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In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims†

MARJORIE A. SILVER*

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INTRODUCTION

In recent years, the Supreme Court has demonstrated an increasingly expansive view of preclusion doctrine. In a series of cases over the past decade, the Supreme Court has endorsed the application of statutory and common law preclusion to bar litigation of federal civil rights claims in federal court. The cases in which such issues arose involved the impact of state court and state agency determinations on subsequent federal civil rights actions. The Court has held that section 1738, the full faith and credit statute,¹ requires federal courts to give state court judgments the same preclusive effect as would the courts of the state in which the judgment was rendered,² that section 1738 applies to the issue as well as claim preclusion rules of the rendering state,³ and that Congress did not intend actions brought pursuant to section 1983 of the Civil Rights Act to be excepted from section 1738.⁴

The Court's expansive application of preclusion has reached both reviewed and unreviewed state agency determinations. In *Kremer v. Chemical Construction Corp.*,⁵ the Court held that section 1738 prohibited a federal court from hearing a Title VII claim brought by a plaintiff who had lost before the state human rights agency and had unsuccessfully challenged that decision in state court.⁶ In *University of Tennessee v. Elliott*,⁷ although the

1. 28 U.S.C. § 1738 (1982).

2. *Allen v. McCurry*, 449 U.S. 90 (1980).

3. *Migra v. Warren School Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984).

4. *Allen*, 449 U.S. at 99; *Migra*, 465 U.S. at 83-84.

5. 456 U.S. 461 (1982).

6. *Id.* at 468.

7. 478 U.S. 788 (1986).

Court held that section 1738 was inapplicable to unreviewed state agency determinations, it nonetheless developed a common law rule of preclusion to operate in the absence of a governing statute.⁸ The Court decided that to give preclusive effect to an unreviewed agency factual determination on a subsequent Title VII claim would clash with congressional intent,⁹ while applying preclusion to a determination of the same agency on a subsequent section 1983 claim would not.¹⁰

The path the Court has taken in *Kremer* and *Elliott* and the preclusion cases that preceded it is an unfortunate one. The Court has frustrated the substantive purpose of the civil rights laws through its rigid approach to section 1738. By borrowing from full faith and credit statute doctrine to formulate a common law doctrine of preclusion for unreviewed state agency determinations, the Court ignores the functional differences between agencies and courts. The fundamental reasons for the existence of administrative agencies—the need for less expensive, less formal, speedy alternatives to litigation for the resolution of disputes, for instance—find no expression in the Court's common law administrative preclusion doctrine. Instead, the Court's generous application of preclusion doctrine to the determinations of administrative agencies undercuts the goals of the civil rights statutes by creating obstacles to effective redress of civil rights violations, depriving aggrieved parties of their day in court, and thereby heralding preclusion's goals as superior to those of the civil rights laws.

It is the thesis of this Article that, in the absence of exceptional circumstances, courts should refuse to give preclusive effect to agency determinations in subsequent litigation of claims arising under any federal civil rights statute, regardless of whether state courts would do so. The need for finality and repose must be balanced with the need to insure vindication of civil rights claims. What is needed is an alternative to preclusion, one that will preserve the values of informality and expediency served by administrative agencies, without sacrificing litigants' rights to a federal forum for vindication of federal claims *not* resolved through agencies' alternative dispute resolution mechanisms. Such an alternative, however, must allow for appropriate deference to agency determinations.

Part I of this Article discusses the evolution of the application of common law and statutory preclusion to administrative determinations generally, and the purpose and functions of administrative agencies in furthering enforcement of the federal civil rights laws. Part II reviews the Supreme Court's civil rights preclusion decisions over the past decade and demonstrates the awkwardness of the *Elliott* decision's bifurcated approach to preclusion.

8. *Id.* at 794.

9. *Id.* at 795-96.

10. *Id.* at 796-99.

Part III reveals the inadequacy of the Court's approach to administrative preclusion by surveying the variables informing the administrative preclusion analysis. Part IV explores the tension between the elements of proper preclusion and the reality of the administrative process. Part V suggests that the Court's recent unwillingness to find exceptions to section 1738 and common law preclusion is an unnecessary departure from precedent. Part V further examines the scope and legitimacy of the respective federal and state interests in applying preclusive effect to agency determinations, to explain why courts should make exceptions for civil rights cases. This consideration includes some doctrinal development in state law on the preclusive effect of agency determinations. Finally, Part VI develops an alternative to administrative preclusion in subsequent civil rights litigation. I suggest that using agency determinations to create presumptions and alter burdens of proof is a better alternative than broad preclusion because it affords deference to agency determinations while accommodating important state and federal interests.

I. A CLASH OF GOALS: PRECLUSION, ADMINISTRATIVE AGENCIES AND CIVIL RIGHTS ENFORCEMENT

The doctrines of *res judicata* and collateral estoppel—claim and issue preclusion¹¹—serve important interests in assuring repose to disputes, finality and predictability of decisions, and in reducing costs associated with multiple adjudications of the same matter. In a number of cases the Court has upheld application of the doctrine despite challenges supported by strong equitable arguments.¹²

-
11. Under the doctrine of *res judicata* [or claim preclusion], a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel [or issue preclusion] . . . the second action is under a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). Following the lead of the *Restatement (Second) of Judgments*, § 74 (1982), courts increasingly use the term "claim preclusion" in lieu of "*res judicata*" or "merger" and "bar," and "issue preclusion" in lieu of "collateral estoppel."

12. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), is a case in point. Five of seven plaintiffs who unsuccessfully sued on identical antitrust claims appealed the district court's determination that federal law provided no remedy; the other two (*Moitie* and *Brown*) abandoned their federal suit and sought relief under state law in state court. Defendants succeeded in removing the *Moitie* and *Brown* suits to federal court and having them dismissed for *res judicata*. However, before any of the seven cases reached the court of appeals, the Supreme Court, in an unrelated case, held that a federal antitrust remedy existed. Consequently, the court of appeals determined that "simple justice" demanded an exception to *res judicata* for *Moitie* and *Brown* because of these peculiar circumstances. The Supreme Court reversed,

A. *The Evolution of the Application of Preclusion and Section 1738 to Agency Determinations*

Traditionally, the doctrine of preclusion embraced by the Court arose in the context of *judicial* litigation. Fewer than fifty years ago, the notion that *agency* determinations might have preclusive effect in court proceedings was strange indeed.¹³ Not only did courts hold the doctrines of *res judicata* and collateral estoppel inapplicable to agency determinations, such determinations were given scant deference by reviewing courts.¹⁴ As Professor Perschbacher has written, "most courts viewed administrative hearings as specialized proceedings lacking the disinterested decision-making machinery and formality of judicial action," and "agency determinations were not even considered adjudications."¹⁵ As administrative agencies grew in size and number and began to engage in more quasi-judicial activity, their adjudicatory functions gained acceptance if not respect. It was hardly surprising therefore that the critical distinctions between what agencies do and what courts do began to blur. In 1932, in *Crowell v. Benson*,¹⁶ the Supreme Court endorsed the notion that congressional vesting of certain (but not all) fact-finding functions in administrative agencies did not violate article III, even though the determinations would *not* be subject to *de novo*

stating:

"Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. . . . The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

Id. at 401 (quoting *Baldwin v. Iowa Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). The Court relied, in part, on its decision in *Reed v. Allen*, 286 U.S. 191, 198 (1932) (holding that party who had successfully appealed adverse determination concerning bequest of property, but failed to appeal adverse determination in related ejectment action, was barred by *res judicata* from subsequently pursuing own ejectment action); see also Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 63 (1982) ("The basic principle of *res judicata* reflects a paradox: finality in judicial decisions is desirable not because courts are infallible but because they are fallible. The possibility that different courts will reach different conclusions on the same issue renders necessary a 'convention of finality.'"). But see Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 614-15 (1985) (arguing that the Court has failed to explore competing values in choosing preclusion over alternatives and has heralded finality, not as a "normative conclusion," but as if its supremacy were predetermined).

13. See Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 431 (1983); *Pearson v. Williams*, 202 U.S. 281, 285 (1906) (decisions of executive departments cannot constitute *res judicata*).

14. See Perschbacher, *supra* note 13, at 431.

15. *Id.*

16. 285 U.S. 22 (1932).

review by article III courts.¹⁷ *Crowell* arose in the context of direct judicial review of an agency determination, and was not, therefore, a preclusion case. Eight years later, in *Sunshine Anthracite Coal Co. v. Adkins*,¹⁸ the Court applied preclusion to an administrative determination in a collateral proceeding for the first time. The precluded issue, however, was a narrow one, and the relationship between the two proceedings substantial.¹⁹ Other decisions of the Court during this time period continued to hold the line on expanding the preclusive effects of agency determinations.²⁰

Nonetheless, administrative preclusion seeped into the landscape of the law. In 1966, the Court held in *United States v. Utah Construction & Mining Co.*²¹ that Congress intended the Wunderlich Act to require courts to give issue preclusive effect to the determinations of the federal Board of Contract Appeals.²² The Court was *not* promulgating a common law rule of preclusion in *Utah Construction*; it was merely divining congressional intent.²³ The Court did indulge, however, in rather broad and sweeping dicta: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to

17. *Id.* at 54. *Crowell* held that while Congress could constitutionally vest the final determination of "ordinary" facts—like who did what to whom—in the United States Employees' Compensation Commission, Congress could not preclude federal courts from deciding *de novo* other, "jurisdictional" facts—like whether the incident giving rise to the injury occurred upon the navigable seas, or whether an employment relationship in fact existed between the defendant and the plaintiff. See Perschbacher, *supra* note 13, at 431 n.48.

18. 310 U.S. 381 (1940).

19. In *Sunshine*, the National Bituminous Coal Commission had denied *Sunshine's* claim for exemption from a sales tax, finding that its coal was, in fact, bituminous and therefore subject to the tax. When the IRS moved to collect the tax, *Sunshine* filed a federal court action to enjoin the tax collection asserting, *inter alia*, identical grounds to its assertions before the Coal Commission. *Id.* at 402. Thus, even in this case, the "collateral" proceeding was integrally tied to the initial proceeding.

20. See Perschbacher, *supra* note 13, at 432-33 n.54 and cases cited therein.

21. 384 U.S. 394 (1966).

22. *Id.* at 419-20.

[W]hen the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried *de novo* in the Court of Claims when the contractor sues for relief which the board was not empowered to give.

Id. at 420.

23. See *Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1180 (11th Cir. 1985) (*Utah Construction* holding was limited to particular congressional scheme). Some courts and commentators have viewed the holding of *Utah Construction* as even narrower than I have suggested. Since the agreement to submit such disputes to final determination by the Board was part of the standard contract between the procurement agencies and the contractor, the narrowest holding is that the Court was merely carrying out the intent of the parties to the contract. See, e.g., *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1166 n.9 (6th Cir. 1984); Perschbacher, *supra* note 13, at 433-34 n.57.

apply *res judicata* to enforce repose."²⁴ Yet none of the cases cited by the *Utah Construction* Court in support of this proposition involved the preclusive effect to be accorded unreviewed state administrative agencies.²⁵ Nonetheless the *Utah Construction* dictum has gained respectability and widespread application, not only in the courts but also as a mainstay of the *Restatement (Second) of Judgments*.²⁶

But principles of *res judicata* and collateral estoppel are only one prong of the administrative preclusion analysis under our system of federalism. The second prong involves section 1738, the full faith and credit statute. Section 1738 provides that "[t]he records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."²⁷ Whether this applies to the determinations of state agencies had been one of several unresolved questions regarding section 1738. The framers of the full faith and credit clause upon which section 1738 was based,²⁸ and the early

24. *Utah Constr.*, 384 U.S. at 422 (citations omitted); see Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65, 71 n.57 (1977) (suggesting that the Court purposefully engaged in broader dicta to challenge statement of Court of Claims that collateral estoppel was applicable only to decisions of judicial tribunals having authority to find facts and resolve disputes, and that unanimity of Court's decision adds weight to this dicta).

25. The Court relied on *Sunshine Anthracite Coal Co.*, 310 U.S. at 402 (estopping *Sunshine* from relitigating issue it had lost before National Bituminous Coal Commission); *Hanover Bank v. United States*, 152 Ct. Cl. 391, 285 F.2d 455, 460 (1961) (affording preclusive effect to Tax Court determination); *Fairmont Aluminum Co. v. Comm'r*, 222 F.2d 622, 625-26 (4th Cir. 1955) (affording preclusive effect to issue resolved by Tax Court); and *Seatrains Lines, Inc. v. Pennsylvania R.R.*, 207 F.2d 255, 259 (3d Cir. 1953) (estopping *Seatrains* from relitigating issue it had lost before ICC). In all of these cases, the tribunals were federal and the parties were identical. In fact, only *Sunshine* and *Seatrains* involved agency determinations at all, and the *Seatrains* court relied as heavily on the doctrine of primary jurisdiction as it did on preclusion doctrine. *Id.* at 259-60.

26. RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982); see *infra* note 259 and accompanying text.

27. 28 U.S.C. § 1738 (1982).

28. While the legislative history of § 1738 is scant, what does exist suggests that its purpose was to impose upon federal courts the same obligations to honor the judgments of the several states as the full faith and credit clause of the Constitution imposes on the states. Article IV of the Constitution provides: "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1; see Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1218-19 (1986) (citing Atwood, *supra* note 12, at 66-67); Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59, 84 (1984); Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 60 n.124 (1957); see also *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 483-84 n.24 (1982); *Davis v. Davis*, 305 U.S. 32, 40 (1939) ("The Act extended the rule of the Constitution to all courts, federal as well as state.").

legislators who drafted the predecessor to section 1738²⁹ would have had no reason to contemplate the application of full faith and credit to agency determinations.³⁰ Nevertheless, until the Supreme Court decided to the contrary in *University of Tennessee v. Elliott*,³¹ substantial authority existed to support the application of section 1738 to at least certain agency adjudications.³²

Within the universe of agency-to-court preclusion cases is a subset of cases in which administrative agency determinations³³ have precluded relitigation of claims or issues raised in federal civil rights litigation. Whatever the justification for expanding preclusion doctrine to the determinations of administrative agencies generally, it is the thesis of this Article that courts

29. Section 1738 was originally enacted in 1790 and provided: "And the said records and judicial proceedings shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the State from whence the said records are, or shall be taken," reprinted in Nadelmann, *supra* note 28, at 60. It was amended by the Act of 1804, *id.* at 61, and then recodified in 1948, *id.* at 81-82.

30. See *University of Tenn. v. Elliott*, 478 U.S. 788, 795 (1986) ("[B]ecause § 1738 antedates the development of administrative agencies it clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect. . . ."); *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 502, 507 (1982) (1871 Congress did not give thought to administrative agencies). Administrative agencies as we know them were primarily a creature of the New Deal.

31. *Elliott*, 478 U.S. at 794. For discussion of this aspect of *Elliott*, see *infra* note 132 and accompanying text.

32. See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 444 (1943) (holding that the full faith and credit clause is applicable to the determinations of sister states' worker's compensation boards). Given that § 1738 was modeled on the full faith and credit clause, see *supra* note 28, many had assumed, prior to the Court's decision to the contrary in *Elliott*, that § 1738 was to be similarly construed. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 266 n.10 (1980) (assuming application of § 1738 to District of Columbia's consideration of Virginia state agency determination); 2 AM JUR 2D, *Administrative Law* § 505 (1962):

The full faith and credit doctrine applies to determinations by administrative tribunals, and whether the proceeding before the administrative tribunal is regarded as a "judicial proceeding," or its award is a "record" within the meaning of the full faith and credit clause and the act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

Id. (citations omitted); *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 229-30 (1969); *Bartholomew v. State of New York Ins. Dep't*, 469 N.Y.S.2d 219, 221 (N.Y. App. Div. 1983); *Jackson, Matheson & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1520-21 (1981) (§ 1738 purpose and case law supports conclusion that it applies to administrative determinations, despite literal language); see also *Guild Wineries and Distilleries v. Whitehall Co.*, 853 F.2d 755, 758-59 (9th Cir. 1988) (extending full faith and credit to Massachusetts agency determination to same extent it would be accorded deference in Massachusetts court) (citing *Plaine v. McCabe*, 797 F.2d 713, 719 (9th Cir. 1986)) ("When an administrative proceeding meets the requirements set forth in *Utah Construction*, it may rise to the level of a 'judicial proceeding' entitled to preclusive effect by section 1738.").

33. The universe of these agencies may be divided further into those created to enforce civil rights laws, and those created for entirely different purposes. See *infra* notes 250-56 and accompanying text.

should be more restrained in their liberal application of preclusion doctrine in civil rights litigation.

Any evaluation of the application of preclusion principles to adjudications by administrative agencies in subsequent federal civil rights litigation must include a full appreciation of the functions of administrative agencies and the relationship between administrative agencies and federal civil rights enforcement. The Court's use of preclusion to prevent judicial forums from entertaining federal civil rights claims has frustrated the rationale and legitimacy of administrative agency adjudications as well as Congress' purpose in passing the federal civil rights laws.

B. The Purpose of Agency Adjudications

The term "agency adjudication" has both a narrow and a broad meaning. Narrowly, it refers to a process that more or less resembles judicial adjudication. This involves "some kind of hearing"³⁴ where the parties have some opportunity to present evidence to a decisionmaker, who then issues a ruling resolving the dispute. More broadly, however, it refers to just about all the decisions that agencies make that are not rulemaking.³⁵ There must be, then, a staggering number of adjudications, broadly or narrowly defined, that occur each year, given the hundreds of thousands of agencies that exist at the federal, state and local level.³⁶

Some of these agencies are in the business of civil rights enforcement. These, however, are a fraction of the agencies whose decisions may have an impact on the civil rights of individuals. Such agencies include, for example, unemployment compensation boards and disciplinary boards that determine whether an individual was dismissed from employment for cause. They include school disciplinary boards that determine whether a student should or should not be suspended or expelled from school. They include licensing boards that determine whether the license of a professional (or driver) should be revoked. Not infrequently, in the course of business, such agencies determine facts relevant to whether an individual was dismissed or denied a benefit in violation of his or her civil rights.

The creation of agencies, whether to make unemployment compensation decisions or to enforce the civil rights laws, allows development of expertise in the agencies' particular fields, and generally, for speedier resolution of

34. See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

35. See S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 569 (2d ed. 1985) (adjudication is residual category encompassing all agency dispositions other than rulemaking); see also Administrative Procedure Act §§ 6-7, 5 U.S.C. § 555 (1982).

36. S. BREYER & R. STEWART, *supra* note 35, at 8. See Perschbacher, *supra* note 13, at 430 & n.44 (quantity of formal adjudications is increasing: 200,000 formal federal administrative hearings in 1978, compared to 163,200 federal district court cases terminated).

disputes than would be possible were such matters left to the courts. However, such expedience is often at the expense of the kind of process that courts tend to provide.³⁷ Agency processes are designed generally to be less formal and more accessible than their judicial counterparts. Such informality and accessibility facilitates the use of agency processes by those who lack the sophistication or resources to use judicial processes. But this ease of access is often offset by the absence of counsel. In many agency proceedings, especially those concerning civil rights, litigants cannot afford the expense of legal assistance.

Administrative processes in the federal civil rights field compliment or reflect congressional encouragement of informal resolution of disputes. Federal nondiscrimination schemes such as Titles VI and VII of the Civil Rights Act of 1964, for example, use agencies to enable individuals and institutions that have discriminated to come into compliance with the civil rights laws and make appropriate reparations without the necessity of formal court or administrative proceedings.³⁸ The enforcement scheme under Title VI requires that when a complaint of discrimination is filed with the federal funding agency, the agency attempt to achieve voluntary compliance before taking formal measures.³⁹ Title VII requires an aggrieved individual to first attempt state or federal administrative remedies before bringing suit in federal court,⁴⁰ and mandates that agencies attempt to eliminate discrimination through "informal methods of conference, conciliation, and persuasion."⁴¹

Congress designed such measures to supplement, not supplant, judicial causes of action for redress of civil rights violations.⁴² If informal administrative processes fail to resolve the underlying dispute, then an aggrieved individual has the right to seek redress in federal court.⁴³ Under Title VI,

37. See *infra* notes 259-66 and accompanying text.

38. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 499-500 (1987) [hereinafter *Informal Procedures*].

39. 42 U.S.C. § 2000d-1 (1982) (no formal enforcement action to be taken until agency "has determined that compliance cannot be secured by voluntary means").

40. See, e.g., *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972).

41. 42 U.S.C. § 2000e-5(b).

42. See Silver, *Evening the Odds: The Case for Attorneys' Fee Awards for Administrative Resolution of Title VI and Title VII Disputes*, 67 N.C.L. REV. 382, 383 (1989) [hereinafter *Attorneys' Fees*] (Congress created both administrative mechanisms and provisions for judicial redress); see also *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) (Congress intended victims of employment discrimination to have choice between pursuing Title VII administrative and § 1981 judicial remedies); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974) (Congress intended that individuals have right to pursue Title VII remedies in addition to other state and federal remedies, including arbitration); cf. Resnik, *supra* note 12, at 604-05 (Alternative dispute resolution mechanisms were intended as add-ons, not replacements, for judicial processes).

43. See 42 U.S.C. § 2000e-5(f)(1) (right to sue under Title VII); *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 584 (1983) (private right of action under Title VI).

there is no requirement that an individual first exhaust administrative remedies,⁴⁴ although Congress intended such remedies to play a large part in Title VI's enforcement.⁴⁵ Under Title VII, while there is a requirement that a complaining party first take her complaint to either the Equal Employment Opportunity Commission (EEOC), or in the case of states that have such agencies, the state or local fair employment agency, this is only a preliminary step.⁴⁶ The complainant's right to subsequently file in federal court is preserved.⁴⁷

The bulk of civil rights cases in federal court arise under section 1983 and the other reconstruction era civil rights statutes.⁴⁸ Although Congress has not created any administrative mechanisms for the enforcement of such rights, many disputes that would otherwise form the basis of successful section 1983 actions are presented to and resolved by a variety of state and local agencies.⁴⁹ Their resolution at this level rather than through federal court intervention not only furthers the expedient and inexpensive resolution of disputes, it also fosters interests of federalism and comity by allowing state agencies first crack at resolving state law-based disputes.

C. *The Purpose of the Civil Rights Laws*

Congress promulgated both the nineteenth century reconstruction era civil rights laws and modern twentieth century civil rights laws in response to grave problems of rampant discrimination throughout the nation. Infringement of civil liberties and discrimination based on color, religion, sex, handicap, and age prompted sweeping legislative responses.⁵⁰ It was Congress' intent that the courts should liberally construe such laws to effectuate their remedial purpose.⁵¹

44. See *Attorneys' Fees*, *supra* note 42, at 416.

45. See *Informal Procedures*, *supra* note 38, at 499-500.

46. See Mann, *Federalism Issues and Title VII*: *Kremer v. Chemical Constr. Corp.*, XIII N.Y.U. REV. L. & SOC. CHANGE 411, 414 (1984-85) (purpose of exhaustion requirement is to enhance opportunity for amicable settlement of disputes).

47. 42 U.S.C. § 2000e-5(f); see *Informal Procedures*, *supra* note 38.

48. See Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 658-68 (1987) (suggesting that while exact numbers and percentages are unknowable, the bulk of constitutional tort litigation arises under § 1983 and related reconstruction era statutes); L. Greenhouse, *1871 Rights Law Now Used for Many Causes*, N.Y. Times, Aug. 26, 1988, at B6, col. 3 (§ 1983 claims comprise approximately 12% of all civil filings in federal district courts).

49. See Geetter, *Attorney's Fees for § 1983 Claims in Fair Hearings: Rethinking Current Jurisprudence*, 55 U. CHI. L. REV. 1267, 1273 (1988) (arguing that certain claims raised in state agency fair hearings provide a basis for § 1983 claims).

50. For brief descriptions of federal civil rights legislation, see T. EISENBERG, *CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS* 3-7 (2d ed. 1981) and *Informal Procedures*, *supra* note 38, at 485-90.

51. See, e.g., S. REP. NO. 1011, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5910-11 ("In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.").

Nonetheless, while the Court has acknowledged the remedial nature of the various civil rights laws enacted by Congress, recently its actions in construing these laws have frequently constricted rather than expanded the reach, scope and application of civil rights protections.⁵² Obviously, that such laws are to be liberally construed does not mean that all doubts, no matter how substantial, are to be resolved in favor of expanding, rather than limiting civil rights protections. Yet many recent Supreme Court decisions suggest the reverse: unless Congress has spoken with crystal clarity on the subject, doubts are to be resolved in favor of the party resisting the expansion of civil rights protection. In the past decade, the Court has demonstrated this restrictive approach in its increasing eagerness to apply preclusion to bar civil rights litigation. Consequently, the remedial intent of the civil rights laws has been trumped by the Court's expansive application of preclusion doctrine.

The Court recognized in *Monroe v. Pape*⁵³ that a primary purpose behind Congress' enactment of the reconstruction era civil rights laws was to provide a federal remedy enforceable in federal court.⁵⁴ The Court has held this to be Congress' intent with respect to the 1964 Act and its progeny as well.⁵⁵

52. The Court's decisions in the latter part of the 1988-89 term alone have had a devastating impact on civil rights enforcement. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989) (in Title VII disparate impact case, plaintiff retains ultimate burden of proving pretextual nature of employer's asserted business justification); *Martin v. Wilks*, 109 S. Ct. 2180, 2188 (1989) (white employees not barred from challenging consent decree to which they were not parties, despite opportunity to intervene, as parties had burden to join them under Rule 19(a) in order to preclude relitigation); *Lorance v. AT&T Technologies Inc.*, 109 S. Ct. 2261, 2268-69 (1989) (female employees are time-barred under Title VII from challenging collective bargaining agreement applied in neutral manner, because alleged intentional discrimination occurred when agreement was executed, not when applied adversely to them); *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989) (neither state nor state official acting in official capacity is "person" within meaning of § 1983); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372-73 (1989) (racial harassment relating to conditions of employment not actionable under § 1981 because provision does not apply to conduct occurring after formation of contract and does not interfere with right to enforce established contract obligations). For earlier examples, see *Informal Procedures*, *supra* note 38, at 536-37 n.327. I have written elsewhere of the Court's wrongfully restrictive interpretation of the attorneys' fee provision of § 1988 in regard to administrative resolution of discrimination claims. See generally *Attorneys' Fees*, *supra* note 42.

53. 365 U.S. 167 (1961).

54. *Id.* at 180.

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id.

55. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (Congress intended private right of action in federal court under Title IX of the Education Amendments Act of 1972, as under Title VI of the 1964 Act on which it was modeled); *Alexander*, 415 U.S. at 48-49 (Congress intended Title VII private action in federal court to supplement, not supplant, other state and federal remedies).

Nonetheless, in the past decade, the Court's invocation of preclusion has denied that federal remedy.⁵⁶

II. A DECADE OF DISSONANCE: THE COURT'S APPLICATION OF PRECLUSION DOCTRINE IN CIVIL RIGHTS CASES

In the past decade, the Court has rediscovered section 1738 and common law preclusion, and compelled neither by prior Court decisions nor by Congressional pronouncements, expanded their application in a number of civil rights cases. A concern for crowded court dockets and the institutional sensitivities of state tribunals, rather than any informed belief that its approach adequately protects civil rights, appears to have motivated the Court's expansive use of preclusion. A review of these decisions illustrates the development of the Court's thinking about the preclusive effect of administrative determinations, and the analytic distortion in that thinking that has led the majority of the Court to its present doctrine.

A. *The Section 1983 Cases—State Court-to-Federal Court Preclusion Under Section 1738*

During the 1980's the Court has expressed increased confidence in state court adjudications affecting federal rights. The shift actually began a decade earlier in *Younger v. Harris*, which forbade federal courts from enjoining ongoing state criminal proceedings.⁵⁷ It evolved in *Stone v. Powell*, in which the Court held that federal courts would not grant habeas relief on a fourth amendment claim which the petitioner had a full and fair opportunity to litigate in state court.⁵⁸ These cases in large measure rejected the widely held belief that federal forums were necessary for the protection of federal constitutional rights.⁵⁹ The trend continued in *Allen v. McCurry*⁶⁰ and *Migra v. Warren School District Board of Education*.⁶¹

Allen was a section 1983 action filed by Willie McCurry in which he alleged that the police had violated his constitutional rights when they searched his home in connection with an arrest.⁶² In the criminal proceedings arising out of that arrest, McCurry had lost a motion to suppress evidence

56. See *infra* notes 57-155 and accompanying text.

57. 401 U.S. 37, 54 (1971). But see *Mitchum v. Foster*, 407 U.S. 225 (1972) (section 1983 created exception to anti-injunction statute).

58. 428 U.S. 465, 494 (1976).

59. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (criticizing Court's decision in *Powell* and its view of parity between state and federal forums as a "dangerous myth").

60. 449 U.S. 90 (1980).

61. 465 U.S. 75 (1984).

62. *Allen*, 449 U.S. at 92.

gathered during the allegedly wrongful search.⁶³ Because the criminal proceedings had upheld the legality of the search, the district court held that issue preclusion prevented McCurry from relitigating the legality of the search in his section 1983 action.⁶⁴ The court of appeals disagreed. The court reasoned that because *Stone v. Powell* prohibited McCurry from seeking federal habeas review, the section 1983 action was his only route to a federal forum for adjudication of his federal constitutional claim, and that such access was critical given "the special role of the federal courts in protecting civil rights."⁶⁵

The Supreme Court reversed the court of appeals.⁶⁶ In doing so, it proclaimed the virtues of *res judicata* and collateral estoppel in relieving parties of vexatious litigation, conserving judicial resources, and preventing inconsistent adjudications.⁶⁷ It approvingly noted the doctrine's role in promoting comity between state and federal courts.⁶⁸ Furthermore the Court interpreted section 1738 to require federal courts to give the same preclusive effect to judgments of state courts as would the courts of those states.⁶⁹ Although it recognized that the principal motivation behind the enactment of section 1983 was to compensate for the deficiency state courts had theretofore shown in protecting federal constitutional rights, the Court found no compelling evidence in either the language of section 1983 or in its legislative history to suggest that Congress had intended to create an exception to section 1738.⁷⁰ "Since repeals by implication are disfavored," wrote the majority, "much clearer support than this would be required to hold that §1738 and the traditional rules of preclusion are not applicable to § 1983 suits."⁷¹ The Court remanded the case to the court of appeals,

63. *Id.* at 91.

64. *McCurry v. Allen*, 466 F. Supp. 514 (E.D.Mo. 1978).

65. *McCurry v. Allen*, 606 F.2d 795, 799 (8th Cir. 1979).

66. *Allen*, 449 U.S. at 105.

67. *Id.* at 94.

68. *Id.* at 95-96.

69. *Id.* at 96.

70. *Id.* at 99.

71. *Id.* (citations omitted). "[T]he Court's view of § 1983 in [*Monroe v. Pape*, 365 U.S. 167, 174 (1961)] lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous." *Id.* at 101.

There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id. at 104. The majority went on to note some irony in the court of appeals' reliance on *Powell* for its decision, "in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Id.* at 105.

as there had not yet been any determination as to whether all of the elements for the proper application of issue preclusion were present.⁷²

Concerned that the Court was making bad law based on unappealing facts, the dissent acknowledged the important role of preclusion doctrine,⁷³ but voiced doubt that a state criminal proceeding would insure that a defendant—an involuntary participant in such a proceeding—would have adequate opportunity to have his federal claim adjudicated.⁷⁴

After *Allen*, it was unclear whether its holding would be limited to issue preclusion. At least two subsequent decisions—*Patsy v. Board of Regents*,⁷⁵ and *Haring v. Prosise*⁷⁶—supported the view that it might be so limited. Both of these cases reaffirmed that Congress intended section 1983 to provide a federal forum for the vindication of federal rights.⁷⁷

72. *Id.* at 105. Thus while the Court generally announced the applicability of § 1738 to state court determinations in subsequent federal § 1983 litigation, it declined to decide how that doctrine should apply in the case before it. *Id.* at 93 n.2, 105 n.25. There were numerous suggestions in the opinion that because the search had in fact been held partially illegal, and because the scope of McCurry's civil complaint was less than clear, it might not have been appropriate to apply preclusion. *Id.* at 93 n.2.

73. *Id.* at 106 (Blackmun, J., dissenting).

74. *Id.* at 113-16. "A trial court, faced with the decision whether to exclude relevant evidence, confronts institutional pressures that may cause it to give a different shape to the Fourth Amendment right from what would result in civil litigation of a damages claim." *Id.* at 115. "The criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed. To force him to a choice between forgoing either a potential defense or a federal forum for hearing his constitutional civil claim is fundamentally unfair." *Id.* at 116.

75. 457 U.S. 496 (1982).

76. 462 U.S. 306 (1983).

77. In *Patsy*, the Court reaffirmed earlier precedent that § 1983 did not require exhaustion of state administrative remedies. *Patsy*, 457 U.S. at 498. Although careful to state that this case was not to be treated as one of first impression, the majority nonetheless proceeded to discuss Congress' intent in promulgating § 1983. *Id.* at 500-07. It frankly acknowledged that Congress gave no thought whatsoever to the question of exhaustion; hardly surprising, since state administrative agencies did not exist in any relevant number in 1871 when the Act was promulgated. *Id.* at 502, 507. The majority nonetheless concluded that an exhaustion requirement was inconsistent with Congress' desire to provide a federal forum for the vindication of federal rights. *Id.* at 505. In so deciding, the Court reaffirmed that congressional intent, and not the Court's current view of the state of state-federal relations, should govern its decision. *Id.* at 512; see also Smith, *supra* note 28, at 109 (arguing that the same approach should hold true in the Court's approach to preclusion doctrine).

The next year the Court decided *Haring*, 462 U.S. at 306, a preclusion case. *Haring* asked whether a § 1983 plaintiff's guilty plea barred his relitigation of the legality of the search that led to his indictment and plea. *Id.* at 308. The Court unanimously rejected the petitioners' arguments that *Allen* controlled, *id.* at 313, that Virginia would have barred a civil action litigating the validity of the search, *id.* at 316-17, and that the Court should fashion a federal common law rule of preclusion barring the civil claim after a guilty plea, *id.* at 318. The Court stressed that Prosise's guilty plea was in no measure an adjudication of the legality of the search. *Id.* at 316. And, once again, the Court reiterated that "[a]doption of petitioners' rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights." *Id.* at 322. But see *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th Cir. 1988) (*nolo contendere* plea collaterally estops relitigation of probable cause to arrest).

Yet the Court's decision in *Migra v. Warren School District Board of Education*⁷⁸ soon dashed any hopes that the Court was returning generally to a conviction that federal forums were critical for vindication of section 1983 rights. Plaintiff, an elementary education supervisor, prevailed in a state court action against her employer on a breach of contract claim.⁷⁹ She subsequently brought a federal action under sections 1983, 1985, and various provisions of the Constitution alleging that defendants had deprived her of her first amendment rights.⁸⁰ The entire Court agreed that resolution of this matter was controlled if not by the decision itself,⁸¹ by the analysis in *Allen*: Federal courts were bound by section 1738 to apply the preclusion rules of the state that rendered the initial judgment.⁸² "It is difficult to see," wrote the majority, "how the policy concerns underlying section 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments."⁸³ Rejecting plaintiff's argument that distinguishing between issue and claim preclusion would enable litigants to bring their state claims in state court and their federal claims in federal court, and so further the interests of federalism and comity, the Court stated that such "is not the system established by section 1738."⁸⁴

The path the Court followed in *Allen* and *Migra* was not an inevitable one. The Court might well have found an exception to section 1738 in the broad remedial scheme created by section 1983.⁸⁵ Its refusal to do so is consistent with its increasing concern with docket congestion and decreasing concern with effective civil rights enforcement. The point of departure is the Court's insistence that it is no longer the case that state courts are less

78. 465 U.S. at 75.

79. *Id.* at 78-79.

80. *Id.* at 79-80.

81. *Id.* at 83 ("The Court in *Allen* left open the possibility . . . that the preclusive effect of a state-court judgment might be different as to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding.").

82. *Id.* at 83-85.

83. *Id.* at 83.

84. *Id.* at 84. The majority in fact finds this a less sympathetic claim than that of the plaintiff in *Allen*, since *Migra* could have first gone to federal court had she chosen to do so. *Id.* at 85 n.7.

85. See Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L. REV. 859, 866-75 (1976) (arguing congressional intent that § 1983 should be exception to general rules of preclusion and § 1738); see also Smith, *supra* note 28, at 110-19 (advocating multi-step process for determining whether to apply preclusion in § 1983 cases). It bears observation that even if the Court was "wrong" in *Allen* and *Migra* in finding that § 1738 applied to § 1983 actions, nothing "precludes" Congress from correcting the Court's error. Congress' failure to do so may or may not be evidence that the Court was "right." It is interesting to note that after the Court decided in *Brown v. Allen*, 344 U.S. 443 (1953) that a state court determination on a federal constitutional claim did not bar a federal habeas claim (although the Court never even mentioned full faith and credit nor § 1738), Congress amended the habeas statute to make such an exception explicit. 28 U.S.C. § 2254(d) (1982); see Atwood, *supra* note 12, at 73.

able to effectively protect federal constitutional rights than are their federal counterparts.⁸⁶ There is widespread disagreement with this premise.⁸⁷ Even if the Court's position has merit as far as state courts are concerned, placing similar confidence in the adjudications made by state agencies is alarmingly misguided.

B. Kremer v. Chemical Construction Corp.⁸⁸—*Limited State Court Review of Agency Determination-to-Federal Court Preclusion Under Title VII and Section 1738*

Unlike section 1983, Title VII creates a scheme which requires a complaining party to give a state or federal agency an opportunity to resolve

86. See, e.g., *Powell*, 428 U.S. at 494 n.35 ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."). Compare *Currie, Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 319-20 (1978) (arguing that state courts can adequately protect federal rights, as manifest in the *Younger* doctrine) with *Theis, supra* note 85, at 869 ("That conditions leading to the passage of the 1871 Act have changed considerably is no doubt an accurate judgment, although perhaps one for Congress to make if it is to serve as the basis for any shift in policy."). See also *Currie, supra*, at 328 ("No language in section 1983 remotely suggests any modification of *res judicata*. . . . The argument based upon Congress' perception of state court inadequacy would logically destroy section 1738 altogether. All grants of federal jurisdiction are based upon some perceived inadequacy of state courts.").

Recently, in *Felder v. Casey*, 487 U.S. 131 (1988), the Court struck down the application of Wisconsin's notice of claim statute to a § 1983 claim filed in state court. *Id.* at 134. Justice Brennan, writing the 7-2 opinion, held that the notice requirement, by imposing an exhaustion condition, was inconsistent with the Court's decision in *Patsy, Id.* at 146-50. He further rejected the state's argument that the notice requirement gives government defendants an opportunity to settle:

First, it ignores our prior assessment of "the dominant characteristic of civil rights actions: *they belong in court.*" *Burnett*, 468 U.S. at 50 (emphasis added). "These causes of actions . . . exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance." *Ibid.* (emphasis added).

Felder, 487 U.S. at 148. *Felder* was not a preclusion case. Instead, the Court engaged in a reverse-*Erie* type of analysis. *Felder*, 487 U.S. at 151-52. And none of the opinions draw any analogy or make any distinctions between that case and *Elliott, Allen* or *Migra*. It is somewhat ironic that a majority of the Court should find a notice-of-claim statute, which only applies when a § 1983 plaintiff chooses to file his action in state rather than federal court, to create an unacceptable burden on the assertion of a federal right, given its decisions in the preclusion cases involving assertion of § 1983 rights. Compare *Felder*, 487 U.S. at 150-51 (majority's rejection of argument that those who choose to bring their federal claims in state court do so aware of the state's procedural requirements, because states can't unnecessarily burden the exercise of federal rights) with *Felder*, 487 U.S. at 160-61 (O'Connor, J., dissenting with Rehnquist, C.J.) (arguing that since every plaintiff has option of proceeding in federal or state court "the Wisconsin statute 'discriminates' only against a right that Congress has never created: the right of a plaintiff to have the benefit of selected federal court procedures after the plaintiff has rejected the federal forum and chosen a state forum instead").

87. Professor Neuborne, for example, has persuasively argued that the Court's confidence is misplaced, dangerously based on a "myth of parity"; that for a variety of reasons there is no parity between state and federal courts' ability to protect federal constitutional rights. Neuborne, *supra* note 59; see also Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 604-05 (1989) (describing debate among scholars as to whether state courts are as competent or less competent than federal courts in applying federal law).

88. 456 U.S. 461 (1982).

his complaint before he may file suit in federal court.⁸⁹ Rubin Kremer, who believed his employer had discriminated against him because he was a Jew,⁹⁰ filed a complaint with the EEOC, which the EEOC then referred to the appropriate state agency, the New York State Division of Human Rights (NYHRD).⁹¹ The NYHRD found no probable cause, a determination the Appeal Board then affirmed.⁹² Kremer returned to the EEOC,⁹³ and, pursuant to the notification he had received from the Appeal Board,⁹⁴ also filed a petition for review with the Appellate Division of the New York Supreme Court.⁹⁵ On February 27, 1978, that court affirmed the Appeal Board's order.⁹⁶ Thereafter, the EEOC agreed there was no probable cause, and issued Kremer a right-to-sue notice enabling him to proceed to federal court on his Title VII claim.⁹⁷ Bound by a decision of the Second Circuit issued while *Kremer* was pending,⁹⁸ the district court reluctantly granted defendant's motion to dismiss based on *res judicata*.⁹⁹ The Supreme Court granted certiorari from the Second Circuit's affirmance of that decision,¹⁰⁰ and, in a 5-4 split, affirmed.¹⁰¹

As with *Allen*, and subsequently *Migra*, the majority found section 1738 controlling; the federal court was bound to accord the same preclusive effect to the Appellate Division's ruling as another New York court would have done.¹⁰² The Court concluded that a state court, bound by New York's Executive Law,¹⁰³ would have barred Kremer from bringing any further action on the same claim.¹⁰⁴ The majority reasoned that Title VII's exhaus-

89. See *supra* note 40 and accompanying text.

90. Kremer alleged some additional bases of discrimination. *Kremer*, 456 U.S. at 463, 464 n.2.

91. *Id.* at 463-64.

92. *Id.* at 464.

93. *Id.*

94. *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786, 787 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

95. *Kremer*, 456 U.S. at 464.

96. *Id.*

97. *Id.* at 465.

98. *Sinicropi v. Nassau County*, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979) (Article 78 review precluded subsequent Title VII claim); see also *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977) (Article 78 review precluded subsequent § 1981 claim).

99. 477 F. Supp. 587 (S.D.N.Y. 1979). "To submit to *Mitchell* and *Sinicropi*, however, is not to agree with them. The *Mitchell* majority's conclusion that Title VII's *de novo* review is satisfied by a combination of an agency finding of no probable cause coupled with Article 78 review seems fanciful." *Id.* at 591.

100. *Kremer*, 623 F.2d at 786.

101. *Kremer*, 456 U.S. at 466.

102. *Id.* at 468.

103. N.Y. EXEC. LAW § 300 (McKinney 1972) (where an individual chooses to resort to agency procedures for adjudication of a claim, "the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned").

104. *Kremer*, 456 U.S. at 466-67.

tion requirements did not require Kremer to seek state court review; but once he had, he was bound by the *res judicata* consequences of the state court's decision.¹⁰⁵ The Court limited its holding to the facts presented, and suggested in a footnote that the same analysis would not apply under Title VII to an unreviewed state agency determination.¹⁰⁶ As it had held regarding section 1983, the Court found Congress had no intention of creating an exception to section 1738 by passing Title VII. The Court held that preclusion applied even though the state court judgment was one of limited review of an investigatory agency determination rather than a full adjudicatory proceeding.¹⁰⁷

The dissent disagreed with the majority's interpretation of Title VII's statutory language and legislative history,¹⁰⁸ and questioned the Court's understanding of the limited nature of the state court's review.¹⁰⁹ It argued

105. *Id.* at 469-70.

106. *Id.* at 470 n.7 ("[I]t is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts."). *But see id.* at 484 n.26:

Certainly, the administrative nature of the factfinding process is not dispositive. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, *res judicata* is properly applied to decisions of an administrative agency acting in a "judicial capacity."

Id. (citation omitted).

107. *Id.* at 481 ("[F]or present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law."); *id.* at 483 ("We have little doubt that Kremer received all the process that was constitutionally required in rejecting his claim that he had been discriminatorily discharged contrary to the statute."). In fact, the state agency determination was made after investigation only, with no adversarial hearing. *Id.* at 464.

The Court was unimpressed with Kremer's argument that its holding would deter litigants from seeking state court review of adverse administrative determinations. *Id.* at 478. Rather, the Court found that "[d]epriving state judgments of finality not only would violate basic tenets of comity and federalism but also would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems." *Id.* (citation omitted). It further failed to address the anomalous result of its decision that despite Congress' intended deference to state procedures in Title VII, only the person who exhausts a little of the state procedures will have access to a federal forum, but one who follows through to completion will be barred from federal court. *Id.* at 504-05 (Blackmun, J., dissenting).

108. *Id.* at 488 (Blackmun, J., dissenting) ("[I]f in 1972 Congress had intended final decisions in state 'proceedings' to have preclusive effect, it certainly would not have instructed that they be given 'substantial weight.'"); *see also id.* at 511:

Both the text of Title VII and its legislative history indicate that Congress intended the claimant to have at least one opportunity to prove his case in a *de novo* trial in court. Thus, while I agree with the Court that Title VII did not impliedly repeal § 1738, I cannot accept the Court's construction of § 1738 in this case [in which Kremer had no *de novo* hearing in either state or federal court].

Id. (Stevens, J., dissenting).

109. *Id.* at 488-93. "[A]lthough it claims to grant a state court preclusive effect, in fact the Court bars petitioner's suit based on the state agency's decision of no probable cause." *Id.* at 492-93.

that the majority had the comity issue backwards: cutting off access to a federal forum for a Title VII claim once a party has obtained state court review would result in fewer Title VII complainants seeking state court review.¹¹⁰ "It is a perverse sort of comity that eliminates the reviewing function of state courts in the name of giving their decisions due respect."¹¹¹

Given the Court's formalistic approach to section 1738, the result in *Kremer* is not surprising.¹¹² It is nonetheless distressing. Mr. Kremer, without benefit of counsel,¹¹³ went through the procedures he was told to go through, and then found himself barred from the federal courthouse.¹¹⁴ He never had any adversarial testing of his complaint. Perhaps his complaint was meritless; perhaps it was not.¹¹⁵ If not for his mistake in seeking routine state court review of the routine state administrative determination, he would have had the right to test his complaint in federal court, a right Congress provided him in Title VII.¹¹⁶ Kremer made a choice perhaps, but not an informed one.¹¹⁷

No conceivable reason exists for having a scheme which requires complainants to first pursue state administrative remedies and then forecloses federal remedies should they seek all available state review of the agency determination. Moreover, the Court's analysis in *Kremer* would suggest—as some courts have subsequently held—that employers might insure that complainants are barred from pursuing a Title VII claim in federal court in those instances in which the complainant prevails at the administrative level by successfully seeking state court review and reversal.¹¹⁸ And as for

110. *Id.* at 504.

111. *Id.* at 505.

112. Interestingly, however, the Court never discusses, nor even notes, the inconsistency between its slavish adherence to § 1738 in these cases, and its decision in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), holding that a federal court had jurisdiction under Title VII to award attorney's fees to a plaintiff who had prevailed in related (New York) state proceedings. *Id.* at 61; see Mann, *supra* note 46, at 426. While the cases might be distinguished by issue and claim preclusion, the Court's § 1738 analysis suggests there should be no difference, and the Court's subsequent decision in *Migra* seems to confirm this.

113. See Mann, *supra* note 46, at 426.

114. See *Kremer*, 477 F. Supp. at 593 n.10.

The unfairness of applying *Sinicropi* to plaintiffs such as Mr. Kremer was brought home to this court when Mr. Kremer was told his complaint had to be dismissed. He was obviously shocked to discover that he had no right to federal review. He complained that he had gone through all the procedures he had been told to go through, but had never obtained a hearing on his claim.

Id.

115. While the Court certainly never says that it is influenced by his having lost at every administrative and state court level, one wonders whether this particular fact pattern helped make bad law; cf. Resnik, *supra* note 12, at 615-16 (Court's preclusion decisions not explained by belief that initial determinations were "correct").

116. 42 U.S.C. § 2000e-5(f)(1) (1982).

117. *Kremer*, 623 F.2d at 787.

118. See *Davis v. United States Steel Supply*, 688 F.2d 166, 172-76 (3d Cir. 1982) (applying *Kremer* rationale to state court reversal of finding of discrimination in subsequent § 1981 action). *Davis* and the issue of voluntary vs. involuntary litigants are discussed *infra* notes 228-49 and accompanying text.

the informed civil rights complainant who loses at the state administrative proceeding, the lesson of *Kremer* is that he better stop short of the state courthouse door if he wishes to have his day in federal court.¹¹⁹ The absence of state court review was a necessary condition to avoiding preclusion under *Kremer*. It did not turn out, however, to be sufficient.

C. University of Tennessee v. Elliott¹²⁰—*Unreviewed State Agency-to-Federal Court Preclusion Under Title VII and Section 1983*

In 1981 University officials notified Robert E. Elliott that he would be dismissed from his position in the Agricultural Extension Service for inadequate job performance and misconduct.¹²¹ Elliott challenged his dismissal through the state's administrative machinery, and also filed a federal law suit alleging that he was being discriminated against because he was black in violation of both Title VII and the reconstruction era civil rights laws.¹²² The state agency, after a hearing held before an assistant to one of the named defendants in the federal suit,¹²³ sustained several of the University's charges, and found that Elliott had failed to demonstrate that the actions taken against him were racially motivated.¹²⁴ Rather than seek state court review of this determination, Elliott returned to federal court.¹²⁵ The district court granted the University's motion for summary judgment, holding that Elliott was not entitled to relitigate the issue of racial animus in federal court.¹²⁶

The court of appeals reversed.¹²⁷ Relying on *Kremer*, it held that an unreviewed state agency determination could not preclude relitigation of a Title VII claim.¹²⁸ As to the Reconstruction Act claims, it held that section 1738 was inapplicable, and it declined to fashion a federal common law

119. In fact, plaintiff better not go near the courthouse door. See *Bray v. New York Life Ins.*, 851 F.2d 60, 61-62 (2d Cir. 1988) (holding plaintiff's federal Title VII action precluded by state court's dismissal of action to review administrative determination because of statute of limitations and improper service, when New York court would afford such dismissal *res judicata* effect).

120. 478 U.S. 788 (1986).

121. *Id.* at 790.

122. *Id.* at 790-91.

123. The administrative assistant to the University's Vice President for Agriculture presided as an Administrative Law Judge (ALJ). *Id.* at 791.

124. *Id.* at 791-92. However, the ALJ concluded that discharge of Elliott was too severe a penalty for the conduct and instead ordered Elliott transferred to a new assignment with new supervisors. *Id.* at 791.

125. *Id.* at 792.

126. *Id.*

127. *Elliott v. University of Tenn.*, 766 F.2d 982 (6th Cir. 1985), *modified*, 478 U.S. 788 (1986).

128. *Id.* at 989.

rule of preclusion because, among other reasons, to do so would be incompatible with Congress' purpose in creating a federal forum for the adjudication of federal rights.¹²⁹

The Supreme Court, in a suprisingly terse 5-3 opinion,¹³⁰ agreed with the court of appeals on the Title VII claim, and on its interpretation of section 1738.¹³¹ The majority began its discussion by declaring, unsupported by any citation, that section 1738 governs only "the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case."¹³² However, said the majority, federal courts are nonetheless free to fashion a common law rule of preclusion in the absence of a governing statute.¹³³ As to the Title VII claim, the Court agreed it would be inappropriate to fashion such a rule as the language of Title VII itself was inconsistent with affording preclusive effect to an unreviewed state agency finding on discrimination.¹³⁴ Furthermore, the Court had previously held in *Chandler v. Roudebush*¹³⁵ that Congress intended the Title VII claimant to have a *de novo* trial in federal court, regardless of any administrative finding.

129. *Id.* at 990-93.

130. Justice Marshall did not participate. See *Elliott*, 478 U.S. at 799. Justice Stevens, joined by Justices Brennan and Blackmun, concurred as to the resolution of the Title VII claim, and the inapplicability of § 1738, but dissented as to the Court's resolution of the other civil rights claims. *Id.* at 799-803.

131. *Id.* at 794-96.

132. *Id.* at 794; see discussion *supra* notes 27-32 and accompanying text as to whether the full faith and credit clause or § 1738 applies to the determinations of state agencies. *Elliott* does acknowledge *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980):

Significantly, all of the opinions in [*Thomas*] express the view that the Full Faith and Credit Clause compels the States to give preclusive effect to the factfindings of an administrative tribunal in a sister State. . . . The Full Faith and Credit Clause is of course not binding on federal courts, but we can certainly look to the policies underlying the Clause in fashioning federal common-law rules of preclusion.

Elliott, 478 U.S. at 798-99. *Thomas*, however, involved Virginia and the District of Columbia, and discussed § 1738, as well as the full faith and credit clause, as relevant to the preclusion inquiry. *Thomas*, 448 U.S. at 261, 266 & n.10.

133. *Elliott*, 478 U.S. at 797. The Court noted that since § 1738 antedated the development of administrative agencies, it could not be considered any kind of congressional disapproval of such a rule. *Id.*

134. *Id.* at 795.

Under 42 U.S.C. § 2000e-5(b), the [EEOC], in investigating discrimination charges, must give "substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law." . . . [I]t would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court.

Id. But see *Jackson, Matheson & Piskorski*, *supra* note 32, at 1505-06 (arguing that Title VII requires that at least substantial weight be given to state agency's investigative determination, but that it is consistent with giving more weight, even preclusive effect, to state agency determination rendered after full opportunity for hearing).

135. 425 U.S. 840, 848 (1976).

But the majority found no similar difficulty in applying preclusion to the other civil rights claims. It read the Court's decisions in *Allen* and *Migra* broadly: nothing in the legislative history of section 1983 suggested "that Congress intended to repeal or restrict the traditional doctrines of preclusion."¹³⁶ And, despite its acknowledgement that the 1871 Congress could not foresee the development of administrative agencies, the majority saw "no reason to suppose that Congress, in enacting the reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century."¹³⁷ Relying on *United States v. Utah Construction & Mining Co.*,¹³⁸ the Court held that when an administrative agency acts "in a judicial capacity . . . [and] resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts should give the agency's determinations the same preclusive effect they would receive in the state's own courts.¹³⁹ However, as no court had determined whether Elliott's administrative hearing met that test, the Court remanded the case.¹⁴⁰

It is difficult if not impossible to reconcile the reasoning of the Court in *Elliott* regarding the reconstruction era claims with its reasoning two years earlier in *McDonald v. City of West Branch*.¹⁴¹ In *McDonald*, a discharged police officer filed a grievance pursuant to his union's collective bargaining agreement. The grievance eventually proceeded to arbitration, and the arbitrator ruled that the employer, the City of West Branch, had just cause for dismissing McDonald. McDonald then filed a section 1983 claim alleging that he was discharged for exercising his first amendment rights.¹⁴² The Supreme Court rejected arguments that section 1738 barred relitigation of the reason for discharge, and refused to fashion a common law rule of preclusion.¹⁴³ The Court cited its refusal to do so in prior cases involving arbitration, one involving Title VII, the other the Fair Labor Standards Act.¹⁴⁴ The Court said that its refusal to apply preclusion in those cases

136. *Elliott*, 478 U.S. at 797 (citing *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980)).

137. *Elliott*, 478 U.S. at 797.

138. 384 U.S. at 394.

139. *Elliott*, 478 U.S. at 797-98 (quoting *Utah Constr.*, 384 U.S. at 422). In *Elliott*, as in *Kremer*, the Court misread the holding of *Utah Construction*. See *Kremer*, 456 U.S. at 484-85 n.26 ("In [*Utah Construction*], we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a 'judicial capacity.'"). See discussion of *Utah Constr.*, *supra* notes 21-26 and accompanying text.

140. *Elliott*, 478 U.S. at 799 n.8.

141. 466 U.S. 284 (1984) (no preclusion afforded to arbitration determination in subsequent § 1983 case).

142. *Id.* at 285-86.

143. *Id.* at 287-89.

144. *Id.* at 288-89 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (no preclusion

was "based in large part on our conclusion that Congress intended the statutes at issue . . . to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes."¹⁴⁵ While the Court acknowledged the suitability of arbitration in resolving certain claims, like contract disputes,¹⁴⁶ it reaffirmed its prior holdings that arbitration could not "provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard."¹⁴⁷ Thus the Court refused to apply preclusion to an arbitration decision to bar either a Title VII or a section 1983 claim.

The *Elliott* Court failed to discuss the civil rights arbitration cases.¹⁴⁸ Certainly there are distinctions between arbitration proceedings and many judicial-like agency proceedings that may have some relevance to their respective abilities to protect federal constitutional and statutory rights.¹⁴⁹ However, it is nonetheless remarkable that the Court in *Elliott* made no attempt to demonstrate either that agency proceedings offer more civil rights protection than arbitration proceedings, or that agency proceedings are the procedural equivalent of judicial proceedings. In contrast, the civil rights arbitration cases demonstrate the important differences between arbitral and judicial processes,¹⁵⁰

attaches to arbitration in subsequent Title VII litigation); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (no preclusive effect of arbitration on a subsequent Fair Labor Standards Act claim)).

145. *McDonald*, 466 U.S. at 289 (emphasis added).

146. *Id.* at 290-91; see *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (upholding binding arbitration under Arbitration Act for federal securities claims prior to adjudication of joined state law claims, and declining to decide preclusion question); *Thomas*, 448 U.S. at 296 n.3 (Rehnquist, J., dissenting) ("Arbitration awards . . . have traditionally been afforded full faith and credit."); *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352 (11th Cir. 1985) (requiring preclusion based on prior arbitration decision in RICO claim); see also *Shell, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. Rev. 623, 673-75 (1988) (arguing that arbitral preclusion should be determined through application of contract law principles rather than application of law of judgments).

147. *McDonald*, 466 U.S. at 290; see also *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1306 (8th Cir. 1988) (distinguishing federal policy in arbitration of commercial disputes and civil rights claims); *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33 (2d Cir. 1988) (binding arbitration under Railway Labor Act not preclusive on subsequent fourth amendment claim brought under § 1983).

148. The *Elliott* majority makes only passing reference to *Alexander* regarding the irrelevance of plaintiff's voluntary choice of the administrative forum. See *Elliott*, 478 U.S. at 796 n.5.

149. For example, whereas the purpose of administrative proceedings may be to implement a statutory scheme protecting public rights, such as Title VII, arbitration proceedings exist largely to resolve disputes arising out of private bargains. See *Alexander*, 415 U.S. at 53 (arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties"); *Shell*, *supra* note 146, at 634 (arbitration system frequently encourages arbitrator to "split the difference between the parties").

150. *But see Owens v. Texaco*, 857 F.2d 262, 265-66 (5th Cir. 1988) (district court precluded from relitigating arbitrator's interpretation of collective bargaining agreement and should have considered arbitrator's finding of no racial discrimination).

and offer no basis for distinguishing between section 1983 and Title VII claims in the preclusion analysis.¹⁵¹

If all the Court was saying in *Elliott* was that a federal court shall apply the state's preclusion rule *if* the agency proceeding is truly like a judicial proceeding, then the decision would be of largely theoretical interest, as agency proceedings will rarely be procedurally equivalent to judicial proceedings. This analysis appears unlikely, however, given the Court's apparent willingness, as in *Elliott*, to borrow from section 1738 jurisprudence in fashioning its own common law rules of preclusion.¹⁵² Thus the Court's analysis in *Kremer*—that the agency proceedings must merely meet minimum due process standards for section 1738 to require preclusion¹⁵³—may well shape the Court's view of procedural sufficiency or equivalency even when the Court is applying not section 1738 but general rules of preclusion. If so, then the Court's stated test in *Elliott*—that the state's own preclusion rules regarding unreviewed state agency determinations will apply when the state has acted "in a judicial capacity" and resolved factual disputes which the parties "had an adequate opportunity to litigate"¹⁵⁴—will, in many instances, result in the loose and inappropriate application of preclusion principles to unreviewed state agency determinations.¹⁵⁵

D. The Title VII/Section 1983 Dichotomy

Another unfortunate result of the Court's decision in *Elliott* is that in the numerous cases that join Title VII and section 1983 claims,¹⁵⁶ adminis-

151. See, e.g., *Alexander*, 415 U.S. at 56-58; *McDonald*, 466 U.S. at 290-92.

152. See, e.g., *Elliott*, 478 U.S. at 797 ("The Court's discussion in *Allen* suggests that it would have reached the same result even in the absence of § 1738.").

153. *Kremer*, 456 U.S. at 481.

154. *Elliott*, 478 U.S. at 799 (quoting *Utah Constr.*, 384 U.S. at 422).

155. The Court recently declined an opportunity to further define what would constitute a "full and fair opportunity to litigate." See *Nelson v. Jefferson County, Ky.*, 863 F.2d 18 (6th Cir. 1988), cert. denied, 110 S. Ct. 76 (1989). The question presented in *Nelson* was: What are minimally acceptable standards for federal courts that must attempt to apply state preclusion law in determining whether or not to dismiss federal constitutional claims prosecuted pursuant to 42 U.S.C. 1983 under rules set forth in *Migra* and *Elliott*?

156. See Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 724 (1988) ("Many constitutional tort cases are employment discrimination claims against a government that also include a title VII allegation."). While the Supreme Court has held that preemption is inapplicable to a suit joining claims under § 1981 and Title VII, *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975), it has also held that Title VII cannot form the basis for a separate conspiracy charge under § 1985, *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 376-77 (1979). The Court has yet to rule explicitly on whether Title VII preempts actions under § 1983. See *id.* at 377 n.21 (distinguishing legislative intent behind §§ 1981 and 1983 from that of § 1985). For an argument that Title VII should not preclude related § 1983 actions, see Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 265 (1987).

trative preclusion will apply to the latter, but not to the former.¹⁵⁷ The post-*Elliott* decision in *Long v. Laramie County*¹⁵⁸ is a striking example of the fruits of this distorted approach to preclusion.

Sharon Long claimed that Rodney Southworth, her supervisor at Laramie County Community College, had sexually harassed her.¹⁵⁹ A College Grievance Committee heard eighteen hours of testimony and entered findings that the College's Board of Trustees subsequently adopted.¹⁶⁰ The Board found that Southworth had sexually harassed Long, that Long complained to other officials at the college about Southworth's harassment, and that, as a consequence the college retaliated against her by not renewing her employment contract.¹⁶¹ The Board ordered the college to reinstate Long in an appropriate position and pay her back wages of \$4,080.00 plus attorneys' fees.¹⁶² After further difficulties with the college, Long filed charges with the Office for Civil Rights which found that the school had retaliated for her efforts on behalf of sexually harassed female students. She also filed with the EEOC which found probable cause to believe she had been discriminated against through sexual harassment, and issued a notice of right to sue.¹⁶³

Long then instituted an action in federal district court under Title VII and sections 1983 and 1985.¹⁶⁴ With the agreement of the parties, the trial judge bifurcated the trial of the Title VII claim from the sections 1983 and 1985 claims and first held a bench trial on the Title VII claims.¹⁶⁵ After trial, the court rejected Long's claims, finding she "had failed to establish a prima facie case of sex discrimination because she had failed to prove that Southworth had sexually harassed her or that the college or the

157. The Court's lack of concern with consistency in its various civil rights preclusion cases is interesting given frequent congressional and judicial attempts at consistency in other areas of civil rights enforcement. See, e.g., *Attorneys' Fees*, *supra* note 42, at 405-06 (Courts show deference to Congress' desire for consistent application of the civil rights attorneys' fees statutes.). Lower courts have split as to whether claims arising under the Age Discrimination in Employment Act are to be treated the same as Title VII claims for purposes of preclusion. Compare *Duggan v. Board of Educ. of Chicago Heights*, 818 F.2d 1291, 1297 (7th Cir. 1987); *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646 (11th Cir. 1987) and *Rosenfeld v. Department of the Army*, 769 F.2d 237, 239 (4th Cir. 1985) (same as Title VII) with *Stillians v. Iowa*, 843 F.2d 276, 282 (8th Cir. 1988) and *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1283 (9th Cir. 1986) (preclusion applicable). See also Note, *Administrative Res Judicata and the Age Discrimination in Employment Act*, 89 COLUM. L. REV. 1111 (1989) (Age Discrimination Act claims, like Title VII claims, should not be precluded based on unreviewed state agency determinations.).

158. 840 F.2d 743 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 73 (1988).

159. *Id.* at 745-46.

160. *Id.* at 746-47.

161. *Id.* at 747.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

individual defendants had retaliated against her.¹⁶⁶ The court accepted the defendants' explanations of their failure to reemploy Long, finding them not to be pretextual.¹⁶⁷ Because the proceeding was *de novo*, the court did not consider itself bound by the findings of the Grievance Committee, the Board of Trustees, the OCR, or the EEOC, and believed all those findings to be based on Long's unsubstantiated and uncorroborated version of the facts.¹⁶⁸ Furthermore, the judge found Long's credibility to be highly questionable.¹⁶⁹ The court subsequently granted defendants' motion for summary judgment on the sections 1983 and 1985 claims, based on the issue preclusive effect of his decision on the Title VII claims.¹⁷⁰

The Tenth Circuit affirmed the trial court's decision on the Title VII claim, but reversed, on the basis of *Elliott*, its disposition of the Reconstruction Act claims.¹⁷¹ Convinced that the state agency proceedings met the *Utah Construction* test, the court of appeals believed that despite its finding on the Title VII claim, the district court was required by *Elliott* to give the same preclusive effect to the Board's determination as would the Wyoming courts.¹⁷² The appellate court noted in passing that Justice Stevens' dissent in *Elliott* had remarked upon the incongruity of this result.¹⁷³

Although this is not the first time that *res judicata* principles have produced strange results,¹⁷⁴ the Title VII/section 1983 dichotomy in *Long* is bizarre, unnecessary and does not flow from any obvious tactical error made by the party resisting preclusion.¹⁷⁵ If a primary purpose of fashioning a rule of preclusion is to avoid relitigation and redundancy, then this rule fails miserably, given the frequent joinder of Title VII with other claims arising under the antidiscrimination laws.¹⁷⁶ Sexual harassment of a state

166. *Id.* at 748.

167. *Id.*

168. *Id.*

169. *Id.* A collateral issue in this case was the surprise testimony offered by the defendants of Long's former husband, who she apparently believed to be dead until he walked into the courtroom as the defense's first witness and testified that Long had spent time in a mental institution and had a poor reputation for truthfulness. *Id.* at 748; Conversation between Marjorie A. Silver and Richard C. LaFond, attorney for Sharon Long (July 7, 1988). Although the court of appeals found that defendants had clearly violated the rules of discovery and the pre-trial order by not informing Long of their intention to call the former husband as a witness, it refused to find that the trial judge had abused his discretion by allowing the testimony. *Long*, 840 F.2d at 749-50.

170. *Long*, 840 F.2d at 749-50.

171. *Id.* at 749, 751.

172. *Id.* at 751. The court of appeals concluded, albeit without much analysis, that the Wyoming courts would give preclusive effect to the findings of the Board. *Id.* at 752.

173. *Id.* at 751 n.3 (citing *Elliott*, 478 U.S. at 800 n.1 (Stevens, J., dissenting)).

174. See, e.g., *Reed v. Allen*, 286 U.S. 191, 198 (1932) (failure to appeal from adverse determination in ejectment action meant party who had established entitlement to bequest of property could retain rents, but forfeited title).

175. See *id.*

176. See Catania, *Access to the Federal Courts for Title VII Claimants in the Post-Kremer Era: Keeping the Door Open*, 16 LOY. U. CHI. L.J. 209, 228 n.86 (1985). Title VII claims may of course also be joined with other kinds of claims.

employee violates Title VII as well as section 1983. Nonetheless, under the *Long* court's seemingly inevitable interpretation of *Elliott*, Long won on her section 1983 claim, and lost on her Title VII claim.¹⁷⁷

The absurdity of this result may go further. Under Title VII, a party must first submit her dispute to a designated state fair employment agency, if one exists, before filing suit. *Elliott* may require that any determination of an issue of fact made in an adjudicatory hearing before such a state agency may not be binding on a subsequent Title VII claim filed in federal court, but *must* be binding on a joined section 1983 claim.

III. THE VARIABLES IN ADMINISTRATIVE PRECLUSION ANALYSIS

In a sense, *Elliott* posed a simplistic solution to a complex problem: federal courts should apply the state's preclusion law unless to do so would be inconsistent with a federal statute, or violate fundamental notions of due process. But application of this rule reveals that its simplicity is chimerical, for the variables are complex and numerous. Whether preclusion is consistent with a federal statute, for instance, is not always easy to discern, especially when Congress apparently gave no thought to the preclusion issue. Whether the parties have received the process that was their due is frequently in the eyes of the beholding court. Further, the joinder of precluded and non-precluded claims can yield bizarre results, as in *Long*. These and other variables with which the lower courts continue to struggle have produced a crazy quilt of administrative preclusion doctrine, both of reviewed and unreviewed agency determinations. This Part identifies and explores a number of these variables. The problems raised underscore the inadequacy of the Court's approach to the doctrine of administrative preclusion, and the need for a coherent solution to the treatment of administrative determinations in federal civil rights litigation.

177. But the conclusion of the district and circuit courts that Title VII forbade giving preclusive effect to the state agency's determination in *Long* is not forgone. All of the Supreme Court cases that have spoken to the Title VII preclusion question in regards to unreviewed state agency determinations have focused on Congress' intent to grant *employees* a right to trial *de novo* on their Title VII claims; none of the opinions addressed a case such as *Long* where the employee, rather than the employer, had prevailed below. See *Elliott*, 478 U.S. at 795-96 ("[O]ur decision in *Chandler v. Roudeshush* . . . strongly supports respondent's contention that Congress intended *one in his position* to have a trial *de novo* on his Title VII claim." (emphasis added)); *Chandler*, 425 U.S. at 844 ("It is well established that § 706 of the Civil Rights Act of 1964 accords private-sector *employees* the right to *de novo* consideration of their Title VII claims." (emphasis added)); *Alexander*, 415 U.S. at 48-49 (Title VII's legislative history manifests intent that the *individual* has the right to pursue claims under Title VII as well as other applicable state and federal statutes). The *Long* courts were not necessarily wrong, but they failed to recognize that a question existed. I think the question is far from settled. If this protection against preclusion extended only to employees and not employers, that would have additional important consequences for analysis of the Court's preclusion doctrine. Such an inquiry, however, is beyond the scope of this endeavor.

A. Issue vs. Claim Preclusion

Do the same rules apply regardless of whether a party is relying on issue preclusion or claim preclusion? That is, if a federal court is bound to apply the state's rules of preclusion as to an agency's *determination of an issue of fact*, must the federal court also apply the state's rules regarding whether an agency adjudication will bar subsequent *claims*?

Administrative issue preclusion alone will generally frustrate an attempt by a plaintiff who was unsuccessful before the agency from bringing a subsequent action in federal court. In fact, administrative claim preclusion will arise only when the plaintiff either lost before the agency and now wants to raise a related claim or theory of the case in federal court,¹⁷⁸ or prevailed below and now seeks additional remedies in federal court. In the former case, claim preclusion might bar the plaintiff from pursuing a claim based on the same transaction under a different statutory right in federal court even if issue preclusion would not foreclose the claim. For example, if at his disciplinary hearing, Elliott had contested unsuccessfully the charge that his work performance was inadequate, or that he had engaged in misconduct, without raising the issue of racial discrimination, administrative claim preclusion nonetheless might operate to bar him from subsequently bringing a federal civil rights action.¹⁷⁹

Furthermore, for plaintiffs who have prevailed before an agency, claim preclusion may jeopardize otherwise legitimate federal statutory claims for attorneys' fees. Title VII, for example, empowers the court to award attorneys' fees to a plaintiff who prevails on an employment discrimination claim through state administrative or judicial proceedings.¹⁸⁰ But in state courts and agencies that have no authority to award fees, a prevailing party's right to recover fees will only be cognizable in federal court.¹⁸¹ If

178. Under the approach of the *Restatement (Second) of Judgments* § 24, claim preclusion bars not only claims that were raised below, but also those that could have been, but were not, raised below. See Shreve, *supra* note 28, at 1212.

A new claim is precluded when it is so closely related to a previously raised claim that together they constitute a "claim" in a larger sense. This expanded concept of a claim is intended to signify all of the alternative legal theories and the full scope of remedies generated by the facts of the original controversy.

Id.

179. In other words, even were it true that his work performance was inadequate and that he engaged in misconduct, but for preclusion, Elliott would prevail on his civil rights claim if he could establish that similarly situated white employees were not discharged. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (black employee allegedly fired for illegal activity must be given opportunity to show that white employees who engaged in similar activity were retained or rehired).

180. Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k) (1982).

181. The Supreme Court has never ruled on the exclusivity of federal jurisdiction over Title VII. The majority rule is that state courts lack concurrent jurisdiction that would empower them to award fees. See, e.g., *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3d Cir.

fees are deemed an additional remedy, then claim preclusion arguably may operate to vitiate the right to recover them.¹⁸²

The fate of plaintiffs who lose before an administrative agency is similarly in doubt. The Court in *Allen* held that section 1738 barred relitigation in a section 1983 action of the *issue* of the legality of a search first determined in a criminal prosecution suppression hearing. Despite arguments that the holding should not be extended to bar the assertion of a federal claim which had never been litigated in a related state proceeding,¹⁸³ the entire *Migra* Court found the *Allen* reasoning controlling, and held a plaintiff who had been successful in her state court action to be bound by the preclusion laws of that state under section 1738 on a subsequent section 1983 claim in federal court. But that result hinged in large measure on the Court's construction of section 1738, and its finding that section 1983 did not create an exception.¹⁸⁴ Yet administrative preclusion doctrine need not necessarily produce the same result given the Court's holding that section 1738 does not apply to the unreviewed determinations of state agencies.

The Court's decision in *Elliott*, the linchpin of which was the *Utah Construction* dicta, was limited to issue preclusion:

[W]e hold that when a state agency "acting in a judicial capacity . . . resolves *disputed issues of fact* properly before it which the parties have had an adequate opportunity to litigate" federal courts must give the

1986) (federal jurisdiction over Title VII claims is exclusive). *But see* *Lindas v. Cady*, 150 Wis. 2d 421, 441 N.W.2d 705 (1989) (state court has concurrent jurisdiction over Title VII claims).

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61-63 (1980), the Court held that a federal court was empowered to award fees under Title VII to a party who prevailed on his claim before state administrative and judicial tribunals, when such tribunals lacked power to award such fees. The Supreme Court held subsequently in *North Carolina Dep't of Transp. v. Crest*, 479 U.S. 6, 15 (1986), that § 1988 provides no right to one who had prevailed on an administrative Title VI claim to bring suit in federal court *solely* to recover attorneys' fees. However, even if *Crest* applies to Title VII, *see Attorneys' Fees*, *supra* note 42, at 393-94, 406 & n.184, it still would not resolve the preclusion issue when the plaintiff previously filed a protective federal lawsuit, yet the case is resolved thereafter by state tribunals. Neither *Carey* nor *Crest* raised any preclusion question.

182. This might occur if the claim preclusion rules of the state would bar the suit for additional remedies. *See, e.g., McNasby v. Crown Cork & Seal, Inc.*, 888 F.2d 270 (3d Cir. 1989) (reversing district court's dismissal of federal claim for additional remedies because Pennsylvania law would not bar the claim).

183. These arguments relied in part on cases such as *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 280-83 (1980), which suggested that the full faith and credit clause of the Constitution might require application of the original state's issue preclusion, but not claim preclusion, rules. U.S. CONST. art. IV, § 1; *see Gjellum v. City of Birmingham*, 829 F.2d 1056, 1068 (11th Cir. 1987); *Atwood*, *supra* note 12, at 75-76.

184. *Amici* in *Migra* had urged that it was inconsistent with congressional purpose to apply claim preclusion to a § 1983 action involving matters not actually litigated in the prior action. *See Smith*, *supra* note 28, at 78.

agency's *factfinding* the same preclusive effect to which it would be entitled in the State's courts.¹⁸⁵

The states that participated as amici in *Elliott* in support of applying preclusion never urged that the holding be broadened to encompass claim preclusion as well,¹⁸⁶ and circuit courts subsequently have refused to so extend the *Elliott* doctrine.¹⁸⁷ For example, in *Gjellum v. City of Birmingham*,¹⁸⁸ the Eleventh Circuit refused to apply claim preclusion to bar a police officer who had successfully challenged his suspension before the county personnel board from subsequently suing for damages under section 1983.¹⁸⁹ The court held that nothing in *Elliott*, nor any "federal common-law of preclusion" compelled it to apply state claim preclusion rules regarding unreviewed state agency determinations to claims under section 1983, and that to fashion any such rule would frustrate the purposes behind the civil rights laws.¹⁹⁰ The court found the distinctions between issue preclusion and claim preclusion sufficiently compelling to adhere to full

185. *University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (citation omitted) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)) (emphasis added). *But see* *Frazier v. King*, 873 F.2d 820, 828 (5th Cir. 1989) (Jones, J., dissenting) (*Utah Construction* "referred generally to principles of res judicata and did not distinguish between issue and claim preclusion.").

186. *See* Amicus Curiae Brief for the State of Kansas and Other Joining States at 15, *Elliott*, 478 U.S. at 788 (No. 85-588) [hereinafter "States' Amicus Brief"] ("The granting of issue preclusion to such agency decisions will resolve the dilemma and continue to leave the federal district courts as final enforcers of civil rights claims.").

187. *See Gjellum*, 829 F.2d at 1064-65; *see also Frazier*, 873 F.2d at 824 (holding administrative proceeding afforded no claim preclusion in § 1983 action under either federal or Louisiana law).

188. 829 F.2d at 1056.

189. John Gjellum, a Birmingham, Alabama police officer, was suspended from his job for tape recording his conversations with other police officers. Gjellum appealed to the Jefferson County Personnel Board which reversed the suspension, based on the lack of any police department policy forbidding such tape recording. The City sought review by the Circuit Court of Jefferson County and, although Gjellum was not allowed to intervene in those proceedings, the court affirmed the Board's decision.

Gjellum then filed a § 1983 claim in federal district court. The court granted summary judgment for the defendants, holding that after *Elliott*, Gjellum was barred by claim and issue preclusion from relitigating matters decided by the Board. Alternatively, the court found that Gjellum was not entitled to relief on the merits. On review, because Gjellum had prevailed before the Board, the appellate court deemed issue preclusion irrelevant, as it "would at most limit [defendants'] ability to relitigate issues decided adversely to them in the prior proceedings." *Id.* at 1060. Thus the court of appeals focused on the claim preclusive aspect of the district court's holding.

First the court of appeals analyzed whether Alabama would give claim preclusive effect to the judgment of the state court. Because Gjellum was not a party to the state court proceedings, the court of appeals concluded that the Alabama courts, which require, *inter alia*, that "the parties to both suits are substantially identical," would not afford claim preclusive effect to the state court's judgment. *Id.* at 1060. The court then analyzed whether *Elliott* required the federal court to apply the state's claim preclusion rules to the Board's determination. *Id.* at 1058-65.

190. *Id.* at 1065-67.

faith and credit policies in the context of the former, but not the latter.¹⁹¹

As the court recognized in *Gjellum*, the refusal to apply claim preclusion, as opposed to issue preclusion, creates no risk that the court's determination will be *inconsistent* with the agency determination, so that concerns regarding comity and federalism are not compelling.¹⁹² Generally, the state agency will lack jurisdiction or authority to entertain the federal claim, and may be incapable of awarding remedies available in federal court.¹⁹³

Arguably, strict application of claim preclusion might bar the subsequent action nonetheless if plaintiff voluntarily chose to bring his action in a state administrative forum of limited jurisdiction, and could have joined all his claims—federal and state, under pendent jurisdiction—in a federal action.¹⁹⁴ While preclusion in such a case is generally troubling,¹⁹⁵ it would be especially

191. *Id.* at 1069.

192. *Id.* at 1064, 1065 n.21.

With respect to the claim preclusive effect of unreviewed state agency rulings, we conclude that the importance of the federal rights at issue, the desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed administrative proceeding, and the limitations of state agencies as adjudicators of federal rights override the lessened federalism concerns implicated outside the contours of the full faith and credit statute. In addition, claim preclusion, unlike issue preclusion, does not create a risk of inconsistent results

Id. at 1064; *see also* Davis v. United States Steel Supply, 688 F.2d 166, 189 (3d Cir. 1982) (en banc) (Gibbons, J., dissenting) ("An interpretation of Title VII and section 1738 which recognizes issue preclusion in those instances in which a claimant resorts to state court judicial review is a reasonable accommodation between conflicting federal policies favoring vindication of civil rights and state policies favoring finality of judicial determinations."). *But see* Perschbacher, *supra* note 13, at 446-47 (finality of judgments more important than inconsistent resolution of factual issues); Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63 (1986) (issue preclusion serves less important finality interests than claim preclusion).

See infra notes 323-31 and accompanying text for discussion of federal and state interests in preclusion.

193. *See, e.g.,* Boykins v. Ambridge Area School Dist., 621 F.2d 75, 79 (3d Cir. 1980) (no res judicata accorded determination of Human Relations Commission in subsequent § 1983 suit because Commission lacked authority to award damages).

194. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring) (plaintiff who failed to allege state claims in federal suit should be barred from subsequently asserting them in state suit); *see also* Shreve, *supra* note 28, at 1261-62 (suggesting that federal claim preclusion rules might require parties with claims under federal statutes that provide for exclusive federal jurisdiction to append state claims or risk forfeiting opportunity to bring second action). *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1980), stating that there is no preclusion where:

plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority . . . and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief

Id.

195. *See* Shreve, *supra* note 28, at 1261-63 (such claim preclusion rules may interfere with state courts' ability to develop their own substantive law).

problematic when applied to unreviewed state agency determinations and would undercut the reasons for having less formal, more expeditious agency resolution of various disputes.¹⁹⁶

In fact, some lower courts have understandably shown reluctance to so extend preclusion, even when the administrative determination has been reviewed by a state court. In *Healy v. Town of Pembroke Park*,¹⁹⁷ the Eleventh Circuit allowed four discharged police officers, who had successfully attacked their dismissal before the Florida Public Employees Relations Commission, to bring a section 1983 action for supplemental relief despite a state court affirmance of the Commission's order on review sought by the town.¹⁹⁸ The court noted that the Commission lacked the power to award either compensatory damages for mental anguish, or punitive damages,¹⁹⁹ and rejected the defendant's argument that the plaintiffs could have joined their section 1983 claim with their state court action to enforce the Commission's order.²⁰⁰ Section 1983's intent was to supplement, not supplant, state remedies; thus, said the court, it would be inconsistent with the intent of section 1983 to apply preclusion.²⁰¹ Similarly, in *Reynolds v. New York State Department of Correctional Services*,²⁰² a federal district court in New York refused to apply *Kremer* to bar plaintiff's Title VII claim. Although plaintiff had lost before the New York State Division of Human

196. See *Frazier*, 873 F.2d at 824.

This holding [that claim preclusion is inapplicable to agency determination in subsequent § 1983 suit] permits plaintiffs to pursue administrative remedies without jeopardizing their § 1983 claims. . . . In addition, it has the practical effect of encouraging plaintiffs to seek administrative remedies before turning to the federal courts. A contrary result would encourage plaintiffs to bypass administrative proceedings in order to preserve their claims under § 1983.

Id.

197. 831 F.2d 989 (11th Cir. 1987).

198. *Id.* at 990-91. The Commission had ordered the Town of Pembroke Park to reinstate the four officers and pay them back wages. Plaintiffs subsequently sought supplemental relief under § 1983 in federal district court for compensatory and punitive damages, and attorneys' fees. The district court had granted the town's motion to dismiss based on administrative res judicata. *Id.*

199. *Id.* at 991-92 ("In the Eleventh Circuit it is well settled that res judicata will not operate to bar matters which were not raised before an administrative agency and over which it did not have jurisdiction.").

200. *Id.* at 992.

201. *Id.* at 992-93.

Congress realized in enacting § 1983 that it was altering the balance of judicial power between the state and federal courts, and in doing so it was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts. [G]iven the intent of broad constructions and expansive use of § 1983 and its attendant remedies, it must be concluded that the limited state administrative remedies which were made available to the plaintiffs as a result of the unfair labor practice charge filed by their union, does [sic] not restrict or preclude their attempt to become whole by seeking additional damages in the federal forum.

Id. (citation omitted).

202. 568 F. Supp. 747 (S.D.N.Y. 1983).

Rights, and had unsuccessfully sought state court review, the court found that the state determination was inconsistent with Title VII doctrine, since New York law tolerated a broader BFOQ ("bona fide occupational qualification") exception to employment discrimination than did federal law under Title VII.²⁰³

Notably, neither *Reynolds* nor *Healy* purports to analyze the preclusion question in terms of section 1738; they return instead to the purpose behind the federal civil rights laws, Title VII in the case of *Reynolds*, section 1983 in the case of *Healy*. Given the Court's interpretation of section 1738 in *Migra* and *Kremer*,²⁰⁴ however, the question of whether claim preclusion would operate in the case of reviewed state agency determinations is likely to be a function of state, rather than federal, law.²⁰⁵ As to unreviewed state agency determinations, however, it is not at all clear what the Court will do.

B. Adjudicatory vs. Investigatory Determinations

Agency adjudications range greatly in formality.²⁰⁶ Unlike the "due process" hearings states hold before they take adverse action against state employees²⁰⁷—such as the hearing in *Elliott*—many agencies, both state and

203. *Id.* at 750-51.

204. There has been some controversy over whether *Kremer* was solely an issue preclusion case, or encompassed claim preclusion as well. Since *Kremer* lost below, issue preclusion alone was sufficient to bar his subsequent action, and it was unnecessary for the Court to reach the question of claim preclusion. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 n.22 (1982).

The lower courts did not discuss whether it is the doctrine of res judicata or collateral estoppel that applies here. . . . It may be that petitioner would be precluded under res judicata from pursuing a Title VII claim. However that may be, it is undebatable that petitioner is at least estopped from relitigating the issue of employment discrimination arising from the same events.

Id. The Court's reasoning seems to suggest that claim preclusion would apply as well. See, e.g., *id.* at 466-67:

There is no question that this judicial determination precludes *Kremer* from bringing "any other action, civil or criminal, based upon the same grievance" in the New York courts. By its terms, therefore, § 1738 would appear to preclude *Kremer* from relitigating the same question in federal court.

Id. (citation omitted) (emphasis added).

205. See *McNasby v. Crown Cork & Seal, Inc.*, 698 F. Supp. 1264, 1271-72 (E.D. Pa. 1988) (based on interpretation of Pennsylvania law, plaintiff who prevailed before Pennsylvania Human Relations Commission but who obtained limited monetary relief was barred by § 1738 from seeking additional relief in federal court because of state court affirmation of agency determination), *rev'd*, 888 F.2d 270 (3d Cir. 1989); cf. *Davidson v. Capuano*, 792 F.2d 275, 276, 282 (2d Cir. 1986) (based on interpretation of New York law, prisoner's § 1983 action not precluded by earlier, successful state court proceeding because that proceeding could not provide all of the civil rights damages that federal action could). But see *Jackson, Matheson & Piskorski*, *supra* note 32, at 1516 (preclusion should not apply when federal and state remedial standards differ).

206. See *infra* notes 261-65 and accompanying text.

207. See *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) (due process would require prior hearing before termination of teacher with vested property right in employment).

federal, charged with enforcing non-discrimination laws, make determinations based on investigations only.²⁰⁸ Although all sides are accorded the opportunity to provide the investigator with relevant information, they may or may not be offered the opportunity to challenge the information provided by their opponents. Nor is there any pretense of a classic "hearing" at which an impartial decisionmaker presides over the offering and contesting of evidence and argument.²⁰⁹ The Supreme Court's opinions in *Kremer* and *Elliott* suggest that whether such an investigatory determination will be accorded preclusive effect in a subsequent civil rights action will depend on whether there was any state court review. In *Kremer*, the New York State Division of Human Rights (NYHRD) determined there was no probable cause to believe Mr. Kremer had been discriminated against solely on the basis of such an investigatory hearing. The Court held that since that decision was reviewed, albeit under the limited standard applicable to review of agency determinations, section 1738 operated to bar the federal court from relitigating the question of whether Chemical Construction Company discriminated against Kremer on the basis of his ethnicity. The majority rejected the argument that Kremer never had the hearing on his Title VII claim that Congress intended him to have.²¹⁰ Rather, the majority found that the administrative proceedings satisfied minimum due process standards and deemed that sufficient to satisfy any rights Mr. Kremer had.²¹¹

208. See, e.g., *Kremer*, 456 U.S. at 483 (describing investigative procedures of NYS Division of Human Rights). The EEOC is an example of a federal agency that has no adjudicatory powers. See *Informal Procedures*, *supra* note 38, at 504-05.

209. See *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (due process hearing requires impartial decisionmaker, right to retain counsel, opportunity to offer evidence and cross-examine witnesses and present argument). Although some agencies like the EEOC have neither the administrative machinery, nor the authority to hold formal hearings, other agencies may hold such a hearing at some stage. For example, OCR, if it determines after investigation that there has been a violation of one of the statutes it enforces and it is unable to obtain compliance through voluntary means, has the option either to hold a formal administrative hearing, or refer the case to the Department of Justice for court litigation. See 34 C.F.R. §§ 100.8, 100.9 (1988).

210. *Kremer*, 456 U.S. at 492-93 (Blackmun, J., dissenting).

Thus, although it claims to grant a state court decision preclusive effect, in fact the Court bars petitioner's suit based on the state agency's decision of no probable cause. The Court thereby disregards the express provisions of Title VII, for, as the Court acknowledges, Congress has decided that an adverse state agency decision will not prevent a complainant's subsequent Title VII suit.

Id.

211. The majority's opinion reflects a remarkable lack of sensitivity to the limited nature of the administrative proceedings and subsequent state court review. See *Mann*, *supra* note 46, at 439 (unacceptable risk of error in *Kremer* inasmuch as finding was made by an investigator rather than impartial fact-finder and there was no opportunity to augment agency record in proceedings before reviewing state court); Jackson, Matheson & Piskorski, *supra* note 32, at 1518-19 (§ 1738 should not apply when court decision was merely limited review of agency investigatory determination).

If Kremer never sought state court review, it is relatively certain that at least two bases would have barred a federal court from affording preclusive effect to the NYHRD's no probable cause determination. The first is subsequently made explicit in *Elliott*: Congress never intended a Title VII claimant to be precluded in federal court by an unreviewed state agency determination. The second is implicit in *Elliott*: because section 1738 is inapplicable to unreviewed state agency determinations, administrative preclusion must be based on federal common law. This common law, which springs from the *Utah Construction* dicta, applies only to determinations made by administrative agencies acting in a judicial capacity. Because an agency like the NYHRD does not act in a judicial capacity, its determination will not bar the reconsideration of the same issue or issues in a subsequent federal civil rights action.²¹² Thus, even for claims brought under section 1983, if the state agency has not held a trial-like hearing in making its determination—and that determination has not been reviewed by any state court—nothing the Supreme Court has said to date would suggest that any federal court should—or could²¹³—apply preclusive effect to the determination of that agency. And this must be true *whether or not the courts of the state in question would apply preclusive effect to the unreviewed state agency determination*.²¹⁴

C. Mandatory vs. Optional Use of Agency Processes

Another factor to consider in the preclusion analysis is whether the plaintiff must pursue administrative remedies prior to filing a federal lawsuit. Before an aggrieved employee can sue in federal court, she must first submit her claim to the EEOC, or, in the case of a state or locality having comparable nondiscrimination laws, to the relevant state or local agency.²¹⁵

212. Cf. *Doe v. New York Univ.*, 511 F. Supp. 606, 608-10 (S.D.N.Y. 1981) (rejecting plaintiff's argument that OCR findings of discrimination should shift burden of proof to defendant to prove no discrimination, because OCR determination was based on investigatory, not adjudicatory procedures).

213. While *Kremer* suggested that minimum due process for purposes of § 1738 was satisfied by the investigatory determination of the NYHRD, and the state court review to insure the determination comported with applicable law, I believe it would be inconsistent with due process for a federal court to afford preclusive effect to a purely investigative determination that was never reviewed by any court. See *Kremer*, 456 U.S. at 482-83 (if initial "judgment" fails to comport with due process, then "there could be no constitutionally recognizable preclusion at all").

214. See N.Y. Exec. Law § 297(9) (McKinney 1982) (party who filed with NYHRD precluded from bringing any other action based on same grievance); *Scott v. Carter-Wallace, Inc.*, No. 36312 (N.Y. App. May 23, 1989) (LEXIS, States Library, NY file) ("[O]nce a grievance is taken to the State Division, the election to do so cannot be undone through the simple expedient of dropping the proceedings before that agency and commencing an action in court."); see also *id.* (charge filed with EEOC constitutes election of remedies under Exec. Law § 297(9) thus precluding state court suit under Human Rights Law).

215. 42 U.S.C. § 2000e-5(b), (c), (f) (1982).

Thus the agency has the first crack at resolving the Title VII dispute. Only if the agency fails to resolve the dispute within the statutory time period (180 days, in the case of the EEOC, or 240 days, in the case of the state or local agency), will the EEOC issue the putative plaintiff a right-to-sue notice, her ticket into federal court under Title VII.²¹⁶ It would not be just to apply preclusion to an agency determination that the parties were forced to tolerate, even if the agency determination was made in a court-like proceeding. The Court has recognized as much in interpreting Title VII to guarantee a right to trial *de novo*.²¹⁷

Unlike Title VII, section 1983 has no exhaustion requirement of any kind.²¹⁸ Thus one can proceed directly to federal court on a section 1983 claim, bypassing any relevant local, state or federal administrative avenues for resolving the underlying dispute. Does the existence of this option suggest that the application of preclusion to the determination made by an agency to which the individual voluntarily submits his claim should be of less concern?²¹⁹ Interestingly, some of those who argued in the past in favor of an administrative exhaustion requirement for section 1983 bolstered their argument with reassurance to critics that *res judicata* and collateral estoppel would be inapplicable to the determinations made by such agencies.²²⁰

The absence of an administrative filing requirement does not mean that prior resort to administrative remedies is undesirable. Congress has established and encouraged the utilization of non-mandatory federal ad-

216. 42 U.S.C. § 2000e-5(f); 29 C.F.R. § 1601.28.

217. See *Elliott*, 478 U.S. at 795-96 (to give preclusive effect to unreviewed state agency determination on employment discrimination claim in Title VII action would be inconsistent with § 2000e-5(b) and Court's prior holding in *Chandler v. Roudeshush*, 425 U.S. 840 (1976)). Preclusion is inapplicable under Title VII even if the party voluntarily submitted her claim to an administrative hearing. *Elliott*, 478 U.S. at 796 n.5.

218. *Felder v. Casey*, 487 U.S. 131 (1988) (application of Wisconsin's notice of claim requirement to § 1983 action filed in state court inconsistent with no exhaustion requirement); *Patsy v. Board of Regents*, 457 U.S. 496, 502, 516 (1982) (Congress never intended and Court declines to fashion exhaustion requirement for § 1983 actions brought in federal court).

219. Compare *Davis*, 688 F.2d at 178 (Garth, J., concurring) (preclusion afforded this reviewed state agency determination even less troubling than in *Kremer* because "Ms. Davis was not obliged as was *Kremer*, to defer to a local administrative agency in the first instance") and *Carpenter v. Reed ex rel. Department of Pub. Safety*, 757 F.2d 218 (10th Cir. 1985) (if plaintiff was required to first submit dispute to Personnel Board, then Board's determination would preclude subsequent discrimination complaint) with *Daniels v. Barry*, 659 F. Supp. 999, 1001 (D.D.C. 1987) (absence of an exhaustion requirement in § 504 of the Rehabilitation Act is evidence that D.C. Office of Human Rights determination does not preclude federal claim brought under § 504).

220. See *Patsy*, 457 U.S. at 532 (Powell, J., dissenting) ("[Exhaustion of state remedies] does not defeat federal-court jurisdiction, it merely defers it."); *Patsy v. Florida Int'l Univ.*, 634 F.2d 900, 910 (5th Cir. 1981) ("Unlike judicial actions, state administrative proceedings carry no *res judicata* or collateral estoppel baggage into federal court.") *rev'd*, 457 U.S. 496 (1982); Bacharach, *Section 1983 and An Administrative Exhaustion Requirement*, 40 OKLA. L. REV. 407, 411 (1987) (exhaustion requirement would only postpone exercise of federal jurisdiction).

ministrative procedures for enforcement of claims arising under Title VI and similar nondiscrimination statutes.²²¹ Encouraging the utilization of state agency procedures is also sound policy: Disputes resolved through such processes will help alleviate the burden on the federal courts, and allow state tribunals to further their own state interests.²²² Distinguishing between mandatory and voluntary utilization of agency procedures would be counterproductive to such policy. If litigants bypass administrative remedies merely to preserve their federal civil rights claims, the number of cases on the federal docket will increase. The docket would be cluttered not only with claims brought by Title VII litigants unable to resolve their disputes at the administrative level, but also by litigants with other civil rights claims who might have satisfactorily resolved their disputes through informal agency processes.²²³

Applying preclusion to determinations made by optional administrative processes has other serious consequences. It detrimentally restricts the choices available to parties deciding whether to attempt resolution of a potential dispute informally through agency proceedings. The considerations may be different when one is choosing between filing a discrimination complaint with a government funding agency or filing a lawsuit on the same claim, than when one is deciding whether to apply for unemployment compensation benefits upon termination of employment.²²⁴ In either case, however, concerns about the preclusive effects of the agency determinations will burden the choice of whether to initially attempt agency processes.²²⁵ Those aware of the possible consequences of their choice may choose to forego the administrative process in order to preserve the right to a judicial determination, thus frustrating a primary purpose in creating administrative

221. I have argued elsewhere that it makes no sense to distinguish between Title VI and Title VII proceedings for purposes of awarding attorneys' fees for civil rights cases resolved administratively. See *Attorneys' Fees*, *supra* note 42, at 416-20. Given Congress' desire for consistency among the civil rights laws, see *supra* note 157, I am unpersuaded by the Court's conclusion in *Elliott*, based on specific language in Title VII, that Congress intended a different preclusion result under that law than under the other civil rights/antidiscrimination schemes.

222. See discussion *infra* notes 323-31 and accompanying text.

223. *Davis*, 688 F.2d at 193 (Sloviter, J., dissenting).

The advantages of resorting in the first instance to a procedure whereby disputes may be resolved by conference, conciliation and persuasion are evident: an unrepresented claimant may seek and sometimes be awarded relief; the parties may informally resolve their differences without the bitterness engendered by litigation; and the courts are spared the additional burdens of yet more lawsuits.

Id.

224. See *infra* notes 250-56 (discussing relevance in preclusion analysis of whether claim adjudicated by agency is related to subsequent federal civil rights claim).

225. See *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 647 (11th Cir. 1987) ("Granting deference to unreviewed decisions of this agency in subsequent ADEA lawsuits could cause potential plaintiffs to forego their chance at unemployment compensation for fear of jeopardizing their ADEA claims or else force employees and employers to litigate unemployment compensation claims as discrimination suits.").

forums for dispute resolution.²²⁶ Furthermore, those who lack the benefit of counsel (or have unsophisticated counsel), may not be aware that the choice is burdened.²²⁷ In formulating rules of preclusion for administrative determinations, judges must be cognizant that agencies exist, in part, so that those unsophisticated in the law may have the opportunity for fair redress of grievances, without counsel and without the onerous costs of judicial litigation. When possible, promulgators of rules should avoid creating rules that allow individuals to forfeit unwittingly their rights to judicial remedies.

D. Voluntary vs. Involuntary Litigants

Should it make a difference whether the party seeking relief in federal court voluntarily submitted to the prior proceeding? If a plaintiff in the federal action prevailed before the agency in the first action, but that determination was overturned by a state court on review sought by the losing defendant, should that matter in the court's analysis of whether or not to preclude the federal claim?

In *McCurry v. Allen*,²²⁸ the nature of the first proceeding, a suppression of evidence hearing, persuaded the court of appeals that the application of preclusion to bar McCurry's section 1983 claim would compromise his rights to have a federal court determine his federal claim.²²⁹ The Supreme Court

226. See *Davis*, 688 F.2d at 193-94 (Sloviter, J., dissenting).

This leads to the patently unsatisfactory conclusion that complainants will be well-advised to bypass the state administrative machinery. . . . The courts and judges of this country, from the Chief Justice of the United States down, have repeatedly spoken of the need to seek dispute resolution mechanisms outside of litigation. There is also a public policy, reflected in various statutes requiring initial resort to state administrative procedures, to use that procedure whenever possible. . . . I dissent from this example of what one of our colleagues frequently refers to as "mechanical jurisprudence."

Id.; accord *id.* at 189 (Gibbons, J., dissenting) (majority position applying preclusion will result in bypassing state conciliation efforts); see also *McDonald v. City of West Branch*, 466 U.S. 284, 292 n.11 (1984) (holding no preclusion in § 1983 claim based on prior arbitration finding because, *inter alia*, contrary rule might cause employees to bypass arbitration); cf. *Attorneys' Fees*, *supra* note 42, at 419 (describing similar consequences if attorneys' fees are not available for successful administrative resolution of dispute).

227. See *Davis*, 688 F.2d at 193 (Sloviter, J., dissenting).

[B]ecause she sought to utilize the informal procedure which the State of Pennsylvania provides for persons who believe themselves to be victims of racial discrimination, because she chose to conciliate rather than litigate in the first instance, and because she was successful in that effort, thereby giving U.S. Steel the opportunity to invoke the jurisdiction of the Pennsylvania courts, Ms. Davis will lose the \$50,736.11 judgment awarded to her by the district court.

Id.

228. 606 F.2d 795 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980).

229. *Id.* at 798-99; see Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 970 (1984) (noting that McCurry had no opportunity to cross-claim for damages in suppression hearing, and limited opportunity for discovery).

disagreed, finding section 1738 required application of state preclusion law that would bar relitigation of the factual determination made in the earlier proceeding.²³⁰ The dissent would have created an exception in the case of an involuntary criminal defendant.²³¹

Yet *Allen* involved no administrative determination; the issue arose in the context of state court/federal court preclusion. And in *Kremer*,²³² which did involve a prior administrative decision, the question of involuntariness did not arise. Mr. Kremer lost all of his state administrative and state court review proceedings; thus when he presented his Title VII claim to the federal courts, he had never been an involuntary litigant. The Court emphasized the fact that Mr. Kremer was not *required* to seek state court review of the adverse state agency determination, and that once he had made that election, he could not be heard to complain that he was entitled to a federal forum as well.²³³

But what if Mr. Kremer had won before the New York State Division of Human Rights, and Chemical Construction Corp. had successfully appealed that determination to state court? Would Mr. Kremer *still* be denied his federal forum for adjudication of his federal Title VII claim? Under the Court's reasoning that section 1738 is controlling, it appears that the voluntary or involuntary status of the litigant in a reviewed state agency proceeding makes no difference.²³⁴

This situation faced the Third Circuit in *Davis v. United States Steel Supply*,²³⁵ a case it decided shortly after the Court handed down *Kremer*. Davis prevailed on his racial intolerance complaint before the Pittsburgh Commission of Human Relations after a full adversarial hearing.²³⁶ U.S. Steel then appealed to the Allegheny County Court of Common Pleas, which affirmed.²³⁷ U.S. Steel appealed again to the Commonwealth Court, which unanimously reversed the Court of Common Pleas and held that the administrative record contained inadequate support for the conclusion that U.S. Steel had violated the applicable Pittsburgh ordinance. Davis chose not to appeal to the Pennsylvania Supreme Court, and instead filed a section

230. *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

231. *Id.* at 113-16 (Blackmun, J., dissenting); see Atwood, *supra* note 12, at 97-98 & nn.189-90 (noting that some lower court cases had drawn distinctions for § 1983 claim preclusion purposes as to whether a litigant was voluntarily or involuntarily before the state court, but that the rationale of such cases would not survive the Court's reasoning in *Allen*).

232. 456 U.S. at 461.

233. *Id.* at 469-70.

234. See *id.* at 504-05 n.18 (Blackmun, J., dissenting) ("In some future case, the Court may find such a result inimical to Title VII but, given today's decision, no complainant could safely predict that the Court would not apply § 1738.").

235. 688 F.2d at 166.

236. *Id.* at 168.

237. *Id.* at 168-69.

1981 action in federal district court.²³⁸ The district court denied U.S. Steel's *res judicata* motion, and, based principally on the Pittsburgh agency's administrative record,²³⁹ decided U.S. Steel had violated section 1981 by discriminatorily discharging plaintiff. Upon affirmance of that decision by a panel, the Third Circuit granted *en banc* review.²⁴⁰

Thus in at least five hearings relating to the merits of her complaint, only one tribunal rejected Ms. Davis' proof that U.S. Steel had discriminated against her on the basis of her race. Nor did that court decide that U.S. Steel had *not* discriminated against Ms. Davis; merely, that the administrative record failed to demonstrate that it had.²⁴¹ Nonetheless, the full panel of the court of appeals held Ms. Davis' section 1981 claim to be barred.²⁴² The court found *Kremer* controlling, and was unimpressed by the relevance of Ms. Davis' involuntary status before the one proceeding that rejected her proof.²⁴³

The Court's approach to administrative preclusion in federal civil rights litigation, even concerning voluntary litigants, disserves Congress' intent

238. *Id.* at 169.

239. The parties stipulated to a decision based on the record, with some supplementation. *Id.* at 170.

240. *Id.*

241. *See id.* at 185 (Gibbons, J., dissenting).

242. The court found that Pennsylvania courts would preclude Ms. Davis' claim, and that § 1981 created no exception to § 1738. *Id.* at 170-77.

243. *Id.* at 177. Judge Garth contributed a reluctant concurrence, stating that he was forced to agree that *Kremer* left the court with no alternative. Although he always believed that Congress intended to provide victims of discrimination with a federal fact-finding forum, *Kremer* had rejected that notion, *id.*, and the Court had drawn no distinction between cases in which the plaintiff was the one to take the case into the state courts, and cases in which a losing defendant did so:

Justice White, writing for the *Kremer* Court, must have been aware of Justice Blackmun's dissenting observation, the thrust of which was that *res judicata* should not apply where the *plaintiff* had not sought judicial review of the administrative action but had rather been forced into a state forum by the defendant. . . . [T]he Supreme Court has clearly indicated that no such distinction can avoid the *res judicata* bar. Thus, at least to me, it is now evident that § 1738 bars a federal proceeding which seeks to litigate the same discriminatory actions adjudicated in a prior state court proceeding, even though it was not the plaintiff who chose the state court forum.

Id. at 178 (citations omitted); *accord* Gonsalves v. Alpine Country Club, 727 F.2d 27, 29 (1st Cir. 1984) (*Kremer* rationale applies to state court reversal of administrative determination favorable to plaintiff). *But see* Davis, 688 F.2d at 188-89 (Gibbons, J., dissenting) (recognizing issue preclusion when complainant chooses state court review, but not when it is sought by respondent, is reasonable accommodation between need for finality and civil rights policies); Smith, *supra* note 28, at 80-81:

Kremer's and *Migra's* description of section 1738 as a strict mandate to apply the issuing state's law is contrary to a substantial body of precedent. Therefore, the Court's opinion should not be interpreted as an implied rejection of similar flexibility in the application of section 1738 to civil rights cases in which the party precluded has not had a chance to exercise the choice of forum that sections 1983 and 1343 were intended to guarantee.

Id.

that an aggrieved party have a federal forum for adjudicating a federal claim. The Court's failure to distinguish between civil rights victims who have voluntarily placed their case before a state court, such as Mr. Kremer, and those who have not, such as Ms. Davis, further erodes Congress' purpose in passing the civil rights laws.²⁴⁴ If every time a defendant who lost before a state agency sought state court review, the only Title VII cases originally adjudicated by a state agency that would end up in federal court would be those in which the state agency entirely rejected the employment discrimination claim.²⁴⁵ Admittedly, it would be a strained interpretation of section 1738 which would allow one result in the case of the voluntary litigant and another in the case of the involuntary litigant.²⁴⁶ But this hardly proves that the result in *Davis* was correct; rather it underscores the deficiencies in the Court's application of section 1738 to limited state court review of state agency determinations.

The preceding discussion has focused almost exclusively on state agency proceedings in which losing defendants sought state court review, and thus the Court's interpretation of section 1738 controlled. The situation will likely arise in the future where the Court must consider the application of its *Elliott* rule of common law preclusion to a plaintiff who was involuntarily haled before an administrative agency.²⁴⁷ The Court may respond no differently than it did in *Elliott*, by fashioning a rule which would incorporate the *Utah Construction* dicta and the state's own rules of preclusion.²⁴⁸ Yet here, too, the application of preclusion to bar from federal court one who voluntarily submits to an agency's processes is, along the continuum of injustice, less extreme than the application of preclusion to bar one who

244. See *Davis*, 688 F.2d at 179 (Gibbons, J., dissenting) ("[A] review of the procedural history of this unfortunate lawsuit will serve as a case study in the ability of determined defendants to use the judicial process to delay and eventually deny accountability for discrimination.").

245. See *id.* at 189. This is assuming, of course, that state courts would afford preclusive effect to the agency's decision. In order to avoid such consequences, the Title VII plaintiff would have to insure that as soon as the statutory waiting period had run, see *supra* notes 215-27 and accompanying text, she would abandon the administrative proceedings and file her claim in federal court.

246. Compare *Mann*, *supra* note 46, at 457 ("The rule articulated in *Kremer* also creates the possibility that defendant, rather than plaintiff, can determine whether plaintiff will be allowed a trial de novo in federal court.") with *Catania*, *supra* note 176, at 212, 264 (arguing that *Kremer* would not be so bad as long as it is not extended to preclude complainants who did not affirmatively seek state court redress, since Congress provided Title VII complainants with a statutory right to a trial de novo of their Title VII claims).

247. See, e.g., *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985) (plaintiff's § 1983 claim for false arrest barred by probable cause determination in administrative license revocation proceedings in which he was defendant).

248. In fact, Mr. Elliott's own situation was not far removed; he could have chosen to leave quietly and not seek a hearing on his termination. Yet in a state disciplinary proceeding an employee is much like an involuntary litigant, because *not* seeking agency review will result in the loss of employment or other sanction.

had no choice, and thus no opportunity for a "day in court" on his federal claim.²⁴⁹

E. Related vs. Unrelated Agency Proceedings

Some agency proceedings are part and parcel of the federal civil rights enforcement scheme. Proceedings before the EEOC, or designated state and local fair employment agencies, are part of the fabric of Title VII, part of the congressional scheme. Proceedings before the Office for Civil Rights, or before other civil rights enforcement arms of federal funding agencies are components of Congress' overall purpose in enacting Titles VI, IX and section 504. Should the determinations that these agencies make—all other factors being equal—be accorded greater, lesser or the same preclusive effect as determinations made by agencies *unrelated* to these enforcement schemes?

In *Elliott*, the factual determination at issue—whether Elliott was dismissed for reasons having to do with his race—was made in the context of a state disciplinary proceeding.²⁵⁰ In fact, the hearing examiner disavowed any authority to adjudicate Elliott's federal civil rights claims but allowed him to produce evidence of discrimination as an affirmative defense.²⁵¹ The hearing examiner's findings included a determination that Elliott had failed to prove that his firing was racially motivated.²⁵² It was this factual determination that the Court said could not be accorded preclusive effect on a Title VII claim, but could—perhaps must—on a section 1983 claim, if the state's own courts would do so.

In *Elliott*, the Court did not discuss whether it mattered that the factual determination was rendered in an administrative disciplinary proceeding, rather than by a state fair employment agency. It is, I believe, a legitimate inference that the Court believed any such distinction irrelevant.²⁵³

249. The considerations here are similar to the unfairness that would result if one who was required to exhaust administrative remedies were then deprived court review. See *supra* notes 215-27 and accompanying text.

250. *Elliott*, 478 U.S. at 790.

251. *Id.* at 791.

252. *Id.*

253. Some lower courts have afforded preclusion regardless of the lack of schematic relationship between the agency determination and the federal claim. See, e.g., *Zanghi*, 752 F.2d at 46 (determination by license revocation board that defendant police department and its agents had probable cause to arrest plaintiff for drunken driving precluded redetermination of issue in § 1983 action for false arrest). Others have refused to apply administrative preclusion in federal discrimination claims regardless of the relationship. See, e.g., *Rosenfeld v. Department of the Army*, 769 F.2d 237, 239 (4th Cir. 1985) ("Whether the prior administrative findings be those of the Civil Service Commission, the EEOC, or any other federal agency is immaterial. . . . Congress entrusted the ultimate resolution of discrimination to the federal judiciary."). Interestingly, the states that filed an amicus brief in *Elliott* urged that the Court afford preclusion to the factual findings of state agencies created to satisfy the dictates of the federal due process clause, while seeming to concede that the same treatment would not be

Arguably, however, courts should show a greater willingness to afford preclusive effect to determinations made by agencies with some particular civil rights expertise. If an agency regularly makes such determinations, then its findings appropriately might carry more probative weight than similar findings by agencies whose principle business lies elsewhere. Preclusion, and deference generally, is less appropriate when the agency in question has no particular expertise.²⁵⁴

The Supreme Court has struggled to identify the kind of proof that will support an inference of intentional racial discrimination.²⁵⁵ Lower federal courts have struggled to follow its leadership.²⁵⁶ How much weight, then, should a court give a determination made by a state disciplinary board, or unemployment compensation board, as to whether an elusive motivation like racial animosity informed an employment decision? Understandably, from time to time agencies must make such factual determinations for purposes of the particular administrative schemes they enforce. But the probative value of those determinations will vary greatly from one factual scenario to another, from one bureaucratic decisionmaker to another. Prohibiting the reexamination of such a determination in a collateral action filed to enforce federal nondiscrimination obligations, or remedy civil rights violations, is far too extreme and costly an approach, even to protect

accorded factual determinations made by state fair employment agencies. *See Elliott*, States' Amicus Brief, *supra* note 186, at 4. Their reasoning was that the Supreme Court should not require such due process hearings on one hand, and on the other allow federal courts to upend the decisions of such agencies by ignoring their determinations in collateral litigation. *Id.* at 11-12.

254. Some circuit courts have agreed. *See, e.g., Delgado*, 815 F.2d at 646 (Unreviewed unemployment compensation proceeding's determination that plaintiff was discharged for violating employer's policies did not preclude relitigation of age discrimination claim. "[W]e find it unnecessary to determine whether the findings of a state administrative agency should be denied preclusive effect in all cases because the findings at issue here are not the result of proceedings before a state agency charged with the enforcement of state age discrimination laws.") *reh'g denied*, 820 F.2d 1231 (11th Cir. 1987); *cf. Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1283 (9th Cir. 1986) (inadequate opportunity to litigate age discrimination claims before unemployment compensation board).

These agencies must make other factual determinations for which they arguably have the requisite expertise, such as whether or not Elliott violated any school policies. These determinations may be worthy of greater deference in a collateral proceeding. *See infra* notes 346-92 and accompanying text.

255. *See, e.g., Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (foreseeability alone not sufficient to establish intentional discrimination; action must have been taken because of, not in spite of, its consequences); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-68 (1977) (identifying factors such as historical context, sequence of events and legislative or administrative history as relevant to finding of intentional discrimination); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (discriminatory impact relevant to, but not conclusive of, determination of intentional discrimination).

256. *See, e.g., U.S. v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221-35 (2d Cir. 1987) (affirming district court's evidentiary findings of segregative intent in city's housing and schools), *cert. denied*, 486 U.S. 1055 (1988).

legitimate state interests in preventing federal courts from ignoring the determinations of state agencies.

F. State vs. Federal Administrative Proceedings

One other variable warrants mention: the effect on administrative preclusion doctrine when the first determination is made by a federal rather than state agency. None of the civil rights preclusion cases that have reached the Supreme Court as yet have involved dispositions made by federal administrative agencies.²⁵⁷ *Elliott* is limited to the preclusive effect of unreviewed state agency determinations. At least two things are clear when the agency is federal: Section 1738 is inapplicable, and concerns regarding federalism and comity are irrelevant to consideration of the preclusion question. It is also clear from the Court's decisions in *Kremer* and *Elliott* that a determination by the EEOC will have no preclusive effect on a subsequent Title VII claim in federal court. But what about a determination by the Office for Civil Rights, or the Civil Service Commission, on a subsequent section 1983 claim? Will the Court automatically fall back on its *Utah Construction* dicta, or will it hold the line on the erosion of federal civil rights? The Court has the opportunity to limit its application of preclusion to state agency determinations and not expand it to those of federal agencies. Although I believe the distinction would be artificial,²⁵⁸ nonetheless it is preferable to any further expansion of preclusion doctrine to the determinations of federal agencies. Liberated from section 1738 and concerns of federalism and comity, the Court will, I hope, adopt a presumption *against* preclusion.

IV. THE ELEMENTS OF PROPER PRECLUSION

A. Process, Counsel and Informed Choices

1. Preclusion, Process and the *Restatement*

The *Restatement (Second) of Judgments* adopts in large measure the *Utah Construction* approach to administrative preclusion.²⁵⁹ Even within the

257. I have discovered few lower court cases in which this issue arises. See *Nasem v. Brown*, 595 F.2d 801, 802 (D.C. Cir. 1979) (holding that pro-federal employee decision by Civil Service Commission on retaliation charge not given preclusive effect in Title VII action because first decision lacked procedural safeguards sufficient to satisfy *Utah Construction* criteria). But cf. *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 638 (2d Cir. 1989) (concluding, with little analysis, that Department of Labor ALJ's finding of no harassment or retaliation for filing of whistleblower complaint with Nuclear Regulatory Commission to be *res judicata* based on *Utah Construction* criteria).

258. See *infra* notes 323-31 (similarity of federal and state interests in preclusion).

259. RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982): Adjudicative Determination by

Restatement's own exceptions, however, one may discern reasoning for eschewing the application of preclusion that would foreclose adjudication of federal civil rights claims. The *Restatement's* invocation might be characterized as follows: If the agency's procedures and mission are substantially equivalent to that of a court, then the agency's determinations should be treated like a court's determinations for purposes of preclusion.²⁶⁰ The problem with this is that an agency's procedures and mission are too often *not* the same as those of a court. While administrative proceedings run the gamut from the least to the most formal, they are seldom the equivalent of judicial proceedings. The administrative proceeding which formed the basis for preclusion in *Kremer*, for example, was only an investigation to determine whether probable cause to go forward existed.²⁶¹ Mr. Kremer never received a hearing on his claim. In *Elliott*, the hearing, while extensive and adversarial, was held before an employee of one of the defendants,²⁶² hardly an impartial factfinder. Even as to formal hearings under the

Administrative Tribunal

(1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication . . . ;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

. . . .

(e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions

Id.

260. See RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b:

Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure *substantially similar* to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality *approximates* those of courts may properly be accorded the conclusiveness that attaches to judicial judgments.

Id. (emphasis added). The comments cite the Administrative Procedure Act and Model State Administrative Procedure Act provisions as examples of procedures adequate to afford preclusive effect. *Id.* at comment c. *But see* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.9 at 78 (2d ed. 1983). Professor Davis embraces the "rhyme, reason and rhythm" of *res judicata* and concludes that it should apply to administrative adjudications just as it does to judicial ones, regardless of whether a litigant has had an opportunity to rebut evidence and argument by opposing parties. He thus goes further than the *Restatement (Second) of Judgments*, and fails to discuss any countervailing considerations in distinctions between administrative and judicial processes, or the relevance of a particular statutory scheme to such an analysis.

261. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 464 (1982).

262. *University of Tenn. v. Elliott*, 478 U.S. 788, 791 (1986).

Administrative Procedure Act²⁶³ or the Model State Administrative Procedure Act, hearsay is freely admissible, little if any pre-hearing discovery is available to the parties, and there may be no compulsory subpoena power.²⁶⁴ And while many state procedures may look relatively good in print, the reality of what transpires at such hearings makes application of preclusion principles to their determinations inappropriate.²⁶⁵ These and other differences between judicial and agency decisionmaking make the application of judicial-type rules of preclusion to agency determinations exceedingly problematic, especially as they affect the rights of civil rights litigants. Consequently, while *Elliott* and many lower court cases have embraced the *Utah Construction* dicta, far fewer courts have actually scrutinized the agencies' procedures and found the application of preclusion appropriate in subsequent civil rights litigation.²⁶⁶

263. U.S.C. §§ 551-599, 701-706 (1988).

264. See, e.g., *Boykins v. Ambridge Area School Dist.*, 621 F.2d 75, 79 (3d Cir. 1980) (noting that Pennsylvania had narrowly circumscribed discovery tools available in Human Relations Commission proceedings); Perschbacher, *supra* note 13, at 452-53 (agency procedures, including those of the APA, not equivalent of judicial procedures); The Committee on Labor and Employment Law of the Association of the Bar of the City of New York, *Unemployment Insurance Decisions and the Doctrine of Collateral Estoppel*, 40 THE RECORD 738, 742 (1985) (hereinafter *N.Y. Bar Committee Report*) (New York State's Unemployment Compensation hearings lack "opportunity for parties to seek information, prepare witnesses or gather other evidence for presentation. . . . [T]here is no provision for pre-hearing access to information from one's adversary or a third party. . . . Nor, as a practical matter, can parties effectively subpoena information. . . .").

265. See *N.Y. Bar Committee Report*, *supra* note 264, at 740-41 ("Given the large number of cases in the system and the relatively small number of [ALJ's] available to try these contested matters, the regulatory demand for prompt determinations has resulted in hearings that are brief, if not perfunctory."). In 1984, 52,000 cases were heard and decided by about 40 ALJ's, meaning each ALJ was responsible for 1300 cases.

The average hearing lasts from twenty to forty minutes. Significantly, the judges not only try but render decisions in each of these half-dozen cases per day. In practice, a judge has less than one hour to acquaint him or herself with the file, take all testimony, hear argument, research any cases cited by the parties and write the decision.

Id.; Resnik, *supra* note 12, at 620 ("Investigations of agencies, such as the New York Human Rights Division and the Social Security Administration, reveal inadequate processes, erratic decisionmaking, lack of resources, and administrative malfunctioning.").

266. See, e.g., *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1283-84 (9th Cir. 1986) (Unemployment Insurance Appeals Board decision not entitled to preclusive effect in age discrimination suit because parties lacked adequate opportunity to litigate factual issues relevant to latter claim); *Gargiul v. Tompkins*, 704 F.2d 661 (2d Cir. 1983), *vacated*, 465 U.S. 1016 (1984), *rev'd on other grounds*, 739 F.2d 34 (1984) (no preclusion in § 1983 action because hearing before Commissioner of Education was not adversarial); *Anderson v. Babb*, 632 F.2d 300, 306 n.3 (4th Cir. 1980) (no preclusion in litigation challenging election procedures where state agency factfinder was not neutral); *Nasem v. Brown*, 595 F.2d 801 (D.C. Cir. 1979) (inadequate procedural safeguards, particularly absence of live witness testimony); *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1422-23 (E.D.N.Y. 1984) (employer not bound by factual findings made in unemployment compensation hearing because of certain procedural irregularities in those proceedings); *Lykes Bros. S.S. Co. v. General Dynamics Corp.*, 512 F. Supp. 1266, 1269 (D. Mass. 1981) (limited ability to discover and present evidence; interested

2. Preclusion, Process and Sophistication

Litigants who appear before agencies that regulate the economy, or adjudicate commercial disputes, like the Bituminous Coal Commission in 1940,²⁶⁷ or the Federal Board of Contract Appeals in 1966,²⁶⁸ or the Commodities Exchange Commission today,²⁶⁹ generally have the resources and sophistication to insure that they protect their interests. Applying preclusion to the determinations of such agencies under *Restatement*-like criteria is therefore far less unsettling than when courts apply preclusion to determinations made by agencies adjudicating disputes involving unsophisticated disputants like Rubin Kremer and Robert Elliott.²⁷⁰ In fact, given the tenor of the commentary to the *Restatement*, one might doubt whether its drafters ever anticipated that the Supreme Court would apply administrative preclusion to the unreviewed determinations of agencies in subsequent federal civil rights litigation.²⁷¹

tribunal); Perschbacher, *supra* note 13, at 458; Mann, *supra* note 46, at 441-45; cf. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985) (NYS Dept. of Environmental Conservation's procedures deficient for purposes of Clean Water Act preclusion of citizen suit); *Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1138-39 (3d Cir. 1985) (EPA's informal enforcement procedure lacking in procedural safeguards and right of intervention available in federal court suit under Clean Water Act); *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 217-19 (3d Cir. 1979) (Pennsylvania's Hearing Board procedures deficient; intervention as of right not allowed citizens). *But see, e.g., Nelson v. Jefferson County, Ky.*, 863 F.2d 18, 20 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 76 (1989) (precluding § 1983 suit based on Police Merit Board's upholding of plaintiff's discharge because Kentucky would apply preclusive effect to the determination); *Long v. Laramie County Community College Dist.*, 840 F.2d 743, 749, 751 (10th Cir. 1988) (finding *Utah Construction* criteria satisfied despite finding by district court that agency's findings "were based on plaintiff's version of the facts, unsubstantiated an[d] uncorroborated by any witnesses before the court."); *Gear v. City of Des Moines*, 514 F. Supp. 1218, 1224 (S.D. Iowa 1981) (applying issue preclusive effect to state unemployment compensation hearing determination in subsequent §§ 1983 and 1985 claims, finding *Utah Construction* criteria satisfied); cf. *Bowen v. United States*, 570 F.2d 1311, 1321-22 (7th Cir. 1978) (*Utah Construction* dictates preclusion in Federal Tort Claim Act suit based on finding of National Transportation Safety Board even though hearsay admissible and discovery opportunities limited in administrative process where plaintiff unable to demonstrate actual prejudice).

267. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (discussed *supra* note 18 and accompanying text).

268. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) (discussed *supra* note 21 and accompanying text).

269. Cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849-50 (1986) (holding no article III violation when litigant knowingly chose more expeditious, less expensive CFTC adjudication over litigation in article III court).

270. See *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1306 (8th Cir. 1988) (distinguishing commercial from civil rights disputes in terms of mandatory arbitration and preclusion); cf. *Benjamin v. Traffic Executive Ass'n E. R.R.*, 869 F.2d 107, 113 (2d Cir. 1989) (distinguishing application of issue preclusion to arbitrator's determination of whether railroad employees were rate bureau employees for purposes of Staggers Act from arbitral preclusion in federal civil rights claim).

271. See RESTATEMENT (SECOND) OF JUDGMENTS § 83 comments a-i (1982). The comments illustrate a variety of situations in which preclusion might be appropriate, and a variety in which it would not. None of the former involved civil rights claims; several of the latter did.

First, discrimination complainants are individuals, not corporations. Second, they tend to be individuals on the lower rungs of the social and economic ladder. Third, they are generally *not* represented by counsel during their administrative hearings. All of this means that they are in a weak position to protect their long-term interests in the context of administrative proceedings, and unlikely to know of their rights.²⁷² Explaining preclusion doctrine to those versed in the law is a formidable challenge; how can we expect unrepresented litigants to understand it and its consequences? When Rubin Kremer sought state court review of the adverse agency determination, he was simply doing what he thought he was supposed to do.²⁷³ When the Supreme Court subsequently informed Mr. Kremer that because he sought state court review he could no longer bring his Title VII suit in federal court, was he able to understand why? Although adequacy of process is the point of departure, courts should be concerned as well with litigants' ability to comprehend the preclusive consequences of their choices.²⁷⁴ If litigants have difficulty understanding why the law prevents them from litigating their claims, their respect for the law and the courts in general may diminish.²⁷⁵

3. Preclusion, Process and Bureaucracy

Regardless of whether litigants are aware of the potential preclusive consequences of their choices, applying preclusion to agency determinations

272. See Mann, *supra* note 46, at 411 ("Congress conceived of Title VII as a tool to be used by unschooled litigants, a right of action to ensure that complaints of invidious discrimination could be heard fairly and expeditiously."); *id.* at 451 (Kremer lacked incentive to litigate fully at state level due to ignorance of possible subsequent preclusive effect of state court determination); Braveman & Goldsmith, *Rules of Preclusion and Challenges to Official Action: An Essay on Finality, Fairness, and Federalism*, 39 SYRACUSE L. REV. 599, 625 (1988) (noting that although litigants may be aware of their administrative remedies, they are not aware of rules of preclusion, and may not consult attorney until conclusion of administrative proceedings).

273. See Mann, *supra* note 46, at 452 (arguing that Kremer only appealed to state court because his right to do so was set forth on notice attached to administrative decision).

274. See *Kremer*, 456 U.S. at 506 (Blackmun, J., dissenting) ("The Court has . . . constructed a rule that will serve as a trap for the unwary *pro se* or poorly represented complainant."); *Evans v. Syracuse City School Dist.*, 704 F.2d 44, 47 (2d Cir. 1983) (refusing to apply *Kremer* holding to *pro se* plaintiff who was unaware of consequences of seeking state court review); see also Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 350 (1978) (suggesting that claim preclusion should not apply to bar constitutional claim not raised in prior state proceeding, especially when litigant lacked counsel); *N.Y. Committee Bar Report*, *supra* note 264, at 743 (arguing against preclusive effect of unemployment compensation hearings because, in part, applicants are unaware of possible preclusive effects of such determinations on subsequent proceedings). But see Mann, *supra* note 46, at 461 n.315 and accompanying text (citing cases in which courts held *pro se* litigants barred from subsequent federal discrimination claim based on state court review of administrative determinations).

275. See *Kremer v. Chemical Constr. Co.*, 477 F. Supp. 587, 593-94 ("Whatever increase is attained in judicial efficiency through finalizing state court decisions is likely to be at the expense of these [uninformed *pro se*] plaintiffs who will not know they should avoid our sister courts."), *aff'd*, 623 F.2d 786 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

is troubling because of the institutional and political realities of administrative government. What agencies do when they adjudicate cannot be divorced from what they do the rest of the time. Unlike courts, most agencies combine a variety of quasi-judicial, quasi-legislative and executive functions.²⁷⁶ Unlike courts, agencies use adjudications to further agency policy and goals.²⁷⁷ Thus their determinations may be shaped by the development of overarching policy concerns at the expense of individual justice.

In addition, pragmatic concerns may interfere with the ability of administrative agencies to render decisions and make findings that merit preclusive effect. Foremost among these is the need for an administrative adjudicator to get through the day, the week, and the month. Given staggering caseloads the quality of such adjudications, despite the best of intentions, must inevitably suffer. Budgetary constraints may impair the ability of an agency to deliver all the process that is due.²⁷⁸ It is highly problematic for a court to afford preclusive effect, for example, to the determinations of an Unemployment Compensation Board hearing officer who has "less than one hour to acquaint him or herself with the file, take all testimony, hear argument, research any cases cited by the parties *and* write the decision."²⁷⁹

This is the reality of mass justice afforded in schemes like Workers' Compensation. It is also to a large extent deliberate. Workers' Compensation proceedings are designed to offer quick solutions to emergency situations. They are not forums for litigation of all the rights and responsibilities arising out of a particular transaction or occurrence. Even if feasible, it would run counter to the intent and capabilities of such proceedings were litigants to litigate "to the hilt" in order to protect against the subsequent preclusive effects of adverse determinations.

Another consequence of the mixture of functions within an administrative agency is that specialization by factfinders—even those couched in a cloak of impartiality—may lead to institutional biases that influence the outcome of particular adjudications. For example, the hearing examiner in *Elliott* was an employee of one of the defendants in Elliott's federal suit. This is by no means an unusual situation in the typical due process hearing afforded discharged employees. The Court, faced with comparable situations involving a combination of functions within an agency, has held that given the realities of the limitations of state and local agencies, this alone does not

276. See S. BREYER & R. STEWART, *supra* note 35, at 569.

277. See Perschbacher, *supra* note 13, at 452, 454 (noting inappropriateness of applying collateral estoppel to agency determinations because, *inter alia*, resolution of agency disputes may be biased by agency's particular policies and combination of functions within agency).

278. See Resnik, *supra* note 229, at 978 n.660 (citing to state bar report finding that agency in *Kremer* case—New York State Division of Human Rights—was unsatisfactorily discharging its obligations due to inadequate budget).

279. See *N.Y. Bar Committee Report*, *supra* note 264, at 741.

violate due process in the absence of *explicit* demonstration of bias.²⁸⁰ However, the same considerations do not mandate that preclusion be afforded the determinations of such agencies. While the cost to a state or local agency of having to hire a non-employee decisionmaker to hear due process claims might well outweigh the benefits of having such an extra safeguard against bias, no such heavy cost would pertain were the Court's administrative preclusion rule discarded.

Additionally, there is cause for concern about institutional competence when bureaucrats make determinations that are binding on courts, especially when agency personnel who do not routinely enforce civil rights laws—the scenario in *Elliott*, for example—are the ones making such determinations.²⁸¹ While judges may differ widely in ability, their occupations at least presume some basic competence in deciding cases. No such presumption attaches to an agency employee who, as one of many obligations, presides over adjudicatory hearings. And even as to those bureaucrats who specialize as administrative law judges or hearing examiners, competence in deciding areas within their sphere of presumed expertise does not translate into competence in deciding questions outside that sphere.²⁸² Expertise in determining whether an employee was fired for cause does not equate with expertise in adjudicating racial discrimination.²⁸³

One might dispute the relevance to the preclusion analysis of any one of these distinctions between the bureaucrat and the judge. After all, one might argue, elected judges for fixed terms may not be as free of political biases as judges appointed for life; on the whole, federal judges may be more capable of adjudicating discrimination claims than state judges. Nonetheless preclusion and full faith and credit apply to the determinations of all. It is, however, the sum of the distinctions between most court judges and most administrative judges—the pressures on the latter to render hundreds of decisions in a fraction of the time most court judges have, the multiplicity of functions performed by the bureaucratic decisionmaker and the limited nature of his expertise—that is significant. All of these factors, although of varying significance depending on the circumstances, undermine the desirability of a general presumption of administrative preclusion.

280. See, e.g., *Winthrow v. Larkin*, 421 U.S. 35, 52 (1975) (combination of investigative and adjudicative functions within state licensing board does not *per se* violate due process); cf. *Shweicker v. McClure*, 456 U.S. 188, 197 (1982) (private insurance carrier employee could serve as hearing officer on employer's denial of medicare claim).

281. Cf. *Carlisle*, *supra* note 192, at 94 (“[W]hen courts make these issue determinations decisive in an administrative or arbitral forum, they surrender their authority to a hidden judiciary. An independent judiciary may be compromised when its authority is diffused and re-allocated under the banner of conserving resources and reducing caseloads.”).

282. Cf. *McDonald v. City of W. Branch*, 466 U.S. 284, 290 (1984) (noting that unlike that of court, arbitrator's expertise pertains to law of the shop, not law of the land).

283. See *supra* notes 250-56 and accompanying text.

The *Kremer* case suggests a distinct although obviously related aspect of the problem of administrative preclusion. As discussed previously, the administrative "hearing" afforded Mr. Kremer did not meet the *Restatement* criteria; Mr. Kremer's complaint was dismissed pursuant to the agency's investigative determination that probable cause was lacking. Preclusion was based not on the administrative determination itself, but on the application of section 1738 to the state court review of that determination. The bottom line in *Kremer*, nonetheless, was that Kremer was barred from having any court hear his Title VII claim *de novo*, despite the explicit provision in Title VII for such a right²⁸⁴ and despite the fact that he never had *any* adjudicatory hearing on his claim. Judicial review of administrative determinations is generally quite limited in scope. Applying preclusion pursuant to section 1738 to such limited review of a purely investigative, as opposed to adjudicatory, determination is not justifiable under *Restatement* criteria at all. Despite the *Kremer* majority's opinion that the process accorded Mr. Kremer satisfied the minimum procedural requirements of the due process clause,²⁸⁵ any justification for applying preclusion must be distinct from any confidence that the precluded litigant has had the kind of full and fair airing of his claim that would comport with traditional notions of due process.²⁸⁶ The *Kremer* majority suggested—without expounding—that were section 1738 not applicable, the requirements for "a full and fair opportunity to litigate" might well exceed those it concludes constitute the "minimum procedural requirements" of the due process clause.²⁸⁷

Although I argue in Part V that the Court has taken a misguided route in its construction of section 1738, the battle for judicial revision of the

284. See Resnik, *supra* note 12, at 620-21 ("The redundancy built into schemes like title VII was not accidental. . . . The designers . . . were concerned—in my view, understandably—about vesting sole factfinding authority in state agency decisionmakers.").

285. *Kremer*, 456 U.S. at 483-85; see Mann, *supra* note 46, at 436 ("The Court [in *Kremer*] . . . simply recoiled from labeling the state proceedings constitutionally infirm and reasoned backward from that reaction.").

286. See Mann, *supra* note 46, at 431 ("The standards enunciated in *Kremer* represent a significant retreat from even minimal guarantees of procedural fairness."); *id.* at 438, 444-45 (arguing that denial of Kremer's right to press Title VII claim in federal court constituted denial of due process).

287. See *Kremer*, 456 U.S. at 481:

Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the . . . Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.

Id. But see *id.* at 483 n.24 ("The Court's decisions enforcing the Full Faith and Credit Clause of the Constitution . . . suggest that what a full and fair opportunity to litigate entails is the procedural requirements of due process." (citations omitted)); see also *Gore v. R.H. Macy & Co.*, 52 Empl. Prac. Dec. (CCH) ¶ 39,509 (defendant did not have full and fair opportunity to litigate in administrative forum, but rejecting defendant's claim that it was denied due process).

Court's construction of section 1738 may well be over. Arguably, the Court is not yet similarly entrenched in its view of the preclusive effect of unreviewed agency determinations. I have argued that as a class, agency proceedings do not afford the kind of "full and fair opportunity to litigate" which has formed the bedrock of preclusion doctrine. But the range of administrative decisionmaking mechanisms comprises numerous procedural subclasses and the Court has yet to give sufficient guidance as to which of these it believes fall within, and which without, the "full and fair opportunity to litigate."²⁸⁸ In *Elliott*, the Court avoided the factual inquiry into whether the state administrative hearing at issue in that case would constitute a full and fair opportunity to litigate. The question was left for the lower courts on remand.²⁸⁹ We can presume that the kind of investigatory determination made in *Kremer*, had it not been reviewed by a state court, would clearly fall without. If so, it must be that in the case of judicially reviewed agency determinations, minimum standards of due process as the Court understands them can be satisfied by less than a full and fair opportunity to litigate, but that administrative preclusion, under *Elliott*, will only apply when process beyond such minimum standards, process constituting a full and fair opportunity to litigate, has in fact been afforded. The Court appears to mean less than equivalency to judicial processes, or, as explicated above, there would be little practical application to the theory of administrative preclusion since few, if any, administrative adjudications are in fact the equivalent of judicial adjudications. Perhaps it is presumptuous to assume the Court, in advance of a specific case or controversy, had any specific intent as to what would constitute a "full and fair opportunity" to litigate before an administrative forum. We—and the Court—may find some guidance in the Court's own analysis in another area of preclusion law.

B. The Parklane Criteria

In 1979, in *Parklane Hosiery Co. v. Shore*,²⁹⁰ the Court determined under which circumstances federal courts appropriately might apply offensive collateral estoppel so as to preclude a defendant from relitigating issues it had lost in prior litigation against a party other than the plaintiff.²⁹¹ While

288. See *supra* note 155.

289. *Elliott*, 478 U.S. at 799 n.8.

290. 439 U.S. 322 (1979).

291. The facts of *Parklane* are incidental to the Court's discussion of the applicability of offensive collateral estoppel. The defendant had lost a suit brought by the Securities and Exchange Commission alleging that the defendant had issued false and misleading proxy statements in violation of the Securities and Exchange Act. Shore brought a stockholder's class action in which he sought partial summary judgment, seeking to estop Parklane from relitigating the proxy statement issue. The district court denied the motion for partial summary judgment, and the court of appeals reversed. *Id.* at 324-25. The Supreme Court affirmed the court of appeals, holding that estoppel should have been applied, despite the opportunity for a jury trial in Shore's damage action which was unavailable in the SEC's action brought for equitable relief. *Id.* at 332-33, 335-37.

administrative preclusion was not at issue, some of the criteria the Court identified in this context bear on the legitimacy of administrative preclusion. The Court's principle focus in *Parklane* was fairness to the party—in this case the defendant—against whom preclusion was asserted.²⁹² Did the defendant have incentive to litigate the first case vigorously? Were future actions foreseeable? Was the judgment relied upon inconsistent with one or more previous judgments in favor of the defendant? Were procedural opportunities in the second action available that were lacking in the prior action that might have affected the result?²⁹³

Were the Supreme Court to deem this the relevant inquiry for the application of administrative preclusion in a federal civil rights action, seldom would the courts apply preclusion. The kind of foreseeability that the Court contemplated in *Parklane* presumes a sophistication and ability to make informed choices rarely applicable to the civil rights plaintiff who has submitted some prior claim to an administrative agency. Since an unrepresented—or underrepresented—claimant would be unlikely to anticipate the binding effect of the agency's determination in subsequent litigation, he would frequently lack incentive, and perhaps ability, to litigate vigorously. The party might never even contemplate the need to seek the advice of counsel. In many instances, a claimant would not be able to afford counsel even if he realized counsel's value. A worker's compensation applicant, for example, is unlikely to anticipate the effect of that adjudication on any subsequent claim, and even if he did, would have little ability to do anything about it. The interests of neither society nor the individual worker would be served by having that individual forfeit application for such benefits solely to preserve the opportunity to subsequently bring a civil rights claim.²⁹⁴

Furthermore, the *Parklane* Court specifically recognized the absence of an opportunity to engage in "full scale discovery" in the first action as the kind of procedural disparity that would make the application of preclusion inappropriate. In fact, the Court said in *Parklane* that "[i]ndeed, differences in available procedures may sometimes justify not allowing a prior judgment

292. *Id.* at 330-31. The Court also voiced concern about the possibility that plaintiffs would adopt a wait-and-see attitude if offensive preclusion were freely applied. *Id.* at 329-30.

293. *Id.* at 330-31; see RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (articulating reasons for not applying issue preclusion consistent with Court's *Parklane* criteria).

294. Commentary to the *Restatement* suggests a similar result. To preserve the value of expedient administrative relief under schemes like worker's compensation, the commentators recognized the need to "confine the stakes to the matter immediately in controversy. Thus issue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in anticipation of its effect in another proceeding." RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment h (1982); see also *id.* at § 28 comment d (preclusion may be inappropriate as to decisions of courts designed for speedy, inexpensive determinations of small claims).

to have estoppel effect in a subsequent action even between the same parties. . . .²⁹⁵

In upholding the application of offensive collateral estoppel under the facts of that case, the *Parklane* holding is consistent with other recent Supreme Court cases expanding the reach of preclusion doctrine. Nonetheless, the limitations for the appropriate application of preclusion that the Court proposes in dicta could arguably minimize the effective impact of *Elliott*. If the criteria deemed applicable to offensive collateral estoppel in court-to-court adjudication are applied to the Court's test of what constitutes a "full and fair opportunity to litigate" in the administrative context, then few if any civil rights cases will be precluded by prior administrative determinations.²⁹⁶ However, the mood of cases such as *Elliott* suggests otherwise. Perhaps the difference is the Court's dedication to the spirit, rather than the letter, of section 1738—that federal courts should generally defer to state preclusion law.²⁹⁷ Perhaps the difference is a more insidious antipathy to civil rights claims.²⁹⁸ Whatever the reason, drawing such distinctions disserves both the purpose of having administrative agencies as less formal alternatives to court litigation, as well as Congress' intent in passing the civil rights laws.

C. A Word About Privity

An additional element to the "full and fair opportunity to litigate" analysis involves the identity of parties. If the parties to the administrative

295. *Parklane*, 439 U.S. at 331 n.15.

296. Courts consider whether parties had incentive to litigate their claim "to the hilt" in assessing whether the first action provided a "full and fair opportunity to litigate." See Mann, *supra* note 46, at 447 and cases cited therein. As to the Court's concern in *Parklane* about applying preclusion when there have been prior inconsistent judgments, the Court's bifurcated approach to administrative preclusion under Title VII and other civil rights statutes itself increases the possibility of inconsistent judgments, as demonstrated by the *Long* case. See *supra* notes 158-77 and accompanying text.

297. Nothing in *Parklane*, which was based on a federal claim, would require state courts to similarly limit their application of preclusion. See Mobilia, *Offensive Use of Collateral Estoppel Arising Out of Non-Judicial Proceedings*, 50 ALB. L. REV. 305, 329 (1986) (criticizing state court's application of offensive collateral estoppel given *Parklane*'s focus on how vigorously prior claim was litigated). See *infra* notes 323-30 and accompanying text for a discussion of the federalism and comity issues involved.

298. See Resnik, *supra* note 12, at 616-19 (suggesting the preclusion rules the Court has developed may reflect hostility by some members of the Court to particular substantive rights); Resnik, *supra* note 229, at 970-71 (suggesting Court failed to apply its own *Parklane* criteria to § 1983 claim in *Allen*). But see Perschbacher, *supra* note 13, at 438 (criticizing the application of preclusion to facts of *Parklane* and suggesting distinct similarities between the SEC suit in *Parklane* and administrative proceedings for purpose of preclusion analysis).

proceeding are not the same as the parties to the subsequent civil rights action, then preclusion can only apply against a party to the prior action, or someone in privity with a party to that action.²⁹⁹

Not infrequently a discrimination complainant is not actually a party to the administrative proceeding. Rather, an aggrieved person files a complaint, and the government takes over. This is, for example, the procedure followed by the Office for Civil Rights in enforcing Title VI. If OCR is unable to voluntarily resolve a violation of Title VI, it will bring administrative enforcement proceedings, or refer the case to the Department of Justice for appropriate action. A complainant may or may not be allowed to intervene in the proceedings.³⁰⁰ In evidentiary proceedings brought by the New York City Commission on Human Rights, the complainant has a right to intervene.³⁰¹ Yet unrepresented complainants generally choose not to exercise that right, in which case the Law Enforcement Bureau presents the case in support of the complaint.³⁰² If the proceedings are determined adversely to the government, will the complainant be precluded from bringing a private right of action on the same claim or issues?³⁰³ Substantial authority, including commentary to the *Restatement*, suggests not.³⁰⁴ Yet there is authority

299. See *Parklane*, 439 U.S. at 327 n.7 ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

300. Regulations provide that the complainant is not a party to any administrative proceedings, but may appear as *amicus curiae*. 34 C.F.R. § 101.23 (1988). It is not clear whether a complainant would be able to intervene as of right under Federal Rule of Civil Procedure 24 in any litigation the Department of Justice were to bring.

301. NEW YORK CITY, N.Y. CHARTER AND ADMIN. CODE § 8-109(2)(b) (1986).

302. Author's conversation with Gretchen Flint, Assoc. Legal Director, Law Enforcement Bureau, New York City Commission on Human Rights (July 17, 1989).

303. See Note, *The Binding Effect of EEOC-Initiated Actions*, 80 COLUM. L. REV. 395 (1980) (arguing that adequacy of representation is key as to whether prior suit by EEOC binds unnamed individuals in subsequent private actions). The reverse situation presents itself when EEOC brings suit against an employer following an unsuccessful action brought by an individual employee against the same employer, making similar allegations of employment discrimination. *EEOC v. Jacksonville Shipyards*, 696 F. Supp. 1438, 1441 (M.D. Fla. 1988) (no preclusive effect since EEOC was neither party nor in privity with party to prior suit). *But cf. Donovan*, 587 F. Supp. at 1420 (OSHA bound by an earlier adjudication against the complainant, even though court acknowledged that the government's aim was to benefit employees generally).

304. See RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment c (1982) ("In some types of administrative proceedings, the victim of a statutory wrong may complain to the agency but not be given initiative or control of an enforcement proceeding. In such circumstances the agency rather than the victim is the party to whom the rules of *res judicata* apply."); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1125 (7th Cir. 1987) (individual not precluded by employer victory in prior EEOC suit); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1203 (2d Cir. 1972) (individual plaintiffs not bound by prior judgment against Attorney General in favor of employer); see also *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1061 (11th Cir. 1987) (applying Alabama law, no claim preclusive effect based on state court review of state agency determination because plaintiff not allowed to intervene); cf. *Student Pub. Interest Research Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131 (3d Cir. 1985) (interpreting Clean Water Act provisions prohibiting private enforcement suit when government is diligently prosecuting related civil or criminal action inapplicable to EPA administrative enforcement action in which citizens were not afforded right to intervene).

to the contrary, that privity exists because the government is acting in the interests of the complainant.³⁰⁵

Kremer suggests that when the state agency decision has been reviewed by a state court, section 1738 requires that the federal court look to the state's privity rules. In the absence of such review, federal courts are free to apply their own rules. However, *Elliott* suggests that the Court will look to the state privity rules nonetheless. The problem with this approach is the lack of any assurance that the state rules will adequately protect the federal interests involved. At a minimum, the federal court should engage in the independent inquiry of identifying whether the government's interests in the earlier proceedings were substantially different from the federal plaintiff's interests in vindicating her statutory or constitutional rights.³⁰⁶ If the difference is substantial, then it would be inappropriate, and arguably unconstitutional,³⁰⁷ to preclude the federal claim.

The apparent simplicity of having the federal courts look to the state's own preclusion law is inadequate justification for ignoring the federal court's responsibility to insure that the prior proceeding in fact, not just on its face, constituted a "full and fair opportunity" to litigate for the party against whom preclusion is asserted. Before *Elliott*, the various federal courts demonstrated no consistent, cohesive approach assuring that they would apply administrative preclusion only in cases where preclusion was properly applied, and where the parties' rights to a hearing on their claim were adequately protected.³⁰⁸ The *Elliott* approach fares no better. It neither produces a coherent doctrine of preclusion, nor does it adequately protect competing federal or state interests in the enforcement of the civil rights laws.

305. See, e.g., *Rynsbarger v. Dairymen's Fertilizer Coop., Inc.*, 266 Cal. App. 2d 269, 72 Cal. Rptr. 102 (1968) (private nuisance suits estopped by adverse determination in public nuisance suits since private litigants deemed in privity with government representatives); EEOC Compl. Man. (CCH) ¶ 2130 (July 1986) at 2179 (whether *Kremer* would bar complainant from pursuing federal remedies after determination adverse to state agency will depend on whether state would consider complainant in privity with state agency). The EEOC takes the position, however, that if it decides to pursue such a case it would not be precluded by the determination adverse to the state agency. See *id.*

306. See *Gjellum*, 829 F.2d at 1061 ("Whatever interests the Jefferson County Personnel Board had in the proceedings before the circuit court were substantially different from Gjellum's interests in vindicating his constitutional rights."); *Jacksonville Shipyards, Inc.*, 696 F. Supp. at 1440 ("EEOC fills two roles, one as representative of the charging parties and another as guardian of the public interest"); Note, *supra* note 303, at 400 (because EEOC plays two roles, at times these interests may conflict and private interests may suffer).

307. See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940) (Illinois court violated due process by applying preclusion to determination in proceeding in which plaintiff was not adequately represented).

308. See Perschbacher, *supra* note 13, at 458 and cases cited therein ("Current rules provide no assurance that collateral estoppel will be limited to circumstances where the administrative proceeding was procedurally equivalent to a judicial trial.").

V. THE FEDERAL AND STATE INTERESTS IN PRECLUSION

The Court's conclusion in *Elliott* that section 1738 only applies to court determinations, and not to those of state administrative agencies, may not be very convincing,³⁰⁹ but more problematic is the Court's failure to weigh appropriately the various state and federal interests involved in adopting a common law of issue preclusion, which, except for Title VII cases, accomplishes the same purpose. In fact, the Court's expansive approach to preclusion ignores sound bases for recognizing exceptions. Whether or not section 1738 was intended to apply to unreviewed state agency determinations, federal courts need not, and should not, afford preclusive effect to such determinations in subsequent federal civil rights litigation.

A. Rules and Exceptions

If the Court was wrong to conclude in *Elliott* that section 1738 was inapplicable to unreviewed agency determinations, that has important implications for the Court's analysis of preclusion and Title VII. The distinction the Court drew in *Kremer* and *Elliott* would fail. The Court held in *Elliott* that Congress intended that state agency determinations without benefit of state court review would have no preclusive effect on subsequent federal Title VII claims,³¹⁰ and in *Kremer* that federal courts must accord the same preclusive effect to *reviewed* state agency determinations that they would receive from the courts of their own states. But the Court only reaches this result by concluding that section 1738 trumps Title VII, although Title VII trumps federal common law rules of administrative preclusion. Analytically, at least for administrative proceedings in which agencies have acted in a judicial capacity and have not offended due process,³¹¹ the decision on preclusion should not depend on whether or not a state court has reviewed the administrative determination.

The Court has created this problem for itself by rigidly interpreting section 1738 in cases such as *Allen*, *Migra* and *Kremer* and demonstrating rare willingness to find exceptions. It is this rigidity that has infused the Court's application of preclusion to unreviewed state agency determinations as well, with the limited exception of Title VII.

309. See *supra* notes 31-32 and accompanying text.

310. *University of Tenn. v. Elliott*, 478 U.S. 788, 795 (1986).

Under 42 U.S.C. § 2000e-5(b), the . . . EEOC . . . must give "substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law." As we noted in *Kremer*, it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court.

Id. (citation omitted).

311. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982).

While the Court has acknowledged in the recent civil rights cases that Congress could create exceptions to section 1738, it has insisted that Congress must do so explicitly, or, at the least, that implied exceptions are disfavored.³¹² Yet the Court has traditionally allowed exceptions to constitutional preclusion when giving preclusive effect would damage a sister state's interests in matters of local concern.³¹³ For example, in *Thomas v. Washington Gas Light Co.*,³¹⁴ the Court held that the strong state interest in the administration of worker's compensation schemes justifies not precluding the forum state from awarding the plaintiff additional benefits despite a sister state's prior adjudication of the claim.³¹⁵ Similarly, the Court has historically found exceptions to preclusion in state-federal cases.³¹⁶

312. See *Allen v. McCurry*, 449 U.S. 90, 99 (1980) ("Since repeals by implication are disfavored, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.") (citing *Migra, Kremer, Elliott*). But cf. *Davis v. United States Steel Supply*, 688 F.2d 166, 191 (3d Cir. 1982) (Gibbons, J., dissenting) (arguing that Congress intended § 1981 claims to have federal forum despite state civil judgments to the contrary).

313. See *Smith*, *supra* note 28, at 85-94 and cases discussed therein; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1983).

A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.

Id.

314. 448 U.S. 261 (1980).

315. *Id.* at 285. Although the Court held in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 444 (1943), that full faith and credit is applicable to the determinations of sister states' worker's compensation boards, the Court modified the *Magnolia* decision in subsequent cases. Thus in *Thomas* and its predecessor, *Industrial Comm'n of Wis. v. McCartin*, 330 U.S. 622 (1947), the Court found exceptions to the applicability of full faith and credit. *Thomas* suggested that both the limited jurisdiction of the Virginia compensation commission, and the informality that existed in such proceedings and was encouraged by the state, were reasons not to apply

an unnecessarily aggressive application of the full faith and credit clause . . .

For neither the first nor the second State has any overriding interest in requiring an injured employee to proceed with special caution when first asserting his claim. Compensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. . . . This informality is consistent with the interests of both States. A rule forbidding supplemental recoveries under more favorable workmen's compensation schemes would require a far more formal and careful choice on the part of the injured worker than may be possible or desirable when immediate commencement of benefits may be essential.

Thomas, 448 U.S. at 284-85 (citation omitted).

316. See *Smith*, *supra* note 28, at 95. *Smith* identifies cases in which federal courts have refused to apply preclusion based on state court judgments when to do so "would conflict with a congressional scheme of federal remedies and federal jurisdiction." *Id.* He notes, however, that these cases arose in terms of resolving conflicting claims of federal and state rules of preclusion, *id.*, and that *Allen* was the first case analyzed in terms of whether Congress intended a particular federal statute—§ 1983—to create an implied exception to § 1738. *Id.* at 95 n.210. *Haring v. Prosise*, 462 U.S. 306, 313 n.7, 322-23 (1983), argues *Smith*, expressed a

Thomas actually concerned the effect of a Virginia judgment in subsequent District of Columbia proceedings.³¹⁷ Another example is *Brown v. Felsen*, in which the Court refused to bar a bankruptcy proceeding creditor from raising a defense impliedly conceded in settlement of state proceedings on the debt.³¹⁸ The Court noted that *res judicata* "blockades unexplored paths that may lead to truth," that it "is to be invoked only after careful inquiry," and that the interests served by preclusion would not be furthered by applying it in that case.³¹⁹ Both *Thomas* and *Felsen* demonstrate that there can be exceptions to preclusion even within the confines of constitutional or statutory full faith and credit.³²⁰

Both *Thomas* and *Felsen* endorsed exceptions only to claim preclusion.³²¹ Nonetheless, their reasoning supports the inappropriateness of administrative issue preclusion as well.³²² To afford preclusive effect to the determinations of state administrative agencies ignores strong federal policies, such as insuring that individuals' civil rights are protected by the process they are

willingness to recognize exceptions to preclusion in certain § 1983 claims. Smith, *supra* note 28, at 75-76. Smith suggests that *Migra* does not negate a case-by-case approach to determine the applicability of claim preclusion exceptions. *Id.* at 79-80; see also Atwood, *supra* note 12, at 73-76.

317. *Thomas*, 448 U.S. at 263-64. Although the Court wrote mostly in terms of constitutional full faith and credit, it acknowledged that § 1738, as well as the clause, was applicable to its analysis. *Id.* at 266 n.10.

318. 442 U.S. 127, 132 (1979). The Court said that the decision regarding preclusion was to be made only after examining the interests served by preclusion, the state court's interest in "orderly adjudication," and the federal interests reflected in the federal statute. *Id.*; see Atwood, *supra* note 12, at 74-75 (discussing *Felsen*). The Court in *Felsen* did not explicitly discuss full faith and credit, but rather relied on general principles of preclusion. *Felsen*, 442 U.S. at 132-39. Before *Allen*, the federal courts seldom discussed state-federal preclusion in terms of § 1738. See Smith, *supra* note 28, at 64-65.

319. *Felsen*, 442 U.S. at 132.

320. Exceptions of course exist as well to the application of *res judicata* and collateral estoppel when full faith and credit is not implicated. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 26, 28 (1980) (exceptions to claim preclusion and issue preclusion, respectively); Reed v. Allen, 286 U.S. 191, 208-09 (1932) (Cardozo, J., dissenting) (arguing that rigid adherence to *res judicata* rules would cause perverse results). But see C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4426 (1981) ("The premise of preclusion itself is that justice is better served in most cases by perpetuating a possibly mistaken decision than by permitting relitigation. . . . The fairness of preclusion is addressed directly by imposing requirements of foreseeability and similarity of legal context, and by recognizing changes in the legal climate.").

321. *Thomas*, 448 U.S. at 281-82.

To be sure . . . the factfindings of state administrative tribunals are entitled to the same *res judicata* effect in the second State as findings by a court. But the critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.

Id. The *Felsen* decision leaves open the question of whether collateral estoppel would apply. *Felsen*, 442 U.S. at 139 n.10.

322. In fact, *Thomas*' discussion of the lack of sophistication of the average worker's

due under the Constitution and by the remedies Congress provided to redress violations of those rights. These federal policies are no less important than the state interest in administering worker's compensation benefits, and thus no less entitled to exemption from any general rule of preclusion.

B. Reconciling Federal and State Interests

In order to evaluate the competing claims made by preclusion on one hand, and the need for federal forums and remedies for redressing federal rights on the other, one must evaluate the competing and complimentary state and federal interests in having preclusion—claim or issue—apply to the administrative determinations of state agencies in subsequent civil rights litigation. Federal and state courts share a common interest in finality to disputes, and in uncluttered court dockets. And, in both federal and state remedial schemes, administrative agencies play an important role in providing prompt, expeditious and inexpensive forums for the resolution of disputes. Neither federal nor state courts have much interest in hearing cases that could be resolved easily and fairly at the agency level.

Nonetheless, the most significant factor that seems to have motivated the Court in recent years to choose preclusion over competing civil rights interests is its belief that section 1738 requires the federal courts to apply state preclusion law. And in state agency-federal court preclusion the same principles motivating the Court's interpretation of section 1738, namely comity and federalism, logically compel the formulation of a common law rule to accomplish the same goals the Court ascribes to Congress in the promulgation of section 1738.

Federal courts should not interfere with the necessary resolution of issues of fact by state agencies such as workers' compensation or disciplinary boards. But allowing the resolution of these facts to completely preclude reexamination of the same facts in subsequent civil rights actions unnecessarily sacrifices legitimate federal interests.³²³ Both federal and state courts

compensation litigant, and the states' interest in expedient, informal adjudication of workers' compensation claims is the only truly compelling response to Justice Rehnquist's dissenting argument that nothing had precluded Thomas from originally pursuing his claim in the District of Columbia, rather than Virginia. See *Felsen*, 448 U.S. at 294-95 (Rehnquist, J., dissenting).

323. See *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1064-65 (11th Cir. 1987), where the court refuses to extend *Elliott's* holding to claim preclusion because:

[T]he importance of the federal rights at issue, the desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed administrative proceeding, and the limitations of state agencies as adjudicators of federal rights override the lessened federalism concerns implicated outside the contours of the full faith and credit statute.

Id.; *Leaman v. Ohio Dept. of Mental Retardation*, 825 F.2d 946, 958 (6th Cir. 1987) (*en banc*) (Keith, J., dissenting), which criticizes the majority's 8-6 split decision holding the Ohio

are concerned with the derogation of state administrative determinations by federal courts. The Court's decisions in *Allen*,³²⁴ *Migra*,³²⁵ *Kremer*³²⁶ and *Elliot*³²⁷ all manifest that concern. Preclusion is one response to those concerns, but it is not the only nor the best response.³²⁸ Although granting preclusive effect to state judgments promotes comity and federalism, it may also deter litigants from using state processes to resolve state-based claims in order to preserve their federal civil rights claims.³²⁹ If this occurs, the Court can hardly claim that the state's interests are being served. In fact, the states will be deprived of opportunities to interpret their own laws, and to resolve disputes arising under those laws, free of unnecessary federal interference.³³⁰

In addition to frustrating state interests, this does not further Congress' purpose in passing federal civil rights legislation like section 1983. Despite

Revised Code § 2743.02(A)(1) to operate as a statutory waiver of any subsequent federal claim:

[T]he majority exalts a state waiver provision above a plaintiff's right to seek relief for unconstitutional acts, rewards a litigant's diligent pursuit of . . . § 1983 remedies with total exclusion from a state or federal forum and characterizes the effect of its holding in terms of a simple contractual metaphor, as if Constitutional rights are bushels of wheat.

Leaman, 825 F.2d at 958.

324. 449 U.S. at 95-96 ("[R]es judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.").

325. *Migra v. Warren School Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) ("This reflects a variety of concerns, including notions of comity. . . .").

326. 456 U.S. at 478 ("Depriving state judgments of finality would violate basic tenets of comity and federalism. . . .").

327. 478 U.S. at 798 ("Having federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism.").

328. Ironically perhaps, one of the arguments pressed on the Court as to why it should establish an exhaustion requirement for § 1983 actions in *Patsy* was that such an approach would promote "the goal of comity and improve federal-state relations by postponing federal-court review until after the state administrative agency had passed on the issue; and would enable the agency which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision." *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 512 (1982) (emphasis added). An exhaustion requirement would have been *inconsistent* with the preclusion of relitigation of issues determined by the administrative tribunal; nonetheless, the Court's refusal to adopt such a requirement fails to establish the validity of applying preclusion when parties submit their claims first to the state agency.

329. See discussion *supra* notes 221-26 and accompanying text.

330. Compare *Kremer*, 456 U.S. at 505 (Blackmun, J., dissenting) (arguing that by encouraging complainants to bypass state courts, state courts will not have opportunity to correct state agency errors, thus affecting quality of state agency decisionmaking. "It is a perverse sort of comity that eliminates the reviewing function of state courts in the name of giving their decisions due respect.") with *id.* at 478 (disputing importance, but not validity, of this argument); see also *Catania*, *supra* note 176, at 269 n.234 ("In view of Congress' intent to encourage states to combat employment discrimination, it is doubtful that it intended to force complainants to abandon state administrative proceedings in order to protect their rights under Title VII."); *Braveman & Goldsmith*, *supra* note 272, at 624 (to preserve federal forum, litigant may bypass state administrative and judicial proceedings, depriving state of opportunity to further its own policies).

the Court's statements to the contrary, Congress did not intend to require that civil rights claims be resolved in judicial rather than administrative forums.³³¹ What Congress intended was the presence of a federal forum to resolve federal claims that have not been *satisfactorily* resolved through other dispute resolution mechanisms, including state agency and court proceedings.

C. *What We Can Learn from the States*

Because the Court has instructed lower federal courts to apply state administrative preclusion rules, it is useful to look at these rules to better inform our understanding of the consequences of federal preclusion doctrine. Although state courts today³³² generally embrace the principle that preclusion may attach to the determinations of administrative agencies,³³³ they often make exceptions when the circumstances warrant.³³⁴ Some state courts, and some federal courts interpreting state law, have made exceptions when the findings of agencies designed for the expedient resolution of disputes, such as unemployment compensation boards, are relied on in attempts to bar subsequent civil rights claims.³³⁵ Furthermore, several states, including Cal-

331. See *Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234, 241 n.16 (1985) ("[T]he dominant characteristic of civil rights actions' is that 'they belong in court,' " citing *Burnett v. Grattan*, 468 U.S. 42, 50 (1984)); see also detailed discussion in *Attorneys' Fees*, *supra* note 42, at 396 n.134.

332. See RESTATEMENT (SECOND) OF JUDGMENTS § 83 reporter's note (noting that first *Restatement* had no counterpart to § 83 because at time of its promulgation, the general rule was that administrative determinations were not considered adjudications for preclusion purposes).

333. See, e.g., *Brown v. Dow Chem. Co.*, 875 F.2d 197, 199 (8th Cir. 1989) (stating that under Arkansas law, preclusion applies to decisions and findings of administrative commission acting in quasi-judicial capacity, citing, *inter alia*, *Bockman v. Arkansas State Medical Bd.*, 229 Ark. 143, 147, 313 S.W.2d 826, 829 (1958)); *Tidewater Oil Co. v. Jackson*, 320 F.2d 157, 161 (10th Cir. 1963) (interpreting Kansas preclusion law to afford preclusive effect to Kansas Corporation Commission's determination in subsequent diversity suit for damages); *People v. Sims*, 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); Carlisle, *supra* note 192, at 63-64 (New York courts have recently expanded application of collateral estoppel to determinations made in administrative hearings).

334. See *Catania*, *supra* note 176, at 230.

[M]any states will not apply issue preclusion if it was not foreseeable that the issue would arise in the context of a subsequent action, or the party did not have the incentive or opportunity to litigate the issue fully in the prior proceeding, or the burden of persuasion has shifted or is different in the second proceeding. With respect to claim preclusion, a state may also recognize the party's right to split his claim if the court or agency hearing the first proceeding did not have the subject matter jurisdiction to render complete relief.

Id. (citing generally A. VESTAL, *RES JUDICATA/PRECLUSION* 397-427 (1969)); see also Carlisle, *supra* note 192, at 78 (stating that while the New York Court of Appeals has reiterated that preclusion applies to administrative determinations, it has acknowledged, in *Venes v. Community School Bd.*, 43 N.Y.2d 520, 523, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 808-09 (1978), that the decision whether to grant such determinations preclusive effect proved "remarkably elusive").

335. See, e.g., *Kelley v. TYK Refractories Co.*, 860 F.2d 1188, 1194-95 (3d Cir. 1988)

ifornia, Missouri and New York, have recently enacted legislation further limiting the preclusive effect of unemployment compensation proceedings.³³⁶ There is, however, no consistent approach to administrative preclusion

(Pennsylvania would not apply preclusion to reviewed workers compensation decision in subsequent § 1981 racial discrimination complaint, relying on *Odgers v. Commonwealth Unemployment Compensation Bd.* of Review, 514 Pa. 378, 525 A.2d 359 (1987), which held that determination that work stoppage was strike for purposes of the Public Employee Relations Act was not preclusive of whether action was strike for purposes of workers compensation scheme, because two statutes were enacted to further entirely different policies); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 361-62 (4th Cir. 1985) (Maryland would not apply preclusive effect to reviewed workers compensation decision in subsequent Title VII action, relying on *Cicala v. Disability Review Bd.*, 288 Md. 254, 418 A.2d 205 (1980), which held defendant was not precluded from relitigating whether injury was service related in case where workers compensation board had ruled for plaintiff, because of substantial difference in two statutory schemes); *Clapper v. Budget Oil Co.*, 437 N.W.2d 722 (Minn. Ct. App. 1989) (adverse determination by Department of Jobs and Training that plaintiff had voluntarily terminated his employment did not estop subsequent age discrimination, breach of contract and wrongful termination claims); *Board of Educ. v. New York State Human Rights Appeal Bd.*, 106 A.D.2d 364, 482 N.Y.S.2d 495, 497 (1984) (no preclusion because plaintiff lacked full and fair opportunity to litigate, couldn't foresee that application for unemployment benefits would bar subsequent discrimination complaint and because state law gave state Division of Human Rights jurisdiction over discrimination complaint) relied on in *Hill v. Coca Cola Bottling Co.*, 786 F.2d 550, 553-54 (2d Cir. 1986) (employment discrimination suit not barred for plaintiff who lost before court reviewed state unemployment insurance proceedings); see also *Jalil v. Avdel Corp.*, 873 F.2d 701, 705 (3d Cir. 1989) (New Jersey would not afford preclusive effect to state court affirmation of arbitration decision in subsequent Title VII litigation because of lack of identity of issues decided); *Davidson v. Capuano*, 792 F.2d 275, 276 (2d Cir. 1986) (§ 1983 plaintiff who prevailed in state Article 78 proceeding was not estopped since, under New York law, claim preclusion would not apply as Article 78 proceeding was limited to injunctive relief).

336. CAL. UNEMP. INS. CODE § 1960 (West Supp. 1989) (added by Stats. 1986, ch. 283, § 1); MO. ANN. STAT. § 288.215 (Vernon Supp. 1989) (L. 1988, H.B. No. 1485, § A, eff. March 1, 1988); N.Y. LAB. LAW § 623(2) (McKinney 1988) (as amended L. 1987, ch. 258, § 1).

The reasoning behind such legislation supports a cautious approach to administrative preclusion generally. The New York statute, for example, was prompted by a report issued by the Committee on Labor and Employment Law of the Association of the Bar of the City of New York, recommending legislation to remedy the court of appeals decision in *Ryan*, 62 N.Y.2d at 494. *Ryan* afforded preclusive effect to an unemployment insurance determination in subsequent litigation brought by *Ryan* against his employer for false arrest, malicious prosecution, slander and wrongful discharge. *Id.* at 495. The Committee's report criticized the decision on a number of grounds:

It is the Committee's view (a) that unemployment insurance proceedings, designed for quickly determining the narrow issue of benefit eligibility, do not afford the kind of hearing and review that should warrant giving preclusive effect to the finding or determinations made; and (b) that it would frustrate the purposes of the Unemployment Insurance Law to force adjudication of questions relating to other potential civil litigation into that forum. The Committee also believes that deciding on an *ad hoc* basis whether any particular unemployment insurance determination might properly be given preclusive effect creates an undesirable lack of certainty about the possible future ramifications of the agency's actions. This uncertainty will inevitably cause parties to seek to resolve collateral matters before the unemployment insurance referees . . . or before the Unemployment Insurance Appeal Board.

Accordingly, this report recommends legislation preventing findings of the Administrative Law Judges or the Appeals Board from being given preclusive effect in any other proceeding.

N.Y. Bar Committee Report, *supra* note 264, at 738.

among the various states.³³⁷ A number of states have had little to say on the subject altogether.³³⁸

The Court's approach has a facile, *Erie*-type³³⁹ integrity: The preclusive effect of a state administrative agency will be accorded the same preclusive effect in federal civil rights litigation (other than Title VII) that the state's own courts would accord it. The problem is that while it may create consistency *intra*-state, it creates inconsistency *inter*-state.³⁴⁰ Preclusion rules on federal claims may differ depending on the state of the agency that made the administrative determination. While this might be appropriate for state-law based claims brought in federal court,³⁴¹ it is entirely inappropriate for federal claims manifesting federal policies such as the civil rights laws.³⁴²

This is not to suggest that federal courts, when unencumbered by state preclusion rules, have shown any greater pattern of consistency. However, the Court is in a position to provide guidance towards a coherent approach.

Preclusion is not necessary to protect the legitimate state interest that federal courts honor the determinations of state agencies. Federal courts can accord appropriate deference to the findings of state administrative tribunals short of precluding the relitigation of issues or claims raised before

337. Compare, e.g., *Brugman v. City of New York*, 64 N.Y.2d 1011, 1012, 478 N.E.2d 195, 196, 489 N.Y.S.2d 54, 55 (1985) (discussed in Carlisle, *supra* note 192, at 82 as implying that full and fair opportunity to adjudicate can be satisfied on basis of paper record, where party opposing preclusion had no opportunity to cross-examine witnesses against him) with *Clapper*, 437 N.W.2d at 726 (administrative hearing in which formal rules of evidence and procedure do not apply, hearsay is admissible, and agency oversees participation by attorney does not constitute full and fair opportunity to litigate for purposes of preclusion).

Nor is there necessarily consistency even *intra*-state. See *N.Y. Bar Committee Report*, *supra* note 264, at 749 ("Lower court cases, even after *Ryan*, continue to be decided contrary to each other, and practitioners are thus left without adequate guidance. . . .") Compare *Brugman*, 478 N.E.2d at 195 with *Gore v. R.H. Macy & Co.*, 52 Empl. Prac. Dec. (CCH) ¶ 39,509 (refusing to give preclusive effect under *Ryan* standards to unemployment compensation proceeding determination that plaintiff did not engage in misconduct upon finding that defendant lacked full and fair opportunity to litigate plaintiff's discrimination claim in administrative forum).

338. See, e.g., *Clapper*, 437 N.W.2d at 725 ("Whether to give collateral estoppel effect to an administrative determination is an issue of first impression in Minnesota."); 2 CAL. JUR. 3D *Administrative Law* § 239 (1973) (stating that California courts have not given sufficient systematic consideration to issues of administrative preclusion).

339. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (federal court sitting in diversity is to apply substantive law of state in which it is located).

340. See *Atwood*, *supra* note 12, at 105 (discussing claim preclusion where federal courts have exclusive jurisdiction: "Federal court adherence to the res judicata law of each individual state could result in an inconsistency among the federal courts in their treatment of claims which are their exclusive prerogative.").

341. Even as to state-based claims, it requires the federal courts to be fully familiar with the preclusion doctrine of the particular state, including all exceptions to that doctrine. See *Catania*, *supra* note 176, at 229 (Court's interpretation of § 1738 requires federal courts to apply states' exceptions as well as general preclusion rules).

342. Cf. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958) (federal policy overrides conflicting state policies in applying *Erie*-analysis).

such tribunals. Persuasion rather than preclusion will best accommodate the competing and complimentary state and federal interests in insuring deference to state agency determinations and the legitimate assertion of federal civil rights claims. In Part VI, I develop such an alternative approach.

VI. A BETTER WAY

The Court, not Congress, has adopted a presumption in favor of preclusion. The Court assumes that preclusion should apply, unless Congress has specified to the contrary.³⁴³ I would adopt a reverse presumption in applying preclusion to the determinations of administrative agencies in subsequent civil rights litigation. Administrative preclusion is generally inconsistent with Congress' intent in passing civil rights legislation, and courts should refrain from applying the doctrine to foreclose civil rights litigation so as not to frustrate the policies underlying these laws.³⁴⁴

An alternative to preclusion is needed so that federal courts will accord administrative determinations appropriate deference without being disabled entirely from either the opportunity or the responsibility to entertain federal civil rights claims.³⁴⁵ In this Part, I demonstrate that this might be accom-

343. To date, Title VII is the only exception. See discussion *supra* notes 134-35 and accompanying text. There has been some recent activity in Congress to set additional limits on preclusion. In May of 1989, the Subcommittee on Human Resources of the House Committee on Ways and Means entertained a bill which would prohibit any court (state or federal) from affording preclusive effect to determinations made under state unemployment compensation laws. H.R. 2369, 101st Cong., 1st Sess. (1989); see Testimony of Congressman Bruce A. Morrison before the Subcommittee on Human Resources, Committee on Ways and Means, May 24, 1989 (citing "increasing misapplication of the principle of collateral estoppel" as creating need for such legislation).

344. See *University of Tenn. v. Elliott*, 478 U.S. 788, 803 (1986) (Stevens, J., dissenting) ("Due respect for the intent of the Congress that enacted the Civil Rights Act of 1871 . . . should preclude the Court from creating a judge-made rule that bars access to the express legislative remedy enacted by Congress."); cf. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 501-02 (1982). In rejecting the application of an exhaustion requirement to claims brought under § 1983, the Court stated:

Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.

Id.

345. Much of what I propose might justify an exception to preclusion based on agency (or arbitral) determinations in other litigation as well. To make that leap, however, goes beyond this current undertaking. Some critics of expanding preclusion advocate a transubstantive approach. See, e.g., Carlisle, *supra* note 192, at 97-98 (arguing that courts should allow one opposing issue preclusion based on administrative findings to create rebuttable presumption of nonpreclusion by demonstrating, case by case, the existence of procedural or evidentiary factors making preclusion inappropriate). However others advocate less preclusion for civil rights claims. See, e.g., Braveman & Goldsmith, *supra* note 272, at 599-600 (arguing that although

plished by utilizing administrative agencies' factual determinations to create presumptions and alter burdens of proof. This is a sound alternative to preclusion,³⁴⁶ which accommodates comity and federalism interests as well as concerns that plaintiffs should not be afforded multiple shots at litigating the same claim or issue. Yet unlike preclusion doctrine it will not impair the usefulness of administrative agencies as alternatives to court litigation for the informal, speedy and economical resolution of disputes. Further, such an approach is no abrupt departure from traditional approaches to shifting burdens of proof, or how courts generally treat agency determinations, in civil rights litigation. It would, however, require the Court—or Congress³⁴⁷—to abandon the recent path the Court has taken.

A. *The Proposal*

I propose the following: Courts would have discretion to alter burdens of proof³⁴⁸ that would otherwise apply in federal civil rights litigation, based

expansion of preclusion rules is reasonable response to scarce judicial resources, there is danger of fundamentally unfair application to civil rights litigants); Resnik, *supra* note 12, at 605-06 (criticizing the Court's transubstantive approach to preclusion); see also Crosby, *Administrative Collateral Estoppel in California: A Critical Evaluation of People v. Sims*, 40 HASTINGS L.J. 907 (1989) (criticizing California Supreme Court's application of preclusion to unreviewed fair hearing determination in subsequent criminal prosecution and arguing for limitations on administrative preclusion).

346. Why not have the federal courts decide case-by-case whether to apply preclusive effect to the determinations of administrative agencies? The problem with such an approach is that it would fail to fulfill the reasons for having rules of preclusion in the first place. Parties would not be able to predict the preclusive consequences of what they do, and do not, litigate in one litigation for purposes of subsequent litigation, if preclusion were at the discretion of the secondary forum. Thus, as in the case of unemployment compensation proceedings, sophisticated litigants might still attempt to litigate "to the hilt" for fear that a subsequent court would apply preclusive effect to the initial tribunal's determinations. Furthermore, litigating whether or not preclusion should apply can be as costly and complicated as pursuing the underlying substantive claim. See *N.Y. Bar Committee Report*, *supra* note 264, at 747-48.

347. Since *Elliott* is a common law rule of preclusion the Court could undo it without any congressional direction. However, Congress could explicitly dictate that preclusion should not apply. See, e.g., H.R. 2369, *supra* note 343. As to the Court's interpretations of § 1738, a congressional response might be more appropriate than were the Court to revisit this issue of statutory interpretation. Nonetheless, the Court certainly could correct its own error; cf. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2371 (1989) (declining to overrule prior interpretation of § 1981 despite doubt about earlier construction, but recognizing that overruling may be appropriate where precedent is "found to be inconsistent with the sense of justice or with the social welfare") (citation omitted).

348. Burdens of proof are procedural devices that may affect substantive rights significantly. See, e.g., Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1207 (1981) ("[T]he concept of burden of proof is one of the most important procedural notions in our legal system; it helps implement the substantive laws by instructing the factfinder on the degree of confidence he should have in the correctness of factual conclusions for a particular type of case," (citing, *inter alia*, *Addington v. Texas*, 441 U.S. 418, 423 (1979))). The term "burden of proof" includes two concepts, that of burden of production (the burden of producing affirmative evidence) and

on agencies' factual determinations that meet certain minimum criteria. Administrative proceedings that meet *Elliott's* "full and fair opportunity to litigate" test,³⁴⁹ would not be the basis for either claim or issue preclusion; however administrative findings introduced into evidence would create a presumption in favor of the party who prevailed on the resolution of that issue before the agency. This presumption may alter the burden of persuasion as well as the burden of production on the issue previously adjudicated.³⁵⁰ The result would be either a shift of the burden from one party to the other, or an increase in the standard of proof for the party who already has the burden.³⁵¹ In addition to its operation in the event of trial, the presumption may control the disposition of a motion for summary judgment by the party relying upon it.³⁵²

If administrative findings do not meet the *Utah Construction* test, or, as to state agency determinations, state law would afford such findings no preclusive effect, then such findings would create no presumptions, and current doctrine would determine admissibility.

Irrespective of the above, both issue and claim preclusion may be applicable if the party seeking to invoke preclusion can demonstrate that:

- (I) the parties knowingly have agreed that the current adjudication is to be a final adjudication of all rights and liabilities arising from the transaction or transactions at issue, or that the determination of an issue or issues in the current adjudication is to bind the parties in subsequent litigation; or
- (II) (A) the administrative proceedings afforded all relevant procedural safeguards afforded by the judicial proceedings;
- (B) the party opposing preclusion had incentive to litigate vigorously before the administrative tribunal;

the burden of persuasion (the burden of convincing the factfinder that you meet the applicable standard of proof). See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989) (distinguishing burden of production from burden of persuasion regarding employer's business justification in Title VII suit).

349. *Elliott*, 478 U.S. at 797-98 (quoting from *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966)).

350. See Belton, *supra* note 348, at 1222 ("The weight of authority holds that genuine presumptions are neither evidence nor substitutes for evidence, but are merely procedural devices that shift the burden of producing evidence to the party against whom it operates. They are rebuttable and not conclusive. . . ."). My proposal would use presumptions more aggressively than that suggested by Belton to shift or otherwise alter both burdens of proof. The presumption would be deemed to establish the fact, subject to rebuttal by the opposing party. Cf. S. BREYER & R. STEWART, *supra* note 35, at 628 (suggesting tripartite approach to official notice, one part of which would permit agency to take judicial notice of facts subject to rebuttal).

351. For example, plaintiff who lost below might now have to demonstrate by "clear and convincing evidence" rather than by "a preponderance of the evidence" that she was entitled to relief.

352. Unless the party opposing preclusion produces material, probative evidence demonstrating the existence of a material issue of fact, the party relying on preclusion would prevail. See FED. R. CIV. P. 56(e).

- (C) (if claim preclusion) the party opposing preclusion could have raised the federal claim before the administrative proceedings and such proceedings could have afforded comparable remedies to those available in federal court; and
 - (D) the party opposing preclusion knew or should have known that subsequent proceedings on the claim or issue would be precluded; or
- (III) a federal statute explicitly provides that preclusion shall apply to the administrative decision.

B. Presumptions in Practice

This approach would work as follows. A defendant who had lost on the discrimination issue before an agency whose procedures met the minimum criteria would have the burden of proving the absence of discrimination. That is, the plaintiff could avail herself of the presumption that discrimination occurred, based on the administrative findings, thus shifting both the burden of production and the ultimate burden of persuasion to the defendant. This type of case might arise where the administrative agency granted only a partial remedy.

Alternatively, if plaintiff had lost before the agency and thereafter filed a federal civil rights claim, she would have to overcome the presumption that defendant did not discriminate. Since plaintiff normally would have the burden of proof in such a case, she would have to prove discrimination by "clear and convincing" evidence rather than a mere "preponderance."³⁵³

In either case, the party seeking to rely on the administrative findings might use them in support of a motion for partial or total summary judgment. That party would prevail unless the opposing party was able to demonstrate the existence of a material issue of fact. For example, posit that plaintiff had lost below against a state defendant in state fair employment administrative proceedings on a claim of sexual harassment. She subsequently files a claim under Title VII and section 1983, again alleging sexual harassment. On the strength of the previous administrative findings,

353. This proposal is not inconsistent with the analysis of the application of the clear and convincing standard in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1792 (1989) (plurality opinion). The decision rejected the lower court's application of the clear and convincing standard to an employer seeking to establish that it would have made an employment decision irrespective of any discriminatory motive. However, Justice Brennan acknowledged that the standard, when applied, is more appropriately used defensively rather than offensively—for example, as applied to the plaintiff in a defamation case.

Although there is legitimate skepticism as to whether any meaningful distinction exists in application (as contrasted with theory) among various standards of proof such as "preponderance of the evidence" and "clear and convincing evidence"—or even "beyond a reasonable doubt," see, e.g., *United States v. Fatico*, 458 F. Supp. 388, 409-10 (1978) (discussing relevant literature demonstrating wide disparities of perceptions regarding quantum of proof necessary under various standards), I do not believe we should abandon efforts to draw such distinctions in the absence of more satisfactory alternatives.

defendant moves for summary judgment on both claims. If plaintiff is unable to produce *any*³⁵⁴ probative evidence that the administrative fact-findings are deficient, then defendant would prevail.³⁵⁵ However, if plaintiff offers such evidence, then plaintiff would have demonstrated the existence of a material issue of fact, entitling her to go to trial.³⁵⁶ Yet to prevail at trial, she would still have to demonstrate by clear and convincing evidence that she had been sexually harassed.³⁵⁷

354. Recent decisions of the Supreme Court, *see, e.g.,* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986), suggest that lower courts may weigh the probity of evidentiary submissions on motions for summary judgment, in particular where the non-moving party would bear a heightened burden of proof at trial, *id.* at 252-55. While inappropriate in general, *see* Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 115-16 (1988) (discussing the contradictions and inappropriateness in the Court's approach to weighing evidence on motions for summary judgment), it is particularly inappropriate in the context of civil rights litigation. *See id.* at 161 (enhanced summary judgment usually will work to benefit of defendants, society's "haves," and to disadvantage of plaintiffs, the "have nots"). Thus I would accompany my suggested alternative to preclusion with a strong admonition that doubts as to probity should be resolved in favor of denying such motions for summary judgment. *See Liberty Lobby*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. . . . Neither do we suggest that the trial courts should act other than with caution in granting summary judgment . . .") (citation omitted).

355. In fact, plaintiff and her attorney might be liable to the defendant for Rule 11 sanctions for bringing a claim not "well grounded in fact [or] warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. . . ." FED. R. CIV. P. 11. *See, e.g.,* *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 252-54 (2d Cir. 1985) (ordering award of attorneys' fees under Rule 11 to defendants who prevailed on summary judgment, because of, *inter alia*, plaintiffs' previous loss in state court).

356. Plaintiff might also resist defendant's motion by demonstrating that the administrative adjudicator applied an incorrect legal standard. The court, of course, should entertain any questions of law *de novo*. In the absence of a record, findings, or conclusions of law enabling the court to ascertain exactly what facts the agency found, or what legal standard the agency applied, doubts should be resolved in favor of allowing plaintiff to proceed to trial.

357. I have grossly oversimplified questions concerning burdens of proof in discrimination cases in general and in Title VII cases in particular. The complexity of issues regarding burdens of proof in Title VII cases continues to occupy the Court and scholars alike. *See, e.g.,* *Wards Cove*, 109 S. Ct. at 2126 (plaintiff retains ultimate burden of proving pretextual nature of employer's asserted business justification in disparate impact case); *Price Waterhouse*, 109 S. Ct. at 1787-88 (plurality opinion) (in mixed motive cases, burden of persuasion, as well as burden of production, shifts to employer once plaintiff has met burden of persuasion that discrimination was a substantial cause of adverse employment decision); *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2790 (1988) (O'Connor, J., concurring) (arguing that in disparate impact case, burden of persuasion always remains with plaintiff, even when burden of production shifts to defendant); *id.* at 2792 (Blackmun, J., concurring) (arguing that in disparate impact cases, both burdens shift to defendant once plaintiff establishes *prima facie* case); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981) (burden of persuasion remains with plaintiff even when plaintiff makes out *prima facie* case of discriminatory treatment that shifts burden of production to defendant); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (plaintiff's *prima facie* case of disparate impact shifts burden of proof to defendant); Belton, *supra* note 348, at 1211-12 (advocating a rule that would treat both statutory exceptions and judicially created defenses as affirmative defenses, shifting both burdens to the defendant once plaintiff established his *prima facie* case); Furnish, *A Path*

If, however, plaintiff could demonstrate that the administrative proceedings did not afford her a full and fair opportunity to litigate the issue in question under the *Utah Construction* criteria—for example, that the administrative factfinder had failed to consider a relevant issue of law or fact—then the admissibility of the administrative proceedings would be determined under current doctrine,³⁵⁸ and would not operate to create presumptions or alter burdens of proof.

While my approach would presume the inapplicability of administrative preclusion in federal civil rights litigation, such a presumption might be rebuttable in one of three ways.³⁵⁹ First, if the parties have expressly or impliedly stipulated that the administrative adjudication would bind them in future litigation, either as to issue or claim preclusion, then, in the absence of additional reasons for formulating an exception,³⁶⁰ the court should comply with the parties' agreement.³⁶¹

Second, if the administrative proceedings are the equivalent of judicial proceedings in all relevant respects, then the court should have the discretion to invoke preclusion.³⁶² As to claim preclusion, the party opposing preclusion must have had the opportunity to raise his federal claim in the administrative proceedings, and such proceedings must have afforded a comparable remedy to what a federal court might award. Furthermore, the party opposing

Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine, 23 B.C.L. REV. 419 (1982) (advocating different rules on burdens of persuasion for disparate impact and disparate treatment cases); Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine*, 55 TEMP. L.Q. 372, 394-96 (1982) (advocating allocation of burden of persuasion to employer in disparate impact cases based on analogy to affirmative defense burden in disparate treatment cases). My proposal, if adopted, would likely generate a myriad of questions as to how the proposal would operate in pretext and mixed motive cases. These must be addressed at a later day. Generally, though, I am advocating that the burden would be one notch harder for the party who had lost before the administrative agency, regardless of what the pre-existing burden would be.

358. See *infra* notes 383-89 and accompanying text.

359. See Perschbacher, *supra* note 13, at 459 (advocating rebuttable presumption against issue preclusion based on administrative findings in all subsequent litigation).

360. Such reasons would include fraud, duress or procedural irregularities in the administrative proceedings or the agreement that such proceedings be binding.

361. See Perschbacher, *supra* note 13, at 459 (applying issue preclusion to protect and promote parties' expectations corresponds to original historical basis for collateral estoppel).

362. For example, the court would look to whether or not the agency proceedings afforded notice, an opportunity for direct and cross-examination, the right to subpoena adverse witnesses, an impartial fact-finder, and comparable discovery opportunities. The word "relevant" is important, however. Even if the judicial proceeding afforded some procedural opportunities not afforded by the administrative proceedings, this would not be determinative of the preclusion question. The party seeking to rely on preclusion would have the opportunity to demonstrate that the additional procedures would not be relevant to the outcome. Procedural opportunities would include differences in burdens of proof. This approach assumes, I believe accurately, that there are hearings that would constitute a "full and fair opportunity to litigate" under *Elliott*, yet would nonetheless not be the procedural equivalent of a judicial proceeding.

preclusion must have had reason to litigate vigorously below with an actual or presumed understanding of the consequences such administrative litigation might have on subsequent proceedings.³⁶³ The burden should be placed on the party seeking to rely on preclusion to demonstrate that all of these criteria are met.³⁶⁴

Third, preclusion will apply if Congress has *explicitly* provided for the application of preclusion to administrative findings in federal civil rights legislation. Given the evidence that applying preclusion to the determinations of administrative agencies in federal civil rights litigation is inconsistent with Congress' intent in passing civil rights legislation,³⁶⁵ the responsibility should be Congress', not the Court's, to state otherwise.

C. *Advantages and Disadvantages*

This approach will go far towards addressing the Court's concerns regarding finality, repose and repeated bites at the apple. It makes sense to accord appropriate deference to administrative findings; in the absence of some evidence to the contrary, there is little justification for assuming that the administrative determinations were erroneous.³⁶⁶

Furthermore, this solution would eliminate the problematic dichotomy between Title VII and other civil rights schemes created by *Elliott*. The language in Title VII that persuaded the Court that Congress intended that unreviewed administrative determinations should have no preclusive effect in subsequent Title VII litigation was that the EEOC was to "accord

363. Thus factual findings of discrimination in a Title VI fund termination proceeding against a school accused of discriminating on the basis of race, in which the school is represented by counsel and has every incentive to litigate vigorously, might be preclusive to the extent similar findings by a court would be preclusive in a subsequent § 1983 suit against the school brought by one of the alleged victims of racial discrimination. Such a case would rely on the criteria the *Parklane* Court articulated for offensive collateral estoppel. See *supra* notes 290-95 and accompanying text.

364. Compare *Davis v. United States Steel Supply*, 688 F.2d 166, 170 (3d Cir. 1982) (stating that under Federal Rule of Civil Procedure 8(c) *res judicata* is affirmative defense; thus party asserting bar bears burden of showing its applicability) with *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 501-02, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 827 (1984) (holding that party asserting collateral estoppel has burden of demonstrating sameness of issue decided, but that party opposing preclusion must demonstrate absence of full and fair opportunity to litigate).

365. See *supra* notes 38-47 and accompanying text.

366. See *Price Waterhouse*, 109 S. Ct. at 1802 (O'Connor, J., concurring) (justifying shifting the burden of persuasion that the action would have been taken but for the consideration of impermissible discriminatory factors to the employer in a mixed motive case):

If as we noted in *Teamsters*, "presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof," one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate concerns.

Id. (citation omitted).

substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law.”³⁶⁷ My approach would accord such weight, without depriving litigants with Title VII or any other civil rights claims, of an opportunity to have a federal court consider them.

Consider how this approach would have altered the result in *Long v. Laramie County Community College District*.³⁶⁸ The state agency had found that Ms. Long was the victim of sexual harassment, and awarded some relief. When she subsequently sued for additional remedies under both Title VI and the reconstruction era civil rights statutes, the court of appeals rejected the agency’s findings of sexual harassment for purposes of the former claims, while holding, under *Elliott*, that it was bound by such findings for purposes of the latter. Under the alternative I propose, there would be no need for a different approach under Title VII—where Congress *explicitly* precluded preclusion—and the reconstruction era statutes. For both claims, the court would consider the administrative findings. If the findings in *Long* had altered the burdens of proof, then the school would have been required to prove by a preponderance of the evidence that it had not sexually harassed Ms. Long.³⁶⁹ While we don’t know whether this shift would have helped Ms. Long, it would have had the benefit of consistency and integrity for the decisionmaking process. The ultimate judicial finding on the claim of sexual harassment would have been consistent for Title VII and reconstruction era claims alike, an approach far preferable to the one engendered by *Elliott*.

The alternative I propose will also allow a consistent approach to the myriad of variables discussed in Part III. It resolves any questions about whether *Elliott* would apply to claim as well as issue preclusion.³⁷⁰ It would apply whether or not the administrative proceeding had been reviewed by a state court under a limited standard of review. Thus it would resolve the problems caused by the *Kremer* Court’s affording preclusive effect to purely investigatory determinations.³⁷¹ It would apply whether or not a litigant was statutorily required to present his claim to an administrative agency prior to seeking judicial relief,³⁷² and whether or not the litigant was a voluntary or involuntary party before the administrative tribunal.³⁷³ As to whether it would resolve questions about findings made by “nonexpert” tribunals, the discretion accorded the court under my proposal could be exercised so as

367. *Elliott*, 478 U.S. at 795 (citing 42 U.S.C. § 2000e-5(b) (1982)).

368. 840 F.2d 743 (10th Cir. 1988); see *supra* notes 158-77 and accompanying text.

369. This, again, assumes that the court finds the administrative proceedings met due process standards, a finding the court in *Long* in fact made. *Long*, 840 F.2d at 751.

370. See *supra* notes 178-205 and accompanying text.

371. See *supra* notes 206-14 and accompanying text.

372. See *supra* notes 215-27 and accompanying text.

373. See *supra* notes 228-49 and accompanying text.

to refuse to create presumptions in cases where there is reason to doubt the competence of the adjudicator to make the particular factual determination at issue.³⁷⁴ Finally, the approach would apply to both state and federal administrative determinations.³⁷⁵

D. No Radical Departure

This alternative is consistent with the way courts dealt with agency determinations before the Supreme Court's recent expansion of preclusion doctrine. Courts have traditionally accorded deference to agency findings and, in some cases, have altered burdens or standards of proof based on such findings. In *Freedom Savings and Loan Association v. Way*,³⁷⁶ a pre-*Elliott* case, the Eleventh Circuit held that the findings of the Trademark Trial and Appeal Board (TTAB) were not preclusive in a subsequent trademark infringement suit. The court's determination was based on its reading of Congress' intent in the Lanham Act to provide for "extensive judicial involvement in the registration and protection of trademarks."³⁷⁷ Nonetheless, the court relied on precedent of both the Fifth and Eleventh Circuits to the effect that decisions of the TTAB would control in a subsequent infringement suit "unless the contrary is established by evidence that, in character and amount, carries 'thorough conviction,'"³⁷⁸ and that such a standard of proof arose "out of respect for the expertise of the TTAB."³⁷⁹

Congress adopted a similar approach to the one suggested here in its 1966 amendments to the federal habeas corpus statute, albeit with regard to state court, not agency findings.³⁸⁰ The statute provides for a presumption of correctness to be accorded a state court determination of a factual issue on a habeas claim, unless the petitioner is able to demonstrate one of eight enumerated deficiencies in the state court proceedings. The presumption operates to shift to the petitioner the burden to establish "by convincing evidence that the factual determination by the State court was erroneous."³⁸¹

Under the habeas statute, however, if petitioner is able to demonstrate a deficiency in the state court proceedings, for example that the factfinding

374. See *supra* notes 250-56 and accompanying text.

375. See *supra* note 257 and accompanying text.

376. 757 F.2d 1176 (11th Cir. 1985).

377. *Id.* at 1180 ("Section 1071(b) of Title 15 U.S.C.A. (1982) empowers courts to hear appeals from TTAB *de novo*.").

378. *Id.* at 1181 (quoting *American Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 10 (5th Cir. 1974); *Aloe Creme Laboratories, Inc. v. Texas Pharmacal Co.*, 335 F.2d 72, 74 (5th Cir. 1964)).

379. *Way*, 757 F.2d at 1181.

380. 28 U.S.C. § 2254(d) (1977).

381. *Id.* Thus the statute also operates as an explicit exception to § 1738. See *Atwood*, *supra* note 12 at 73.

procedures did not afford a "full and fair hearing," then the federal court is to afford no presumption of correctness to the state court findings.³⁸² Even in the absence of a specific congressional directive, courts have altered burdens and standards of proof only when the agency findings so warranted. In *Jane Doe v. New York University*,³⁸³ for example, the district court refused to shift the burden of proof from the plaintiff to the defendant based on administrative findings that the school had discriminated.³⁸⁴ First, the court noted that the plaintiff and the school were not technically adversaries in the administrative proceedings.³⁸⁵ Second, the agency conducted no hearings, but rather made its determination pursuant to an investigation.³⁸⁶ Third, agency officials were not impartial arbiters, but rather investigators and potential adversaries of the school.³⁸⁷ The Court's analysis was consistent with my approach; since the administrative proceedings did not meet the *Utah Construction* criteria, no shifting of burdens was appropriate.

While refusing to shift the burden of proof, the *Jane Doe* court held that the agency findings would be admissible at trial, and that the weight to be accorded them would be determined after argument as to their credibility.³⁸⁸ The approach in *Jane Doe* is similar to the one the Court articulated in the civil rights arbitration cases.³⁸⁹ It is a sound approach in those circumstances

382. *Selz v. State of California*, 423 F.2d 702, 703 (9th Cir. 1970).

383. 511 F. Supp. 606 (S.D.N.Y. 1981).

384. *Id.* at 610. The Office for Civil Rights (OCR) had found that the school's refusal to readmit plaintiff as a medical student because of her mental condition violated the school's nondiscrimination obligations concerning the handicapped. *Id.* at 608.

385. *Id.* at 609.

386. *Id.*

387. *Id.* at 610. This observation is based not on the officials' assigned responsibilities, but rather on the court's inference of bias in how they fulfilled these responsibilities. As one of the OCR officials responsible for the investigation and findings in this case—I was Chief Regional Civil Rights Attorney—I realize that my assessment that bias was not a factor in the agency's determination that the school was in fact responsible for discrimination under § 504 might be susceptible to an accusation of lack of objectivity.

388. *Id.* See *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39 (1976) ("Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*." (citation omitted); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 363-64 (4th Cir. 1985) (holding that while preclusion was inapplicable, second tribunal may consider findings of first); cf. *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988) (holding that extent of deference to administrative findings left to discretion of district court on direct review of administrative findings under EHA which provides: "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2) (1982)). Other scholars have agreed on the appropriateness of introducing administrative findings as evidence, rather than using them for purposes of preclusion. See, e.g., *Perschbacher*, *supra* note 13, at 461 nn.182-83; *Carlisle*, *supra* note 192, at 98 n.215.

389. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974) ("The arbitral decision

when it would be inappropriate—for the reasons set out above—either to invoke preclusion or to create presumptions that shift or alter burdens of proof.

CONCLUSION

In recent years the Supreme Court has extended inappropriately the application of statutory and common law preclusion to state administrative determinations. This extension has undermined the purpose of the civil rights laws in particular, and has overlooked the reasons for utilizing administrative agencies for more informal, less expensive resolution of disputes. This erosion of judicially guaranteed civil rights protection is both unnecessary and dangerous. By refocusing its inquiry, the Court—or Congress—could satisfy the justifiable functions of preclusion (finality, efficiency, predictability, comity) by utilizing presumptions and alterations in burdens of proof to grant appropriate deference to agency decisionmaking without eliminating access to federal forums for protection of federal civil rights.

may be admitted as evidence and accorded such weight as the court deems appropriate.”). While the Court expressed no view on what weight that should be, stating that it should depend on the circumstances, it cautioned the court to keep in mind that Congress intended for Title VII plaintiffs to have a “judicial forum for the ultimate resolution of discriminatory employment claims.” *Id.* at n.21; accord *McDonald v. City of West Branch*, 466 U.S. 284, 292 n.13 (1984); see also Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 47, 81-82 (1989) (preclusion should generally not be afforded arbitral findings since courts’ admission of arbitral findings into evidence satisfies desire for consistency).

NOTES



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