NOTES

AWARDS OF ATTORNEYS' FEES TO UNSUCCESSFUL ENVIRONMENTAL LITIGANTS

On several occasions during the past decade, federal courts have awarded attorneys' fees to public interest groups for unsuccessful suits brought under federal environmental statutes.[1] These statutes generally authorize fee awards in private enforcement actions, and in some suits to review administrative implementation of statutory schemes, whenever the court deems such an award "appropriate."[2] Prevailing plaintiffs have recovered fees under the statutes without much difficulty or fanfare,[3] but awards to losing parties have been more controversial.[4]

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[1] *See, e.g.*, Northern Plains Resource Council v. EPA, 670 F.2d 847 (9th Cir. 1982); Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42, 55 (D.C. Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242); Metropolitan Wash. Coalition for Clean Air v. District of Columbia, 639 F.2d 802 (D.C. Cir. 1981) (per curiam); Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973); North Slope Borough v. Andrus, 507 F. Supp. 106 (D.D.C. 1981), *rev'd sub nom.* Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982); Citizens Ass'n v. Washington, 383 F. Supp. 136 (D.D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976).

[2] *See* Toxic Substances Control Act §§ 19(d), 20(c)(2), 15 U.S.C. §§ 2618(d), 2619(c)(2) (1976); Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4) (1976); Surface Mining Control and Reclamation Act of 1977, § 520(d), 30 U.S.C. § 1270(d) (Supp. IV 1980); Deep Seabed Hard Mineral Resources Act § 117(c), 30 U.S.C. § 1427(c) (Supp. IV 1980); Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 505(d), 33 U.S.C. § 1365(d) (1976); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g)(4), 33 U.S.C. § 1415(g)(4) (1976); Deepwater Port Act of 1974, § 16(d), 33 U.S.C. § 1515(d) (1976); Safe Drinking Water Act § 1449(d), 42 U.S.C. § 300j-8(d) (1976); Noise Control Act of 1972, § 12(d), 42 U.S.C. § 4911(d) (1976); Energy Policy and Conservation Act § 335(d), 42 U.S.C. § 6305(d) (1976); Resource Conservation and Recovery Act of 1976, § 7002(e), 42 U.S.C. § 6972(e) (Supp. IV 1980); Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (Supp. IV 1980); Ocean Thermal Energy Conversion Act of 1980, § 114(d), 42 U.S.C. § 9124(d) (Supp. IV 1980); Outer Continental Shelf Lands Act Amendments of 1978, § 23(a)(5), 43 U.S.C. § 1349(a)(5) (Supp. IV 1980).

One of the few federal environmental statutes that do not provide for fee shifting is the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4361 (1976).

[3] *See, e.g.*, Palila (Psittirostra bailleui) v. Hawaii Dep't of Land & Natural Resources, 512 F. Supp. 1006 (D. Hawaii 1981); Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1145–46 (D.R.I. 1977).

[4] *See, e.g.*, Wall St. J., Sept. 8, 1982, at 32, col. 1. Amendments pending in the Senate would limit fee awards under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6987 (1976 & Supp. IV 1980), to substantially prevailing parties. *See* [13 Current Developments] ENV'T REP. (BNA) 783 (Oct. 8, 1982). Legislation proposed by the Reagan Administration would similarly restrict fee shifting under more than 70 federal statutes. *See* Wash. Post, Nov. 20, 1982, at A3, col. 1.

This Note discusses when, if ever, courts should award attorneys' fees to unsuccessful environmental litigants.[5] Part I of the Note outlines the history of "fee shifting" in the United States and examines the statutes under which fees have been awarded to losing litigants. Part II argues that, although traditional principles of restitution fail in general to justify fee awards to unsuccessful parties, such awards can serve a legitimate role in encouraging socially productive litigation. Part III evaluates the standards courts have applied in granting or denying fees to unsuccessful litigants, and proposes that in making this determination courts should assess the prospective desirability of a lawsuit rather than its ultimate effects. Part IV considers and rejects the objection that awarding fees to losing parties under the statutes in question requires an exercise of discretion beyond the institutional competence of the courts.

I. THE LEGAL CONTEXT OF PUBLIC INTEREST FEE AWARDS

A. The American Rule and Its Exceptions

Although English courts for centuries have granted attorneys' fees along with other litigation expenses to prevailing parties,[6] American courts long ago departed from the "English rule."[7] The Supreme Court noted as early as 1796 that the "general practice" in the United States was to exclude counsel fees from damage awards, and ruled that the federal courts could not deviate from that practice without express congressional authorization.[8] Since then, the Court has repeatedly affirmed the general "American rule" barring fee shifting absent statutory or contractual authorization.[9]

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[5] In this Note, "unsuccessful" and "losing" describe parties who lose in court and fail to achieve the objectives of their litigation. Federal litigants who obtain favorable settlements or spur reform of challenged practices typically are considered to have prevailed for purposes of determining eligibility for statutorily authorized fee shifting, *see infra* note 22; this Note focuses on awards to parties who have not prevailed even in this broad sense. In addition, the discussion here is limited to awards of attorneys' fees to losing environmental plaintiffs and petitioners under federal law. The Note does not discuss the circumstances under which counsel fees should be granted to unsuccessful defendants or the question whether different considerations should govern fee awards under state law.

[6] *See* Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

[7] The historical reasons for the American rejection of the English rule are obscure. *See, e.g.*, *id.* at 873–78; Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 80–81 (1963).

[8] Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

[9] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 249–50 (1975) (citing cases).

The Court has long recognized two equitable exceptions to the American rule. First, if a litigant's efforts bestow a "common benefit" on a class or create or protect a "common fund" from which members of a class may recover, the litigant may recover attorneys' fees respectively from the other members of the class or from the fund.[10] The purpose of this exception is to prevent unjust enrichment of those who benefit from litigation.[11] Second, courts may use fee shifting as an equitable penalty for abusive litigation practices. Thus, even in the absence of statutory authorization, a court may assess fees against a party who has willfully violated a court order[12] or has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[13]

During the early 1970's, federal courts began to recognize a third equitable exception to the American rule. Under the "private attorney general" doctrine, the counsel fees of plaintiffs who had vindicated important statutory interests and conferred widespread public benefits were charged to the losing defendants.[14] Often there was no pretense that the losing defendants represented or could pass on the costs proportionately to those benefited by the litigation;[15] the awards were based not on a theory of restitution, but on a judicial deter-

[10] The common fund theory was first applied by the Supreme Court in Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 1157 (1882), to permit the prevailing plaintiff to recover contribution for his attorneys' fees from the fund. In Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885), the Court extended the theory to permit the prevailing party's *attorney* to sue directly for a share of the fund created by the suit, even though the attorney had already received his fee from his client. The Court subsequently extended the theory to cover situations in which, although no fund was created or protected, the litigation bestowed a common benefit on an ascertainable class. *See* Hall v. Cole, 412 U.S. 1, 5–7 & n.7 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389–97 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939). *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974) (discussing the common fund exception in the context of the law of restitution) [hereinafter cited as Dawson, *Attorney Fees from Funds*]; Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975) (arguing that principles of restitution justify *Greenough*-type but not *Pettus*-type fee shifting) [hereinafter cited as Dawson, *Public Interest Litigation*].

[11] *See* Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 280–81 & n.8 (1982).

[12] *See* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426–28 (1923).

[13] F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974) (citing Vaughan v. Atkinson, 369 U.S. 527, 530–31 (1962)); *cf.* FED. R. CIV. P. 37 (authorizing fee shifting for discovery abuses).

[14] *See* Note, *supra* note 11, at 284.

[15] *See, e.g.*, Wilderness Soc'y v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1974), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). *But cf.* Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1333 n.1 (1st Cir. 1973) (arguing against sharp distinction between common benefit and private attorney general doctrines).

mination that the advancement of certain important public interests required providing such incentives to plaintiffs.[16] In *Alyeska Pipeline Service Co. v. Wilderness Society*,[17] however, the Supreme Court limited the private attorney general doctrine to situations in which Congress had expressly provided for fee shifting. Noting that Congress had authorized awards of attorneys' fees in litigation conducted under selected federal statutes,[18] the Court held that Congress had "reserved for itself" the task of determining when exceptions should be allowed to the American rule.[19] Federal courts thus are not free to fashion nonstatutory exceptions to the general rule beyond the traditional common fund/common benefit and bad faith exceptions.[20]

B. Statutory Authorization

More than one hundred federal statutes now authorize awards of attorneys' fees in actions brought to vindicate particular federal rights and interests.[21] Under the majority of these statutes, awards are limited to "prevailing" or "substantially prevailing" parties.[22] Most of the major federal environmental statutes, however, specify that, in private actions for enforcement or judicial review, attorneys' fees may be granted to any party whenever the court deems such an award "appropriate."[23]

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[16] *See* Dawson, *Public Interest Litigation*, *supra* note 10, at 899.

[17] 421 U.S. 240 (1975).

[18] *Id.* at 260–61.

[19] *Id.* at 269. The Court found the American rule partly codified in a line of statutes dating back to 1853. *See id.* at 251–57.

[20] *Id.* at 269.

[21] *See* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 323–27 (1981) (listing statutory provisions). In addition to the many statutes that couple grants of substantive rights with authorization for fee shifting, two federal statutes provide for awards to broad classes of prevailing parties. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (Supp. IV 1980), authorizes awards in actions brought to enforce any of a range of civil rights statutes. The Equal Access to Justice Act, 28 *id.* § 2412, directs courts to award fees to prevailing parties in nontort actions brought by or against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.*

[22] *See* Nat'l L.J., Nov. 29, 1982, at 11, col. 1. It is now largely settled that "prevailing" for the purposes of statutory fee awards does not generally require a favorable judicial determination on the merits. Thus, plaintiffs who achieve their aims through settlements or consent decrees are entitled to fees as "prevailing" parties. *See* E. LARSON, *supra* note 21, at 62–68. Similarly, courts have awarded fees to plaintiffs under "prevailing" party provisions when lawsuits have served as "catalysts" that spur voluntary changes in defendants' behavior. *See id.* at 68–74.

[23] *See* sources cited *supra* note 2. Some statutes authorize fee shifting only in

The statutory language and legislative history of the environmental fee-shifting provisions provide little direct guidance to judges deciding whether to award attorneys' fees. The decision is explicitly delegated to the courts;[24] fees are to be awarded "whenever the *court* determines such award is appropriate."[25] The legislative history of the attorneys' fees provisions is typically sparse, largely because these provisions serve peripheral roles in environmental statutes and therefore receive considerably less legislative attention than do more substantive provisions.

That environmental statutes authorize awards "to any party"[26] and omit the "prevailing" party restriction common in other statutes suggests that Congress did not intend to authorize awards only to parties who prevail on the merits. Legislative history, though meager, supports this inference.[27] With most statutes, however, it is unclear whether Congress anticipated awards to parties who *lose* on the merits, as op-

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enforcement actions and actions to compel an implementing agency to perform a mandatory duty. *See, e.g.*, Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (1976). Other statutes provide for fee awards in any private enforcement action or action for judicial review. *See, e.g.*, Clean Air Act §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f) (Supp. IV 1980).

Some nonenvironmental federal statutes arguably authorize fee awards to losing parties. *See, e.g.*, Consumer Product Safety Act § 24, 15 U.S.C.A. § 2073 (West 1982); Employment Retirement Income Security Act of 1974 (ERISA), § 502(g), 29 U.S.C. § 1132(g)(1) (Supp. IV 1980); Powerplant and Industrial Fuel Use Act of 1978, § 725, 42 U.S.C. § 8435(d) (Supp. IV 1980). No awards to losing parties appear to have been made under these statutes. *But cf.* Winpisinger v. Aurora Corp., 469 F. Supp. 782, 786 (N.D. Ohio 1979) (dictum that ERISA authorizes fee awards regardless of party's success).

[24] "Congress expressly used 'appropriate' as the standard in section 307(f) [of the Clean Air Act]; it specifically gave to *courts* the authority to interpret that standard on a case-by-case basis . . . ." Sierra Club v. Gorsuch, 672 F.2d 33, 42 n.10 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242).

[25] *E.g.*, Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (1976) (emphasis added). Other federal environmental fee-shifting provisions are worded similarly. *See* sources cited *supra* note 2.

[26] *E.g.*, Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (1976). Other provisions share this wording. *See* sources cited *supra* note 2.

[27] Section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d) (Supp. IV 1980), which authorizes fee awards in private enforcement actions, was intended to include "plaintiffs in actions which result in successful abatement but do not reach a verdict." S. REP. NO. 1196, 91st Cong., 2d Sess. 38 (1970). Other environmental fee-shifting provisions were meant to parallel § 304(d). *See, e.g.*, H.R. REP. NO. 218, 95th Cong., 1st Sess. 90 (Surface Mining Control and Reclamation Act), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 627; S. REP. NO. 988, 94th Cong., 2d Sess. 17–18 (1976) (Resource Conservation and Recovery Act); S. REP. NO. 1160, 92d Cong., 2d Sess. 17 (Noise Control Act), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4655, 4667; H.R. REP. NO. 911, 92d Cong., 2d Sess. 132–34 (1972) (Clean Water Act).

posed to parties who obtain favorable settlements or whose claims are mooted or dismissed on procedural grounds.[28] Courts must therefore decide for themselves whether, in light of the goals of the environmental statutes, such awards are ever "appropriate," and if so when.

II. THE APPROPRIATENESS OF FEE AWARDS TO UNSUCCESSFUL PARTIES

Fee awards to losing environmental litigants could conceivably serve either or both of two purposes. Parties could be granted fees as a form of restitution, as under the common fund/common benefit doctrine.[29] Alternatively, fee shifting could serve to encourage socially desirable litigation, as under the private attorney general doctrine.[30] To a great extent, the two rationales correspond to different (but not mutually exclu-

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[28] The legislative history of § 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. IV 1980), authorizing fee shifting in proceedings to review EPA implementation of the statute, appears clearly to extend eligibility for awards to unsuccessful parties:

> The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC v. EPA*, 484 F.2d 1331, [1388] (1st Cir. 1973).

H.R. REP. NO. 294, 95th Cong., 1st Sess. 337, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416. Conceivably, though, Congress meant to extend eligibility for fee awards only to parties who do not prevail in court but nonetheless are successful in some sense. *See* Alabama Power Co. v. Gorsuch, 672 F.2d 1, 15 (D.C. Cir. 1982) (Wilkey, J., dissenting); Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 20 & n.15, Gorsuch v. Sierra Club, No. 82-242 (U.S. Aug. 1982) (seeking review of Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242)) [hereinafter cited as Petition for Certiorari]. The concern may have been simply to rule out narrow standards applied by some courts under statutes that restricted fee awards to "prevailing" parties; not until 1980 did the Supreme Court hold that such provisions did not require parties to obtain favorable judicial decrees in order to qualify for awards of attorneys' fees, *see* Maher v. Gagne, 448 U.S. 122, 129–30 (1980).

[29] *See supra* p. 679. Indeed, fee awards under the common fund/common benefit doctrine have not been restricted entirely to prevailing parties. Courts have awarded fees under the common benefit exception to parties who had unsuccessfully litigated the proper construction of wills and inter vivos trusts. The courts have charged the fees to the estate or trust, and in at least one case, fees were awarded out of trust assets for an unsuccessful suit to remove the trustees. The courts reasoned that the unsuccessful parties had helped to settle questions of interpretation and of trust administration and thus had helped to protect the fund. *See* Dawson, *Attorney Fees from Funds*, *supra* note 10, at 1630–31 nn.111–12 & 116 (citing cases); *see also* Hargrove v. Caddo Parish School Bd., Civ. No. 17,630 (W.D. La. 1972) (awarding fees to unsuccessful plaintiffs for service in educating court about reapportionment problems), *cited in* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 675 (1974).

[30] *See supra* pp. 679–80.

sive) roles for litigation. Restitutionary arguments for fee shifting accord with what Professor Chayes has termed the "traditional model" of the lawsuit, a model that views litigation as a process aimed at resolving disputes between the particular parties before the court.[31] In contrast, incentive arguments, by focusing on the broad social effects of litigation, reflect more directly the concerns of the "public law model," which conceives of the lawsuit as a mode of policy formulation.[32] Fee awards to losing parties generally are difficult to justify as restitution, but such awards can legitimately serve to encourage litigation that is in the public interest.

A. Fee Awards as Restitution

Litigants who are ultimately unsuccessful in court and who fail to spur any change in a defendant's behavior can nonetheless confer public benefits[33] for which they arguably should be paid.[34] Courts awarding fees to losing environmental plaintiffs have referred, for example, to the service provided by the parties in helping to settle the law by educating the court and airing important arguments.[35] Traditional notions of restitution, however, justify fee shifting only when it serves to spread the costs of litigation proportionately among the beneficiaries[36] and only up to the value of the benefits conferred.[37] In the context of fee awards to unsuccessful parties, compliance with these two requirements is problematic.[38]

The first limitation may present few problems when an unsuccessful suit against the government confers a public benefit: the government presumably can act as a fiscal proxy for

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[31] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976).

[32] *Id.* at 1302.

[33] *See* Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C.L. REV. 1133, 1134–43 (1976).

[34] Although voluntary providers of unrequested services are generally not entitled to restitution, RESTATEMENT OF RESTITUTION § 112 (1937), an exception to this rule has traditionally been allowed when the services fulfill the duty of another and satisfy pressing requirements of public welfare, *see id.* § 115. Public interest litigants serving as private attorneys general can thus arguably claim restitution from the government for performing important enforcement duties.

[35] *See, e.g.*, Sierra Club v. Gorsuch, 672 F.2d 33, 39–41 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242).

[36] *See, e.g.*, Note, *supra* note 11, at 281.

[37] RESTATEMENT OF RESTITUTION § 155 (1937); *see* Dawson, *Public Interest Litigation*, *supra* note 10, at 851.

[38] The attempt to justify fee awards to private attorneys general as an extension of the common fund/common benefit exception breaks down for similar reasons. *See* Dawson, *Public Interest Litigation*, *supra* note 10, at 888–907.

the public.[39] When private parties are sued in enforcement actions, however, fee shifting often will fail to pass on the costs of litigation proportionally to the beneficiaries of the action — usually the public at large.[40] Private firms may raise prices, but price increases tax consumers in proportion to their purchases, not beneficiaries of the unsuccessful suit in proportion to the benefits they receive.

Moreover, the public benefits claimed to accrue from the unsuccessful efforts of public interest groups — benefits such as judicial understanding and resolution of statutory ambiguity — are abstract and difficult to valuate. Some of these benefits may be worth the fees paid to the losing litigants, but rarely will that worth be obvious.[41] Courts awarding fees to losing environmental litigants, however, generally have not paused to inquire whether the benefits conferred were arguably worth the fees. In the typical case, the court scrutinizes the fee request to determine whether it reflects the fair market value of the attorneys' services, but the benefit to the public is considered only in determining whether fees should be awarded, not in setting the size of the award.[42] Without some reason for suspecting that the services performed were worth their cost to the beneficiaries, however, traditional principles of unjust enrichment cannot justify *any* award of attorneys' fees, much less an award to a losing party.

These difficulties do not imply that awards of attorneys' fees to losing parties are unfair or inappropriate, nor even that courts should attempt to place dollar values on the benefits conferred by litigants requesting fee awards. For although traditional notions of restitution cannot explain the fee awards courts have granted to unsuccessful environmental litigants, such awards can be justified as incentives for socially useful litigation.

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[39] *See, e.g.*, La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

[40] *See, e.g.*, Wilderness Soc'y v. Morton, 495 F.2d 842, 1029 (D.C. Cir. 1974), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[41] *See, e.g.*, Sierra Club v. Gorsuch, 684 F.2d 972 (D.C. Cir.) (per curiam) (awarding $90,000 in attorneys' fees for unsuccessful litigation found to have clarified the Clean Air Act and several issues of administrative procedure), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242).

[42] *See* Note, *supra* note 11, at 337–38, 341–42, 347. Some courts have awarded unsuccessful environmental litigants the reasonable market value of their services even before calculating fees. *See, e.g.*, Northern Plains Resource Council v. EPA, 670 F.2d 847 (9th Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d 33, 42 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982). *But cf.* Note, *supra* note 11, at 347–48 & n.319 (some courts have adjusted size of award to reflect extent of public benefit).

B. Fee Awards as Incentives

The legislative history of the fee-shifting provisions in federal environmental statutes indicates that these provisions, like their counterparts in other federal statutes,[43] were enacted primarily not to prevent unjust enrichment, but to encourage litigation aimed at furthering the substantive goals of the statutes and to deter frivolous or harassing suits.[44] Congress appears to have been concerned in particular with inducing litigation to ensure proper administrative implementation of the environmental statutes.[45] To promote such useful litigation, it may initially seem sensible to grant fees only to successful litigants.

Fee awards to losing parties, however, can help to encourage successful suits. Because of the unpredictability of judges,[46] the complexity of environmental litigation,[47] and the long duration of environmental suits[48] — with the accompanying potential for intervening events and collateral legal developments that may alter the chances for success[49] — even the most astute and responsible environmental groups will often be unable to predict accurately which of their suits will succeed. Such groups therefore may often be deterred from filing potentially successful suits by the prospect of having to pay their litigation expenses if the suits prove unsuccessful.[50]

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[43] *See* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 303–06 (1977) (discussing legislative history of fee provisions in federal statutes).

[44] *See, e.g.*, H.R. REP. NO. 294, 95th Cong., 1st Sess. 337 (Clean Air Act § 307(f)), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416; S. REP. NO. 988, 94th Cong., 2d Sess. 18 (1976) (Resource Conservation and Recovery Act); H.R. REP. NO. 911, 92d Cong., 2d Sess. 133–34 (1972) (Clean Water Act); S. REP. NO. 414, 92d Cong., 2d Sess. 81 (1971) (Clean Water Act), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3747; S. REP. NO. 1196, 91st Cong., 2d Sess. 38 (1970) (Clean Air Act § 304(d)).

[45] *See, e.g.*, Sierra Club v. Gorsuch, 672 F.2d at 38 (§ 307(f) of Clean Air Act was "intended to encourage the participation of 'public interest' groups in resolving complex technical questions and important and difficult questions of statutory interpretation, and in monitoring the prompt implementation of the Act"); H.R. REP. NO. 294, 95th Cong., 1st Sess. 337 (to similar effect), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416; S. REP. NO. 284, 95th Cong., 1st Sess. 81 (1977) (citizen suits under Outer Continental Shelf Lands Act "should help to keep program administrators 'on their toes'").

[46] *See* Skillern, *Private Environmental Litigation: Some Problems and Pitfalls*, 9 ST. MARY'S L.J. 675, 745 (1978).

[47] *See* Trubek, *Environmental Defense, I: Introduction to Interest Group Advocacy in Complex Disputes*, in PUBLIC INTEREST LAW 151, 152 (B. Weisbrod ed. 1978).

[48] *See* Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 258 (1976).

[49] *See infra* notes 71 & 79.

[50] *See* Skillern, *supra* note 46, at 739.

This deterrent can be reduced by assuring public interest plaintiffs that, within certain bounds, they will be compensated for their litigation costs even if they lose.[51]

Fee awards to unsuccessful parties may be objected to on three grounds: their effect on litigation behavior is speculative; they may encourage unproductive litigation; and they may unfairly burden successful parties.[52] None of these objections, however, warrants a flat rule against awarding fees to unsuccessful litigants.

Courts and legislatures must make decisions on the basis of the information available to them. Although the effectiveness of fee shifting in inducing litigation has not been closely examined,[53] existing information indicates that the availability of fee awards does influence the willingness of public interest groups to bring suit. Anecdotal evidence and preliminary survey data suggest, for example, that the Supreme Court's decision in *Alyeska Pipeline* noticeably discouraged public interest litigation.[54] Moreover, public interest litigation in the British Commonwealth apparently has been hamstrung by the English rule, under which losing litigants must pay both their own and their opponents' litigation expenses.[55] The Commonwealth experience suggests that requiring unsuccessful public interest litigants to pay their own attorneys' fees but not those

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[51] Some courts have adjusted upward the fees awarded to prevailing parties to reflect the risk taken by the parties that the lawsuit would be unsuccessful and that no fees would be awarded. *See, e.g.*, Copeland v. Marshall, 641 F.2d 880, 892–93 (D.C. Cir. 1980) (en banc); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973). Although accurate application of the "contingency multiplier" could theoretically compensate fully for the disincentive to litigation caused by denying fees to losing parties, in practice the multiplier is a feeble solution. The multiplier is applied inconsistently, and many courts do not apply it at all. *See* E. LARSON, *supra* note 21, at 115–53. Even when the adjustment is made, it is likely to be too small; after arguing throughout a case that the law compels a finding in their favor, and after obtaining a favorable opinion written in similarly unequivocal terms, successful litigants will be hard pressed to convince the judge that their success actually had been highly contingent. Moreover, the multiplier does little to encourage lawsuits by smaller environmental groups and pro bono lawyers who do not conduct sufficient federal environmental litigation to permit comfortable spreading of losses.

[52] In addition, such awards have been objected to on the ground of institutional competence. *See infra* pp. 693–96.

[53] *See* Sands, *Attorneys' Fees as Recoverable Costs*, 63 A.B.A. J. 510, 515 (1977); Skillern, *supra* note 46, at 740–41.

[54] COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 315–18 (1976).

[55] *See* Williams, *Fee Shifting and Public Interest Litigation*, 64 A.B.A. J. 859, 862 (1978); Comment, *Financial Barriers to Litigation: Attorneys' Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148, 166 (1981).

of their opponents will also discourage some productive litigation, albeit not as strongly as does the English rule.

The second objection concedes the incentive effect of cost shifting but argues that unsuccessful parties should be denied fee awards in order to deter undesirable litigation.[56] To be sure, limiting awards of attorneys' fees to prevailing parties may reduce the number of wasteful or harassing lawsuits by forcing potential litigants to weigh the viability of their claims more carefully. This reduction, however, comes at the cost of discouraging desirable suits. Moreover, given the difficulty of predicting which suits will prove productive, even awards of attorneys' fees to *prevailing* parties will presumably induce some unproductive suits; useful litigation can hardly be encouraged without simultaneously encouraging some undesirable litigation.[57] And the suits that most need encouragement may well be those that present difficult issues and for which success is most uncertain — precisely those suits arguably deterred by limiting awards to prevailing parties.[58] Finally, and perhaps most importantly, courts can avoid encouragement of unproductive suits by dismissing frivolous suits summarily,[59] by allowing prevailing defendants to collect attorneys' fees when the plaintiffs' claims were harassing, unreasonable, or baseless,[60] and by limiting eligibility for fee awards by means less drastic than the automatic exclusion of all losing parties.[61]

The third argument against granting incentive awards of attorneys' fees to losing plaintiffs is based on a concern for fairness to prevailing defendants. After a court has vindicated a defendant's behavior, it may seem perverse to charge the defendant for the plaintiff's legal expenses. This problem is most acute when unsuccessful enforcement actions are brought

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[56] The Department of Justice, for example, has argued that awarding attorneys' fees to losing parties "threatens to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation." Petitition for Certiorari, *supra* note 28, at 8 (footnote omitted).

[57] "[T]here is no general tax, subsidy, or scheme for shifting legal fees which will induce parties to bring suit if and only if that is socially desirable." Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 337 (1982).

[58] "The major drawback of awarded fees is the possibility that they might encourage lawyers to ignore difficult and more complex cases in favor of those where a fee could be obtained with little effort or risk." COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 54, at 319; *see also* Comment, *supra* note 55, at 165–66 (discussing importance of encouraging risky litigation).

[59] *See* FED. R. CIV. P. 56.

[60] *See* Note, *supra* note 11, at 302.

[61] *See infra* pp. 688–93.

against private defendants, although in some circumstances it may be fair to require subsidization of private enforcement as a cost of doing business. When prudent but unsuccessful suits are brought against the United States or any of its agencies or officers, however, awarding fees to the plaintiffs will not be unfair to the government or the public. In an effort to encourage litigation to ensure effective implementation of federal environmental statutes, Congress has in effect authorized incentive awards to be charged against the government in "appropriate" circumstances. For courts to carry out that legislative mandate in order to further statutory objectives seems reasonable and fair.[62]

III. THE STANDARD FOR APPROPRIATENESS

A. Judicial Approaches

Associated with the two rationales for fee shifting described in Part II, and the models of litigation to which they correspond, are two judicial standards for determining when an award of fees is "appropriate." Although some courts have rejected out of hand petitions for awards of attorneys' fees filed by losing plaintiffs under the federal environmental statutes,[63] most courts considering fee requests by prevailing or nonprevailing litigants under these statutes have either assessed the results of the litigation or appraised its prospective desirability, or they have done both.

The test courts apply most frequently to determine if fee shifting would be appropriate analyzes whether the party requesting the fee award has made a "substantial contribution"[64] to the goals of the authorizing statute. In *Natural Resources*

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[62] Sovereign immunity may require narrow construction of authorizations for fee awards against the government. *See* Petition for Certiorari, *supra* note 28, at 13–14. Once the United States has consented to be sued, however, it is questionable whether sovereign immunity should affect the availability of fee shifting. *See* Lehman v. Nakshian, 453 U.S. 156, 170 n.1 (1981) (Brennan, J., dissenting). Moreover, even granting the necessity for narrow construction, it is difficult to read the environmental statutes to authorize awards only to successful parties. The statutes explicitly vest discretion in judges to determine when awards are appropriate, and pointedly omit any restriction of awards to "prevailing" or "substantially prevailing" parties. Courts therefore may limit eligibility for awards by exercising the discretion granted to them, but the statutes cannot readily be construed to require such a limitation.

[63] *See, e.g.*, Hill v. TVA, 84 F.R.D. 226 (E.D. Tenn. 1979); Colorado Pub. Interest Research Group v. Train, 373 F. Supp. 991 (D. Colo.), *rev'd on other grounds*, 507 F.2d 743 (10th Cir. 1974), *rev'd*, 426 U.S. 1 (1976).

[64] Sierra Club v. Gorsuch, 672 F.2d 33, 35 n.3 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242).

Defense Council, Inc. v. EPA,[65] for example, the First Circuit deemed an award of fees "appropriate" under the citizen suit provision of the Clean Air Act because the petitioners, although losing some issues, had "helped to enforce, refine and clarify the law."[66] The court noted that the petitioners had thereby "assisted the EPA in achieving its statutory goals."[67] In several more recent cases, the District of Columbia Circuit has awarded attorneys' fees against the government to substantially nonprevailing environmental litigants, based on findings that the suits furthered the goals of relevant federal statutes by educating the court or the public or by aiding judicial interpretation of statutory ambiguities.[68] In other cases, courts have denied fees to losing environmental litigants found to have insufficiently benefited the public.[69]

Courts have occasionally invoked a second standard for appropriateness, a standard that asks whether the suit *at the time of its commencement* was of the sort the statute can fairly be read to contemplate. In *Metropolitan Washington Coalition for Clean Air v. District of Columbia*,[70] the District of Columbia Circuit chided the trial court for denying fees to the losing plaintiff when that denial was based solely on the absence of public benefit.[71] "Quite obviously," the court argued, "the legislature, when it called for citizen-suits, considered a fee recovery to be consonant with the public interest whenever the underlying suit was a prudent and desirable effort to achieve an unfulfilled objective of the [Clean Air] Act."[72]

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[65] 484 F.2d 1331 (1st Cir. 1973).

[66] *Id.* at 1334.

[67] *Id.*

[68] *See, e.g.*, Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42 (D.C. Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242); Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982) (per curiam); *cf.* Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1974) (awarding fees when litigation had spurred clarifying legislation that clearly authorized defendant's actions), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Fees were also awarded under the substantial contribution standard in Citizens Ass'n v. Washington, 383 F. Supp. 136 (D.D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976).

[69] *See, e.g.*, Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982); Carpenter v. Andrus, 499 F. Supp. 976 (D. Del. 1980); Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co., 62 F.R.D. 353 (D. Del. 1974), *aff'd mem.*, 510 F.2d 969 (3d Cir. 1975).

[70] 639 F.2d 802 (D.C. Cir. 1981) (per curiam).

[71] The District of Columbia's Clean Air Act implementation plan required closure of a solid-waste incinerator. Appellants sued to force compliance. The suit became moot when the EPA approved a plan revision permitting continued operation of the facility. *Id.* at 803.

[72] *Id.* at 804.

Finding that, when the suit was filed, "there may have been . . . a well-founded expectation" that it would further implementation and enforcement of the Clean Air Act, the court of appeals ordered the trial court to award fees to the unsuccessful plaintiffs.[73]

The prudent effort standard of *Washington Coalition* has been followed by the District Court for the District of Columbia[74] and by the Court of Appeals for the Ninth Circuit[75] but has been all but abandoned by the court that formulated it. For reasons not readily apparent, recent decisions of the Court of Appeals for the District of Columbia Circuit pay lip service to *Washington Coalition*[76] but emphatically embrace the substantial contribution standard rejected in that case.[77]

Although courts have not always distinguished carefully between the two standards,[78] the difference can be important. The substantial contribution standard assesses the ultimate effects of a lawsuit; the prudent effort standard appraises the suit's prospective desirability. The results of these different assessments will often diverge, particularly when intervening events that could not have been predicted at the outset of a suit render it futile or unnecessary.[79] Moreover, the two stan-

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[73] *Id.* at 805.

[74] *See* North Slope Borough v. Andrus, 507 F. Supp. 106 (D.D.C. 1981), *rev'd sub nom.* Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982).

[75] *See* Northern Plains Resource Council v. EPA, 670 F.2d 847 (9th Cir. 1982).

[76] *See, e.g.*, Sierra Club v. Gorsuch, 672 F.2d 33, 36–37 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242); Alabama Power Co. v. Gorsuch, 672 F.2d 1, 3 (D.C. Cir. 1982).

[77] *See* Village of Kaktovik v. Watt, 689 F.2d at 225; Environmental Defense Fund, Inc. v. EPA, 672 F.2d 42, 55 (D.C. Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d at 42 n.10; Alabama Power Co. v. Gorsuch, 672 F.2d at 3.

[78] *See, e.g.*, Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1338 (1st Cir. 1973) ("The purpose of an award of costs . . . is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals."); Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co., 62 F.R.D. 353, 355–57 (D. Del. 1974) (award denied because suit failed to advance statutory purposes and was not at the time of filing the type of litigation Congress sought to encourage), *aff'd mem.*, 510 F.2d 969 (3d Cir. 1975).

[79] *See, e.g.*, *Washington Coalition*, 639 F.2d 802 (D.C. Cir. 1981) (per curiam), *discussed at supra* note 71; American Constitutional Party v. Munro, 650 F.2d 184 (9th Cir. 1981); Coalition for Basic Human Needs v. King, 535 F. Supp. 126 (D. Mass. 1982). In *Coalition for Basic Human Needs*, fees were denied under a statute authorizing awards only to prevailing parties; although plaintiffs had prevailed in court and their suit was prudently brought, intervening events had rendered the suit arguably without public benefit. Similarly, the court in *Munro* refused to award fees under a "prevailing party" provision when amendment of the challenged state statute mooted the suit before trial and plaintiffs failed to demonstrate that the suit had been sufficiently influential in leading to the amendment.

dards respond to different rationales for fee shifting and fit different models of litigation.

B. Comparison of the Standards

Whereas the substantial contribution standard, in the context of fee awards against the government, comports with restitutionary principles and the traditional notion of litigation as a process aimed at justice between the parties,[80] the prudent effort standard responds more directly to the public role for private litigation[81] contemplated by the federal environmental statutes.[82] If the purpose of awarding fees under these statutes were restitution to deserving litigants, it would make sense to grant awards only to those litigants who have bestowed benefits on the parties to be charged with the attorneys' fees. Once litigation is viewed as a vehicle for statutory implementation, however, and once fee awards are understood to function as incentives rather than as restitution, it is no longer clear that awards should be limited to cases in which litigation has demonstrably benefited the public.[83] The question is not who deserves fees as an equitable matter, but what standard for awarding fees will provide the optimal incentive structure for encouraging desirable litigation.

The point of allowing fee awards to unsuccessful parties is to encourage desirable suits by alleviating the uncertainty of fee recovery,[84] and the prudent effort standard performs this function better than does the more stringent substantial contribution standard.[85] To be sure, the prudent effort standard is somewhat unpredictable in application; litigants can never be certain whether a particular judge will find their suit "prudent and desirable." But the substantial contribution standard is doubly unpredictable: litigants must guess both the likely consequences of their suit and whether the judge will deem those consequences sufficiently beneficial to justify an award

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[80] *See* Chayes, *supra* note 31, at 1282–83.

[81] *See id.* at 1302.

[82] *See supra* p. 685.

[83] *But cf.* Harrisburg Coalition Against Ruining the Env't v. Volpe, 381 F. Supp. 893, 897–98 (M.D. Pa. 1974) (denying fees under the private attorney general rationale because of insufficient public benefit).

[84] *See supra* pp. 685–86.

[85] *See* North Slope Borough v. Andrus, 515 F. Supp. 961 (D.D.C. 1981), *rev'd sub nom.* Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982). The district court in *North Slope* argued that, since the suit was of precisely the sort Congress had sought to encourage, denial of fees because of plaintiffs' failure on the merits "would preclude the ability of attorneys to predict, with any degree of certainty, when an award would be deemed 'appropriate.'" *Id.* at 965 n.17.

of attorneys' fees.[86] By awarding fees only to parties who actually assist statutory implementation, the substantial contribution standard excludes some prudently brought suits and consequently should be expected to deter some desirable litigation.

In contrast, the incentive structure set up by a properly applied prudent effort standard would discourage for the most part only undesirable suits. A "prudent" effort can be understood as one that presents a reasonable chance of significantly advancing the goals of an act (and that does not present an unreasonable risk of obstructing those goals). There is no apparent reason to award fees to parties who bring suits that, whether or not frivolous or harassing, are at their outset clearly not prudent efforts to further primary statutory objectives.[87] Thus, fees are properly denied even to prevailing plaintiffs when the aims of a suit are manifestly at odds with the motivating policies of the authorizing statute.[88]

Although superior to the substantial contribution standard as a means of advancing statutory objectives, the prudent effort standard should be qualified in two ways. First, to be eligible for fees, a party should be required to present its case effectively.[89] Such a requirement is necessary to avoid subsidizing and encouraging incompetently litigated suits, and should not significantly deter groups able to handle complex litigation.[90] Second, considerations of fairness may preclude

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[86] Moreover, a court could make application of the prudent effort standard even more predictable by issuing, toward the outset of litigation, a tentative assessment of whether the action is prudently brought. Plaintiffs might move for such a ruling in the form of a partial summary judgment. *See* FED. R. CIV. P. 56.

[87] *Cf.* Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982) (denying fees to unsuccessful plaintiffs, partly because suit obstructed prodevelopment aims of authorizing statute).

[88] *See* Carpenter v. Andrus, 499 F. Supp. 976 (D. Del. 1980) (denying fees to plaintiff who sued successfully to recover leopard skin seized under the Endangered Species Act, 16 U.S.C. §§ 1531–1543 (1976 & Supp. IV 1980)). *But cf.* Florida Power & Light Co. v. Costle, 683 F.2d 941 (5th Cir. 1982) (awarding fees to private utility opposing regulation); Alabama Power Co. v. Gorsuch, 672 F.2d 1, 5 (D.C. Cir. 1982) (awarding fees to municipality opposing regulation).

[89] *See* North Slope Borough v. Andrus, 507 F. Supp. 106, 108 (D.D.C. 1981), *rev'd sub nom.* Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982); *cf.* Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 25–26, 45 (1982) (suggesting that standing and class certification be based on representational competence).

[90] The requirement that a suit be prudently brought could be understood to include a requirement that the particular party involved be competent to bring the action. For two reasons, however, competence should be assessed at the conclusion of the litigation. First, courts should avoid giving, in effect, a blank check to a private group to litigate a suit as it sees fit. Second, a prospective determination whether a

fee shifting in some situations in which private (or nonfederal) defendants are unsuccessfully sued.[91] But when a federal agency or official is sued prudently and competently for inadequate or improper implementation of statutory objectives, an award of counsel fees will be appropriate regardless of the outcome of the suit.

IV. JUDICIAL COMPETENCE

Dissenting in *Alabama Power Co. v. Gorsuch*,[92] Judge Wilkey of the District of Columbia Circuit argued forcefully that determining when to award fees to unsuccessful parties involves political choices outside the proper domain of the courts.[93] To avoid a delegation to the courts of legislative authority so broad that it would violate the separation of powers, Judge Wilkey urged his colleagues to limit awards under the environmental fee-shifting statutes to prevailing parties.[94] Given a reasonably inclusive notion of politics, Judge Wilkey is correct in characterizing the appropriateness of fee shifting as a political issue, but the narrow judicial role he advocates is neither necessary nor politically neutral. Courts also exercise political discretion under statutes limiting fee awards to prevailing parties, and such discretion appears to fit within the role for the judiciary prescribed by the Supreme Court. More importantly, limiting to prevailing parties the benefits of fee provisions does not void the delegation of discretion to the courts; such construction is merely one fully political way of exercising judicial choice.[95]

The political nature of the determination when to award attorneys' fees to unsuccessful parties is unavoidable.[96] To select intelligently between the substantial contribution stan-

party will capably represent the interests at stake could exclude new groups and small, local organizations, which lack experience litigating in federal court but may prove fully competent.

[91] *See supra* pp. 687–88.

[92] 672 F.2d 1 (D.C. Cir. 1982).

[93] *Id.* at 20 (Wilkey, J., dissenting).

[94] *Id.* Judge Wilkey's dissent specifically addressed fee shifting under § 307(f) of the Clean Air Act, but his arguments logically extend to awards granted under similarly worded provisions in other statutes.

[95] *Cf.* Chayes, *supra* note 89, at 59–60 (arguing that deferential refusals to invalidate laws or regulations inescapably reflect policy judgments).

[96] Strictly speaking, however, the determination does not implicate the "political question" doctrine elaborated in Baker v. Carr, 369 U.S. 186 (1962). That doctrine traditionally has limited the extent to which courts may interfere with executive and legislative functions through constitutional construction; it has not concerned the exercise by the judiciary of statutorily delegated discretion. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-16, at 79 (1978).

dard and the prudent effort standard, for example, one must balance the advantages and disadvantages of more strongly encouraging environmental litigation.[97] How the scales tip will depend in large part on whether one is concerned more with desirable suits currently not brought or with undesirable suits currently brought.

The type of judicial discretion envisioned by the environmental fee-shifting provisions is not, however, as radically unprecedented as Judge Wilkey implies.[98] Under statutes limiting awards of attorneys' fees to prevailing parties, courts have long exercised discretion not only in determining whether parties have prevailed,[99] but also in deciding whether particular prevailing parties should be awarded fees.[100] Statutes authorizing fee awards to prevailing parties frequently employ permissive terms that leave to courts the task of determining when prevailing parties should receive fees.[101] In response to that delegation, courts have developed a variety of standards to

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[97] *See supra* p. 687. In addition, Judge Wilkey argued that "it is impossible to discern a standard [for awarding fees] both different from 'prevailing' and consistent with principled judicial interpretation." *Alabama Power Co.*, 672 F.2d at 9 (Wilkey, J., dissenting). Presumably, he would view the standard developed in Part III of this Note to be unsupported by legislative history, *id.* at 16, and so close to an "all-but-the-frivolous" standard that it would require a clearer statement of congressional intent, *id.* at 16–17.

Although the requirement that Congress declare its intent unambiguously is in some contexts a familiar rule of statutory construction, application of the rule to the federal fee-shifting provisions is inappropriate. Traditionally, courts have employed the "clear statement" doctrine to buttress constitutional protections of state interests, *see* L. TRIBE, *supra* note 96, § 5-10, at 250, § 5-20, at 304, and individual rights, *see id.* § 5-17, at 288–89, § 5-19, at 299. The *Alyeska Pipeline* rule, however, is statutorily based, *see* 421 U.S. at 251–62, and reflects judicial deference to the legislature in the field of cost awards, *see id.* at 262–64. Congressional enactments pursuant to that holding should therefore be construed in a straightforward manner calculated to effectuate their overall purpose.

Such construction is especially appropriate given that the *Alyeska Pipeline* Court based its holding on statutory interpretation far more expansive and creative than that suggested in this Note. Congress had never clearly stated an intention to preclude further development of nonstatutory bases for fee shifting; the Court inferred the prohibition from an ambiguous pattern of legislative activity. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 173, 175–77 (1975). Courts are free to require more clarity in statutes designed to satisfy the *Alyeska Pipeline* rule than was demanded of the enactments on which the rule was based, but such an anomalous position would cast doubt on any claim of political neutrality.

[98] "It is true that courts have long had some discretionary authority to award costs and attorneys' fees. But the authorization here is new and different[,] . . . a requirement that we act as legislature." *Alabama Power Co.*, 672 F.2d at 20 (Wilkey, J., dissenting).

[99] *See* Note, *supra* note 11, at 286–320; Comment, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. CHI. L. REV. 819 (1982).

[100] *See* Note, *supra* note 11, at 320–35.

[101] *See id.* at 320–22 (citing statutes).

deal with the different goals of various statutory provisions.[102] These standards reflect choices no less political than those involved in awarding or denying fees to nonprevailing parties. Similarly, the fee-shifting provisions in federal statutes grant courts wide discretion in determining the size of awards; virtually all of the statutes direct only that the fees awarded be "reasonable."[103] The standards developed by courts for calculating awards inevitably have incorporated the kind of political considerations involved in the decision whether to grant fees to unsuccessful parties.[104]

Not only is broad discretion in awarding fees well precedented; it also accords with the role for the judiciary articulated by the Supreme Court. In *Alyeska Pipeline*, the Court held that federal judges could not pick and choose among statutory goals, awarding attorneys' fees for vindication of those policies deemed by the courts to be most important.[105] The task of ranking legislative objectives, the Court ruled, is judicially unmanageable and should be left to Congress.[106] Once Congress has decided that fee awards should be used to encourage private enforcement of a particular statutory scheme, however, the courts may properly be given wide latitude in determining when to grant such awards.[107]

In any case, courts cannot avoid the broad discretion conferred by the environmental fee-shifting provisions. Judge Wilkey's desire for stronger legislative guidance is understandable; Congress may well be better equipped than the courts to determine how strongly environmental litigation should be encouraged.[108] Under the statutes as currently written, however, a decision to limit fee awards to prevailing parties is no less

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[102] *See id.* at 323–35.

[103] *See id.* at 335–36 (citing statutes).

[104] *See* Berger, *supra* note 43, at 306–15.

[105] 421 U.S. 240, 269 (1974); *see supra* p. 680.

[106] *See* 421 U.S. at 263–64.

[107] "Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id.* at 262.

Similarly, the Court in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), observed:

> Some of these statutes make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs. But many of the statutes are more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants, and entrusting the effectuation of the statutory policy to the discretion of the district courts.

Id. at 415–16 (footnotes omitted).

[108] *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 255–74, 293–98 (1977) (discussing structural limitations of courts in formulating general policy). *But see* Sierra Club v. Gorsuch, 672 F.2d 33, 42 n.10 (D.C. Cir.) (per curiam) (defending broad judicial discretion under § 307(f) of the Clean Air Act as "entirely logical . . .

an exercise of judicial discretion, and no less political, than is a decision to draw the line at "prudent and desirable" lawsuits or at lawsuits that substantially further relevant statutory aims.[109] Not only does narrowly restricting eligibility for fee shifting hamper environmentalists and help their foes, but the traditional model of adjudication to which such a restriction appeals[110] itself embodies profound substantive choices between competing political visions.[111] Such choices should be made openly and explicitly.

V. CONCLUSION

Congress enacted the fee-shifting provisions of the federal environmental statutes to encourage litigation that advances the substantive objectives of the statutes and to discourage frivolous or harassing suits. The first of these functions can best be served, and the second will not be compromised, by extending eligibility for awards of attorneys' fees to parties who bring and effectively litigate prudent actions to force more vigorous implementation of the statutes, regardless whether the actions ultimately prove productive. Limiting fee shifting to actions that succeed in court or that substantially advance statutory goals may deter some unproductive suits, but at the price of discouraging useful litigation. The desirability of additional litigation is fundamentally a matter of political judgment, and when to award fees may most appropriately be a legislative question. It is not, however, a question beyond the competence and traditional domain of the courts, and, given the wording of the environmental fee-shifting provisions, it is not a question the courts can avoid.

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since courts would be in the best position to assess the contributions of the parties and the importance of each case"), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242); North Slope Borough v. Andrus, 515 F. Supp. 961, 965 (D.D.C. 1981) (noting that trier of facts is uniquely qualified to determine whether suit was "prudent and desirable" effort to further statutory objectives), *rev'd sub nom.* Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982); Chayes, *supra* note 31, at 1307–09, 1314 (arguing that courts may often be the policymaking institution of choice and that Congress often is unable to provide more than vague guidance).

[109] Judge Wilkey implied that by refusing to award counsel fees to nonprevailing parties courts can remand to Congress the interpretation of "appropriate." *See Alabama Power Co.*, 672 F.2d at 17 (Wilkey, J., dissenting) ("We should . . . follow congressional guidance and, where there is none, we should wait."). But Congress is free to clarify the fee-shifting provisions regardless how courts apply them; there is no reason to believe that limiting awards to prevailing parties will spur clarifying amendments more effectively than would application of the substantial contribution or prudent effort standard.

[110] *See* Chayes, *supra* note 31, at 1304–05; *supra* pp. 682–83.

[111] *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).