 F.2d at 570. It maintained that retroactive seniority, in contravention of the provisions of the collective bargaining agreement, could be ordered only over the union's objection if the union had the opportunity to participate in litigation to decide whether a Title VII violation had occurred. *Id.* at 577.

558. *Id.* at 579-80.

559. 461 U.S. at 759.

560. *Id.* at 771.

any terms of the conciliation agreement; rather it held merely that the employer should bear the financial exposure of answering both to the charging parties under the conciliation agreement, and to the displaced employees whose seniority rights were infringed under the collective bargaining agreement.⁵⁶¹

In *Safeway*, the court accepted the union's argument that terms of the conciliation agreement that conflict with a valid collective bargaining agreement cannot be enforced over a union's objection, unless the union has had the opportunity to participate in an adjudication to determine whether a Title VII violation has occurred.⁵⁶² The court emphasized the voluntary nature of the conciliation process:

Conciliation is, by its own terms, a voluntary process. The involved parties are free to agree, and conversely, free not to agree. If they choose to agree, then the goal of voluntary compliance has been achieved. If they choose not to agree, then "conciliation" cannot alter the terms of a collective agreement. To do so, there must be an adjudication that discrimination has occurred.⁵⁶³

The concerns articulated by the courts concerning the rights of third parties are even more compelling when there has not been an agency finding of cause or discrimination. Thus the "finality" of any negotiated settlement is necessarily limited by its legitimacy, and its legitimacy is affected by any attempt to alter or interfere with the rights of individuals not parties to the agreement.⁵⁶⁴

The third-party concerns are clear in the case of the union and its collective bargaining agreement but are less clear when there is no union or other group specifically protected by national policy such as that articulated by the National Labor Relations Act.⁵⁶⁵ In the latter case, the rights of individuals not parties to the agreement are nonetheless affected.⁵⁶⁶ This is perhaps one of the rea-

561. *Id.* at 767.

562. 714 F.2d at 577.

563. *Id.* at 580.

564. See generally Goldstein, *Robbing Peter To Pay Paul: The Conflict Between the Title VII Conciliation Process and Collective Bargaining*, 3 DET. C.L. REV. 647 (1983) (discussing union participation in settlements to prevent the injustice of not allowing an affected party to participate in decisions that may deprive it of its rights). But cf. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1852 (1986) (holding invalid a collective bargaining provision providing for preferential treatment of racial minorities even though ratified by union membership).

565. 29 U.S.C. § 151 (1982).

566. The tension between the goal of voluntary compliance and the concern that affirmative action without a finding of discrimination will violate the constitutional or statutory rights of nonvictims is manifest in cases such as *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053 (1987); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986); *Local 93 of the Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). This tension infuses the current debate over the legitimate role of civil rights enforcement in the United States today. See *supra* note 57. Of greatest concern is voluntary action without at

sons OCR declines to attempt ECR in cases involving class complaints or with class implications. However, even a mediated resolution of an individual complaint may have negative repercussions for nonparties. For example, a resolution that guaranteed an individual victim of alleged sex discrimination the next available supervisor position would mean that other persons, perhaps equally or even more qualified, would not receive a position that they might have attained but for the mediated agreement.

The controversy over the enforceability of EEOC negotiated agreements arises as a matter of interpreting Title VII law and purpose, rather than because of any absence of finality or commitment by the agency to the negotiated agreement. As discussed earlier, an EEOC negotiated agreement is written and signed by the parties and usually by an EEOC representative.⁵⁶⁷ Upon receiving information of a breach of the agreement, EEOC has discretion to reopen the case on its merits or to take administrative or judicial action to correct the breach.⁵⁶⁸

This is not the case under OCR's early complaint resolution procedures. OCR does not commit itself to monitor or to enforce any mediated agreement. Its manual provides explicitly that upon alleged breach, the complainant shall be informed that he may file a

least an administrative finding of discrimination, whether before any administrative attention has focused on the legitimacy of the practices of the entity in question, or whether during an administrative investigation. *See Bakke*, 438 U.S. at 302 ("[W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations."). And yet, voluntary action is the goal of the federal civil rights scheme. As Justice Brennan stated in *Bakke*:

Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action. . . . Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action.

438 U.S. at 364 & n.38 (Brennan, J., concurring in part and dissenting in part); *see also Weber*, 443 U.S. at 204 ("It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.").

The debate is still very much alive. *See Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring in part) (requiring public employers to find illegal discrimination before engaging in affirmative action programs would severely undermine employers' incentive to voluntarily meet civil rights obligations); *id.* at 1863 (Marshall, J., dissenting) (noting that formal findings of past discrimination are not necessarily predicate to the adoption of affirmative action policies).

567. *See* EEOC Compl. Man. (CCH) ¶ 1262 (Mar. 1979).

568. *Id.* ¶ 552 (Sept. 1984).

new complaint and that OCR will investigate the allegations of discrimination rather than the allegation of a breach of the ECR agreement.⁵⁶⁹ The only concession made by OCR is that it will calculate the 180-day timeframe within which a complaint is to be filed from the date of the alleged breach, rather than from the date of the alleged act of discrimination.⁵⁷⁰ In fact, OCR's procedures do not even suggest that the complainant would have a common law action against the recipient for breach.⁵⁷¹

Thus, OCR's mediation procedures fail miserably under any enforceability analysis. If unenforceable, as the *Safeway* court's decision suggests, the incentives to abide by the terms of a mediated resolution are minimal, and the temptations to breach are substantial. Whether this has in fact created a problem of finality is less clear; no data exists to indicate whether recipients are breaching mediated agreements with any frequency.⁵⁷²

*b. Negotiated Voluntary Compliance Before Findings*⁵⁷³

The problem of enforceability and finality of resolutions reached during the pendency of an OCR investigation is similar to, and may be greater than, the problem under OCR's early complaint resolution procedures. It may be greater because of the lack of official recognition of such procedures. Although ECR procedures specify how to calculate the 180-day filing period in the case of an alleged breach of a mediated agreement,⁵⁷⁴ no formal policy speaks to calculating time periods when a complaint is filed by a complainant who had earlier withdrawn a complaint based on the recipient's written or verbal promise. Although the agency may waive the 180-day rule on the basis of "good cause" in such a situation,⁵⁷⁵ the lack of clarification of such a policy invites abuse.⁵⁷⁶

569. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 9; see also PEER STUDY, *supra* note 92, at 32-33.

570. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 9; see also PEER STUDY, *supra* note 92, at 32-33. It is unclear how OCR justifies this approach in calculating the date of the alleged discrimination when it refuses to view a breach itself as an instance of such discrimination, but OCR apparently has not yet been called to task on its approach.

571. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, app. J at 9; PEER STUDY, *supra* note 92, at B29-30 (Silverstein). Although an action based on contract may nonetheless exist, it is unlikely that many complainants would have the resources to bring such an action.

572. See, e.g., PEER STUDY, *supra* note 92, at 51 (noting that several complainants surveyed felt that the institutions had not kept the settlement agreements). Since OCR assigns a new complaint number to complaints alleging that an ECR agreement has been breached, OCR has no way of tracking the incidence of breach.

573. The discussion concerning enforceability and finality of EEOC's mediation procedures is incorporated under this section.

574. OCR, 1985 INVESTIGATION PROCEDURES MANUAL, *supra* note 124, at 10.

575. The agency may waive the 180-day rule if: (1) the complainant could not reasonably be expected to know within the 180 days that the act was discriminatory; (2) illness or other incapacitating circumstances precluded filing within 180 days; (3) another civil rights enforcement agency failed to act where a similar complaint had been filed; (4) complainant shows good cause for failing to file in a timely manner (e.g., perceived changes in OCR's jurisdictional authority). *Id.* at 11.

576. OCR may reopen a "predetermination closed investigation": when the com-

c. *Negotiated Voluntary Compliance After Informal Findings*

Under OCR's procedures, the agency must incorporate into a letter or statement of findings any agreement reached after informal findings.⁵⁷⁷ The letter or statement should state the compliance problems and the steps the recipient has taken and has promised to take to correct the problems.⁵⁷⁸ The finality and enforceability of a resolution reached at this stage should be no different from the finality and enforceability of a resolution reached after formal findings.

d. *Negotiated Voluntary Compliance After Formal Findings*

This Article has addressed, in the discussion of the enforceability of negotiated agreements, the cases upholding EEOC enforcement of conciliation agreements.⁵⁷⁹ In *EEOC v. Liberty Trucking Co.*,⁵⁸⁰ the Seventh Circuit explored the legislative history of the statutory provision for conciliation and concluded that while ambiguous, it supports the conclusion that Congress intended the federal courts to have jurisdiction to enforce conciliation agreements.⁵⁸¹ The courts that have considered the question appear to be unanimous in concluding that without enforceability in federal court of conciliation agreements, the statutory purpose of eradicating discrimination would be seriously undermined.⁵⁸² There remains, of course, the problem of EEOC's limited re-

plainant decides to allow OCR to release her name to the respondent; when the complainant decides to cooperate with OCR in the investigation; or when the complainant, whom OCR could not locate, contacts OCR after the complaint closure and requests reopening of the investigation. OCR procedures make no provision for reopening complaints when allegations that had been resolved become unresolved. *Id.* at 50.

577. *Id.* at 54.

578. *Id.* at 55-57.

579. See *supra* text accompanying notes 547-68.

580. 695 F.2d 1038 (7th Cir. 1982).

581. *Id.* at 1041-44. The court first recites the ambiguous statutory history, which reveals that the original bills provided the courts of appeals with jurisdiction to enforce conciliation agreements, but that a substitute bill shifted jurisdiction to the district courts and greatly simplified the original jurisdiction provisions. The substitute bill, now codified at 42 U.S.C. § 2000e-5(f)(3), provided for federal jurisdiction over "actions brought under this title" and did not refer specifically to conciliation agreement enforcement actions. The Seventh Circuit concluded that despite the ambiguity of this phrase, "[n]othing in the debates or reports indicates that the substitute bill was meant to change the original proposal which explicitly provided for federal court jurisdiction over EEOC actions to enforce conciliation agreements." 695 F.2d at 1041. The court found that after the 1972 amendments, conciliation remained the most important function of EEOC. *Id.* at 1042 (citing *EEOC v. Raymond Metal Prods. Co.*, 530 F.2d 590, 596 (4th Cir. 1976)).

582. *E.g.*, *EEOC v. Safeway Stores, Inc.*, 714 F.2d 567, 573 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1040 n.5, 1043 (7th Cir. 1982).

sources, which may affect its ability to bring suit in every instance of breach.⁵⁸³ Nonetheless, within the bounds of this problem, there is indisputable jurisdiction.⁵⁸⁴ *Liberty Trucking* sends a clear message to an employer contemplating a conciliated agreement, or contemplating breach of one, that EEOC stands ready and able to seek judicial redress and has no obligation to prove its case of underlying employment discrimination, as it would have to do if no conciliation agreement existed.

The Title VI regulations provide that OCR may request DOJ to bring suit to enforce recipients' contractual obligations.⁵⁸⁵ Although the case law is limited, it supports the conclusion that the government can enforce, under Title VI, a negotiated agreement entered into after a formal finding of nondiscrimination, and need not prove the underlying discrimination.⁵⁸⁶ A related issue is

583. Cf. *supra* note 540. EEOC's regulations provide for a written conciliation agreement, signed by the parties and EEOC, and proof of compliance with Title VII in accordance with the terms of the agreement before a case is closed. 29 C.F.R. § 1601.24(a), (c) (1986). The agreement contains a provision that EEOC may review compliance with the terms of the agreement, including examination of relevant witnesses and documents. EEOC Compl. Man. (CCH) ¶ 1276 (Mar. 1979). Neither the regulations nor the *Compliance Manual* mention procedures upon breach of conciliation agreements. Although the revised procedures recognize the need for monitoring, see *supra* notes 539-40 and accompanying text, critics fear the Commission's change in enforcement policy will cripple already overtaxed resources. See 1985 EEOC Hearings, *supra* note 159, at 33, 49, 59-60.

584. But see Calleros, *Reconciling the Goals of Federalism with the Policy of Title VII: Subject-Matter Jurisdiction in Judicial Enforcement of EEOC Conciliation Agreements*, 13 HOFSTRA L. REV. 257, 267 (1985). Professor Calleros argues that despite his endorsement of a broad interpretation of Title VII, *id.* at 257 n.*, there is no federal jurisdictional basis for enforcing Title VII conciliation agreements. *Id.* at 267. He suggests that requiring an employee to use a state rather than federal forum will have little influence on whether an employer will breach an agreement. *Id.* at 296, 305-06. Thus, he ignores the resource problem and the availability of a federal court suit by EEOC for the employer's breach. See *id.* Although he suggests possible concurrent jurisdiction as an alternative thesis, *id.* at 289, he never addresses whether EEOC might sue the employer in state court, see *id.* at 279-80.

585. See 34 C.F.R. § 100.8(a) (1986) ("If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by . . . (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be sought to enforce any rights of the United States . . . or any assurance or other contractual undertaking" (emphasis added)).

586. See *Cannon v. University of Chicago*, 441 U.S. 677, 722 (1979) (White, J., dissenting) ("The 'other means' provisions of § 602 include agency suits to enforce contractual antidiscrimination provisions . . ."); *United States v. Tatum Indep. School Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969) (stating that specific performance exists as a contractual remedy for breach of a voluntary desegregation agreement). In *Cannon*, Justice White relied upon the remarks of Senator Ribicoff: "For example, the most effective way for an agency to proceed would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient . . . or . . . the agency would have authority to sue to enforce compliance with its own regulations." 441 U.S. at 772 n.9 (quoting 110 CONG. REC. 7066 (1964)); see also *United States v. Marion County School Dist.*, 625 F.2d 607, cert. denied, 451 U.S. 910 (1981); *United States v. Frazer*, 297 F. Supp. 319 (M.D. Ala. 1968). Additional support for this conclusion is furnished by *Caulfield v. Board of Educ.*, 583 F.2d 605, 613 (2d Cir. 1978) (*Caulfield I*) (a challenge by third parties to the validity of a voluntary agreement between OCR and the New York City Board of Education to resolve findings of discrimination in the hiring and assignment of minority teachers). In *Caulfield I*, the court held that the voluntary agreement "to effect compliance was precisely the type of action contemplated by Congress in using the phrase 'voluntary

whether the beneficiaries of such an agreement are able to enforce it in federal court.⁵⁸⁷ Unlike a conciliation agreement under Title VII where the parties to the agreement generally include the charging party as well as the employer and EEOC, the complainant is not a party to a negotiated agreement under Title VI. Nonetheless, the complainant or class of beneficiaries whose rights are protected by the agreement usually have a direct interest in its enforcement. Although the problem of sufficient resources will often prevent a beneficiary from pursuing such litigation, allowing such actions may alleviate the problems of the government's lack of resources, change in policy, or intergovernmental dispute precluding the agency or DOJ from pursuing such litigation.⁵⁸⁸ An action to enforce such an agreement, whether brought by the government or by the beneficiaries, is consistent with the policies that motivated the Supreme Court in *Cannon*; specific enforcement of the agreement focuses on remedying the discrimination rather than on terminating federal financial assistance.⁵⁸⁹

The enforceability of voluntary agreements, whether pursuant to mediation or after agency findings of discrimination, will raise many of the same obstacles as raised by the original litigation. Limitations on resources will frequently preclude either the

means.' " *Id.* at 614. Although this case was not a suit to enforce the agreement, but rather an attempt to invalidate it, the reasoning of the court would point in the direction of enforceability. See also *Caulfield v. Board of Educ.*, 632 F.2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (*Caulfield II*) ("The argument for upholding the voluntary affirmative action plan is even stronger in this case than it was in the *Weber* case, for here HEW itself initiated the investigation and notified the Board of alleged Title VI and Title IX violations."); *supra* note 564 and accompanying text (discussing the effects of such agreements on the rights of third parties).

587. See Block, *supra* note 112, at 16. It is Block's view that, especially in this era of lack of commitment to civil rights enforcement in the federal government, allowing such third-party actions promotes the purposes of the civil rights laws and is consistent with case law that recognizes the rights of private individuals to bring actions under Title VI to enforce contracts of assurance furnished by recipients. *Id.* at 16-17 (citing *Lau v. Nichols*, 414 U.S. 563 (1974) and *Tatum Indep. School Dist.*, 306 F. Supp. at 288) (recognizing the government's right to enforce compliance agreements); see also *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1481 (7th Cir. 1985) (denying a third-party beneficiary action under Section 503 of the Rehabilitation Act). The court in *D'Amato* held that the analysis of whether a third-party action should be allowed should parallel the analysis of whether a private right of action exists under the statutory scheme; the court distinguished the case before it from what would ensue if the third-party action were brought under Section 504, for which a private right of action has been recognized. *Id.* at 1481-82.

588. OCR is powerless to bring litigation on its own, see *supra* note 182 and accompanying text; it can only refer appropriate cases to DOJ which, not infrequently, will refuse to bring suit as requested.

589. *Cannon v. University of Chicago*, 441 U.S. 677, 704-05 (1979). In dissent, Justice White quoted Senator Ribicoff's explanation of the purpose of allowing the Department of Justice to bring suit to specifically enforce contractual or legal obligations: "'All of these remedies have the obvious advantage of seeking to end the discrimination, rather than to end the assistance.'" *Id.* at 722 n.9 (quoting 110 CONG. REC. 7066 (1964)).

agency or the individual from suing for breach of informally-agreed-to remedies. Nonetheless, the legitimacy of the procedures and the likelihood that the procedures will produce agreements that resolve the underlying dispute with finality are likely to be affected by the official recognition that the agreements will be enforceable, if not enforced, upon breach. The greater the likelihood that the agency will take measures to enforce a breached agreement, and that such measures will embarrass the recipient/employer economically or otherwise, the greater the likelihood that the recipient/employer will not breach. When the disincentive that enforceability would provide is absent — such as in the case of the ECR mediated agreement — the likelihood that breach will occur is increased. Thus, finality, though not dependent on enforceability, is likely affected by it.

E. Other Values

1. All or Nothingness

Judicial adjudication, as we know it, is a winner-take-all proposition.⁵⁹⁰ Both the risks and the possible gains are greater than for alternative procedures. This is similarly true for cases tried through administrative enforcement proceedings. If there is value in all parties giving up something and concomitantly gaining something, then litigation through judgment — whether judicial or administrative — is not to be preferred. Such “all or nothingness,” however, is not an especially helpful concept in assessing the desirability of litigation brought by the agency. Once either agency has made a determination that a violation of the law has occurred, it is obligated to seek a complete remedy for that violation. Although it is obligated to use informal means to resolve the compliance matter voluntarily, any resolution obtained must completely cure the violation, and a compromise of differences between the parties would be prohibited under either statutory mandate.⁵⁹¹

When a complainant files a private right of action under Title VI, or a charging party, having received notice of right to sue from EEOC, files an action under Title VII, neither is likely to know with any degree of certainty whether the plaintiff will prevail, or, if he does, how much he will recover. Thus, there is a great deal of uncertainty in calculating whether to risk judgment or accept settlement. It might well behoove a private individual to settle a case prejudgment.⁵⁹² A case resolved through mediation or negotiation

590. See Susskind & Madigan, *supra* note 169, at 180.

591. See *supra* text accompanying notes 405-13.

592. The calculation is somewhat different from the point of view of the recipient of federal funds who refuses to comply voluntarily and is then faced with fund termination proceedings, either administrative or judicial. When the purpose of the proceeding is to seek termination of federal financial assistance, the parties know with some degree of certainty the risks of losing and the gains of winning. This is, however, complicated somewhat by the question of which programs are infected by the discrimination. See *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984) (holding

at the agency level, or a prejudgment consent decree, avoids the risk of losing all.

2. Individual Control and Autonomy

Related to, but nonetheless distinct from, procedural and substantive fairness is the quality of individual autonomy and control. The power to control one's own lawsuit, while costly, insures a greater measure of autonomy than is available to a complainant before an administrative enforcement agency.

A private right of action under Title VI empowers a plaintiff to affect the course and conduct of a proceeding⁵⁹³ which is likely unavailable to her if she files a complaint with OCR. Once a complaint is filed, if ECR is either rejected or never offered, and an investigation begins, the scope of the investigation, the framing of the issues, the ultimate finding, and the remedy negotiated are all within OCR's control. Thus, a complainant who desires not to relinquish such control may prefer the route of private litigation. The loss of control under Title VI is as great in an administrative hearing commenced by the agency as it is in other phases of the administrative process. It is arguable, but not at all clear, that if the agency, through DOJ, were to pursue the case to federal court, the court might be compelled to allow the individual to intervene as of right.⁵⁹⁴ Nonetheless, as discussed previously, the interests of the government — fund termination or other systemic relief — and the interests of the complainant — individual remedy — are quite different.⁵⁹⁵

that nondiscrimination obligation extends only to a program or an activity receiving federal financial assistance, not to an entire institution); Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969) (ruling that if federal funds "support a program that is infected by a discriminatory environment, then termination of such funds is proper").

593. Professor Auerbach suggests, however, that a plaintiff's autonomy in litigation may be surrendered to either his counsel or the court:

Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy. Litigation can be as bizarre as Alice's Wonderland. . . . As a litigant tumbles down the slippery slope into dense procedural thickets, familiar landmarks recede. The journey may even resemble a sudden regression to childhood. . . . Although a lawyer can provide reassuring guidance, *in loco parentis*, the price of protection is still dependence. Even as a dangerous adversary is fended off, the judge looms as a menacing authority figure, empowered to divest a litigant of property or liberty. Autonomy vanishes as mysteriously as the smile of the Cheshire cat.

J. AUERBACH, *supra* note 77, at vii-viii.

594. See FED. R. CIV. P. 24.

595. The differences in relief sought would suggest that if intervention were to be allowed at all, it would be permissive under rule 24(b) rather than as of right under rule 24(a). Cf. Cannon v. University of Chicago, 441 U.S. 677, 703 (1979) (concluding that Title IX of the Education Amendments of 1972 "authoriz[es] an implied private cause of action for victims of prohibited discrimination").

The complainant, however, may maintain autonomy and control should she (and, necessarily, the recipient) choose to attempt mediation through the ECR process. In fact, OCR promotes this as one advantage of ECR.⁵⁹⁶ At least in theory, the OCR representative remains a neutral third party allowing the complainant and recipient mutually to resolve the matter as they see fit. Were the complaint to proceed to investigation the complainant would lose the opportunity to control the ultimate findings and resolution;⁵⁹⁷ furthermore, it is not inconceivable that even if the agency were to find a violation, the complainant might receive no individual remedy at all.⁵⁹⁸ Thus, mediation, the least formal of the informal alternatives, ensures a measure of autonomy similar to what is available to an individual who decides to file a private lawsuit rather than file a complaint with OCR.

Loss of autonomy from using the agency's informal procedures is less of an issue for a Title VII complainant. A putative plaintiff in a Title VII action is required to exhaust her administrative remedies before bringing a private right of action. However, the charging party maintains a far more active role in EEOC's proceedings than if a comparable complaint were filed with OCR. Although the individual may not play any role in determining whether there is cause to believe Title VII discrimination has occurred, once such cause is found, she participates in fashioning an appropriate remedy.⁵⁹⁹

Whether the agency uses the rapid charge process, or whether it makes a finding and attempts conciliation, the complainant retains the right to accept or reject the proffered settlement. Although both methods contemplate an agreement among the charging party, the employer, and the agency, EEOC's procedures allow for situations where the agency believes the employer has proffered an adequate settlement, and the charging party disagrees.⁶⁰⁰ The charging party may sacrifice the advantage of agency processes and litigation support in such circumstances, but

596. See OCR, 1985 INVESTIGATIVE PROCEDURES MANUAL, *supra* note 124, app. J at 16 ("Questions and Answers about Early Resolution — A Guide for Mediators"); see also PEER STUDY, *supra* note 92, at 80.

597. See Block, *supra* note 112, at 10-11.

598. See *supra* note 241 and accompanying text.

599. See *supra* text accompanying note 166.

600. When the charging party is satisfied by the employer's offer, and EEOC remains unsatisfied that compliance problems have been remedied, EEOC may continue to investigate. See EEOC Compl. Man. (CCH) ¶ 550 (Mar. 1987) (negotiated agreements). The agency may decide alternatively to close a limited class case where full relief has been offered and the charging party is not satisfied. *Id.*; see also *id.* ¶¶ 1281 (Mar. 1979), 1284 (Mar. 1979) (stating that the agency may accept conciliation agreement offering full relief without charging party approval). The *Compliance Manual* does not state whether during conciliation efforts the charging party and the employer may reach an agreement that is insufficient to remedy fully the charge and therefore unacceptable to EEOC. It is likely that such a situation would be treated pursuant to paragraph 550, and that conciliation would either proceed further or be deemed to have failed. See *id.* ¶¶ 1311-1318 (Mar. 1979) (conciliation failure). If EEOC and the employer reach a conciliation agreement without the agreement of the charging party, the latter will be issued a notice of right to sue. *Id.* ¶ 1283 (Mar. 1979).

she will retain the right to bring an action in federal court, thus preserving subsequent autonomy and control.

3. Continuing Relationships

Mediation may be more conducive to the continuation of amicable relationships than any of the alternatives, formal or informal.⁶⁰¹ Formal adversarial processes are least compatible with such ongoing relationships; mending entrenched differences after a win-or-lose, take all-or-nothing, resolution to a controversy breeds resentment and distance, rather than harmony and compatibility. If a charging party desires to continue an employment relationship with his employer, or if a student intends to continue as a student at her institution, a resolution agreed to by the parties will more likely ensure the opportunity for conflict-free continuation, than would litigation or some of the other alternatives. Once the agency has made a cause finding, or a finding of discrimination, the adversarial nature of the process becomes somewhat entrenched. If the parties reach a resolution during the course of the investigation, the opportunity for a harmonious relationship would be less impaired than if they reach resolution after the conclusion of the investigation. Also, a resolution reached after informal findings may jeopardize a relationship less than one reached after formal communication of those findings. But of all the possibilities, successful mediation will best assure that each party has heard and understood the concerns of the other, and has accepted a mutually agreeable solution that is conducive to future dealings.

4. Nonconfrontation

The value of nonconfrontation is linked to ensuring the con-

601. See M. FRANKEL, *PARTISAN JUSTICE* 117-18 (1980); L. SINGER & E. NACE, *MEDIATION IN SPECIAL EDUCATION: TWO STATES' EXPERIENCES* 15 (1985) (noting that a key to success of the use of mediation in resolving special education placement disputes was the continuity in relationships); Sander, *supra* note 253, at 120.

Both agencies acknowledge the advantages of the mediated approach when ongoing relationships are involved. See OCR, 1985 *INVESTIGATION PROCEDURES MANUAL*, *supra* note 124, app. J at 1; APRIL 16 *POLICY STATEMENT*, *supra* note 157, at 1-3. As Professor Anthony Amsterdam stated at the 45th Judicial Conference of the D.C. Circuit:

Professor Auerbach finds that in closed communities of purpose unlike our society, mediation and conciliation may bring the strong and the weak together on terms of relative equality, since the interests and powers of both are subordinated to their common acceptance of a transcendent need to reconcile differences, and there exists a shared commitment to common values as a framework of reference for the reconciliation. But in our own materialistic, individualistic and competitive culture, alternative dispute resolution mechanisms find and leave the parties with all the chips in the hands of the stronger.

105 F.R.D. 251, 291 (1984).

tinuity of relationships, but focuses on the respondent rather than the complainant. A recipient or employer may be more receptive to changing its processes and practices if the change is presented in the form of advice rather than edict.⁶⁰² An employer or university may prefer to avoid the negative publicity that attaches to a lawsuit or the agency's public announcement of compliance problems.⁶⁰³ Therefore, a procedure that diminishes confrontation may facilitate an expeditious and appropriate resolution. Although the merits of a nonconfrontational approach are debatable, it is clearly an important goal of the current administration.⁶⁰⁴

Mediation achieves the goal of nonconfrontation, as does every informal process used by OCR short of a formal LOF. Early complaint resolution, however, which avoids an investigation and the confrontational environment that accompanies it, promotes nonconfrontation more than the other informal, but nonetheless investigative, procedures.⁶⁰⁵

Conclusion

A number of factors complicate the evaluation of formal and informal procedures. First, many valued goals are mutually incompatible. The resolution with the greatest deterrent effect may not be the most cost-effective. The most cost-effective resolution may provide the fewest procedural safeguards. The resolution with the most procedural safeguards may not promote harmony in a continuing relationship between the parties. Second, the constraints imposed in the statutory scheme add further complications. Cost-effectiveness, interpersonal harmony, and personal autonomy may not be relevant to promoting the goals of Title VI and Title VII. The goals of Title VI may not be coextensive with those of Title VII; thus, it may be inappropriate to base the development of alternative procedures under Title VI on those developed under Title VII. Finally, our ability to evaluate the effectiveness of the various procedures against any number of the identified values is substantially impaired by lack of controlled, empirical data, and opportunities for comparison. Nevertheless, I venture some observations and recommendations.

602. On the other hand, school officials sometimes will desire formal administrative findings (at the least) as a basis to convince constituents that funding must be allocated to address the compliance problem.

603. A survey of recipients who participated in the ECR pilot program shows support for this conclusion. See PEER STUDY, *supra* note 92, at 100. The contraposition to this, which was recognized by some of the respondents surveyed, is that ECR deprives respondents of public and official exoneration of charges where findings would be in their favor. *Id.* at 123. However, one recipient spokesperson, who acknowledged that his institution had been in violation, noted that ECR had enabled the institution "to tidy up an error at modest cost." *Id.* at 76.

604. See *supra* notes 84-85 and accompanying text.

605. EEOC's processes prior to a cause finding are similarly nonconfrontational, unlike the process once cause is determined or when litigation is pursued.

A. *Litigation*

The most formal alternative, litigation, has numerous characteristics that facilitate achieving justice. The articulation of norms or guiding values and the opportunity to clarify poorly understood or vaguely written statutory commands recommend litigation most forcefully in complex cases. Whether or not adversarial litigation is the preferred method for adjudicating facts, it is the most influential tool for clarifying and applying the law.

Similarly, litigation's procedural safeguards ensure greater procedural fairness than do any of the less formal alternatives, although the balance of power among the parties will influence the success of procedural rules in ensuring fair hearing. The government — EEOC, or DOJ on recommendation from OCR — is a fair adversary against a defending corporate or governmental entity in a suit to enforce the 1964 Act. But when the plaintiff is an individual, the defendant's greater resources and concomitant staying power may impair the ability of fair rules to produce fair results.

Litigation may be the best alternative in promoting finality and guaranteeing enforceability of the results, but it is probably the weakest in expedience and cost-effectiveness. The expense, time, and public resources that litigation consumes have fueled the movement towards procedural alternatives.

B. *Formal Administrative Enforcement*

The benefits and burdens of formal administrative adjudication in civil rights enforcement are troublesome. The influence and precedential value of administrative determinations are more limited than those of the courts. Although the need for agency expertise and the desire to clear court dockets are persuasive reasons for shifting adjudication away from the courts to administrative forums, the administrative law judges who preside over the adjudicatory hearings at OCR⁶⁰⁶ tend not to be experts in Title VI. And because virtually every case in which an ALJ recommends termination of the recipient's funds is appealed through several layers of review, including appeal to the federal court, the time consumed by such hearings is frequently as extensive as that consumed during litigation. In addition, the infrequency of such formal administrative proceedings to terminate funds — whether because of lax enforcement policy or because of recipients' reluctance to gamble on the loss of needed federal funds — does little to recommend such alternatives to court litigation.

606. EEOC does not use formal administrative adjudication.

C. Mediation

The types of mediation practiced by OCR and EEOC differ markedly from each other and must be distinguished in any discussion of their qualities and drawbacks. If such procedures are utilized to free scarce agency resources for the eradication of systemic discrimination, they may serve a worthwhile function. If, however, resources are not scarce, or are not made available to fight discrimination, the use of mediation by a civil rights enforcement agency, whether passive or active, is problematic. Mediation may result in a complainant gaining less than she would if the agency investigated and made findings; conversely, it may pressure an employer who had not discriminated into making concessions. Mediation may resolve individual disputes but cause the agency to overlook patterns and systems of discriminatory practices. The current use of ECR by OCR is at best unnecessary,⁶⁰⁷ and at worst antagonistic,⁶⁰⁸ in ensuring nondiscrimination by recipients of federal funds.

Mediation in the private sector is indisputably helpful and generally inexpensive and expedient in resolving disputes between individuals.⁶⁰⁹ This is especially true when such individuals either desire to, or must, continue in a relationship with one another. In mediation between two individuals who have substantially equal resources, sophistication, and bargaining ability, the opportunity to compromise their differences with the assistance of a neutral third party can reduce conflict and promote harmony and reasonableness.

But when such mediation occurs between individuals or institutions of disparate bargaining ability and resources, concerns regarding fairness and justice abound. Mediation owes no allegiance to established norms, and one party's sophistication may prejudice the other party in achieving a just or fair result.

My preference is for an optional forum for mediation of differences outside the structure of the enforcement agency, preferably within the parties' own community,⁶¹⁰ with ultimate resort when

607. See *supra* text accompanying notes 483-89.

608. See *supra* text accompanying notes 380-84.

609. I agree with OCR that mediation of civil rights disputes is inappropriate for the resolution of class complaints.

610. For example, see the study prepared for the National Institute for Dispute Resolution. See L. SINGER & R. SCHECHTER, *supra* note 50. This study examines the Federal Mediation and Conciliation Service's (FMCS) mediation of complaints under the Age Discrimination Act of 1975, 42 U.S.C. § 6101 (1982), pursuant to government-wide regulations promulgated by HEW in 1979, 45 C.F.R. § 90.43 (1986). This use of an outside mediation agency without its own enforcement powers is unique in federal practice. The decision to have FMCS conduct mediation rather than the agency itself was based on the belief that there was some virtue to separating the mediator from the adjudicating agency. See L. SINGER & R. SCHECHTER, *supra* note 50, at 8.

The authors of the study were hesitant to draw many conclusions, because of the limited data available. Nevertheless, they found that community mediators hired by FMCS tended to have more success than the FMCS professional mediators, *id.* at 13, and community conciliators tended to take a more active role in alleviating imbalances of bargaining power between the parties, *id.* at 15. In addition, community con-

necessary to the enforcement agency or courts.⁶¹¹ Provided there is appropriate counseling to aid complainants and others in deciding whether it is advisable to participate in mediation,⁶¹² a noncompulsory opportunity to mediate would preserve the procedure's advantages without sacrificing the proper mission of the civil rights enforcement agency. It would further resolve concerns regarding biases of agency personnel, due to either a preference for quick resolution, or a potentially premature assessment of the merits of the case.

Such an approach also would largely resolve the problems concerning enforceability of results. A problem with OCR's early complaint resolution is that there is little disincentive to breach the ECR agreement. When a recipient breaches an ECR agreement, the complainant must begin anew by filing a complaint with OCR, which will then commence an investigation. There is a different problem with EEOC's enforcement of a rapid charge agreement upon breach. The agency is enforcing an agreement reached between the parties in the absence of any actual finding that the employer in fact violated Title VII, a potentially unjust and inappropriate posture for an agency charged with enforcing the law. If the mediation process rested within the community and the parties were made aware of both its limitations and its virtues, the agency would be free to focus on the problem of discrimination, rather than on dispute resolution. Nevertheless, if mediation is to remain in the hands of the enforcement agency, the law — either the legislature or the judiciary — should recognize a meaningful right to enforcement of the agreement.⁶¹³

D. Negotiation Before Findings

I find little, if any, reason to sanction negotiation pending inves-

ciliators articulated concern about the fairness to both parties of the agreement reached, a concern not shared by the professional mediators. *Id.* Neither the professional nor the community mediators were particularly concerned with ambiguities in the statute or with ensuring that the parties were apprised of their rights under the statute. *Id.* at 15-16.

611. Edwards, *supra* note 88, at 682.

612. For example, an impartial assessment of the complaining party's case might suggest that it would be extremely difficult to prove a violation. *See supra* note 291 and accompanying text. A handicapped employee might seek advice as to whether he might be more likely to negotiate the specific kind of accommodation he desires if he engaged in mediation rather than submitting a complaint to OCR. The employer might seek advice as to whether or not the practice complained of constituted a violation of the applicable law. Obviously, the providers of such assistance should be neutral.

613. By "meaningful" I mean that the agency itself should be charged with bringing suit to enforce the agreement; the resource problem, which initially recommended use of the agency processes, would likely still be a problem at the point of breach of the agreement.

tigation as practiced by OCR. Even with mediation, I have concern about premature assessment of the merits of the complaint affecting the negotiations. This concern becomes increasingly stronger as the investigation progresses. During the investigatory process, there are few external controls or checks to ensure the justness of an accepted compromise. If the procedures for such negotiations were clarified and codified, some of these concerns might diminish. EEOC's procedures at least are made available to the parties in advance of the agency's fact-finding conference.⁶¹⁴ Nevertheless, the incremental value that might be gained by minimizing the expenditure of resources does not justify allowing an enforcement agency employee to facilitate a negotiated agreement when she is charged with the duty to investigate impartially and make findings on the allegations of the complaint.

E. Negotiation After Informal Findings

For somewhat different reasons, I see no compelling justification for OCR's current practice of attempting negotiation before official notification to the complainant and the recipient of its findings. The proffered value of furthering nonconfrontational resolution of compliance problems is unpersuasive. The procedure has fueled legitimate concern that the Reagan Administration is soft on discrimination. Ex parte secret negotiations with a recipient found to have discriminated imply that OCR frets more about its relationship with such lawbreakers than it does about eradicating and deterring discrimination. Moreover, there is no evidence that the procedure has improved OCR's ability to expedite resolution of compliance problems. A resolution reached pursuant to such a procedure is no more final or enforceable than a resolution reached after a letter of findings is sent. Legitimate grounds for endorsing such a procedure remain unclear.

F. Negotiation After Formal Findings

EEOC's recent shift away from rapid charge mediation towards fuller investigation of charges with an eye towards litigation causes concern that EEOC may not be able to handle the plethora of found charges that will result. The agency's renewed commitment to demand a full remedy likely means that many more cases will require litigation. EEOC appears ill equipped to handle its current caseload, let alone such an increase.⁶¹⁵

Regardless of the value of litigation in creating and legitimizing legally acceptable standards and promoting justice and fairness, a scheme that provides no means of eradicating discrimination short of litigation would prove unworkable and counterproductive. The procedures most consistent with addressing compliance problems short of litigation or formal administra-

614. See *supra* text accompanying notes 429-30.

615. See *supra* note 480 and accompanying text.

tive enforcement are those originally built into the statutory schemes in 1964. Upon finding discrimination both EEOC and OCR are to accept no resolution short of complete compliance. Thus, in theory, if not in practice, there is no inconsistency between their responsibilities as civil rights enforcement agencies and their responsibilities to attempt to conciliate, or achieve voluntary compliance, before commencing formal proceedings.

This is not to suggest that there is no need for litigation to further the goal of justice, to establish norms, or to ensure finality. Cases will arise that will not be capable of informal resolution, for example, if there is a dispute as to what the law requires, or if the costs of compliance are too great to permit the recipient or the corporate employer to acquiesce without a judicial decree. The cases that require a judicial airing — be they individual or class — will have a judicial airing, as long as the agencies are true to their mandate.

A more difficult issue is the degree and manner to which a complainant or charging party should be involved in the agency's postfinding negotiations. Such involvement furthers the complainant's autonomy and individual interest in justice and fairness. But such involvement also creates a risk that the agency's obligation to eradicate discrimination may be compromised by a focus on dispute resolution, a problem with which EEOC has been grappling in its reevaluation of rapid charge processing.

Generally, there need be no conflict between the interests of the individual and those of the institution in ensuring nondiscrimination. Sarah School wants admission to Stowe University.⁶¹⁶ If OCR finds a violation, admitting her is not inconsistent with the goal of bringing Stowe into compliance with Title VI. However, her admission will probably not be sufficient; to comply with the mandate of Title VI, OCR may require Stowe to develop and adhere to certain procedures to ensure that such discrimination will not occur again. Conversely, it may be possible for Stowe to avoid termination of federal funds without admitting Sarah; perhaps she is no longer competitive with current applicants regardless of race.⁶¹⁷ Nevertheless, if Sarah was discriminated against because of her race, she has a statutory, if not constitutional, right⁶¹⁸ to have that discrimination redressed. The discriminatory act should be fully redressed, if possible, within the framework of postfind-

616. See *supra* text preceding note 310.

617. See *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3049 & n.45 (1986).

618. This would depend on whether Stowe was a state school or otherwise promoted policies of the state. See *Evans v. Newton*, 382 U.S. 296 (1966). But see *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

ing negotiations. It makes no sense to require Sarah to go through the expense and delay of then seeking an individual remedy through litigation or otherwise. If a conflict arises between the interests of the individual and those of the agency, OCR could address that conflict by providing for procedures to segregate Sarah's claim from Stowe's general compliance problems.⁶¹⁹ But since the vast majority of cases present no such conflict, OCR should amend its regulations to include complaining parties and their representatives in postfinding negotiations.⁶²⁰

G. *The Roles for Congress, the Courts, and the Agencies*

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁶²¹ the Supreme Court admonished the Court of Appeals for the District of Columbia for its display of judicial activism in requiring the Nuclear Regulatory Commission to use additional rulemaking procedures beyond those specified in the Administrative Procedure Act.⁶²² Justice Rehnquist, writing for the Court, reviewed the legislative history of the Administrative Procedure Act and concluded "that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed."⁶²³ The courts' inability to impose additional procedures on the agencies does not support the conclusion that the agencies have license to transform their statutory missions by the use of less stringent procedures and methods.

If one administration chooses to use more formal procedures than those specifically mandated by statute, subsequent administrations are not bound to follow suit. Nonetheless, the burden of justifying any changes lies with the agency.⁶²⁴ If a litigant could show that OCR's or EEOC's use of mediation or other informal procedures had frustrated the discovery and termination of systemic discrimination, the courts would be justified in striking down their use.

If Congress chooses to encourage civil rights enforcement agencies to utilize procedures less formal than those used traditionally, it should do so explicitly. My recommendation is that any efforts by Congress to encourage the use of less formal procedures should isolate dispute resolution from the enforcement of nondiscrimination obligations.

619. A procedure similar to that employed by the EEOC might suffice. See EEOC Compl. Man. (CCH) ¶¶ 1281-1284 (Apr. 1985).

620. If the agency fails to do so, Congress should amend Title VI to provide for such participation. In addition to protecting the rights of the individual, including him in these negotiations would diminish any tendency by the agency to accept less than full compliance with the law.

621. 435 U.S. 519 (1978).

622. *Id.* at 548; see 5 U.S.C. § 553 (1982).

623. 435 U.S. at 546.

624. See *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

Further, regardless of the stage at which a mediated or negotiated agreement is obtained, the agreement, if obtained under the auspices of the enforcement agency, should be enforceable in federal court by the agency and by the affected individual. Enforcement costs should not burden the complainant, and the benefits of breach should not outweigh the cost of breach to the school or employer. Congress should amend Titles VI and VII to grant explicitly such rights of action.

Although it is undoubtedly preferable for Congress to speak to these issues explicitly, the courts may continue to play an important role by ensuring that agencies act true to the mandates of their organic statutes and that informal resolutions to compliance problems are enforceable under these statutes.

Yet the agencies need not wait for either Congress or the courts. In spite of political and fiscal pressures, agencies such as OCR and EEOC should reexamine their procedures to assure that they accomplish as well as possible the eradication of unlawful discrimination, consistent with the mandates of Title VI and Title VII.