FEDERALISM ISSUES AND TITLE VII: *KREMER V. CHEMICAL CONSTRUCTION CORP.*

PAMELA A. MANN*

INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] was enacted to provide a sweeping remedy for the intractable societal evil of discrimination in employment. From the beginning, 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. Although it required resort to both state anti-discrimination agencies and to the federal anti-discrimination agency, the Equal Employment Opportunity Commission (EEOC), the statute was a federal response to a problem perceived as national in scope. The enforcement of the statute was primarily, if not exclusively, entrusted by Congress to the federal courts.

Nonetheless, in its recent decisions the Supreme Court has increased the likelihood that an individual who wishes to pursue a discrimination claim in federal court will be precluded from doing so for reasons of form rather than substance. In *Kremer v. Chemical Construction Corporation*,[2] the Court held that prior state administrative proceedings, if appealed into state court, might preclude the Title VII plaintiff from receiving a full hearing on her discrimination claim in federal court or, indeed, anywhere. This decision marks an intensification of the Court's concern for federal-state comity and procedural nicety even where the litigant's opportunity to vindicate her civil rights claims in federal court may be sacrificed as a result.

The Court in *Kremer* denied plaintiff the right to a de novo federal court hearing on his Title VII claim because he had previously sought state court review of the state anti-discrimination agency's finding of "no probable cause" to believe that the plaintiff had been the victim of discrimination. The fact that plaintiff Kremer's claim was submitted to the state agency for consideration solely because of Title VII's requirement that such "deferral" agencies be given a limited "first shot" opportunity to act on Title VII claims was not

* B.A., Oberlin College, 1969; J.D., University of Pittsburgh, 1973. The author has represented plaintiffs in Title VII discrimination actions for many years. She was a senior staff attorney at the National Employment Law Project from 1976-1982 and a clinical law teacher at Rutgers Law School's Constitutional Litigation Clinic from 1982-1984. She is currently chief of the New York State Attorney General's Charities Bureau.

1. 42 U.S.C. § 2000e-2000e-16 (1982). Title VII was amended substantially in 1972: its coverage was extended to the federal government, state and local governments, the EEOC's enforcement role was expanded, and many of the time limits for various procedures were lengthened. Except where otherwise indicated, references to Title VII herein are to the Act as amended in 1972.

2. 456 U.S. 461 (1982).

deemed relevant by the Court. Nor did the *Kremer* Court consider dispositive the primary Title VII enforcement role given to federal courts by Congress. Rather, the Court deemphasized earlier case authority and legislative history that had preserved the primacy of federal de novo hearings on discrimination claims in the face of potential threats of preclusion from prior proceedings.

The *Kremer* Court weighed the policies of Title VII against the command of 28 U.S.C. § 1738, which requires that federal courts accord the same full faith and credit to judgments rendered in state tribunals as would another court in the same state, and found no congressional intent to exempt a state court affirmance of Kremer's "no cause" determination from the operation of the doctrines of res judicata or collateral estoppel. It instead held that Kremer's appeal into state court irrevocably extinguished his right to present evidence of his discrimination claim to a federal court. Though neither the state agency nor the state court heard evidence on Kremer's claim, the Court found that the state decision was sufficient under state law to invoke principles of res judicata or collateral estoppel. It justified deference to the state decision on the basis of its desire to maximize federal/state comity.

The majority opinion in *Kremer* has generated a plethora of commentary as to whether giving preclusive effect to state administrative findings on discrimination claims is consistent with Title VII.[3] Too little attention has been devoted to whether the decision squares with traditional collateral estoppel and res judicata principles. As this article will show, *Kremer* and its progeny not only do violence to the congressional intent behind Title VII, but, as a result of an excessive concern for federal-state comity, also run afoul of traditional notions of collateral estoppel and res judicata. Indeed, it is only when one analyzes the extent of the Court's departure from the notions of fairness underlying the preclusion principles that one can comprehend fully the significant evisceration of federal remedies that *Kremer* represents.

To provide necessary background for this evaluation of the *Kremer* decision, Part I of this article examines the role that state and federal administrative proceedings play in Title VII litigation. It discusses the mechanics of the administrative proceedings, how these proceedings relate to a claimant's subsequent federal litigation, and the importance of a federal trial de novo, with reference to Congress' intent in passing and amending Title VII and to pre-*Kremer* interpretation of relevant provisions of Title VII.

Part II sets out the general concepts of comity and fairness that underlie the preclusion doctrines of res judicata and collateral estoppel, both in general

3. See, e.g., Note, Res Judicata, Collateral Estoppel, and Title VII: Tool or Trap for the Unwary?, 62 Neb. L. Rev. 384 (1983); Jackson, Matheson & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 Mich. L. Rev. 1485 (1981) (criticizing the result in *Kremer* prior to the Supreme Court's decision). See also Catania, State Employment Discrimination Remedies and Pendant Jurisdiction under Title VII: Access to Federal Courts, 32 Am. U.L. Rev. 777 (1983) (suggesting invocation of pendant jurisdiction as solution to *Kremer*'s threat to judicial determination of discrimination claims); Comment, Res Judicata in Successive Employment Discrimination Suits, 1980 U. Ill. L.F. 1049.

and as applied in federal litigation, as a basis for evaluating the *Kremer* decision.

Part III discusses in detail the factual setting of the *Kremer* opinion and the reasoning behind the majority and dissenting opinions. Part IV argues that *Kremer* goes beyond the proper bounds of relevant preclusion principles, by exposing how the Court's result in *Kremer* is inconsistent with the procedural due process and full and fair opportunity standards upon which the Court claims to rely. This Part then examines the standards for granting preclusive effect to an administrative determination and to a judicial affirmance of an administrative determination and shows that application of these standards cannot justify the *Kremer* result.

Part V undertakes a critical analysis of both the Supreme Court's argument in *Kremer* and subsequent lower court interpretation to demonstrate that the *Kremer* ruling and reasoning distort Title VII's intended enforcement scheme.

I
THE ROLE OF ADMINISTRATIVE PROCEEDINGS IN TITLE VII LITIGATION

The Title VII claimant in *Kremer* was required, pursuant to Title VII's statutory scheme, to submit his claim of discrimination to state and federal administrative agencies, prior to obtaining a federal court hearing. To facilitate a full understanding of the errors in *Kremer*, Part I of this article discusses the content, function, and reasons for this requirement, as well as its relationship to the whole statutory scheme of Title VII.

A. Mechanics of the Exhaustion Requirement

Prior to instituting a Title VII discrimination claim in federal court,[4] a claimant must satisfy Title VII's requirement that administrative remedies be "exhausted." This may be accomplished by filing an administrative charge of discrimination with the EEOC within 180 days of the alleged unlawful employment practice.[5] In states that have created a state or local agency to administer a law prohibiting discrimination (known as "deferral agencies"), an administrative charge must be filed with the state or local agency prior to the

4. The issue of whether Title VII provides an exclusive federal remedy has not been resolved with unanimity by the courts. Compare, e.g., Salem v. La Salle High School, 31 Fair Empl. Prac. Cas. (BNA) 10 (C.D. Cal. 1983), Greene v. County School Bd. of Henrico, 524 F. Supp. 43 (E.D. Va. 1981), Peterson v. Eastern Airlines, 20 Fair Empl. Prac. Cas. (BNA) 1322 (W.D. Tex. 1979); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 389 A.2d 465 (1978) (Title VII not exclusively federal remedy) with Valenzuela v. Kraft, Inc. 739 F.2d 434, (9th Cir. 1984); McCloud v. National R.R. Passenger Corp., 25 Fair Empl. Prac. Cas. (BNA) 513 (D.C. 1981); Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978) (Title VII exclusive federal remedy). As the statutory language of Title VII and the cases construing that language generally refer to federal actions, similar reference will be made herein.

5. 42 U.S.C. § 2000e-5(c) (1982).

EEOC's assuming jurisdiction over the charge.[6]

The state or local agency has exclusive control over the charge for 60-day after filing. A litigant may demand that the EEOC assume jurisdiction over a charge filed with a deferral agency after the initial 60-day period has expired. Title VII does not require that deferral proceedings be completed or even started within those 60 days. Deferral agencies are merely given "a limited opportunity to resolve problems of employment discrimination."[7]

Upon assuming jurisdiction over the charge, the EEOC must give "substantial weight"[8] to any final state administrative findings, but is not bound to accept those findings. After the EEOC completes investigation and attempts conciliation, it will issue the claimant a notice of right to sue.[9] The claimant may then file a Title VII action in federal court within 90 days of the issuance of this notice,[10] unless the EEOC itself decides to sue the employer on the claimant's charge. The claimant may demand a notice of right to sue from the EEOC 180 days after the EEOC assumed jurisdiction of the charge, even if the EEOC's administrative proceedings have not been completed.[11] Filing charges with the EEOC and the deferral agency, as well as receipt of a notice of right-to-sue from the EEOC, are necessary predicates to the filing of a Title VII action in federal court.[12] Although agency proceedings need not be pursued to a final agency determination, this requirement is generally referred to as an "exhaustion" requirement.

B. Congressional Intent Behind the Exhaustion Requirement

Both the state and federal exhaustion requirements were enacted to enhance the possibility of amicable settlements of discrimination actions. The EEOC's function was to dispose of all complaints that could be resolved without resorting to a full federal court hearing, as well as to investigate complaints that might eventually be brought by the federal government itself.[13] In

6. The claimant in a deferral state need not file two separate charges of discrimination, although dual filing will satisfy the requirement. She may, at her option, file her charge with the EEOC and allow the EEOC to transmit the charge to the state agency. The EEOC will then resume jurisdiction over the charge after the state agency has been given its prescribed period within which to act. See Love v. Pullman, 404 U.S. 522 (1972), which specifically approved this procedure.

7. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979), citing 42 U.S.C. § 2000e-5(c) (1982). See also *Kremer*, 456 U.S. at 470 n.8.

8. 42 U.S.C. § 2000e-5(b) (1982). See also 29 C.F.R. § 1601.21e (2) (1984): "substantial weight" is defined as "such full and careful consideration. . . as is appropriate in light of the facts. . . ."

9. 42 U.S.C. § 2000e-5 (f)(1) (1982).

10. Id.

11. 29 C.F.R. § 1601.256 (c) (1984).

12. See generally 42 U.S.C. § 2000e-16 (1982); 29 C.F.R. § 1613.201-283 (1984).

13. As originally enacted, Title VII vested the Justice Department alone with authority to enforce Title VII in court on behalf of the United States. When Title VII was amended in 1972, the EEOC was given enforcement authority in actions against private employers, while the Justice Department was given authority to sue state and local governments. 42 U.S.C. § 2000e-5 (1982).

contrast, the deferral agency's functions, although important, were not exercised in all cases. While deferral agencies were given an opportunity to resolve discrimination claims "without premature interference by the Federal Government,"[14] they could decline to exercise jurisdiction at their option.

Although prior resort to federal administrative procedures was widely acknowledged to be an integral part of the legislative scheme, the provisions for deferral of claims to state anti-discrimination agencies represented a compromise between factions of lawmakers in Congress. Congress rejected proposals that Title VII only be available as a remedy in states that had no anti-discrimination legislation,[15] that Congress or the President evaluate the adequacy of each state's procedure as a prerequisite to "deferral" status,[16] and that the EEOC cede exclusive authority to particular states to hear discrimination cases as part of "work-sharing" agreements in states where it deemed the anti-discrimination mechanism to be adequate.[17] Instead, the final version of the bill[18] provided that all states with anti-discrimination statutes and agencies that the EEOC found to be adequate[19] would have a 60-day opportunity to resolve claims of discrimination prior to the EEOC's assumption of jurisdiction.[20]

The deferral requirement reflects congressional judgment that a maximum of 60 days of state agency jurisdiction fully satisfied the deference owed state anti-discrimination laws and agencies. Congress rejected proposals that would have given deferral agencies greater control over Title VII charges for longer periods of time and instead chose limited deferral to state agencies.[21] Moreover, Congress later declined to extend the 60-day deferral period to provide an opportunity for thorough review in the state agency, although it amended Title VII to extend time limits for actions by the EEOC[22] and filings

14. 110 Cong. Rec. 12,725 (1964) (remarks of Sen. Humphrey), quoted in *Kremer*, 456 U.S. at 473.

15. United States Equal Employment Opportunity Commission Legislative History of Titles VII and XI of Civil Rights Act of 1964, 1-11 (1968) (listing amendments adopted and rejected). See also 110 Cong. Rec. 7,205 (1964).

16. 110 Cong. Rec. 2,728 (1964).

17. This proposal was contained in the version of Title VII which emerged from the House of Representatives. H.R. 7152, 88th Cong., 2d Sess. § 708(b) (1964).

18. The Senate modified the House's proposal concerning deferral status, and that modification was adopted as the final version of the Bill.

19. The main criteria against which the EEOC judges the adequacy of deferral agencies are (1) whether the state law prohibits discrimination in the same scope and manner as Title VII; (2) whether the agency can grant appropriate relief; and (3) whether the agency has established procedures for processing charges of discrimination. 42 U.S.C. § 2000e-5(c) (1982).

20. In the final version of the Bill, the EEOC was empowered to enter into worksharing agreements as in the House version of the Bill. However, unlike some earlier proposals, such agreements were not the only way in which anti-discrimination agencies could coexist with the federal enforcement mechanism.

21. See *Oscar Mayer*, 441 U.S. at 757-58.

22. For example, the period within which the EEOC was given to investigate and conciliate claims was extended from 60 to 180 days. 42 U.S.C. § 2000e-5(c) (1982).

by individuals with the EEOC.[23] Although Congress was aware that the short time limits reduced the likelihood that agency action would be completed, it lengthened only those time limits that related to the EEOC.

C. *De Novo Review of Agency Findings: The Critical Concept*

Congress sanctioned stringent time limitations on state and federal agency jurisdiction in large part because the statute guaranteed the right to a federal court hearing on all claims that could not be resolved by the administrative agencies. Congress apparently balanced its belief that resorting to anti-discrimination agencies would maximize efforts to conciliate claims of discrimination against its determination that federal court was the most appropriate forum for vindication of employment discrimination claims. Section 706(f)(1) of Title VII authorizes an individual alleging employment discrimination to bring suit in federal court if the time for agency action has elapsed or if the EEOC declines to bring suit on the claimant's behalf. Title VII contemplates exhaustion of efforts to conciliate, that is, to settle claims with the assistance of an administrative agency, rather than an exhaustion of administrative efforts to *adjudicate*.

While the original version of Title VII implicitly established that the federal court action authorized by Title VII was a de novo hearing rather than an administrative appeal,[24] the 1972 amendments "added language to § 706 which reflect[ed] the *de novo* character of the private section 'civil action' even more clearly than did the 1964 version."[25] The amendments to § 706 contain provisions directing the chief judge of the district in which a "civil action" is pending to "immediately designate a judge in such district to hear and determine the case,"[26] provisions directing the designated judge to "assign the case for hearing at the earliest practicable date,"[27] provisions to appoint a special master to hear the case if it has not been "scheduled for trial within one hundred and twenty days after issue has been joined,"[28] and provisions permitting the court to grant appropriate relief if the district court "finds" a violation of Title VII.[29] As the Supreme Court observed in *Chandler v. Roudebush*, "[t]he terminology employed by Congress — 'assign the case for hearing,' 'scheduled. . . for trial,' 'finds' — indicates clearly that the 'civil action' to which private-sector employees are entitled under the amended version of Title VII is to be a trial *de novo*."[30]

23. The statute of limitations for initial filing of an EEOC charge was extended from 90 to 180 days, and the maximum period for EEOC processing of administrative charges in deferral states was extended from 210 to 300 days. 42 U.S.C. § 2000e-5(c) (1982).

24. 42 U.S.C. § 2000e-5(f)(1) (1982).

25. Chandler v. Roudebush, 425 U.S. 840, 845 (1976) (citation omitted). See fuller discussion of *Chandler* at notes 67-70 and accompanying text.

26. 42 U.S.C. § 2000e-5(f)(4) (1982).

27. 42 U.S.C. § 2000e-5(f)(5) (1982).

28. Id.

29. 42 U.S.C. § 2000e-5(g) (1982).

30. 425 U.S. at 845.

It is now well-established that the right to federal court review cannot be compromised by any action or decision of the EEOC on the complainant's charge of discrimination. In *McDonnell Douglas Corp. v. Green*,[31] the Supreme Court held that plaintiff was entitled to a de novo hearing on his charge of discrimination in hiring practices, despite an EEOC finding of no reasonable cause to believe the charge to be true. The Court stated: "[t]he Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts."[32] In declining to limit federal court hearings based on administrative determinations, the *McDonnell Douglas* Court considered the "large volume of complaints before the Commission and the nonadversary character of many of its proceedings."[33]

While Title VII's grant of the right to a trial de novo may be partially explained by the investigatory, rather than adjudicative nature of administrative proceedings, Title VII guarantees plenary federal action even where prior administrative proceedings were adversarial in character. In *Chandler*[34] the Supreme Court held that federal employees were entitled to a trial de novo in federal court, even though they might have participated in adversarial administrative hearings prior to commencement of court action.[35] The Court specifically rejected arguments that Congress only intended to extend the right to trial de novo to those claimants who had not received prior administrative hearings.[36] In view of the legislative history of the 1972 amendments, the Court found that Congress clearly chose to grant judicial trial de novo to federal as well as private employees.[37]

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31. 411 U.S. 792 (1973).

32. Id. at 798-99.

33. Id. at 799. The Court also cited with apparent approval various court of appeals decisions which had articulated these factors: Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136 (5th Cir. 1971); Flowers v. Local 6, Laborers Int'l Union of N. Am., 431 F.2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (3rd Cir. 1970).

34. See note 25 supra.

35. Section 717(c) of the Act requires that an individual claiming discrimination by an agency or instrumentality of the federal government file an administrative complaint with the federal agency involved and pursue the complaint through the agency's procedures, which often include an evidentiary hearing. As initially enacted in 1972, § 717(c) provided a right of appeal to the Appeals Review Board of the Civil Service Commission. 5 C.F.R. § 713.231(a) (1972). This procedure was modified to require a charge with the EEOC after final agency action, as part of an effort to consolidate most administrative anti-discrimination authority in the EEOC.

36. As the *Chandler* Court pointed out, Congress arrived at the outlines of § 717 governing federal employees against a backdrop of intense debate as to whether trials de novo in federal court were the appropriate enforcement mechanism for Title VII claims generally. 425 U.S. at 848-60. Both houses of Congress rejected proposed amendments to the 1964 bill which would have given the EEOC adjudicative powers, with appellate court review. Instead, the wholly judicial enforcement mechanism, whose chief feature was the plenary trial in federal court, was reaffirmed.

37. Id. at 858. One commentator has suggested that Congress granted the right of trial de novo to Title VII claimants so that the federal courts could monitor the adequacy of state

Because of the guarantee of a federal trial de novo in Title VII, prior submission of a related claim to arbitration will not foreclose a federal Title VII claim arising from the same transaction. The Court in *Alexander v. Gardner-Denver Co.*[38] held that as "final responsibility for enforcement of Title VII is vested with federal courts"[39] and overlapping remedies against discrimination had long been the rule,[40] a federal trial de novo on plaintiff's Title VII claim was not defeated by prior resort to the parallel remedy of a grievance under plaintiff's collective bargaining agreement. The Court held that plaintiff's attempt to arbitrate his discharge claims did not constitute an election of remedies or a waiver of his Title VII claim.[41]

D. The Interrelationship Between State Deferral Procedures and Federal Court Actions

The structure and legislative history of the state/federal administrative scheme, especally the guarantee of a trial de novo, reveals Congress' intent to create a series of administrative remedies that would advance the fight against discrimination but would not impair the right to a federal hearing. Both Congress and the courts envisioned state agency proceedings and remedies as ancillary to federal administrative and judicial proceedings. "It is clear from [Title VII's] scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination."[42]

Thus, in *New York Gaslight Club v. Carey*,[43] the Supreme Court held that Title VII's attorney's fees provision[44] authorized a grant of fees for work performed in "state administrative and judicial proceedings that Title VII re-

agency procedures and laws on a case-by-case basis, after the completion of such proceedings. See Jackson, Matheson & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 Mich. L. Rev. 1485, 1486-87 (1981) [hereinafter Res Judicata/Title VII]. With respect to the formulation of the trial de novo mechanism in 1964, the evidence to support or contradict this theory of congressional intent is scanty. However, the legislative history of the 1972 amendments apparently contradicts this theory. After seven years of experience with actual enforcement of Title VII, Congress in 1972 reaffirmed the trial de novo scheme as the "form and scope of enforcement . . . needed to best protect the rights of all parties involved." S. Rep. No. 415, 92d Cong., 85 (1971) (minority statement of Senator Dominick). Whatever Congress's initial reasons were for vesting the federal courts with plenary power over Title VII claims, independent of agency determinations, this enforcement method was retained in 1972 because the federal judiciary was perceived as more likely than state or federal administrative agencies to decide claims of discrimination fully and fairly.

38. 415 U.S. 36 (1974)

39. Id. at 44.

40. Id. at 47.

41. The *Alexander* Court indicated that the policy reasons supporting its holding with respect to election of remedies would apply equally to the doctrines of res judicata and collateral estoppel. Id. at 44. The Supreme Court has apparently rethought these policy reasons in *Kremer*, as this aspect of *Alexander* is specifically disavowed in *Kremer*, 456 U.S. at 477.

42. New York Gaslight Club v. Carey, 447 U.S. 54, 65 (1980).

43. 447 U.S. at 54.

44. 42 U.S.C. § 2000e-5(k) provides: "In any action or proceeding under this [title], the

quires federal claimants to invoke."[45] Plaintiff Carey prevailed in state administrative proceedings on her claim that she had been denied a position as a cocktail waitress with defendant New York Gaslight Club because of her race.[46] Although the agency awarded her back pay and the position for which she had applied, it did not award attorney's fees, because fees were not authorized by the terms of the New York Human Rights Law.[47] Defendant appealed the state agency's decision to the Appellate Division of the New York Supreme Court, which affirmed the agency's decision.[48]

While the state proceedings were in progress and after the 60-day deferral period had elapsed, the EEOC took jurisdiction over the plaintiff's charge.[49] The EEOC found probable cause to believe plaintiff's charge was true and issued a notice of right to sue. Plaintiff then brought a Title VII action in federal district court raising the same claims of discrimination as were being litigated in the state proceedings. She requested "make-whole" relief, including attorney's fees. Defendant denied the allegations of the complaint and raised the pendency of the state proceedings as an affirmative defense.[50]

After the conclusion of the state litigation, the federal court limited its inquiry to plaintiff's request for fees, apparently without objection by any party. Plaintiff's fee application included charges for hours spent in preparation for state and federal administrative proceedings, the appeals to state court, and the federal action. The district court denied plaintiff's request for fees.[51]

The Supreme Court, however, found that Title VII's fee award provision and its policy of state/federal cooperation required that plaintiff be allowed to recover attorney's fees in federal court for work performed in state proceedings.[52] The Court noted that Title VII's deferral requirement was part of a

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Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

45. 447 U.S. at 66.

46. The New York State Division of Human Rights found probable cause to believe plaintiff's charge of discrimination and held an administrative hearing on the charge, pursuant to N.Y. Exec. Law § 297(4)(a) (McKinney Supp. 1979). After the two-day hearing, at which plaintiff was represented by counsel, the hearing examiner found that defendant had discriminated against plaintiff. Id. at 57.

47. N.Y. Exec. Law § 296 (McKinney 1982).

48. Defendant petitioned the New York Court of Appeals for leave to appeal but that motion was denied. 43 N.Y.2d 951 (1978). *Carey*, 447 U.S. at 59.

49. Counsel for plaintiff requested that the EEOC resume jurisdiction of plaintiff's charge after the state agency had found probable cause and prior to the state administrative hearing. Concurrent state and federal proceedings under Title VII are authorized by Section 706(f)(1) of the Act. See discussion of this provision and its import in text accompanying note 62 infra.

50. Id. at 58. The *Carey* opinion does not indicate whether defendant raised res judicata as an affirmative defense.

51. 458 F. Supp. 79 (S.D.N.Y. 1979). The Court of Appeals for the Second Circuit reversed. 598 F.2d 1253 (1979).

52. The *Carey* Court determined that § 706(k) was intended by Congress to authorize fees for enforcement activity in administrative agencies as well as in court, relying on that section's reference to "any action or proceeding under this title." 447 U.S. at 61-63.

"comprehensive enforcement scheme in which state agencies are given 'a limited opportunity to resolve problems of employment discrimination' and thereby to make unnecessary resort to federal relief by victims of the discrimination".[53] It asserted that Title VII vested " 'ultimate authority' to secure compliance with Title VII" in the federal courts,[54] and found that the federal courts were mandated to provide supplemental relief, such as attorney's fees, where state remedies did not afford complete relief. The Court reasoned that a construction of § 706(k) that prohibited fees for state administrative proceedings would be unfair, given the mandatory nature of the deferral provision, and would defeat the congressional design of the deferral provision:

> complainants unable to recover fees in state proceedings may be expected to wait out the 60-day deferral period, while focusing efforts on obtaining federal relief. See note 6 infra. Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme.[55]

It is clear from *Carey* that prior proceedings in a state administrative agency cannot limit a plaintiff's federal right to relief under Title VII even if state law would give the prior proceedings preclusive effect. Moreover, *Carey* indicates that the deferral requirement and state agency rulings obtained as a result of deferral proceedings must be construed in a way that does not defeat Congress' plan of state/federal cooperation by penalizing claimants for full participation in state proceedings.

Several court rulings addressing the technicalities of processing state agency charges of discrimination manifest an awareness, recognized in *Carey*, of the anomalous nature of the deferral requirement. In *Love v. Pullman*,[56] for example, the Supreme Court rejected the employer's motion to dismiss plaintiff Love's complaint for failure to comply with Title VII's deferral and exhaustion requirements, where he had followed an EEOC procedure that obviated the need for filing a separate charge with the state deferral agency. The complainant in *Love*, acting pursuant to EEOC procedures, filed a timely EEOC complaint and relied on the EEOC to file the required charge with the deferral agency while the EEOC held its own investigation of the charge in abeyance for the 60-day deferral period. Under this procedure, after 60 days, or earlier, if the state agency waives the opportunity to act on the charge,[57] the

53. Id. at 63, quoting *Oscar Mayer*, 441 U.S. at 755.

54. Id. at 64, quoting Alexander v. Gardner Denver Co., 415 U.S. 36, 44-45 (1974).

55. Id. at 65. Note 6 of the *Carey* opinion discusses the concurrent jurisdiction provisions of Title VII. The implications of this provision for the res judicata issue of *Kremer* are discussed more fully at note 281 and accompanying text infra.

56. 404 U.S. 522 (1972). This case was decided prior to the 1972 amendments to Title VII; the legislative history of the amendments expressly approves the holding of Love v. Pullman. See S. Rep. No. 681, 92d Cong., 17 (1972).

57. In *Love*, the EEOC orally notified the Colorado Civil Rights Commission that it had received a complaint from plaintiff. A week later the Colorado agency informed the EEOC by letter that it waived its opportunity to resolve the charge. 404 U.S. at 524.

EEOC resumes jurisdiction without a second filing by the complainant. The Supreme Court approved this procedure.

The Court rejected the argument that the first filing with the EEOC was ineffective because it preceded the 60-day deferral period. It also refused to impose any requirement that the EEOC's notice to the deferral agency be in writing or that the state agency complaint be filed by the complainant rather than the EEOC.[58] The Court found that the EEOC procedure complied with the intent of § 706(b) "to give state agencies a prior opportunity to consider discrimination complaints."[59] The Court deemed a more stringent reading of the deferral requirement to be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[60]

By sanctioning a procedure whereby filing with the EEOC constitutes filing with the state, the Court made apparent that the state deferral requirement is not a grant of jurisdiction to state administrative and judicial bodies to adjudicate the terms of Title VII, but is merely part of the scheme to exhaust conciliation efforts before permitting litigation. And by allowing the EEOC to control the flow of complaints to and from the state agency, the Court clarified the limited deference and authority to be accorded the state agency.[61] The state agency cannot demand that the EEOC or federal district court allow it to complete its proceedings. After 60 days, the administrative complaint is in the EEOC's control, regardless of the deferral agency's disposition of the claim.

Indeed, § 706(f)(1) of Title VII contemplates concurrent state and federal administrative action on the same claim. Federal courts lack jurisdiction over a Title VII claim unless plaintiff has received a notice of right to sue from the EEOC. The EEOC can and does issue notices of right to sue notwithstanding the status of any state procedure. EEOC jurisdiction over the Title VII claim is wholly independent of what may or may not happen in either the state agency or the state courts. This section therefore assumes that the EEOC may proceed with its own investigation and concilation efforts after the claim has been before the state agency for 60 days. Indeed, while § 706(f)(1) allows a federal court to stay a Title VII action for up to 60 days to allow completion of the state proceedings, this same provision also implies that federal court action may proceed while state agency proceedings are incomplete. As the Court observed in *Carey*, this provision of Title VII has the effect of providing each

58. Id. at 525.

59. Id. at 526.

60. Id. at 527.

61. Similarly, in *Oscar Mayer*, 441 U.S. at 750, the Supreme Court considered the state deferral requirement of the Age Discrimination in the Employment Act of 1967, 29 U.S.C. §§ 621 (1982), which was modeled after § 706(c) of Title VII. The Court found that federal rather than state statute of limitations would govern filings with state agencies compelled by the deferral provison. To hold otherwise, the Court observed, would impermissibly hold federal claims hostage to state time limits. Thus, the *Oscar Mayer* Court held that federal procedural rules would control the state deferral proceedings in order to avoid diluting the federal enforcement scheme.

complainant with "an absolute right to resort to an action in federal court" notwithstanding prior proceedings in the state agency or the EEOC.[62]

While the foregoing suggests that federal district courts should pay little, if any, attention to substantive agency rulings (state or federal), other provisions of Title VII arguably cloud the issue. The "substantial weight" amendment is the most important of these. In 1972, Congress passed an amendment to Title VII requiring the EEOC to "accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under State or local law pursuant to [the deferral requirement]."[63] The legislative history of this amendment, while not extensive, suggests that Congress amended the statute to insure that the EEOC would not simply ignore state findings, as some critics of Title VII had charged.[64]

The meaning of the "substantial weight" amendment to Title VII in 1972 has weighed heavily in the debate over whether federal courts should give prior state court proceedings res judicata effect. In the context of the larger administrative scheme of Title VII, "substantial weight" only becomes an issue if the deferral agency makes its finding before the EEOC has acted.[65] Given that the state deferral agency's authority to make findings after 60 days have elapsed is conditional, the "substantial weight" requirement is similarly conditional. Moreover, whether or not the EEOC's findings incorporate results of state proceedings that have been given substantial weight, the federal court may ignore the EEOC's findings in a de novo trial. Nothing in the legislative history suggests that Congress intended the "substantial weight" to be given the deferral agency's finding to impair the right to a de novo trial.

Taken as a whole, Title VII's deferral scheme thus strongly suggests that state agency proceedings are intended to complement rather than impinge upon the federal proceedings. The deferral system was never designed to compromise the right to a trial de novo in federal court.

II
THE ROLE OF PRECLUSION PRINCIPLES IN FEDERAL LITIGATION

As described in Part III, the *Kremer* decision applied preclusion princi-

62. *Carey*, 447 U.S. at 66 n.6. The Court stated that Title VII gave claimants the right to file suit in federal court 240 days after filing their initial charges. It reached this determination by reading the portion of § 706(f)(1) requiring the EEOC to issue a right to sue letter within 180 days of assuming jurisdiction, if it has not sued on the charge in that time, with the 60-day waiting period for state agency action. Chief Justice Burger declined to join in this portion of the *Carey* opinion because it was in his view, unnecessary to the resolution of the issue presented.

63. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 104 (1972) (codified as amended at 42 U.S.C. § 2000e-5(b) (1976)).

64. See 118 Cong. Rec. 310 (1972) (remarks of Sen. Ervin).

65. Whether the references to state deferral "proceedings" in this portion of § 706(b) apply to both agency and court proceedings is discussed more fully in text accompanying note 123 infra.

ples to a state court decision that merely affirmed the findings of a state administrative agency. This section reviews the general standards for and rationale behind the principles of res judicata and collateral estoppel as applied by the federal courts. Part V more fully discusses the case authorities that define the standards governing the preclusive effect to be given administrative decisions and judicial affirmances of such decisions.

28 U.S.C. § 1738 requires the federal judiciary to grant full faith and credit to judgments rendered by state courts.[66] Section 1738 states in pertinent part:

> [J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[67]

As all states have adopted the common law doctrines of res judicata and collateral estoppel in some form,[68] § 1738 requires incorporation of these preclusion principles into multiple forum litigation.

The doctine of res judicata holds that a valid final judgment in one action bars a second suit involving the same parties or their privies based on the same cause of action as in the first suit.[69] Under res judicata principles, all claims, defenses and prayers for relief arising from the cause of action at issue in the first suit are barred from relitigation, whether or not they were actually raised or judicially determined in the first suit.[70] Collateral estoppel is a narrower doctrine than res judicata. Collateral estoppel bars relitigation of issues of fact or law that were actually litigated and determined and which were necessary to the judgment in an earlier action between the parties, even where the cause of action on the second suit is different than in the first suit.[71]

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66. Article IV, section 1 of the Constitution requires each *state* to give full faith and credit to the public acts, records and judicial proceedings of every other state. This constitutional provision does not apply to federal courts. As § 1738, a statutory enactment of the full faith and credit clause between the states and the federal government has remained essentially unchanged since 1790 and is coextensive with the constitutional provision; the divergent sources of the obligation for state and federal courts make no practical difference. See Kremer v. Chemical Corp., 456 U.S. at 483 n.24.

67. 28 U.S.C. § 1738 (1982).

68. See, e.g., Restatement (Second) of Judgments § 86; 1B J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 0.422 (2d ed. 1984). The federal courts have also adopted these doctrines. See, e.g., Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984); Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Allen v. McCurry, 449 U.S. 90 (1980); Cromwell v. County of Sac, 94 U.S. 351 (1877).

69. See, e.g., Montana v. United States, 440 U.S. 147, 153 (1979).

70. See, e.g., Brown v. Felsen, 442 U.S. 127 (1979); Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434 (6th Cir. 1981) (barred second discrimination action for additional relief or different legal theory than in first); 1B J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, ¶ 0.405.

71. See, e.g. *Montana*, 440 U.S. at 147; *Allen*, 449 U.S. at 90. Although collateral estoppel was traditionally applied only where the parties to the second action were the same as in the first action, the "mutuality" doctrine has been transformed by recent decisions. A stranger to the first action may assert collateral estoppel in the second action, so long as the party against

Administrative determinations that are judicial in character generally are entitled to res judicata or collateral estoppel effect.

> 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 apply res judicata to enforce repose.[72]

Preclusion is not, however, an automatic consequence of an administrative final order; before granting preclusive effect to administrative findings, courts must scrutinize closely the administrative action to determine whether preclusion is appropriate.[73] Administrative determinations that are investigatory, rather than judicial in character or that do not allow the parties a full and fair opportunity to litigate are not granted preclusive effect by the courts.[74]

The policies behind res judicata and collateral estoppel, incorporated into § 1738, are those of judicial economy and repose. The preclusion doctrines are founded upon "the generally recognized public policy that there must be some end in litigation"[75] and upon a "desire to avoid the . . . possiblity of inconsistent results, the waste of judicial resources, and the excessive burden on litigants inherent in multiple law suits."[76] Where federal courts apply preclusion principles to bar relitigation of matters concluded by a state court judgment, such application also promotes comity and respect between the state and federal courts.[77] On the whole, courts invoke res judicata and collateral estoppel in the multiple forum context unless Congress has expressly or impliedly repealed § 1738's full faith and credit provision in a particular statute[78] or if compelling federal policies militate against their application.[79]

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whom collateral estoppel is asserted had a full opportunity to litigate the issue in question and other requirements for application of collateral estoppel are met. See Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 323 (1979); Blonder-Tongue Laboratories, Inc., v. University of Ill. Found., 402 U.S. 313 (1978); 1B J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 0.411[1].

72. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966).

73. See Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 709 (8th Cir. 1982) (collateral estoppel effect given to administrative findings only where certain prerequisites met); Anderson v. Babb, 632 F.2d 300, 306, 307 n.3 (4th Cir. 1980) (no preclusive effect in prior administrative determination); Nasem v. Brown, 595 F.2d 801 (D.C. Cir. 1979); Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor, 487 F.2d 342, 350 n.10 (2d Cir. 1973). See Grose v. Cohen, 406 F.2d 823, 824-25 (4th Cir. 1969) ("Res judicata of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings").

74. See, e.g., International Harvester Co. v. Occupational Safety and Health Review Comm'n, 628 F.2d 982 (7th Cir. 1980); Donovan v. Peter Zimmer Am., Inc., 557 F. Supp. 642 (D.S.C. 1982).

75. Baldwin v. Traveling Men's Ass'n., 283 U.S. 522, 525 (1931).

76. *Allen*, 449 U.S. at 96. See also *Federated Dep't. Stores*, 452 U.S. at 401.

77. *Allen*, 449 U.S. at 96. See also *Migra*, 104 S. Ct. at 898; *Kremer*, 456 U.S. at 461.

78. *Allen*, 449 U.S. at 97-99.

79. See Brown v. Felsen, 442 U.S. 127 (1979); Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944).

Res judicata and collateral estoppel are not the invariable rule, however, even in situations where preclusion principles generally would apply. In *Montana v. United States*,[80] the Supreme Court indicated that collateral estoppel would not bar the relitigation of constitutional issues previously rejected by the state courts[81] if controlling facts or legal principles had changed significantly since the state court judgment or if "other special circumstances warrant[ed] an exception to the normal rules of preclusion."[82] The special circumstances enumerated included instances where both actions involved unmixed questions of law[83] or where the federal litigant asserted "unfairness or inadequacy" in the state procedures, *i.e.*, "if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation."[84] Thus, where the prior litigation did not afford a full opportunity to litigate, either because of actual unfairness or as a result of inadequate procedures in the prior action, preclusion principles will not apply.[85]

In sum, the requirement of § 1738 that federal courts give full faith and credit to state proceedings reinforces principles of comity and respect for state authority, as well as principles of repose. At the same time, the courts have recognized that cross-forum preclusion should not be applied by the federal courts where the state litigation did not allow a full opportunity to litigate or where the action should be heard in a federal rather than a state forum.[86]

III

KREMER V. CHEMICAL CONSTRUCTION CORP.

In Kremer v. Chemical Construction Corp.[87] the Supreme Court addressed the issue of whether federal courts hearing a Title VII action are required by 28 U.S.C. § 1738 to give preclusive effect to a prior state court decision upholding a state agency's finding of no probable cause to believe that the employer had illegally discriminated against the plaintiff.[88]

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80. 440 U.S. 147 (1979).

81. The *Montana* exceptions apply to res judicata as well as collateral estoppel. See *Kremer*, 456 U.S. at 481 n.22.

82. *Montana*, 440 U.S. at 155.

83. This exception was found to be especially important in constitutional litigation: "Unreflective invocation of collateral estoppel against parties with an ongoing interest in consitutional issues could freeze doctrine in areas of law where responsiveness to changing patterns of conduct or social mores is critical." Id. at 163.

84. Id. at 163, 164 and n.11. Under the facts presented in *Montana*, the Supreme Court determined that none of the preclusion exceptions applied and that the United States was therefore barred by collateral estoppel from litigating its challenge to the constitutionality of Montana's gross receipts tax on public contractors.

85. See discussion in text accompanying notes 238-239 infra.

86. As discussed more fully at notes 152-157 and accompanying text, the Court has limited this doctrine to situations where Congress has impliedly or expressly repealed § 1738.

87. 456 U.S. 461 (1982). The majority opinion, authored by Justice White, was joined by Chief Justice Burger, Justices Powell, Rehnquist, and O'Connor. Justice Blackmun filed a dissenting opinion, in which Justice Brennan and Justice Marshall joined. Justice Stevens, while indicating agreement with Justice Blackmun generally, filed a separate dissent.

88. The Supreme Court previously held in Allen v. McCurry, 449 U.S. 90, 99 (1980) that a

Kremer initiated his action by filing a charge of discrimination with the EEOC in May 1976.[89] As required by Title VII, the EEOC referred the charge to the state deferral agency, the New York State Division of Human Rights (NYHRD).[90] The NYHRD, after an investigation that consisted of little more than an examination of documents submitted by the employer and three interviews with Kremer,[91] found no probable cause to believe plaintiff's claims.[92]

Kremer appealed the NYHRD finding to the agency's Appeal Board, which affirmed. On December 4, 1977, Kremer attempted to reactiviate his charge in the EEOC. Two days later, he pursued his state remedies still further, appealing the appeal board's determination to the Appellate Division of the Supreme Court of New York for the First Department.[93] The appellate division affirmed the agency's decision in February 1978. The EEOC found no probable cause as to Kremer's federal EEOC charge and issued a notice of right to sue to plaintiff,[94] who brought a Title VII action in the federal district court. He had not been represented by counsel throughout the prior proceedings, and he was unrepresented in the district court.[95]

The district court granted defendant's motion for summary judgment on the basis of res judicata.[96] A panel of the Second Circuit Court of Appeals

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statute will not be exempt from 28 U.S.C. § 1738 unless that statute contains an implied or express repeal of § 1738. As the Court recognized, plaintiff in *Kremer* did not claim that Title VII expressly repealed § 1738. 456 U.S. at 468.

89. Kremer claimed that defendant Chemical Construction Corporation's failure to rehire him as an engineer after layoff was because of his national origin (Polish) and religion (Jewish). His administrative charge also contested his discharge. Kremer v. Chemical Constr. Corp., 477 F. Supp. 587, 588-89 (S.D.N.Y. 1979).

90. Apparently, Kremer did not file a separate charge with NYHRD; his EEOC charge was simply transmitted to the state agency, pursuant to the procedure approved in Love v. Pullman Co., 404 U.S. 522 (1972). Id at 588-89.

91. Kremer v. Chemical Constr. Corp., 623 F.2d 786, 787 (2d Cir. 1980). Kremer's petition for certiorari on pages 2-3 described NYHRD's investigation as "hurried and perfunctory." When Kremer was summoned to review the employer's documents in support of its position, the NYHRD investigator urged him to "read faster. I have to go for lunch."

92. NYHRD made findings of fact on the rehire claim, but none on the discharge claim. *Kremer*, 447 F. Supp. at 589. In the district court's view, however, the rehire claim was "more substantial" than the initial discharge claim. Id.

93. The appeal was brought pursuant to § 298 of the New York Human Rights Law, N.Y. Exec. Law § 298 (McKinney Supp. 1984), and CPLR Article 78, N.Y. Civ. Prac. Law § 7803 (3)-(4) (McKinney 1981), seeking to set aside the agency's determination. 447 F. Supp. at 589.

94. Plaintiff's request for reconsideration of the EEOC's decision was denied by the District Director of the EEOC. 456 U.S. at 465.

95. See 623 F.2d at 787 and 477 F. Supp. at 588. Kremer may have been unrepresented because he could not afford counsel. He was granted leave to proceed in forma pauperis by the Supreme Court. 452 U.S. 960 (1981).

96. The district court rested its decision on Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir. 1979), cert. denied, 444 U.S. 983 (1979). *Sinicropi* held that preclusion principles would bar a Title VII claim where the plaintiff had previously sought state court review of a state anti-discrimination agency finding. *Sinicropi* represented an extension by the Second Circuit of the holding of Mitchell v. National Broadcasting Co., 553 F.2d. 265 (2d Cir. 1977). *Mitchell* found that res judicata barred federal court review of race discrimination claims brought under 42

affirmed, and petition for rehearing en banc was denied.[97]

The Supreme Court affirmed the Second Circuit ruling.[98] It reviewed the legislative history of Title VII and found that "neither the statute nor our decisions indicate that the final judgment of a state court is subject to redetermination" in a federal court.[99] The Court examined Title VII's statutory language, and found that, while "the federal courts were entrusted [by Congress] with ultimate enforcement responsibility" in Title VII: "[s]tate anti-discrimination laws. . . play an integral role in the congressional scheme."[100] It reviewed the mechanics of the state deferral requirement, noting the absence of any language requiring claimants to "pursue in state court an unfavorable state administrative action" and the absence of any specification of the weight to be given such decisions.[101]

The Court regarded the statutory requirement that the EEOC give "substantial weight" to state and local findings as a statement of the minimum deference that state actions could be given, rather than an assertion of the outer limits of deference to be given state determinations. Nor did the Court view § 706(f)(1) of Title VII, which it had interpreted in prior cases to guarantee a right to trial de novo in federal court,[102] to work an implied repeal of § 1738, as neither the statutory language nor earlier case law expressly addressed the interaction between the trial de novo guarantee and the preclusion principles of § 1738.[103]

The Court concluded that the de novo federal trial provision was implemented primarily "to protect employers from overzealous enforcement by the EEOC,"[104] rather than to guarantee the right to litigate in a federal forum. The Court relied heavily on the legislative history of a proposed amendment

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U.S.C. § 1981, where plaintiff had previously appealed a state agency determination on the same claim into state court.

While the district court in *Kremer* felt constrained to follow *Sinicropi*, the bulk of its opinion criticizes *Sinicropi* as unfair, at odds with Title VII's concept of a federal trial de novo, and counterproductive to the expressed comity concerns of the *Mitchell* majority. 477 F. Supp. at 591-94.

97. *Kremer*, 623 F.2d 786 (2d Cir. 1980).

98. The Supreme Court granted the petition for writ of certiorari because of the split in the circuits on the issue presented. *Kremer*, 456 U.S. at 466. See Unger v. Consolidated Foods Corp., 657 F.2d 909 (7th Cir. 1981); Smouse v. General Elec. Co., 626 F.2d 333 (3d Cir. 1981); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980), all finding state judicial review of a state anti-discrimination agency's finding to have no preclusive effect. Only the Second Circuit, in *Sinicropi* and *Kremer* had found preclusion. See also Moosavi v. Fairfax County Bd. of Educ., 666 F.2d 58 (4th Cir. 1981) (preclusion applied to finding in plenary state court proceedings).

99. *Kremer*, 456 U.S. at 470.

100. Id. at 468-69.

101. Id. at 469.

102. Id. at 469-70. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973); Chandler v. Roudebush, 423 U.S. at 840-45.

103. *Kremer*, 456 U.S. at 469-70. In contrast, the Court suggests that § 1738 does not apply to unreviewed state administrative determinations. Such determinations, like determinations of the EEOC, would not bar trial de novo in federal court. Id. at 474-75.

104. Id. at 474.

by Senator Hruska to the original version of Title VII that would have vested exclusive jurisdiction over particular discrimination claims in the EEOC and the federal judiciary. The amendment would have eliminated the possibility of independent proceedings under the National Labor Relations Act,[105] the Railway Labor Act,[106] and other federal civil rights acts.[107] After Senators Javits and Williams spoke against the amendment, pressing, among other arguments, "the real capability in this situation of dealing with the question on the basis of res judicata,"[108] the Hruska amendment was defeated.[109] The Court concluded that Congress, "though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws."[110]

In the Court's view, the conclusion that Title VII or its legislative history contained insufficient evidence of an implied repeal of § 1738 was "suggested if not compelled" by *Allen v. McCurry.*[111] In *Allen*, collateral estoppel was applied in a federal action brought under 42 U.S.C. § 1983.[112] Finding insufficient evidence that Congress had impliedly repealed § 1738 in passing § 1983, the *Allen* Court had found that state collateral estoppel rules would, by virtue of § 1738, apply to a situation where a federal plaintiff's fourth amendment claim had previously been adjudicated in the course of his state criminal trial.[113]

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105. 29 U.S.C. § 158(a) (1982). Actions against employers for unfair labor practices under the NLRA, as well as actions against unions under § 301 of the Act for breach of the duty of fair representation, are mentioned in the debates. See 118 Cong. Rec. 3,368-69 (1972) (remarks of Senator Hruska); Id. at 3,370 (remarks of Senator Javits).

106. 45 U.S.C. § 151-188 (1982), cited in 118 Cong. Rec. 3,370 (1972) (remarks of Senator Javits).

107. See 118 Cong. Rec. at 3,370 (remarks of Senator Javits). Senator Javits notes the deleterious effect of the proposed amendment on enforcement of civil rights acts long antedating the Civil Rights Act of 1964. Presumably, his reference is to 42 U.S.C. §§ 1981, 1983 (1982). See Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

The defeat of this amendment does not support the Court's position. See notes accompanying text 278-88 infra. See also Justice Blackmun's dissent. *Kremer*, 456 U.S. at 499-501.

108. 118 Cong. Rec. at 3,370 (1972) quoted in *Kremer*, 456 U.S. at 475. For Senator Williams remark's see 118 Cong. Rec. at 3,372.

109. Senator Javits also argued that the amendment was unnecessary because, although it was aimed at avoiding harassment of employers, no such harassment had actually occurred. Senator Javits opposed the amendment, as did the Department of Justice, because it would have had the effect of eliminating other remedies against discrimination. Id. at 3,369-70. The *Kremer* opinion focuses only on the remark concerning res judicata. 456 U.S. at 475-76.

110. Id. at 476.

111. Id.

112. Allen v. McCurry, 449 U.S. 90, 94-105 (1980).

113. The Supreme Court took pains to stress the limited nature of its ruling in *Allen*. It stated that it did not decide "how the body of collateral estoppel doctrine or 28 U.S.C. § 1738" should apply in the present case. Id. at 105 n.25.

> Our decision does not "fashion" any doctrine of collateral estoppel at all. Rather, it construes § 1983 to determine whether the conventional doctrine of collateral estoppel applies to the case at hand. It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral estoppel defense in this case is not before us.

The *Kremer* Court also justified the result it reached on the grounds that it furthered "basic tenets of comity and federalism."[114] The Court apparently believed its result was consistent with general policies of federalism[115] as well as "the principles of comity and repose embodied in § 1738."[116]

Having decided that § 1738 controlled the statute before it, Title VII,[117] the Court then applied preclusion principles to the facts presented in *Kremer*.[118] It rejected plaintiff's argument that the state court judgment should not preclude his Title VII action because he had not had a "full and fair opportunity" to litigate his claim in state court. The Court realized that this contention, if proven, would counsel against preclusion,[119] regardless of whether preclusion was sought under res judicata or collateral estoppel.[120] The Court held that the administrative and judicial proceedings in New York were legally sufficient, when measured against the appropriate standard:

> [W]here 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.[121]

Without analysis or extended discussion, the Court equated "full and fair opportunity" with procedural due process, a link that the Court had never

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Id. at 95 n.7.

Thus, the *Allen* Court reserved the question of whether there were any exceptions to a mechanistic application of res judicata or collateral estoppel principles in § 1983 actions. See also Haring v. Prosise, 103 S. Ct. 2368 (1983). Subsequently, in Migra v. Warren City School Dist. Bd. of Educ., 104 S.Ct. 892 (1984), the Supreme Court found that the policies behind § 1983 did not justify an exception to § 1738 in the situation where constitutional claims had not, but could have been raised in a prior state proceeding. It held that res judicata would bar the second action.

114. *Kremer*, 456 U.S. at 478.

115. The Court relied upon Board of Regents v. Tomanio, 446 U.S. 478 (1980) as authority for application of principles of federalism to civil rights cases. The *Tomanio* Court however, while applying state statutes of limitation to § 1983 actions, distinguished § 1983 actions from Title VII actions with respect to application of the state statutes. Id. at 790. See also Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355 (1977) (requirement that EEOC follow state statute of limitations in proceedings instituted in EEOC inconsistent with Title VII).

116. *Kremer*, 456 U.S. at 463.

117. Id. at 475-76.

118. Curiously, despite the Court's insistence in its *Kremer* and *Allen* opinions that state law be consulted as to *how* preclusion principles should be applied, the *Kremer* majority does not discuss in any depth the New York state court cases which grant preclusive effect to affirmances of state anti-discrimination agency findings. In fact, a New York case cited by the dissent, State Division of Human Rights v. County of Monroe, 88 Misc. 2d 16, 386 N.Y.S.2d 317 (1976) casts doubt on the Court's interpretation of New York preclusion law. See *Kremer*, 456 at 507 n.23 (Blackman, J., dissenting).

119. *Kremer*, 456 U.S. at 480-81, citing *Allen*, 449 U.S. at 95; Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971).

120. *Kremer*, 456 U.S. at 481 n.22. See notes 187-220 and accompanying text infra.

121. Id. at 481. This definition of full and fair opportunity was not urged by either party. Indeed, neither Kremer nor Chemical Construction Co. suggested any standards for determining whether prior proceedings had afforded a full and fair opportunity for a litigant to be heard.

before articulated. The Court found New York's administrative and judicial procedures to satisfy minimum due process requirements, and thus to provide a full opportunity to be heard.

In evaluating the prior state proceedings against the requirements of due process/full and fair opportunity, the Court noted that the plaintiff had had the opportunity to present evidence, including sworn witnesses, to the NYHRD investigator and had been given the opportunity to rebut evidence submitted by or obtained from the employer.[122] The Court recognized that, where the investigation resulted in a finding of no probable cause, as in Kremer's case, nothing approximating an adversary hearing was held by the NYHRD. The Court decided, however, that the failure to hold an adversary hearing was occasioned by the conclusion of the agency that the complaint lacked merit as a matter of law, a conclusion that obviated the need for a hearing to resolve disputes of fact. The Court indicated, moreover, that the Human Rights Appeals Board could have ordered a hearing if the Board had found there had not been a full investigation of the complaint, and that the appellate division could have reversed the administrative finding of "no probable cause" if it had found procedural irregularities or arbitrary action by the agency.

The Court "ha[d] no hesitation in concluding that this panoply of procedures, complemented by administrative as well as judicial review . . . [was] sufficient under the Due Process Clause."[123] It approved the imposition of preclusion, even though the "factfinding" was administrative rather than judicial.[124]

IV
KREMER Exceeded the Proper Bounds of Relevant Preclusion Principles

This section analyzes and rejects the *Kremer* majority's interpretation of state administrative proceedings and subsequent state court review under Title VII. It then reviews the case law defining each measure of procedural adequacy which the Court purports to consider in reaching its decision. These include: 1) procedural due process standards; 2) full and fair opportunity standards applied to prior court determinations; 3) standards governing preclusive effect for prior administrative determinations; 4) standards governing preclusive effect for prior judicial affirmances of administrative deci-

122. According to the petitioner's brief, however, NYHRD never heard any of Kremer's witnesses, nor did it require the employer's witnesses to submit to cross-examination. Petitioner's Brief at 17.

123. 456 U.S. at 484 (footnote omitted).

124. Id. at 484 n.26, citing United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966), which approves the application of res judicata to decisions of an administrative agency acting in a judicial capacity. See notes 212-20 and accompanying text infra. As noted above, the agency acted in an investigative rather than a judicial capacity in Kremer's case.

sions. The *Kremer* result is found to be inconsistent with the body of case law construing preclusion doctrines.

Kremer accords preclusive effect to a judicial affirmance of a non-adversarial administrative finding. Not only does this ruling run contrary to preclusion authorities cited by the *Kremer* court itself, but the result also embodies a formulation of the "full and fair opportunity" exception to preclusion principles that is erroneous, both in general and as applied to the facts in *Kremer.* The standards enunciated in *Kremer* represent a significant retreat from even minimal guarantees of procedural fairness. The effect of *Kremer* may be to drastically limit access to the federal courts.

A. Kremer *Analysis Erroneous*

1. The state court decision is not equivalent to a summary judgment determination.

As is clear from the *Kremer* opinion itself, the NYHRD found no probable cause to believe that Kremer had been discriminated against, after a cursory investigation in which the employer submitted documents in support of its position and Kremer was interviewed three times.[125] As no probable cause was found, NYHRD was not required to, and did not, hold a hearing on plaintiff's claims.[126] The appellate division did not take evidence or find facts on plaintiff's claim; rather, it reviewed the administrative determination only as to whether the agency's decision was "arbitrary and capricious."[127]

In reaching the conclusion that Kremer should be precluded from pursuing his Title VII claim in federal court, the majority engaged in a procedural sleight of hand. While the majority acknowledged that only the administrative agency engaged in a "fact finding" process, it asserted that the state court decision should be given preclusive weight because that decision is purportedly "on the merits" of plaintiff's claim and is independent of the decision of the agency.[128] To support these characterizations, the majority likened judicial review of a finding of no probable cause to a decision on a motion for summary judgment that a complaint is insufficient as a matter of law.[129]

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125. See note 91 and accompanying text supra.

126. See notes 221-37 and accompanying text infra.

127. There are sharp differences between the majority and the dissent as to whether the New York appellate court reviews the merits of the agency's decision in applying this standard of review. Compare *Kremer,* 456 U.S. at 480, 481 n.21 with *Kremer,* 456 U.S. at 492 (Blackmun, J., dissenting). The real question, however, is whether the scope of review by the state court is sufficiently broad to make it a separate determination of any kind; as discussed at note 247-55 and accompanying text infra, the judicial review in *Kremer* is not a determination separate from the administrative decision, at least for preclusion purposes.

128. Id. at 481 n.21. It approves the state's "panoply of procedures complemented by administrative as well as judicial review." Id. at 484. The dissent asserted that the majority artificially separated the judicial review from administrative proceedings, whereas judicial review should be seen as "the last step in the administrative process." Id. at 490 (Blackmun, J., dissenting).

129. Id. at 480 n.21. Even based on the cases cited by the majority, this appears an erroneous characterization. The majority's attempts to portray the state court decision as a sum-

While it is true that a judgment dismissing a complaint is entitled to res judicata effect,[130] the decisions according preclusive effect to summary dispositions are inapposite because they involve judicial, not administrative determinations.[131] Comparing the state proceedings in *Kremer* to summary judgment proceedings is therefore inappropriate.[132]

The state tribunal's determination[133] of no probable cause is radically different from a summary judgment determination. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will be granted only where there is no genuine issue of material fact. The party against whom the motion is made is entitled to the benefit of all evidentiary doubt, as well as all favorable inferences to be drawn from the evidence. In actions alleging discrimination, summary judgment is rarely granted, because the material issue of motive is usually in dispute.[134]

In contrast, the NYHRD investigates the complainant's case to determine if probable cause exists to believe that discrimination has occurred.[135] Each party may submit evidence, and the complainant may submit additional proof to rebut the employer's evidence "before any determination dismissing a complaint for no probable cause is made."[136] The complaint will be dismissed if the investigator finds there is "no probable cause *to believe* that the person named in the complaint . . . has engaged, or is engaged in an unlawful discriminatory practice."[137] The agency does not focus on whether the complainant's allegations, if proven, constitute a valid claim of discrimination. If that were the issue, it would be unnecessary to take evidence from the employer or to allow the employee an opportunity to rebut the employer's evidence. Rather, the agency weighs the evidence and makes a credibility determination on the basis of disputed facts.

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mary judgment determination which is independent of the agency's decision stems from its explicit recognition that decisions of the administrative agency cannot be granted preclusive effect under Title VII, id. at n.7, as well as its implicit acknowledgment that judicial affirmance of administrative findings will be granted preclusive effect only where the underlying administrative proceedings were adjudicative in nature.

130. 1B J. Moore, Moore's Federal Practice ¶ 0.409[1] (1974 & Supp. 1975), cited in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977).

131. See Hubicki v. ACF Indus., Inc., 484 F.2d 519, 524 (3d Cir. 1973); Glick v. Ballentine Prod., Inc., 397 F.2d 590, 593 (8th Cir. 1968); Rhodes v. Meyer, 334 F.2d 709, 716 (8th Cir. 1963), cert. denied, 379 U.S. 915 (1964); Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964), all cited in *Mitchell*, 553 F.2d at 271.

132. This is the basis of Justice Stevens's dissent. *Kremer*, 456 U.S. at 510 (Stevens, J., dissenting).

133. As discussed below, the *Kremer* majority attempts to portray the quasi-summary judgment determination as emanating from the state court rather than the state agency. The determination is made, in fact, by the agency, and the Court has a very narrow scope of review.

134. See, e.g., Rodriguez v. Board of Educ. of Eastchester, 620 F.2d 362 (2d Cir. 1980); Coke v. General Adjustment Bureau, 640 F.2d 584 (5th Cir. 1981); Lutcher v. Musicians Local 47, 633 F.2d 880 (9th Cir. 1980); Toney v. Bergland, 645 F.2d 1063 (D.C.Cir. 1981); EEOC v. Keco Indus., Inc., 617 F.2d 443 (6th Cir. 1980), cert. denied, 449 U.S. 899 (1981).

135. See 9 N.Y. Admin. Code tit. 9, § 465.6 (1985).

136. 9 N.Y. Admin. Code tit. 9, § 465.6(c) (1985).

137. N.Y. Exec. Law, § 297(2) (1982).

Moreover, in contrast to a motion for summary judgment, the investigator, rather than the parties, controls and builds the administrative record on which a "no probable cause" finding is based. Indeed, the state agency procedures make it exceedingly difficult for a litigant to produce the proof customarily proffered in a motion for summary judgment. Kremer's complaint in federal court that state administrative procedures were inadequate was based in part on allegations that the investigator failed to take evidence from any of the witnesses Kremer identified and did not require the employer's witnesses to submit to cross-examination.[138] In contrast to a summary judgment proceeding under Federal Rule 56,[139] where the court considers discovery materials and affidavits submitted by the parties, and may conduct an evidentiary hearing if necessary, no discovery is permitted the parties prior to the cause determination by the agency.[140]

Nor does the reviewing New York court use a summary judgment analysis to review the cause determination. The appellate division court may only review the administrative record. The parties may not supplement the agency record in the review before the appellate division, depriving the claimant of an opportunity to present evidence that shows a genuine issue of material fact. By contrast, in the course of considering a Rule 56 motion, a federal court may request additional affidavits and evidence.[141]

The options open to a New York court reviewing the agency's no probable cause findings are radically different from those open to a federal court deciding a Rule 56 motion. The New York court may only review the administrative determination for abuse of discretion.[142] It may not substitute its judgment that dismissal is inappropriate, nor may it find new facts not found by the agency.[143] An affirmance by the appellate division of a no cause finding by NYHRD merely approves the agency's finding as reasonable, even where a contrary finding would be equally reasonable.[144] Rather than searching the record for genuine issues of material fact, the court affirms the agency's resolution of factual disputes if there is *any evidence* in the record supporting the agency's determination. This is virtually the antithesis of a summary judgment decision.

While the *Kremer* majority relies on language in some New York cases

138. Brief of Petitioner, p.17.

139. Fed. R. Civ. P. 56.

140. Compare Wright & Miller, Federal Practice and Procedure: Civil § 2721 (1973), cited in *Kremer*, 477 F. Supp. at 591 with N.Y. Admin. Code tit. —, § 465.6(b) (19—). See also N.Y.S. Div. Human Rights v. Rochester, 53 A.D.2d 1020, 386 N.Y.S.2d 147 (4th Dept. 1976) (purpose of NYHRD subpoenas is obtaining evidence for hearing, rather than for discovery).

141. Id. Fed. R. Civ. P. 56.

142. N.Y. Exec. Law § 298 (McKinney 1982). The NYHRD decision must be "devoid of a rational basis" before it will be overturned by the appellate division.

143. N.Y. Exec. Law § 298 (McKinney 1982) (agency's findings of fact conclusive if supported by substantial evidence).

144. Imperial Diner, Inc. v. State Human Rights Appeal Bd., 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980), citing Mize v. State Div. of Human Rights, 33 N.Y.2d 53, 56, 349 N.Y.S.2d 364, 366 (1973).

suggesting that agency complaints will not be dismissed unless they lack merit "virtually" as a matter of law,[145] the weight of the New York case authority,[146] applicable law and the regulations[147] indicate that a "no probable cause" determination is just that: a determination that the claimant probably does not have a case. A dismissal cannot be avoided simply by a showing of disputes of fact; the litigant is required, without discovery, cross-examination, and the opportunity to subpoena documents or witnesses, to convince an investigator that she will probably succeed on the merits of her claim. In the summary judgment context, a denial of summary judgment means that there are disputed material facts; the converse of a no probable cause determination is a finding that the claimant probably will win in court.

The second error in the Supreme Court's characterization of the state decision as akin to summary judgment is that it incorrectly portrays the state *court*, rather than the state agency, as the decisionmaker.[148] By the Court's own analysis, it is the state court's determination, rather than the agency's determination, that triggers the preclusive effect. Otherwise, the result will be contrary to Title VII's intent that administrative determinations should not bar a trial de novo in federal court.[149] Yet, it is manifest even from the majority opinion,[150] that the state court role is limited to determining if the agency's finding is arbitrary and capricious.[151]

The *Kremer* majority suggests that, given the nature of the state agency's inquiry in the no cause determination, *viz.*, that the complaint fails virtually as a matter of law, the state court's review of that determination is sufficient to afford plaintiff a full and fair opportunity to present his claim. Nonetheless, the Court concedes that judicial review of a NYHRD finding is not de novo. The state court review is limited to the facts adduced by the agency, acting in a non-adjudicative capacity, while pursuing an inquiry that has nothing to do with identifying disputes of fact. As the court's scope of review is exceedingly narrow, the state court's intervention into the process does not expand the claimant's opportunity to have his claim fully and fairly decided beyond the opportunity the claimant was afforded by the agency.

There is no due process magic in the appellate division's determination that the NYHRD was not arbitrary and capricious. In truth, if the process by

145. The Court cites Flah's, Inc. v. Schneider, 71 A.D.2d 993, 420 N.Y.S. 2d 283 (1979); New York State Div. for Youth v. State Human Rights Appeal Bd., 83 A.D.2d 972, 442 N.Y.S.2d 813 (1981) and other cases. See *Kremer*, 456 U.S. at 484 n.21.

146. See note 140 supra.

147. See N.Y. Exec. Law § 297 (McKinney 1982) and N.Y. Admin. Code tit. 9 §§ 465.5, 465.6. (1985). Compare 29 C.F.R. § 1601.19(a)-(b) (EEOC regulations specifying alternative grounds for no cause findings where the claim fails as a matter of law and where the weight of the evidence suggests no discrimination).

148. Cf. *Mitchell*, 553 F.2d at 268-71 (agency's determination is akin to summary judgment determination).

149. *Kremer*, 456 U.S. at 470 n.7.

150. Id. at 484. See also id. at 487 (Blackmun, J., dissenting) and 508-09 (Stevens, J., dissenting).

151. Id. at 480 n.21.

which the state system evaluated Kremer's claim bears any relationship to a decision that the claim lacked merit as a matter of law, that decision was made by the agency, acting in a non-adjudicative capacity. The appellate division, while clearly acting in an adjudicative capacity, did not make the summary judgment determination upon which the Court relies.

2. *The Standard for Evaluating State Proceedings Are Not As "Minimal" as the Court Suggests*

The Supreme Court took an extremely lenient view of the due process standards against which Kremer's state court judgment shoud be measured. While the *Kremer* majority acknowledged that preclusion principles would not bar a later action in federal court if the New York procedures did not afford a full and fair opportunity to litigate the claim, it implied that "full and fair opportunity" is a federal-law concept inapplicable where, as here, § 1738 controlled.[152] Where § 1738 applied, the Court noted, state law rules governing judgments apply, unless the state judgment did not "satisfy the applicable requirements of the Due Process Clause."[153] As a constitutionally infirm judgment could not be granted preclusive effect in the state court, [154] refusal to apply preclusion principles in such a situation would effectuate § 1738's mandate to grant the state court judgment the same preclusive effect as would be granted in the state's own courts.[155]

The *Kremer* Court's suggestion that the procedural due process standard requires less than the "full and fair opportunity" standard is misleading. The Court actually equated the two standards. It indicated that "what a full and fair opportunity to litigate entails is the procedural requirement of due process."[156] Nevertheless, the language of the majority opinion in *Kremer*,[157] with its emphasis on deference to state rules of procedural sufficiency, hints that the "minimum procedural requirements" of the due process clause embody less stringent standards than those enunciated under the "full and fair opportunity" cases.

Under either formulation, *Kremer*'s adverse state court decision should not properly bar his federal Title VII claim. This is true whether an opportunity to have one adversarial hearing is seen as the "process that is due" or

152. Id. at 481-82.

153. Id. at 482.

154. See McDonald v. Mabee, 243 U.S. 90 (1917); Haddock v. Haddock, 201 U.S. 562 (1906); Demp v. Emerson Enters., 504 F. Supp. 281 (E.D. Pa. 1980).

155. At the same time, the Court has acknowledged that the due process standard is derived from federal constitutional law and would prohibit the granting of preclusive effect to a constitutionally infirm judgment. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982): "because minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." (citations omitted).

156. *Kremer*, 456 U.S. at 483 n.24 (citations omitted).

157. See, e.g., id. at 481. "State proceedings need do no more than satisfy minimum procedural requirements of the Fourteenth Amendment's Due Process Clause. . . ."

part and parcel of a "full and fair opportunity" to litigate one's claim. The Court failed to analyze appropriately the adequacy of Kremer's state court proceedings, including his forced-march entry into the state agency, his apparent intent to proceed concurrently in both state and federal forums and the narrow scope of judicial review. The Court instead simply recoiled from labelling the state proceedings constitutionally infirm and reasoned backward from that reaction. As discussed in the balance of Part IV, a principled application of due process standards to the state court proceedings in *Kremer* supports the conclusion that those proceedings were inadequate and that preclusion of his Title VII claim was improper.

3. *The Requirements of Due Process Violated by* Kremer

Under familiar constitutional principles, no person can be deprived of a protected interest without due process of law.[158] In resolving due process claims, the courts pursue a two part inquiry: (1) whether the interest asserted is a protected one, and (2) if so, what process was due prior to infringement of the interest.[159] Applying this analysis to the facts in *Kremer*, the state proceedings did not meet procedural due process standards.

Logan v. Zimmerman Brush Co.[160] made clear that the interest in pursuing a discrimination claim before a state anti-discrimination agency is a protected interest that triggers due process guarantees. This holding in *Logan* followed from well-recognized precedents establishing maintenance of a cause of action in court as a protected interest.[161] The interest in pursuing a Title VII claim in federal court must be seen as similarly protected, based both on this line of cases and on the *Kremer* opinion itself.[162] Thus, Kremer's interest in pursuing his Title VII claim in federal court cannot be extinguished without due process.

The species and amount of process due to a Title VII claimant before her right of action is extinguished encompasses certain basic principles. Generally, where a protected interest is at stake, "some form of hearing" is required.[163] The nature and timing[164] of the hearing "will depend on

158. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Goldberg v. Kelly, 397 U.S. 254 (1970).

159. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-30; Goss v. Lopez, 419 U.S. 565 (1975).

160. 455 U.S. at 429-34.

161. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306; Boddie v. State of Conn., 401 U.S. 371 (1971). See also Holman v. Hilton, 712 F.2d 854 (3d Cir. 1983).

162. See *Kremer*, 456 U.S. at 482-84, applying due process standards without explicitly finding a protected interest, and at 497 n.11 (Blackmun, J., dissenting): "The Court is quite correct in holding that a state decision must satisfy at least due process before it can be given preclusive effect in the federal courts. Indeed, this aspect of the Court's decision follows directly from our decision . . . in *Logan*." [citation omitted].

163. Board of Regents v. Roth, 408 U.S. at 570, 571 n.8. See also *Mullane*, 339 U.S. 306; Londoner v. Denver, 210 U.S. 373, 386 (1908): "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief,

appropriate accomodation of the competing interests involved."[165]

In *Mathews v. Eldridge*,[166] the Court succinctly outlined the factors that determine what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[167]

While the weighing of the factors outlined in *Mathews* has led the courts to approve informal, non-adversarial hearings in certain circumstances,[168] such procedures have not been found sufficient where a litigant attempted to submit her claim to an administrative agency created for the purpose of processing such claims and where she could lose her federal claim completely through the imposition of preclusion principles. In such instances, the courts have required formal evidentiary hearings.[169]

Professor Davis has characterized the principle underlying these cases as follows:

> A party whose interest is protected by due process is entitled to an opportunity for a trial-type hearing on disputed adjudicative facts, except when inspection or testing is deemed a better method for find-

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and, if need be, by proof, however informal." See also 2 K. Davis, Administrative Law Treatise § 12:1 (2d ed. 1979) [hereinafter "Davis"].

164. The issue of whether a hearing was required prior to the deprivation of the interest has been resolved with unpredictable results in recent years. Compare Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (garnishment of property); Goss v. Lopez, 419 U.S. 565 (1975) (public school suspension); Memphis Light Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (utility service) with Mathews v. Eldridge, 424 U.S. 319 (1976) (social security disability benefits); Mackey v. Montrym, 443 U.S. 1 (1979) (suspension of driver's license); Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); Board of Curators v. Horowitz, 435 U.S. 78 (1978) (dismissal from medical school for academic reasons). See also Lowy, Constitutional Limitations on the Dismissal of Public Employees, 43 Brooklyn L. Rev. 1 (1976).

165. *Logan*, 455 U.S. at 434 (citation omitted).

166. 424 U.S. at 319.

167. Id. at 335.

168. For example, informal hearings have been approved where high school students are threatened with suspension, *Goss*, 419 U.S. at 565, where prisoners request hearings on disciplinary actions against them, Wolff v. McDonald, 418 U.S. 539, 563-65 (1974) and where termination of utility service is threatened. Memphis Light, Gas & Water Div., 436 U.S. at 17-18.

169. See Part IV, discussing the "process which is due" before an administrative decision can be found to preclude the claimant's cause of action. The administrative preclusion cases cited there accept, without specifically discussing, the analytic framework of the classic due process cases. For that reason, as Professor Davis suggests, it is appropriate to read these two lines of cases together. *Logan*, the only Supreme Court case addressing this general question, did not reach the issue of what type of process by the agency would satisfy due process. 455 U.S. at 437.

> ing the disputed facts, when the party is entitled to de novo administrative or judicial review, when some urgency requires temporary action pending hearing, or when in a cost-benefit analysis the advantage of trial procedure is out-weighed by its disadvantage.[170]

The necessary elements for a hearing to meet due process standards, while flexible,[171] have been understood to be: a trier of fact who weighs the evidence[172] and who is impartial,[173] and a right to confront and cross-examine witnesses.[174] "What the Constitution requires is 'an opportunity [to be heard] granted at a meaningful time and in a meaningful manner,' and 'for a hearing appropriate to the nature of the case.' "[175] The extent to which "witness credibility and veracity . . . are critical to the decison making process," increases "the potential value of an evidentiary hearing"[176] and makes such a hearing appropriate.

If due process standards developed by prior decisions are applied, it appears that Kremer's right to pursue his Title VII claim was denied without minimal due process. While the New York State procedures might have been adequate as interim procedures,[177] they fail when viewed as dispositive of Kremer's Title VII claim. Neither the informal investigation by the state agency, nor the narrow review of the agency record by the appellate division, afforded Kremer a meaningful qpportunity to be heard. Even if the Court's characterization of the no cause finding as a determination of legal insufficiency is correct,[178] the finding was not made by a neutral fact-finder, but rather, by an investigator responsible for developing the facts and with wide discretion as to how to develop them.[179]

Balancing the interests outlined in *Mathews*[180] the lack of some plenary

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170. Davis § 12:1, at 406.

171. See *Kremer*, 456 U.S. at 483.

172. See, e.g., Morgan v. United States, 298 U.S. 468, 479-80 (1936).

173. See Morrissey v. Brewer, 408 U.S. 471, 486-87 (1972).

174. See Goldberg v. Kelly, 397 U.S. at 268; Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Peters v. Hobby, 349 U.S. 331, 350-51 (1955) (Douglas, J., concurring). Cf. *Wolff*, 418 U.S. at 566-68, (curtailing right to call and cross-examine witnesses in prisoner disciplinary hearing, where risk of disruption and interference with state interests); *Mathews*, 424 U.S. at 344-47; *Goss*, 419 U.S. at 584.

175. *Boddie*, 401 U.S. at 378, quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965) and *Mullane*, 339 U.S. at 313.

176. *Mathews*, 424 U.S. at 343-44. See also Mattern v. Mathews, 582 F.2d 248 (3d Cir. 1978), cert. denied sub nom. Califano v. Mattern, 443 U.S. 912 (1979).

177. Compare Mackey v. Montrym, 443 U.S. at 11-12; Barry v. Barchi, 443 U.S. 55, 64-65 (1979).

178. As discussed at notes 120-49 and accompanying text supra, the Court's attempt to depict the agency's no cause determination as tantamount to a ruling on summary judgment cannot withstand scrutiny.

179. See N.Y. Exec. Law § 297 (McKinney 1982). N.Y. Admin. Code tit. 9, § 465.5 (1985).

180. This task is made difficult by the absence in the *Kremer* opinion of any analysis on this point. Neither party addressed this issue in the briefs, nor was it raised by the lower courts. The Court did not discuss any interests that the defendant state of New York might have of-

evaluation of Kremer's claim by a neutral fact-finder was a denial of due process. The "private interest affected by the official action,"[181] Kremer's interest in pursuing his discrimination claim, is substantial, as the *Logan* Court recognized.[182] There is great risk of an erroneous determination from the procedures used, particularly where the deprivation, as in *Logan*, was final, where the investigator, rather than the claimant, could control the scope and character of the facts garnered through investigation, and where the claimant was powerless to augment the agency record before the appellate division.

The risk of an erroneous determination is magnified by the possibility that dismissal of claims for lack of probable cause may have been a mechanism for limiting the number of claims on which NYHRD holds administrative hearings. The NYHRD generally holds administrative hearings only on claims where it finds probable cause.[183] Under Title VII's statutory scheme, the claimant retains the right to process her claim through the EEOC and, ultimately, to file a Title VII action in federal court, regardless of whether the agency finds probable cause. It may be that, at least in some instances, the agency's motivation in finding no cause is to streamline its handling of claims, rather than to pass fully on the merits of each complaint,[184] with the understanding that the claimant would still have the choice of several forums in which to pursue her claim.

The government's interest in less formal procedures, the final *Mathews* factor, militates in favor of a trial-type hearing prior to the loss of a Title VII claim through preclusion. Indeed, it is not clear what interest, if any, the state could assert in opposition to a plenary hearing prior to preclusion. Assuming that New York would claim that a trial-type hearing prior to a no-cause determination or plenary consideration of plaintiff's claim by a state court would create a financial burden, the state would have several alternatives that could avoid the problem altogether without placing the claimant's rights in jeopardy.

As Kremer's claim was submitted to the state agency only because of Title VII's mandatory deferral requirement, NYHRD could reduce the number of hearings it undertakes, thereby reducing financial burden, by waiving its right to jurisdiction over a greater number of charges. Alternatively, it could cede jurisdiction back to the EEOC where it did not wish to hold a hearing on a particular charge. While this tactic would not fully implement Title VII's deferral requirement, it would reduce the agency's administrative burden without prejudicing Title VII claims. The interest of the state in limit-

fered as militating against alternative procedures or alternative application of preclusion principles.

181. *Mathews*, 424 U.S. at 335.

182. *Logan*, 455 U.S. at 434.

183. N.Y. Exec. Law § 296 (McKinney 1982).

184. See McDonnell Douglas v. Green, 411 U.S. at 792, 800 (1973), where the Court held a no cause determination by the EEOC did not bar a de novo federal trial, based in part on this concern.

ing use of administrative hearings could also be served if the NYHRD dismissed claims for "administrative convenience" rather than for "no probable cause." In that event, the claimant could file a plenary proceeding in state court under § 296-9 of the New York Human Rights Law or could file a Title VII charge with the EEOC.

The interests that militate against formal hearings in other contexts would not apply. In fact, the contrast between situations where informal hearings were approved and the situation under discussion suggests the appropriateness of trial-type hearings. Unlike the school disciplinary hearings discussed in *Goss*,[185] where the defendant's primary obligation was to educate students, here, NYHRD's primary obligation is to process claims of discrimination. While full hearings might create security problems in prison discipline cases,[186] no such barriers militate against full hearing before NYHRD.

Given the options open to the state agency, it would appear that a trial-type hearing is the process due a Title VII claimant in Kremer's situation. Indeed, in the preclusion context, a trial-type hearing has always been considered an essential requirement of due process.

4. *Standards for Administrative Preclusion Violated by* Kremer

As discussed in Part III above, the *Kremer* decision effectively gives preclusive effect to the NYHRD's administrative determination, though the opinion attempts to characterize its decision as turning on the state court affirmance of that determination. According preclusive effect to the judicial affirmance of a non-adjudicative administrative decision violates principles governing the preclusive effect of administrative determinations, in addition to violating Title VII's guarantee of a federal trial de novo. While the cases that construe the sufficiency of administrative hearings for preclusion purposes do not generally invoke procedural due process principles, these cases impliedly recognize that a trial-type hearing is the process that is due in the administrative tribunal before preclusion will extinguish a cause of action.[187]

Under governing case law, res judicata and collateral estoppel are accorded only to administrative determinations that are made by an agency acting in a quasi-judicial capacity. The leading case in this area, United States v. Utah Construction & Mining Co.,[188] is cited by the *Kremer* majority.[189]

In *Utah Construction*, a construction contract dispute had been resolved by the Advisory Board of Contract Appeals, pursuant to language in the contract that specified this method of dispute resolution. After a full adversary hearing before the Board, the Board ruled against the contractor on his claim for "delay damages." The contractor challenged the decision in the Court of

185. 419 U.S. at 573.
186. Wolff v. McDonald, 418 U.S. at 564-69.
187. See Part V of text infra.
188. 384 U.S. 394 (1966).
189. *Kremer*, 456 U.S. at 485 n.26.

Claims.[190] The Court of Claims conducted a de novo hearing of the issues and found in favor of the contractor. The Supreme Court reversed, holding that the administrative findings should have been accorded collateral estoppel effect.[191]

The Court held that:

> 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 apply res judicata to enforce repose.[192]

It found that the Board had been acting in a judicial capacity, the parties had had a full opportunity to present evidence in support of their positions,[193] and were entitled to seek court review of adverse findings. Therefore, preclusion was appropriate.[194]

The weight of case authority is consistent with the result in *Utah Construction*, and generally, though not mechanistically, accords preclusive effect to decisions of administrative agencies, where the agency was acting in a judicial capacity.[195] Conversely, administrative decisions that are not adjudicative in nature have not been given preclusive effect.[196]

For example, in *Gargiul v. Tompkins*,[197] the Second Circuit refused to

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190. 384 U.S. at 399-400. As was contemplated by the statutory scheme, the contractor challenged the finding by bringing an action for breach of contract under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1982). However, the Wunderlick Act of 1954, 41 U.S.C. §§ 321-322, limited the court of claims' scope of review of the prior administrative hearing to an appellate review, rather than a de novo review. Id. at 399-400.

191. The Court relied on the contractual language in reaching this result. Additionally, it reaffirmed its holding in United States v. Carlo Bianci & Co., 373 U.S. 709 (1963) that courts deciding Tucker Act claims after an administrative hearing must limit their review to the administrative record, rather than determining the claim de novo. Cf. § 706(f)(1) of Title VII, which guarantees a trial de novo.

192. 384 U.S. at 422.

193. For example, testimony on only one of the claims took three days of hearings and produced 453 pages of transcript. Id. at 420 n.17. The "administrative hearing approved by the Supreme Court in *Utah Constr.* provided a full dress adversary proceeding, with testimony, cross-examination, exhibits, briefs and arguments." Nasen v. Brown, 595 F.2d 801, 807 (D.C. Cir. 1979).

194. 389 U.S. at 421-23.

195. See, e.g., Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) (administrative determination of Texas Workmen's Compensation Board after adversary hearing barred second action in Louisiana state courts) (cited in *Kremer*, 456 U.S. at 483, 484 n.24); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978) (finding of National Transportation Safety Board collaterally estopped relitigation of contributory negligence claim in later tort action); Nasen v. Brown, 595 F.2d 801 (D.C. Cir. 1979); International Harvester Co. v. Occupational Safety and Health Review Comm'n, 628 F.2d 982 (7th Cir. 1980); Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor, 487 F.2d 342 (2d Cir. 1973); Antram v. Professional Air Traffic Controllers, 672 F.2d 706, 709 n.3. (8th Cir. 1982); Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981).

196. *Davis*, § 21.2 ("res judicata does not apply when an agency is not acting 'in a judicial capacity,' " quoting *Utah Constr.*).

197. 704 F.2d 661 (2d Cir. 1983), vacated, 104 S. Ct. 1623 (1984), rev'd on other grounds, 739 F.2d 34 (1984).

invoke res judicata to bar plaintiff's claim that her substantive due process rights were violated when she was suspended without pay from her teaching position,[198] in part because her hearing before the Commissioner of Education was not an adversary hearing.[199] The Court found that the hearing's "procedural inadequacies, which include[d] the inability to examine or cross-examine witnesses"[200] was a factor that prevented granting preclusive effect to the agency's determination.[201] An opportunity to present testimony and cross-examine witnesses was held to be a prerequisite to preclusion.[202] Res judicata is inappropriate in an administrative setting where the claimants are not represented by counsel and the process is not based on the adversarial model.[203]

A neutral fact finder must have heard the evidence presented in the administrative proceeding for preclusion to be properly imposed. Even where a state election agency's proceedings provided "the rudiments of a truly adversarial presentation of the critical issue."[204] the absence of a neutral fact-finder thus barred the grant of preclusive effect.[205] By contrast, a previous administrative determination precluded plaintiff's § 1983 action where "the hearing officer who evaluated plaintiff's claim performed an adjudicative role, weighing and assessing contradictory evidence and the relative credibility of the wit-

198. In this action under 42 U.S.C. § 1983, plaintiff had raised several challenges to her suspension and subsequent discharge from her teaching position. Some of her claims were barred by collateral estoppel, as she had raised the same issues in a prior state court proceeding. Because she had not raised the substantive due process claims in the prior court proceeding, the court, relying on a line of Second Circuit decisions delineating an exception to normal res judicata principles for constitutional claims (Lombard v. Board of Educ., 502 F.2d 631, 635-37 (1974), cert. denied, 420 U.S. 976 (1975) and its progeny), found that action did not create a bar. 704 F.2d at 666. The rule in *Lombard* has been effectively overruled by Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984) and the Court vacated *Garguil* for this reason. This does not, however, affect the validity of the Court's reasoning with respect to the administrative hearing at issue.

199. 704 F.2d 667.

200. Id., citing Plano v. Baker, 504 F.2d 595, 598 n.5 (2d Cir. 1974).

201. Id. See also Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981), where the court evaluated the procedures governing an earlier unemployment compensation hearing to determine if the administrative denial of benefits should be given preclusive effect in plaintiff's federal § 1983 action. The court found that all of the parties received a judicial hearing as defined by *Utah Constr.*, that the parties had adequate incentive to litigate, and that they had adequate notice of the preclusion ramifications of the administrative decision. Preclusion was, therefore, appropriate.

202. Id. Compare Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Morgan v. United States, 298 U.S. 468 (1936) (reaching a similar conclusion based explicitly on procedural due process principle).

203. See Hunt v. Weinberger, 527 F.2d at 548.

204. Anderson v. Babb, 632 F.2d 300, 306, 307 n.3 (4th Cir. 1980). A state election commission dominated by members of one political party decided against the claim of a candidate from another party after an adversarial hearing. Plaintiff John Anderson's federal court challenge to the fairness of those proceedings and his exclusion from the ballot was sustained by the district court. On appeal by the Democratic National Committee, which intervened as a defendant after judgment, the decision of the district court was affirmed.

205. The classic due process cases reach the same result. See, e.g., Morgan v. United States, 298 U.S. 468 (1936).

nesses as would a trier of fact presiding in a judicial forum.[206]

Indeed, even where the administrative determinations to be given preclusive effect were the product of adversary hearings, res judicata and collateral estoppel are by no means automatically imposed. The general rule was stated in *Grose v. Cohen*:[207]

> Res judicata of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings. Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined; but practical reasons may exist for refusing to apply it. And in any event, when traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice (citation omitted).[208]

Thus, the courts review the procedures employed in the administrative hearing to determine if the procedures were prejudicial to the party against whom preclusion is sought.[209] In *Bowen v. United States*, for example, the court considered whether the admissibility of hearsay evidence or the limitations on discovery had interfered with the fairness of the hearing.[210]

Administrative determinations, even when judicial in character, will be granted preclusive effect only where the legal issue before the agency was not "significantly different" from the issue before the court.[211] "The conclusive effect of an administrative determination is limited to the purpose for which it was made."[212]

Similarly, the courts look to whether the parties to an administrative hearing were aware of the possible res judicata effort that might attach to the

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206. *Gear*, 514 F. Supp. at 1221.

207. 406 F.2d 823 (4th Cir. 1969).

208. Id. at 824-25 (citations omitted). Relying on these principles, the Fourth Circuit refused to grant preclusive effect to a determination on Grose's disability claim, where an adversary hearing was held but the hearing officer's ruling was manifestly erroneous.

209. Bowen v. United States, 570 F.2d 1311, 1322 (7th Cir. 1978). While this inquiry is sometimes referred to, in part, as an inquiry into the existence of a "full and fair opportunity" to litigate, the procedures of administrative agencies appear to be scrutinized more closely than those of judicial tribunals. United States v. Smith, 482 F.2d 1120, 1123 (8th Cir. 1973); *Gear*, 514 F. Supp. at 1221.

210. *Bowen*, 570 F.2d at 1322. See also *Gear*, 514 F. Supp. at 1221.

211. Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger Co., 672 F.2d 580, 583 (6th Cir. 1982), citing Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971). In the *Bricklayers* case, collateral estoppel effect was denied to a ruling made by the National Labor Relations Board in an administrative hearing on an unfair labor practice charge. The court refused to give preclusive effect to the finding that defendant was liable as a "joint employer" in an action for contractual fringe benefits brought under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982), because of the different issues presented by the unfair labor practice charge and the contract action. See also North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir.), cert. denied, 429 U.S. 870 (1976).

212. Connecticut Light & Power Co. v. Federal Power Comm'n, 557 F.2d 349, 353 (2d Cir. 1977).

administrative finding.[213] The "expectations of the parties regarding judicial retrial of factual questions determined in administrative proceedings" are considered in the preclusion analysis.[214] The courts have also refused to extend res judicata or collateral estoppel effect to administrative decisions where strong countervailing policy interests would be frustrated. On this basis, the Ninth Circuit, in *United Farm Workers of America v. Arizona Agricultural Employment Relations Board*,[215] refused to grant preclusive effect to an administrative decision of the California Agricultural Labor Relations Board,[216] where preclusion would have impinged on Arizona's labor policy.[217]

Res judicata is generally not applied to non-adjudicative agency determinations. For example, a decision by the Regional Director of the National Labor Relations Board (NLRB) not to issue a complaint has been denied preclusive effect by the courts.[218] As is the case with NYHRD, the NLRB's decision, made after investigation of charges, is based on a finding of lack of probable cause.[219] As the Fifth Circuit remarked in *Aircraft & Engine Maintenance Employees v. I.E. Schilling Co.*:

> Surely, the mere refusal by the general counsel to issue a complaint is not res judicata and cannot constitute a collateral estoppel. The failure of the general counsel to issue a complaint is not necessarily based on the evidence or the merits of a case. To dismiss a damage suit on the proposition that the general counsel had refused to proceed would be to deny to the employer his day in court. . . .[220]

Clearly, the implicit inquiry in the vast majority of administrative preclusion cases is whether the administrative hearing met standards of procedural due process. Moreover, these cases assume that where the protected interest is the right to press a claim in federal court, a full adversary hearing is the "process that is due" before that interest can be defeated by res judicata or collat-

213. See, e.g., *Bowen*, 570 F.2d at 1322; Donovan v. Peter Zimmer Am., Inc., 557 F. Supp. 642, 652-53 (D.S.C. 1982).

214. *Gear*, 514 F. Supp. at 1221.

215. 669 F.2d 1249 (9th Cir. 1982).

216. Id. at 1255. Indeed, the court refused to grant the California judgment full faith and credit, on the grounds that federalism interests in allowing each state to maintain its own labor policy would be better served. Id. at 1256.

217. Id. See also International Harvester Co. v. Occupational Safety and Health Review Comm'n, 628 F.2d 982, 986 (7th Cir. 1980); Town of Springfield v. Vermont Environmental Bd., 521 F. Supp. 243 (D. Vt. 1981) (no res judicata to state administrative agency findings where importance of federal preemption question presented militated against preclusion) and cases cited therein; *Donovan*, 557 F. Supp. at 652-53 (unemployment insurance hearing not granted preclusion in proceeding under Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660, because it would be inconsistent with OSHA's statutory purpose).

218. Aircraft & Engine Maintenance Employees v. I.E. Schilling Co., 340 F.2d 286 (5th Cir. 1965), cert. denied, 382 U.S. 972 (1966); see also Clark Engineering and Constr. Co. v. United Brotherhood of Carpenters and Joiners, 510 F.2d 1075, 1082-84 (6th Cir. 1975) (reversible error to admit into evidence decision not to issue complaint because decision was ex parte).

219. See 29 C.F.R. § 101.6 (1985).

220. 340 F.2d at 289 (citations omitted).

eral estoppel. As the plaintiff in *Kremer* was barred from pursuing his Title VII claim in federal court based only on a non-adjudicative administrative proceeding, he was denied due process.

5. *Full and Fair Opportunity Standard Violated by* Kremer

In determining whether "administrative proceedings and judicial review . . . should be deemed so fundamentally flawed as to be denied recognition under § 1738,"[221] the *Kremer* courts inquired as to whether parties to the suit have had a "full and fair opportunity" to litigate in prior proceedings.[222] However, instead of relying on definitions of "full and fair opportunity" developed in prior case authorities, the Court chose to recast full and fair opportunity as a bare procedural due process standard. The standard applied in *Kremer* disregarded both prior precedent and the policies that underlie the preclusion principles.

Allen v. McCurry,[223] on which *Kremer* relies heavily, examined the adequacy of state proceedings more analytically than did the *Kremer* Court. The *Allen* Court viewed the full and fair opportunity inquiry as a critical review of the procedures actually followed by the state courts. The *Allen* Court asserted that the failure of a state court "to acknowledge the existence" of certain constitutional claims or the failure of state law "to provide fair procedures for the litigation" of such claims constituted a lack of full and fair opportunity to litigate the claim in state court.[224] The standard enunciated in *Allen* plainly contemplates a critical review of the actual substantive and procedural framework underlying the state litigation. It interprets the full and fair opportunity requirement to include procedural regularity and willingness to hear certain claims.

Montana v. United States[225] sets out a definition of "full and fair opportu-

221. *Kremer*, 456 U.S. at 480.

222. The dissenters in *Kremer* assert that the majority incorrectly characterized the state court decision as a resolution of the same issue raised in *Kremer*. Rather than resolving the merits of Kremer's Title VII claim, the state ruling decided whether NYHRD's decision was arbitrary and capricious. *Kremer*, 456 U.S. at 492-93 (Blackman, J., dissenting) and at 509-10 (Stevens, J., dissenting). Professor Davis also criticizes the *Kremer* decision on this basis. *Davis* § 21:5, pp.64-66. The dissenters recognized that the narrow scope of the appellate division's judicial review contradicted the notion that the court passed on the merits of the plaintiff's claim or added any due process protections beyond those dispensed by the agency.

223. 449 U.S. 90 (1980).

224. *Allen*, 449 U.S. at 101. The Court found these factors to be "essentially the same" as a lack of full and fair opportunity to litigate. The Court compared these factors to the full and fair opportunity standard in the course of evaluating whether any exception to normal preclusion principles might exist in actions under § 1983, beyond "the important general limit on rules of preclusion that already exists, [lack of] full and fair opportunity to litigate the claim or issue decided by the first court." The Court reserved that issue in *Allen*. In Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 897-98 (1984), the Supreme Court decided the issue, finding no exception to § 1738 where constitutional claims were not, but could have been, litigated in the prior state court proceeding. The holding of *Migra* reinforces the notion that the factors enumerated in *Allen* constitute the general "full and fair opportunity" standard.

225. 440 U.S. 147, cited in *Kremer*, 456 U.S. at 480-81. Both the *Montana* and *Kremer*

nity" similar to the *Allen* Court, finding an exception to § 1738 if the federal litigant asserted "unfairness or inadequacy" in the state procedures, *i.e.*, "if there is reason to doubt the quality, extensiveness or fairness of the procedures followed in the prior litigation."[226] The tenor of the argument in *Montana* also suggests the Court's intent that state procedures be viewed with a critical eye in evaluating whether preclusion was appropriate.[227]

This pragmatic and critical approach to the full and fair opportunity standard has been adopted by most courts in considering the appropriateness of preclusions in the § 1983 context. Courts seek to determine the real ability of the litigants to raise their claims in the first proceeding, with particular attention to the degree to which the litigants comprehend the proceedings,[228] or the extent to which procedures of the first court are actually implemented.[229] For example, lack of adequate discovery opportunities will reduce the likelihood of preclusion.[230]

Similarly, where litigants are unfairly denied an opportunity to litigate because of newly-enunciated rules of procedure, preclusive effect has been withheld. In *England v. Louisiana Medical Examiners*,[231] the plaintiffs, Louisiana chiropractors, raised a constitutional challenge to state education requirements in federal district court. The three-judge court, invoking the *Pullman* abstention doctrine,[232] directed plaintiffs to litigate their claims in

opinions cite Gibson v. Berryhill, 411 U.S. 564 (1973), where inadequate state administrative procedures militated against imposition of an exhaustion requirement in § 1983 actions. *Kremer*, 456 U.S. at 481; *Montana*, 440 U.S. at 164 n.11.

226. 440 U.S. at 164 n.11. See notes 80-85 and accompanying text supra.

227. The *Montana* court cited Gibson v. Berryhill, 411 U.S. 564 (1973) and Justice Stevens's dissent in Trainor v. Hernandez, 431 U.S. 434, 469, 470 n.15 (1977), to illustrate the concepts underlying the full and fair opportunity standard. In both cases, the state court proceedings under review were criticized as inadequate. The United States in *Montana* did not, in fact, allege any inadequacy or unfairness in the prior state proceeding. Id. at 163-64.

228. See, e.g., Rhoades v. Penfold, 694 F.2d 1043 (5th Cir. 1983). In *Rhoades*, plaintiff challenged under § 1983 the termination of her parental rights in a state court proceeding where she was not afforded counsel. The court refused to accord res judicata to the original action, finding that she lacked a real opportunity to raise her right to counsel claim in an action where she was unrepresented: "[i]mplicit in her allegation of right to counsel is the notion that she lacked the ability to understand both [the] nature of her constitutional rights and the procedural prerequisites necessary to assert them since she was not afforded the guiding hand of counsel." Id. at 1048. Cf. Boucher v. Dramstad, 522 F. Supp. 604 (D. Mont. 1981) (res judicata inappropriate where plaintiff could not have foreseen consequences of dismissing one defendant from suit).

229. See, e.g., Switlik v. Hardwicke Co., 651 F.2d 852 (3d Cir.), cert. denied, 454 U.S. 1064 (1981), where the court considered, but found unproven, plaintiff's contention that they had been denied a full and fair opportunity to litigate because the court "repeatedly stated its intention to receive evidence and hear argument on the constitutional claim but failed so to do." Id. at 859. The court found the action barred by res judicata and collateral estoppel.

230. See Boykins v. Ambridge Area School Dist., 621 F.2d 75, 79-80 (3d Cir. 1980) (lack of discovery procedures in Human Relations Commission proceedings militates against collateral estoppel effect for such proceedings). Cf. Whitley v. Seibel, 676 F.2d 245, 249-50 (7th Cir. 1982), cert. denied, 459 U.S. 942 (1982) (lack of discovery before preliminary hearing, inter alia, militates against negative inference from failure to raise alibi defense).

231. 375 U.S. 411 (1964).

232. Railroad Comm'n v. Pullman, 312 U.S. 496 (1941) established the rule that where

the state courts and retained jurisdiction. Because plaintiffs believed they were required to do so, they submitted all of their claims, including the federal constitutional claim, to the state court. The state courts considered and rejected plaintiffs' constitutional claims. When plaintiffs returned to federal court, that court ruled that res judicata precluded relitigation of plaintiffs' claims.

While the Supreme Court announced a prospective rule that affirmed res judicata principles as to those constitutional claims submitted to the state court "freely and without reservation,"[233] the Court refused to apply the new rule to the instant plaintiffs. The Court found that such application would be unfair, given the plaintiffs' reasonable misapprehension that they were required to forego federal hearing on their claims. The Court declined to apply preclusion principles where application would deny a captive state litigant his chosen federal forum and where he unwittingly, rather than voluntarily, submitted his claims to the state tribunal.[234]

Similarly, in *Howell v. State Bar of Texas*,[235] the district court incorrectly led plaintiff to believe that he could litigate his federal claims in federal court after fully litigating state claims arising from the same nucleus of operative facts in state court.[236] Upon plaintiff's return to federal court, res judicata was not imposed, because the plaintiff would have been denied his forum as a result of the court's erroneous instruction. The court found that plaintiff lacked a real opportunity to litigate his federal claims, although it "was in theory present."[237]

The courts also consider whether the party had the incentive to litigate his claims "to the hilt" in the prior case in assessing whether the first action provided a full and fair opportunity to litigate. In *Prosise v. Haring*,[238] for example, the Fourth Circuit ruled that plaintiff's § 1983 damage action against various police officers alleging violations of constitutional require-

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decision on a federal constitutional claim can be avoided by the resolution of a related state law claim, the federal court should abstain from deciding the constitutional question until the state courts have decided the state law questions.

233. 375 U.S. at 419.

234. *England* has been construed narrowly in recent decisions. Contrary to the view advanced by the dissenters in *Allen*, *England* does not provide a broad right to a federal forum, nor does it prevent the "captive state litigant" situation generally. The Court in Allen v. McCurry, 449 U.S. at 101 n.17, squarely rejected this view.

235. 674 F.2d 1027 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1065 (1983), cert. denied, 104 S. Ct. 2152 (1984).

236. The district court misapplied the rule announced in *England*, which allows a party remanded to state court by a federal court because of *Pullman* abstention to reserve his federal claims from decision by the state court. Although a plaintiff who has properly made an "*England* reservation" can litigate his federal claims in federal court after completion of the state litigation, such options were not available to Howell because his claim was not in state court pursuant to *Pullman* abstention. Id. at 1030-31.

237. Id. See also *Boucher*, 522 F. Supp. at 607-08; Williams v. Bennett, 659 F.2d 1370 (11th Cir. 1981), cert. denied, 104 S. Ct. 335 (1983).

238. 667 F.2d 1133 (4th Cir. 1981), aff'd sub nom. Haring v. Prosise, 103 S. Ct. 2368 (1983).

ments in the conduct of their search of his apartment, was not barred on collateral estoppel grounds by his plea of guilty to state criminal charges which arose from the search. The Fourth Circuit found that, although Virginia's collateral estoppel rules would ordinarily bar the action, by virtue of § 1738, preclusion was inappropriate in the instant case because plaintiff lacked an adequate incentive to litigate the search issue fully in state court.[239]

The cases construing the "full and fair opportunity" standard in the context of federal habeas corpus review are to the same effect. Under the rule announced in *Stone v. Powell*,[240] writs for habeas corpus predicated on fourth amendment claims will be entertained in federal court only where the state court in the prior action had denied the petitioner "an opportunity for full and fair litigation" of his fourth amendment claim.[241] After *Stone*, a prior state judgment will bar a habeas corpus fourth amendment claim in the same way as would res judicata or collateral estoppel.[242] Given this similarity, at least one court has found that ". . . if a state hearing is a 'full and fair hearing' for federal habeas purposes, this is also sufficient to mandate that collateral estoppel be applied."[243]

A breakdown in the state criminal proceedings that caused a denial of the petitioner's opportunity to present his claims will fail the full and fair opportunity test. For instance, in *Boyd v. Mintz*,[244] the habeas corpus petitioner was first imprisoned and then interviewed by a public defender only four days before the deadline for filing all motions in the case. A motion to suppress was filed late and the state trial court refused to hear the untimely motion. Defendant Boyd was thus prevented from raising his fourth amendment claims. Boyd's petition for a writ of habeas corpus was allowed. The court stated:

> It cannot be said that Boyd intentionally or inadvertently waived or bypassed the state procedures . . . or, that state courts rejected his claim after some meaningful inquiry. Rather, a breakdown in the process occurred which prevented him from even presenting his Fourth Amendment claim . . . . He was prevented from even ex-

239. Id. at 1141. Because the Supreme Court disagreed that Virginia's collateral estoppel rules would have barred the search suit, they did not address the incentive issue as part of the full and fair opportunity requirement. Rather, the Court viewed plaintiff's lack of incentive to litigate the search issue in the prior proceeding as rebutting defendant's argument that the issue had been waived. 103 S. Ct. at 2375-2376. See also Deweese v. Town of Palm Beach, 688 F.2d 731 (11th Cir. 1982) (lack of incentive to litigate first action prevents offensive collateral estoppel).

240. 428 U.S. 465 (1976).

241. 428 U.S. at 482. This is contrary to the general rule that federal courts may reexamine findings of state courts upon a request for a writ of habeas corpus. The habeas corpus statute, 28 U.S.C. § 2254 (1976), contains an express repeal of § 1738. See *Kremer*, 456 U.S. at 485 n.27.

242. See Cower & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977).

243. Silverton v. Department of Treasury, 644 F.2d 1341, 1347 (9th Cir. 1981), cert. denied, 454 U.S. 895 (1981).

244. 631 F.2d 247 (3d Cir. 1980). See also Smith v. Maggio, 664 F.2d 109, 111 (5th Cir. 1981), citing Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980).

plaining the reasons for the delay in filing the motion to suppress.[245]

As in the § 1983 cases, the full and fair opportunity standard in the habeas corpus cases focuses on the litigant's *real* opportunity to litgate, not on its theoretical availability. Thus, where an unanticipated and unforeseeable application of state rules on standing prevent consideration of petitioner's claim in state court, federal courts find lack of full and fair opportunity to litigate.[246]

The full and fair opportuntity cases therefore appear to articulate a standard not followed in *Kremer*. Although in theory *Kremer* had a forum for his claim, he had no practical opportunity to obtain full state court consideration and adjudication of his claim.

6. Kremer *Violates Preclusion Standards for Judicial Affirmance of Administrative Decisions*

The *Kremer* court ostensibly looked to the adequacy of the state court's decision affirming NYHRD in reaching its conclusion that plaintiff's Title VII claim was barred. But the real decision-maker in the prior state proceeding was the NYHRD, rather than the state court, given the narrow scope of the state court's review. This section will show that judicial affirmances of agency decisions have been given preclusive effect only when the underlying agency action could have justified preclusion, even absent subsequent judicial review of that action. The Court effectively determined that the appellate division's review of the NYHRD's no probable cause finding precluded a subsequent Title VII case, regardless of whether the NYHRD's actions, standing alone, met minimal due process/full and fair opportunity standards.[247]

Even if the *Kremer* Court's stated reliance on the judicial decree affirming NYHRD is taken at face value, the imposition of preclusion nevertheless represents an unwarranted extension of established res judicata and collateral estoppel principles. Both cases cited by the majority in *Kremer* to support granting preclusive effect to the appellate division's decision concerned judicial review of adjudicative administrative hearings.[248] *Kremer*, however, involved a *non*-adjudicative agency ruling. Indeed, the unanimous case law in this area restricts the grant of preclusive effect of judicial affirmances of administrative decisions to those situations where the administrative decision is based on an adequate adversarial administrative hearing.

In *Grubb v. Public Utilities Commission of Ohio*,[249] the decision of a pub-

245. 631 F.2d at 251.

246. Riley v. Gray, 674 F.2d 522, 527 (6th Cir. 1982), cert. denied sub. nom. Shoemaker v. Riley, 459 U.S. 948 (1983). See also Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977), cert. denied, 434 U.S. 1038 (1978) (collecting cases). Compare Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (procedural due process violation found where breakdown of state anti-discrimination agency's claim caused dismissal of plaintiff's claim without review of merits).

247. *Kremer*, 456 U.S. at 481 n.21.

248. Id., citing CIBA Corp. v. Weinberger, 412 U.S. 640, 644 (1973) and Grubb v. Public Utilities Comm'n, 281 U.S. 470, 475-77 (1930).

249. 281 U.S. 470 (1930).

lic utility commission, rendered after an evidentiary hearing, was appealed to the Ohio Supreme Court, which affirmed the administrative finding. Plaintiff's later action in federal court attacking the commission's order was found to be barred by res judicata.[250] *CIBA Corp. v. Weinberger*[251] also involved a court challenge to the ruling of an administrative agency acting in a judicial capacity. The agency ruling, made after a full hearing, was affirmed by the Second Circuit. In a subsequent challenge, the Supreme Court held that the agency's decision as to its jurisdiction was conclusive.[252]

Indeed, the unanimous case authorities in this area only allow the granting of preclusive effect to judicial affirmances where the administrative decision was based on an adequate administrative hearing. Thus, where a decision rendered by the Illinois Civil Service Commission after lengthy adversarial hearings was judicially affirmed, preclusion was imposed.[253] And where the City of Pittsburgh Commission on Human Relations reached a decision after "the equivalent of a full judicial hearing," the judicial affirmance of that decision was given preclusive effect.[254]

The *Kremer* court's analysis of preclusive effect should have focused on the character of the administrative hearing, rather than the fact of or character of the judicial review. Under well-recognized due process standards, the litigant's full and fair opportunity to litigate before the administrative agency

250. 281 U.S. at 478-79. Although the claimed constitutional defect had not been raised in state court, the state order was found to be a "judgment on the merits" which barred all claims that were raised or could have been raised in the prior action. See *Migra*, 104 S. Ct. at 892.

251. 412 U.S. 640 (1973).

252. 412 U.S. at 643-44. Although the *Kremer* majority cited this case to support preclusion principles, *CIBA* was not decided on res judicata grounds. The Court concluded that the FDA's decision could not be attacked in a separate proceeding in light of the statutory scheme governing the FDA's jurisdiction over drug safety. The scheme "does not create a dual system of control — one administrative and the other judicial." 412 U.S. at 644.

253. Local 1006 v. Wurf, 558 F. Supp. 230, 236, 237 n.9 (N.D. Ill. 1982). The court noted that the Commission took two days of testimony in one hearing and eighteen days of testimony in another: at these hearings, witnesses testified and were cross-examined, and documents were received. At the conclusion of the hearings, lengthy opinions were rendered by the hearing officers evaluating the evidence and arguments presented. The court found that the administrative determination constituted a judgment on the merits in a court of competent jurisdiction, thereby affording the state court affirmance of the agency decision res judicata effect.

254. Davis v. United States Steel Supply, 688 F.2d 166 (3d Cir. 1982), cert. denied, 460 U.S. 1014 (1983). Plaintiff's race discrimination claim under 42 U.S.C. § 1981 was barred by res judicata because the Pennsylvania courts, reviewing a determination by the Pittsburgh Human Relations Commission after full hearing, reversed the finding that defendant had discriminated against plaintiff. The Court observed:

> Arguably, a court judgment reviewing an administrative proceeding might in some circumstances be denied res judicata effect if there were procedural deficiencies in the administrative proceeding and the Court's standard of review were limited, or if the administrative decision were not deemed to be final.

Id. at 172 (citations omitted). In *Davis*, however, plaintiff did not claim procedural inadequacies. Indeed, the *Davis* Court compared the procedures before it to those in *Kremer*, finding the former to be "far more extensive" than the latter. See further discussion of Davis v. United States Steel Supply at notes 301-09 and accompanying text infra.

ought to determine the issue.[255]

7. Kremer Was Denied Minimal Due Process

The state proceedings afforded Kremer prior to filing his Title VII action in federal court were undoubtedly insufficient to meet minimal standards of fairness. Whether the guarantee of one quasi-judicial hearing on the merits of his discrimination claim is viewed as a matter of minimal due process or full and fair opportunity to litigate, it is clear that such a hearing is a necessary predicate to the preclusion of a Title VII claim. Where the state court ruling is not de novo, but is a restricted review of the agency's determination, the fact of state court action does not increase the fairness of the state court proceedings.

Because Kremer was not afforded a quasi-judicial determination of his claim in the state system, preclusion of his Title VII claim in federal court was improper. Moreover, Kremer was not put on notice that the state proceedings would be a final determination of his Title VII claim. Kremer could and did reasonably view state administrative proceedings and state court review of such proceedings as merely preludes to his Title VII action in federal court[256] For this reason, he lacked the incentive to litigate his claims "to the hilt" in the state proceedings.[257] Moreover, Kremer's lack of control over the evidence considered by the agency and the appellate division, the lack of discovery before the agency's determination,[258] and the informal non-adversarial nature of the proceedings reduced Kremer's ability to fully and fairly litigate his claim. These limitations would have led a reasonable litigant to believe that such proceedings were not a substitute for a plenary federal court

255. Even in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977), which preceded *Kremer* in finding the NYHRD's determination of no probable cause to be the equivalent of a summary judgment determination, the *Mitchell* court looked to the procedures followed by the state agency rather than the reviewing state court to determine res judicata effect. It framed its inquiry as whether the "issue presented to the State Division was fully and fairly adjudicated on its legal or factual merits." Id. at 270, citing *Utah Constr.*, 382 U.S. 900. While the summary judgment analysis adopted in *Mitchell* is flawed, the *Mitchell* Court at least correctly identifies the agency as the decisionmaker, in contrast to *Kremer.*

256. The EEOC itself took this view of the state proceedings, including judicial review of state administrative proceedings. See *Kremer*, 477 F. Supp. at 593. Moreover, the notice of the right to appeal the agency decision into court contained no hint of the preclusive effect of a state court decision. *Kremer*, 623 F.2d at 787.

257. Cf. Deweese v. Town of Palm Beach, 688 F.2d 731 (11th Cir. 1982) (incentive to vigorously defend); Donovan v. Peter Zimmer Am., Inc., 557 F. Supp. 642, 652-53 (D.S.C. 1982) (expectations of parties to administrative proceeding). See also Brown v. Felsen, 442 U.S. 127, 134-36 (1979) (lack of adequate incentive militates against preclusion).

258. See, e.g., Smouse v. General Elec. Co., 626 F.2d 333, 335 (3d Cir. 1980), where preclusion was denied to a state court decision reversing an administrative finding, in part because the agency's discovery rules were "rather restricted," in a Title VII action decided prior to *Kremer.* See also *Boykins*, 621 F.2d at 75; *Bowen*, 570 F.2d at 1311. Full discovery is critical to the development of a Title VII case. Without adequate pretrial discovery to gather the statistical and other information necessary to perform the private attorney-general role envisioned by Congress, the Title VII plaintiff can show no more than a "suspicion of discrimination." See, e.g., Burns v. Thiokol Chem. Corp., 483 F.2d 300, (5th Cir. 1973).

action.[259]

The nature of the state proceedings Kremer followed pursuant to the mandatory deferral requirement justified plaintiff's reasonable expectation that the state finding was not final.[260] Kremer did not initiate his claim in the state agency, but was sent there by the EEOC as a consequence of the deferral requirement.[261] By its own terms, the agency's inquiry was whether there was "probable cause" to believe that Kremer had been discriminated against. This inquiry hardly suggests what the *Kremer* court construes as a legal determination that the claim is or is not sufficient as a matter of law,[262] nor does it suggest a final determination of any kind. Even assuming that the Court is correct in equating this determination with a summary judgment ruling, the expectations of the parties concerning the lack of finality of the probable cause determination militates against preclusion.[263]

Moreover, Mr. Kremer was misled by the state administrative framework. This by itself suggests that he was denied a full and fair opportunity to litigate.[264] As set forth in the Second Circuit opinion,[265] Kremer appealed the no cause finding to the state's appellate division because of a notice attached to the decision of the NYHRD Appeals Board that indicated the right of appeal. The notice did not disclose the possible preclusive consequences of such an appeal. That Kremer, unrepresented by counsel,[266] was unaware of these consequences is confirmed by the fact that he filed his state court appeal two days after requesting the EEOC to reactivate his charge.[267] Kremer's reasonable expectation that state deferral proceedings, including the appeal to state court, were only prerequisites to a plenary federal court hearing was summarized by the district court:

> The unfairness of applying *Sinicropi* [which required preclusion] to plaintiffs such as Kremer was brought home to this court when Mr. Kremer was told his complaint had to be dismissed. He was obvi-

259. Cf. *McDonnell Douglas*, 411 U.S. at 797-99 (no cause determination of EEOC not a bar to de novo federal trial, in part because of ". . . the large volume of complaints before the Commission and the nonadversary character of many of its proccedings. . . ."); Aircraft & Engine Maintenance Employees v. I.E. Schilling Co., 340 F.2d 286, 289 (5th Cir. 1965).

260. See notes 231-37 and accompanying text supra.

261. *Kremer*, 456 U.S. at 463-64. See also note 90 and accompanying text supra.

262. The "probable cause" determination suggests a weighing of the factual components of the charge, in addition to or instead of the legal components of the claim. To determine whether there is probable cause to believe plaintiff has been discriminated against necessarily involves weighing the credibility of witnesses and the authenticity and meaning of documents. See N.Y. Admin. Code tit. 9, § 465.6 (1985) (outlining procedures for rebuttal of respondent's evidence prior to cause determination); N.Y. Exec. Law § 297 (1982) (state division determines whether probable cause to believe discrimination occurred).

263. See Gear v. City of Des Moines, 514 F. Supp. 1218, 1221-22 (S.D. Iowa 1981) (parties' awareness of ramifications of administrative determination considered in assessing preclusive effect).

264. See, e.g., Howell v. State Bar of Tex., 674 F.2d 1027 (5th Cir. 1982).

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

266. Cf. Rhoades v. Penfold, 694 F.2d 1043 (5th Cir. 1983).

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

> ously 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.[268]

The procedures afforded Mr. Kremer under these circumstances were legally insufficient. The due process cases, the administrative preclusion cases, and the full and fair opportunity cases all focus on whether the basic elements of notice and meaningful opportunity to be heard have been met. The preclusion cases, read in conjunction with the due process authorities, make clear that where the protected interest is a judicial cause of action and the threatened deprivation takes the form of res judicata or collateral estoppel, the process that is due is a full adversarial hearing. While a true summary judgment inquiry by an agency official, acting in a judicial capacity, might satisfy due process standards (although not the requirements of Title VII), the no cause determination Kremer received did not, and could not, meet those standards. And while a judicial affirmance of an agency decision rendered after an adversary hearing might be entitled to preclusive effect, judicial affirmance of a non-adversarial administrative determination such as was made in Kremer's case cannot preclude an otherwise viable cause of action.

V

KREMER VITIATES FEDERAL COURT PRIMACY FOR TITLE VII ENFORCEMENT

A. Kremer *Analysis Erroneous*

The Supreme Court's holding that an adverse state court decision precluded Kremer from pursuing his federal Title VII action distorts the enforcement scheme Congress envisioned in enacting Title VII. Congress contemplated that Title VII would be primarily enforced by the federal courts.[269] The state agency role, though important, is a subsidiary element of the federal anti-discrimination scheme. Agency processing of discrimination charges in general is intended to resolve claims short of federal court intervention where possible: Congress never intended that agency determinations would deprive the Title VII claimant of the right to a trial de novo in federal court. Yet the *Kremer* decision creates the potential for exactly such a deprivation.

This section analyzes how the result in *Kremer* violates the congressional design for Title VII. It then reviews several decisions applying *Kremer*, examining the extent to which *Kremer* has diminished the ability of the federal system to enforce Title VII.

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268. 477 F. Supp. at 593 n.10. At a minimum, even assuming that preclusion would be appropriate generally under the procedures described above, it is quite clear that Kremer did not have an opportunity to litigate fully. The Supreme Court has declined to grant preclusive effect in analogous circumstances. See *England*, 375 U.S. 411 discussed at notes 231-34 and accompanying text supra.

269. See Part I of text and accompanying notes supra.

In searching Title VII's legislative history for an implied repeal of § 1738, the *Kremer* majority concluded that Congress intended that normal preclusion principles would bar relitigation of claims previously litigated in state courts.[270] As Justice Stevens pointed out in dissent, however, this should not end the inquiry as to whether the type of state court decision presented in the *Kremer* case should preclude a federal Title VII action.[271] While Title VII may not meet the stringent standard for implied repeal of § 1738 enunciated by the Court in recent cases,[272] Congress clearly "intended the claimant to have at least one opportunity to prove his case in a de novo trial in court."[273] The application of § 1738 in *Kremer* violates that congressional intent.

The majority concedes that agency proceedings cannot defeat a trial de novo in federal court,[274] that "the federal courts were entrusted with ultimate enforcement responsiblity" of Title VII,[275] and that the deferral requirement of Title VII extended only to the filing of charges with the state agency. It noted that no provision of Title VII requires or even contemplates that complainants pursue their claims in de novo state court proceedings or that they appeal unfavorable state agency rulings into state court.[276] It also noted that Title VII is silent as to the preclusive effect of state court appeals from unfavorable agency rulings.[277]

The majority found no bar to preclusion in Title VII's legislative history. The majority reached that conclusion, however, by reviewing particular statutory language and proposed amendments that simply did not address facts at hand. It relied primarily on indications in the legislative history that Congress did not intend Title VII to undermine enforcement of state anti-discrimination laws and on Congress' rejection of the Hruska amendment, which would have made a Title VII action, once it was begun, the exclusive remedy for discrimination claimants.[278]

The fact that Congress "did not intend to supplant" state laws,[279] only establishes that such state laws were entitled to some deference. It does not address how much deference is due.[280] Congress anticipated that the deferral

270. *Kremer*, 456 U.S. at 473-76.

271. Id. at 509-10 (Stevens, J., dissenting).

272. See Allen v. McCurry, 449 U.S. 90, 99 (1980), cited in *Kremer* 456 U.S. at 468. But compare Brown v. Felsen, 442 U.S. 127 (1979) (construing congressional intent as to the operation of § 1738 by examining the purpose of the federal bankruptcy statute as a whole).

273. *Kremer*, 456 U.S. at 511 (Stevens, J., dissenting)

274. Id. at 469-70.

275. Id. at 468.

276. Id. at 469.

277. Id.

278. Id at 472-76.

279. Id. at 476.

280. The dissent found an implied repeal of § 1738 in the 1972 amendment requiring that the EEOC "accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under State or local law." Pub. L. 72-266, § 4, 86 Stat. 104; 42 U.S.C. § 20000e. Some cases rejecting preclusion prior to *Kremer* also relied on this language. See, e.g., Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S.

requirement would cause state agencies, but not necessarily state courts, to pass on Title VII claims. However, congressional concern for the continued efficacy of state laws can only be accurately viewed in the context of its clear intent that de novo federal court review remain uncompromised regardless of state or federal agency proceedings. That Congress recognized the interrelationship of these considerations is demonstrated by its decision to entrust federal courts with review of the adequacy of state agency decisions as a fact of their plenary consideration. It is also manifest from the provisions allowing state and federal review to proceed concurrently under certain circumstances.[281] These provisions, which allow the federal court to stay its proceedings for 60 days to allow completion of "state proceedings," only make sense if de novo consideration is not compromised by agency action.

Moreover, debate concerning the Hruska amendment,[282] relied on heavily by the Court as evidence that Congress intended that state court decisions be accorded preclusive effect, does not support the majority's conclusion. The Hruska amendment specifically would have excluded state anti-discrimination laws from the effort to make Title VII the exclusive remedy for claims of discrimination.[283]

Given that state court review of Kremer's claim was a direct, albeit unanticipated, result of mandatory deferral procedures, and that state court review of Kremer's claim was in the nature of certiorari rather than of a plenary nature, Congress' express wish that prior state agency proceedings should not preclude a subsequent de novo federal Title VII action should have been understood to apply with equal force to a state courts' appellate review of those state agency proceedings. Congress' unequivocal desire to provide a de novo

928 (1975). The *Kremer* dissent asserted that the plain meaning of this provision negates preclusive effect to state court proceedings, as it specifies that substantial weight, rather than preclusion, be accorded.

Given the context in which the amendment was passed, this construction of the substantial weight requirement is not justified. As the majority pointed out, this amendment was passed out of congressional concern that the EEOC was not giving state decisions "due respect." 118 Cong. Rec. 310 (1972) (remarks of Sen. Ervin). Thus, Congress focused on the EEOC, rather than the federal courts, in passing the amendment and intended to increase, rather than decrease the deference given to state findings by the EEOC.

281. See notes 59-64 and accompanying text supra. The *Kremer* majority specifically rejects this interpretation. 456 U.S. at 471 n.8.

282. 110 Cong. Rec. 3,370 (1972).

283. Id. The focus of debate over the Hruska amendment, by both proponents and opponents, was a limitation on multiple federal remedies. Senator Hruska described the purpose of the amendment as eliminating the "multiplicity of actions to be instituted against a respondent before a number of separate and distinct forums for the same alleged offense." 110 Cong. Rec. 3,368 (1972). The benefit of the amendment, in his view, would be to enhance the possibility of "reaching an agreement with the State agency or with the EEOC. . . ." Id.

Similarly, the "comments" of Justice Department officials cited by Senator Javits criticize the amendment on the ground that the amendment "could be interpreted as eliminating the use of provisions of *federal law* other than Title VII in the attack on employment discrimination." Testimony of David Norman, Asst. Attorney General, Hearings of October 4, 1971 before House Committee on Labor and Public Welfare, p.162, quoted at 110 Cong. Rec. 3,369 (1972) (emphasis added).

hearing in federal court for discrimination claimants, irrespective of agency decisions, cannot be squared with precluding federal Title VII claims on the basis of state appellate review of agency decisions that were initiated as a result of mandatory deferral procedures.[284]

As the decision on the claim is made by the state agency rather than the court, and as the claimant is compelled by Title VII to submit his claim to the state agency, preclusion in the *Kremer* context allows plenary review in the federal court to be defeated by an agency finding. Preclusion also shapes the deferral requirement in such a way that the de novo requirement is placed in jeopardy.[285] As Congress intended the 60-day deferral requirement to be a limited expression of deference for state anti-discrimination agency proceedings prior to federal consideration, it could not have intended the deferral requirement to create a trap for unknowing litigants which might deprive them of a plenary hearing.

Congressional concern for providing a comprehensive enforcement scheme with primary responsibility in the federal courts, as well as its strengthening of the guarantee to a federal trial de novo in the 1972 amendments, constitutes evidence of an implied repeal of § 1738 in Title VII.[286] While different considerations might control if the discrimination complainant voluntarily submitted her claim to a state court for plenary review,[287] the imposition of preclusion principles in the *Kremer* situation is in "irreconcilable conflict"[288] with the statutory scheme of Title VII. The *Kremer* majority, however, refused to examine more limited formulations. It did not have to

284. Kremer's claim was determined by NYHRD as a result of mandatory deferral procedures. Under New York law, if Kremer had wished to pursue his claim under state law in the first instance, he would have had the choice of filing a complaint in New York supreme court or in the agency; the choice constitutes an election of remedies. Human Rights Law, N.Y. Exec. Law, § 300 (1982). See also St. Vincent's Hospital v. Division of Human Rights of the Executive Dep't of the State of N.Y., 553 F. Supp. 375 (S.D.N.Y. 1982). Thus, not only was Kremer's claim subjected to agency review rather than judicial review solely as a result of the deferral requirement, but also his claim could not be heard in a plenary fashion by a state court because of New York's election of remedies provision.

285. This is particularly true if *Kremer* is extended to the situation where the employer appeals the state agency finding into state court. Several courts have reached this result. See Gonsalves v. Alpine Country Club, 563 F. Supp. 1283, (D.R.I. 1983), aff'd, 727 F.2d 27 (1st Cir. 1984); Capers v. Long Island, 31 Fair Empl. Prac. Cas. (BNA) 668 (S.D.N.Y. 1983); Cf. Davis v. United States Steel Supply, 688 F.2d 166 (3d Cir. 1982) (en banc), cert. denied, 460 U.S. 1014 (1983) (§ 1981 action barred by judicial review of state agency decision initiated by employer).

286. The Court has considered the creation of a federal enforcement scheme to militate against normal preclusion principles in other factual contexts. See, e.g., Brown v. Felsen, 442 U.S. 127 (1979) (a prior state judgment of the indebtedness was not given preclusive effect in a federal bankruptcy court proceeding).

287. The *Kremer* Court justifies the result it reaches, in part, out of concern that finding an implied repeal of § 1738 would allow de novo review even of a state court judgment after a full trial. 456 U.S. at 478. For the reasons set forth above, this situation is distinguishable from narrow state court review of mandatory agency findings.

288. *Kremer*, 456 U.S. at 468. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976), quoting Posadas v. National City Bank, 296 U.S. 497 (1936).

decide that § 1738 either applied or did not apply to all state court decisions. The majority should have tied its analysis to the nature of the state court decision to determine whether Congress intended Title VII to override § 1738 in the particular situation before the Court.

B. The Effect of Kremer Upon Title VII's Enforcement Scheme

The practical impact of the *Kremer* decision forcefully illustrates the extent of the Court's departure from Congress' enforcement scheme for Title VII. The decision undercuts the guarantee of a federal trial de novo, dilutes the primary role of the federal courts in enforcing Title VII, and segregates remedies for the pervasive problem of employment discrimination that Congress intended should be overlapping and complementary.

1. Right to De Novo Trial Undermined

The *Kremer* court departs from the concept that administrative agency findings cannot bar a federal trial de novo under Title VII.[289] 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. While the claimant in *Kremer* sought review of the state agency determination in a state court, nothing in the majority's analysis in *Kremer* would limit preclusion only to those particular facts. A claimant whose charge was submitted to a state agency because of Title VII's mandatory deferral provisions could be deprived of a federal forum for her Title VII action if the defendant were to appeal to a state court an agency finding favorable to the claimant. Several post-*Kremer* decisions have extended preclusive effect to such state court decisions.[290] Indeed, as the *Kremer* dissent[291] and some of the pre-*Kremer* cases suggest,[292] this result follows logically from the *Kremer* court's holding that judicial review of state deferral agency determinations should be given preclusive effect.

Gonsalves v. Alpine Country Club[293] illustrates this danger. Antone and

289. See notes 187-220 and accompanying text supra.

290. See *Gonsalves*, 563 F. Supp. at 1283; *Capers*, 31 Fair Empl. Prac. Cas. (BNA) at 688; *Davis*, 668 F.2d at 166.

291. *Kremer*, 456 U.S. at 504-505 n.18 (Blackmun, J., dissenting):

> If the complainant prevails after a full hearing, he runs the risk that his adversary may seek judicial review. He could then find himself closed out of federal court if a state court decides that the agency's decision is unsupported by sufficient evidence. (citation omitted). 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.

292. See Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1083 (8th Cir. 1980), cert. denied, 446 U.S. 966 (1980) (no res judicata effect because defendants appealed to state court and Title VII guarantees de novo trial); Unger v. Consolidated Foods Corp., 657 F.2d 909 (7th Cir. 1981), vacated and remanded, 456 U.S. 1002 (1982), cert. denied, 103 S. Ct. 1801 (1983) (which party appeals into court immaterial);. Smouse v. General Elec. Co., 626 F.2d 333, 336 (3d Cir. 1980).

293. 727 F.2d 27 (1st Cir. 1984)

Anthony B. Gonsalves prevailed on their state administrative charges of discrimination, after a full hearing before the state agency. The employer appealed to the Rhode Island Superior Court, which reversed the administrative finding. Plaintiffs subsequently obtained a right-to-sue letter from the EEOC and commenced a federal Title VII action.[294] The district court granted defendant's motion for summary judgment on res judicata grounds and the First Circuit affirmed. Plaintiffs argued that *Kremer* should not control because the employer's appeal forced them into state court, and thus into relinquishing their federal claim.[295] The court rejected plaintiffs' claim stating that "the basic thrust of *Kremer* is the recognition that Congress did not 'envision full litigation of a single [discrimination] claim in both state and federal forums.' "[296] The grant of preclusion was not dependent on the "happenstance of which party — employer or employee — brings the state court action."[297]

Similarly, in *Capers v. Long Island Railroad*,[298] a district court granted defendant's motion for summary judgment based on res judicata. The court rejected plaintiff's argument that preclusion would violate the de novo hearing provisions of Title VII.[299] The court said:

> The Supreme Court opinion in *Kremer* completely undermines the analysis relied on in *Gilinsky*. Although *Kremer* did not specifically consider the case of an employer-initiated state court action, its discussion of Section 1738 and Title VII indicates that a state court judgment in such a case should be accorded its full res judicata effect.[300]

Nothing could more directly impinge congressional intent that litigants be provided a federal forum for a de novo trial of Title VII claims.

In *Davis v. U.S. Steel*,[301] another defendant-initiated state court appeal, the Third Circuit, sitting en banc, found that plaintiff's race discrimination

294. Plaintiff filed EEOC charges shortly after the state filings and approximately six months before their administrative hearing on the state charges. *Gonsalves*, 563 F. Supp. at 1284.

295. Inexplicably, the court does not credit the Gonsalves's claim that they were forced into state court. Without discussion of the mandatory deferral requirement, the court finds that plaintiff's foray into the state system was completely voluntary. 727 F.2d at 29.

296. Id. at 29, quoting *Kremer*, 456 U.S. at 474.

297. Id.

298. 31 Fair Empl. Prac. Cas. (BNA) 668 (S.D.N.Y. 1983). In *Capers*, plaintiffs, black employees of and applicants to the Long Island Railroad, prevailed on their administrative charges of discrimination, after a full hearing before NYHRD. The employer appealed to the New York appellate division, which reversed the administrative finding. Plaintiffs filed an action in federal district court alleging Title VII claims.

299. Plaintiff's argument was based on Gilinsky v. Columbia Univ., 440 F. Supp. 1120 (S.D.N.Y. 1977), a pre-*Kremer* case where preclusive effect was denied a state court judgment reviewing the administrative determination.

300. Id. at 670.

301. 688 F.2d 166 (3d Cir. 1982) (en banc), cert. denied, 460 U.S. 1014 (1983). The Third Circuit vacated its earlier panel opinion, written prior to *Kremer*, which had declined to grant preclusive effect.

action under 42 U.S.C. § 1981 was barred by res judicata. Davis had initially filed charges of discrimination with the Pittsburgh Commission on Human Relations (PCHR), which, after a "full adversarial hearing," found that she had been discriminated against by her employer.[302] U.S. Steel appealed the decision to common pleas court, which affirmed the decision, and then to the Commonwealth Court of Pennsylvania, which unanimously reversed, on the grounds that the record inadequately supported the Commission's findings.

Rather than appealing that decision to the Pennsylvania Supreme Court, Davis filed a § 1981 action in federal district court, raising the same claims as were raised before the agency.[303] The Third Circuit held that *Kremer* and *Allen* compelled the conclusion that Davis's claim was barred by res judicata. It found that the *Kremer* Court's characterization of the state and federal discrimination theories as the same cause of action, as well as the Court's analysis of the state decision in *Kremer* as akin to a summary judgment determination militated in favor of preclusion. The court discovered no intent in the legislative history of § 1981 to work an implied repeal of § 1738 and thus applied Pennsylvania's res judicata rules[304] to bar plaintiff's suit. The court assumed, without discussion, that *Kremer* would apply, notwithstanding that the defendant, rather than the plaintiff, had appealed into state court.[305]

Judge Gibbons, dissenting, opposed the extension of *Kremer* to defendant-initiated state court actions, on the grounds that such an interpretation would undermine congressional intent, recognized by the *Kremer* majority, that agency proceedings could not defeat a trial de novo.[306] He noted that such an extension was dangerous because state agencies, some of which might be hostile to discrimination claimants, would have the opportunity "to grant some scintilla of relief so that a respondent can drag the claimant into a state court."[307] He further argued this extension of *Kremer* might have the result that only those claims which were totally meritless would reach federal court

302. Id. at 168.

303. Davis alleged in these actions that she was subjected to a pattern of harassment, and ultimately discharged, because of her race. Id. at 169.

304. Judge Gibbons's dissent, joined by Judge Higgenbotham, contests the majority's characterization of Pennsylvania's preclusion principles and their application to the state decision in the *Davis* case. In the dissenters' view, Pennsylvania would not grant the state judgment preclusive effect. Id. at 186.

305. The concurring opinion of Judge Garth, however, explicitly addressed the import of *Kremer* in situations where the defendant appeals into state court. Judge Garth, who had ruled for plaintiff as a member of the original panel, regarded *Kremer* as a dispositive change in the law. Before *Kremer* he asserted that: "Congress had always intended to provide victims of employment discrimination with a federal fact-finding forum and the Congress' clear expression of this intent was sufficient to override and supersede any requirement of § 1738." Id. at 177. He construed the *Kremer* Court's failure to distinguish the captive state litigant situation as a clear indication that the *Kremer* majority would apply res judicata there as well. Id. at 178-79.

306. The dissenters in *Davis* referred to this as "the *Kremer* Court's clear premise that there was no obligation to present all claims or all facts to the agency." Id. at 189 (Gibbons, J., dissenting). Although Judge Sloviter wrote separately in *Davis*, she indicated general agreement with the Gibbons dissent. Id. at 192-94, (Sloviter, J. dissenting).

307. Id. at 189 (Gibbons, J., dissenting).

for plenary hearing.[308]

Although Judge Gibbons' view of the potential consequences of the *Kremer* decision is plausible (though, one hopes, unduly pessimistic), his construction of *Kremer* is flawed. Judge Gibbons refers to no language or reasoning in *Kremer* that would justify a distinction in application of preclusion to a state court decision depending on which party had initiated state appellate review of the state agency's finding. Moreover, if the agency decision in *Kremer* is the determination actually being given preclusive effect, there is no basis for assuming that state appellate review initiated by the defendant could be given less preclusive effect than the review obtained on the initiative of the claimant.[309]

Thus, *Kremer*, both on its own facts and as applied to the defendant-initiated state court appeal of agency action, transforms the deferral proceedings into a purgatory in which a litigant's Title VII claims may perish, negating the claimant's opportunity for a federal trial de novo. As the cases discussed above illustrate, the forum choice traditionally reserved to Title VII plaintiffs by Congress may be usurped by defendants.

After *Kremer*, even the state agency may, by its actions, defeat plaintiff's right to a plenary hearing in the federal courts. Not only can the state agency effect this result by granting partial relief, as Judge Gibbons discusses, but also by continuing to process plaintiff's claim after the mandatory deferral period of 60 days has ended. Additionally, the EEOC also may jeopardize a plaintiff's access to federal court by failing to process plaintiff's claim expeditiously after the 60-day deferral period ends, as a state agency may act before the EEOC issues a notice of right to sue to the plaintiff. In each of these situations, the plaintiff is powerless to secure the trial de novo guaranteed him by Congress unless he is able to evade the state agency's evaluation of his claim.[310] A claimant seeking a federal forum will have great incentive to avoid even those state agency efforts aimed at conciliation — the very efforts Con-

308. Id. at 189.

309. Indeed, given the *Kremer* Court's discussion of the minimal due process requirements which state proceedings must meet, *Kremer*, 456 U.S. at 481, it is likely that the Court would find the result in the *Davis*-type situation even easier to justify than the situation where plaintiff initiated court review. As the *Davis* majority notes, plaintiff there had an adversary hearing before the state agency, whereas Kremer never had a hearing on his claim in the agency or anywhere else.

As a matter of res judicata law, the result in *Davis* is sounder than in *Kremer*, as the administrative hearing in *Davis* was adversarial in nature. However, unlike the § 1981 context in which *Davis* was decided, in the Title VII context, the claimant is *required* to file with the state agency. Given the mandatory nature of state proceedings in Title VII, the *Davis* result would violate the guarantee of a federal trial de novo when applied to Title VII actions.

310. As Justice Blackmun points out in his dissent in *Kremer*, this threat to plenary federal court hearing will no doubt cause many claimants to attempt to bypass administrative procedures altogether. *Kremer*, 456 U.S. at 505 n.18. Indeed, if *Kremer* had pursued this course and had simply requested a right to sue letter from the EEOC after 240 days of administrative inaction, pursuant to 42 U.S.C. § 2000e-5(f)(1), he would have been able to file in federal court prior to the adverse agency ruling, which was rendered almost a year after Kremer filed his EEOC complaint.

gress sought to maximize by enacting the deferral requirement.[311]

The cases decided since *Kremer* make clear that the rule in *Kremer* has "serve[d] as a trap for the unwary pro se or poorly represented complainant."[312] When Mr. Kremer made the ill-advised choice to appeal the agency's no-cause determination into state court, he was unrepresented by counsel.[313] Although his actions demonstrated a desire to pursue his discrimination claim in federal court, his appeal cost him the right to a federal trial de novo. While in subsequent cases the courts have on occasion ameliorated the harshest effects of *Kremer* for pro se plaintiffs,[314] the decision to pursue claims in state court has often cost unrepresented plaintiffs their discrimination claims.[315]

2. *The Primacy of the Federal Remedy Undermined*

The dangers of undermining federal primacy in anti-discrimination enforcement are not illusory. In enacting Title VII, Congress intended that federal forums be secured for vindication of discrimination claims largely because of concern that state forums might well be hostile to such claims. There continues to be evidence supporting this concern.

In *Wakeen v. Hoffman House, Inc.*,[316] a federal court applied res judicata to a state court affirmance of a state agency "no cause" determination even

311. See notes 13-23 and accompanying text supra.

312. *Kremer*, 456 U.S. at 506 (Blackmun, J., dissenting). See also *Davis*, 688 F.2d at 177, suggesting agreement with this characterization.

313. See note 95 and accompanying text supra.

314. Evans v. Syracuse City School Dist., 704 F.2d 44 (2d Cir. 1983) is such a case. Plaintiff had filed a pro se complaint with NYHRD, which issued a no cause finding. She appealed to the appellate division, which affirmed the determination because plaintiff failed to appear at a hearing. Thereafter, she appealed to the appellate division still acting pro se. Her appeal was dismissed by the court for failure to prosecute when she neglected to file seven copies of her brief as required by the rules of the court. Id. at 46. Clearly, she had been unable to adequately present her case in the state system without a lawyer. Nor did she "realize that her pro se actions in state court had important ramifications. . ." Id. at 48.

Evans's EEOC claim, filed concurrently with the state claim, ripened into a notice of right to sue, and she filed a pro se action in federal district court. Court-appointed counsel pursued discovery and prepared the case for trial. On the eve of trial, defendant filed a motion to amend his complaint to allege res judicata as an affirmative defense, and, relying on *Kremer*, moved for summary judgment on that basis. Both motions were granted by the district court.

The Second Circuit reversed the decision on the motion to amend, relying primarily on defendant's dilatoriness and prejudice to plaintiff's court-appointed counsel, who had been unaware of plaintiff's foray into state court. The court's main concern appeared to be that to allow defendants to assert affirmative defenses on the eve of trial "would discourage all but the most resolute of the compassionate and public spirited lawyers who would serve as court-appointed counsel." Id. at 118, since such attorneys receive fees only if plaintiff prevails.

315. See Mathew v. New York Telephone Co., 30 Fair Empl. Prac. Cas (BNA) 342 (S.D.N.Y. 1982); Kent v. New York City, 549 F. Supp. 570 (S.D.N.Y. 1982), aff'd, 722 F.2d 728 (2d Cir. 1983), cert. denied, 104 S. Ct. 357 (1983); Prasad v. Wassaic Developmental Center, 546 F. Supp. 679, (S.D.N.Y. 1982); *Davis*, 688 F.2d 166. See also Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir. 1979), cert. denied. 444 U.S. 983 (1979) (plaintiff pro se in all state and federal court proceedings); Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977). Cf. Moosavi v. Fairfax County Bd. of Educ., 666 F.2d 58 (4th Cir. 1981) (state court ruling against pro se plaintiff after plenary hearing barred later Title VII action).

316. 724 F.2d 1238 (7th Cir. 1983).

though the state proceedings embodied legal principles contrary to Title VII. The state agency had found no probable cause on plaintiff's claim that defendant's decision to pay overtime wages to women but not to men constituted sex discrimination. The state agency ruling was based on its finding that defendant had been ordered to follow this practice by another state agency. Under Title VII, however, such a policy would have been deemed sex discrimination,[317] regardless of any other state agency order. The court found that *Kremer* applied, because plaintiff could have raised this claim in the state courts.[318] The court rejected the notion that Title VII provided an independent, supplemental remedy: "That a potential response to Hoffman House's defense finds its base in federal law does not mean that Wakeen can bring an independent federal action to assert that response."[319]

While the cases are not unanimous,[320] it is clear that, after *Kremer*, the ability of the federal courts to "supplement" state discrimination laws may be lessened, if not destroyed. Indeed, *New York Gaslight Club v. Carey*,[321] which upheld the concept that federal courts may enforce Title VII to provide additional remedies to discrimination claimants not available under state law,[322] cannot be reconciled with the interpretation of *Kremer* adopted by the Seventh Circuit in *Wakeen*.

Kremer has also eroded the notion that Title VII supplements but does not supplant other remedies for discriminatory conduct. Title VII claimants have been barred from pursuing their claims in federal court because of state court affirmances of police department disciplinary hearings,[323] sanitation department dismissal proceedings,[324] unemployment compensation hearings,[325]

317. See, e.g., EEOC v. Allegheny County, 705 F.2d 679 (3d Cir. 1983); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Popko v. City of Clairton, 570 F. Supp. 446 (W.D. Pa. 1983).

318. *Wakeem*, 724 F.2d at 1242; Compare Reynolds v. N.Y. State Dep't of Correctional Servs., 568 F. Supp. 747 (S.D.N.Y. 1983).

319. 724 F.2d at 1241.

320. Reynolds v. N.Y. State Dep't of Correctional Servs., 568 F. Supp. 747 (S.D.N.Y. 1983). The court construed *Kremer* to reach a contrary conclusion. There, plaintiff lost in the state courts because New York law accepted defendant's bona fide occupational qualification defense, although federal Title VII law would have rejected the defense on the facts presented. The court reasoned that *Kremer* did not control because, unlike the state decision in *Kremer*, Reynolds's state court decision did not determine that she could not succeed on her Title VII claim.

This analysis is predicated on the two arguments that state discrimination law and Title VII are separate causes of action and that plaintiff could not have raised her federal claims in the state proceedings.

321. 447 U.S. 54 (1980).

322. The Court allowed plaintiff to recover attorney's fees for representation in state proceedings although the state agency and state courts rejected her state claims.

323. Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982).

324. *Kent*, 549 F. Supp. at 570.

325. Knox v. Cornell Univ., 30 Fair Empl. Prac. Cas (BNA) 433 (N.D.N.Y. 1982); Ross v. Comsat, 34 Fair Empl. Prac. Cas. (BNA) 260 (D. Md. 1984). Contra: Goldsmith v. DuPont Co., 32 Fair Empl. Prac. Cas. (BNA) 1879 (D. Del. 1983) (res judicata not a ban where it cannot be said that the two causes of action are the same); Cooper v. City of N. Olmstead, 33

academic disciplinary hearings,[326] and other federal civil rights actions.[327]

Clearly, while *Kremer* does not purport to overrule *Alexander v. Gardner-Denver* and its progeny, the application of preclusion to the full range of remedies formerly supplemented by Title VII suggests a significant erosion of the doctrine of overlapping and complementary remedies contemplated by Congress.

CONCLUSION

The Supreme Court has "long recognized that 'the choice of forums inevitably effects the scope of the substantive rights to be vindicated.' "[328] It has acknowledged that the federal courts have "ultimate authority" to secure compliance with Title VII.[329] Nevertheless, the Court in *Kremer* departed from these principles and, in the name of federal-state comity, diluted the right to a federal trial de novo for Title VII claims. In the name of deference to state court judgments, the Court approved a drastic reduction in due process guarantees for discrimination victims and undermined accepted principles of res judicata and collateral estoppel.

Fair Empl. Prac. Cas. (BNA) 1283 (N.D. Ohio 1983) (claim not precluded when no determination on merits); McCluney v. Jos. Schlitz Brewing Co., 540 F. Supp. 1100 (E.D. Wis. 1981) (issue not litigated). Cf. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982) (pre-*Kremer*).

326. Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984).

327. See, e.g., Snow v. Nevada Dep't of Prisons, 543 F. Supp. 752 (D. Nev. 1982) (§§ 1983, 1985); Foulkes v. Ohio Dep't of Rehabilitation, — F.2d — (6th Cir. 1983) (§ 1981); *Davis*, 688 F.2d at 166 (§ 1981).

328. *Alexander*, 415 U.S. at 56.

329. *Carey*, 447 U.S. at 64, quoting *Alexander*, 415 U.S. at 44-45.

RESPONSE

MARK JACOBY: The introduction indicated that I was selected for this panel to represent the defense counsel's view. No one had told me that before I arrived here and heard it from our moderator. I just assumed that the other panelists were law professors, and as I had once been a law professor, that's why I was selected. But I will proceed, notwithstanding the evil connotation that has been ascribed to me.

My first observation about the *Kremer* decision is that we are dealing with a problem that poses a very narrow set of difficulties in regard to both our concern for the enforcement of the anti-discrimination laws and our concern for comity and repose between the state and federal governments. This point is articulated well in both the majority and the dissenting opinions in *Kremer*. The majority and dissent agree that if Mr. Kremer or any other complainant proceeded with a discrimination complaint before a state agency and that proceeding was not carried on into state court, the complainant would not be precluded from going into federal court with a *de novo* Title VII action. The majority and dissent likewise apparently agree that if a complainant proceeded directly in state court with a state discrimination complaint and there was a summary judgment disposition for defendant, complainant would be precluded from going into federal court with a *de novo* Title VII action.

Under the New York Human Rights Law, a discrimination complainant can either file a complaint with the Human Rights Division or file suit directly in New York State Supreme Court. As I said a moment ago, both the majority and dissent in *Kremer* seem to agree that if the complainant proceeds directly in state court and receives a final disposition on the merits, that disposition will be given preclusive effect. The narrow situation we are dealing with here is one in which a state court judgment has arisen out of review of a state agency determination.

In New York, that situation can arise in two possible settings. One scenario is when an investigatory fact-finding proceeding results in a "no probable cause" decision by a regional director of the Human Rights Division, that decision is appealed to the Human Rights Appeal Board (since abolished) and is then appealed to the Appellate Division of the Supreme Court, and perhaps, to the New York Court of Appeals. Here we are dealing with judicial review of the administrative "no probable cause" decision.

The other scenario is one in which an administrative "probable cause" finding has been made. The case then goes to a public hearing before the State Human Rights Division. A hearing examiner conducts a trial, witnesses are called and testify under oath, and there is cross-examination — all in all, very much the same procedures as one would have in a state or federal court action. The complainant receives an adverse decision after that full administra-

tive trial, and then the case proceeds up through the courts for review. Here we are dealing with judicial review of the administrative decision after an administrative trial.

The *Kremer* decision obviously involves the former scenario — the review of a "no probable cause" determination — and the conclusion of the Supreme Court is that there is preclusive effect if that case is reviewed by the state court. And, of course, it then follows, *a fortiori*, that had Kremer received a probable cause finding, but then received an unfavorable decision after a full trial before the Human Rights Division, which was unsuccessfully appealed to the state courts, the state court decision would be given preclusive effect.

There are, it seems to me, two basic legal issues posed by the opinion in *Kremer* and the analysis presented this morning by the panel. One is the question of the accomodation to be made between the statutory full faith and credit provision, 28 U.S.C. § 1738, and Title VII. The second is the question of the due process standard to be applied in deciding whether to grant preclusive effect under the statutory full faith and credit provision.

As to the first question, the accomodation of the full faith and credit statute with Title VII, it seems to me that the majority and dissent in *Kremer* have a real good go at one another. My own view is that neither side is overwhelmingly persuasive. In the final analysis it's kind of an inconclusive fight, although we know who won on points — or, in this case — votes. The inability of both the majority and the dissent to muster an overwhelmingly persuasive argument flows from the fact that we do not have an authoritative legislative history of Title VII, probably because of the way it was enacted. This particular issue resolved in *Kremer* is but one of many issues that have remained unclear for many years because of this imperfect legislative history.

As to the second issue, the question of whether or not Mr. Kremer has been afforded due process in the "no probable cause" procedure and state court review thereof, prior speakers on this panel mount a very heavy challenge to the Supreme Court's decision. I would not attempt to meet that challenge directly because I have not reviewed authorities on the due process issue in some time. I would point out, however, that the dissenting Justices in *Kremer* do not even so much as hint that they see a serious question as to whether or not the state procedure met minimum due process standards.

Bear in mind, that while Mr. Kremer was acting *pro se* in the state proceedings and initially in federal District Court, he was well represented in the Court of Appeals and before the Supreme Court. It is evident that the due process issue was raised, because the majority discusses it, but the dissent does not deal with it at all. I suspect that is because there is no compelling legal precedent to support the view that due process requires a full-blown trial with the opportunity to cross-examine adverse witnesses. I do not think that is what due process has ever required, and indeed, our Federal Rule 56 would be in jeopardy were that true.

I also believe that Pamela does a disservice to the state agencies in

describing what the investigatory fact-finding process is like and in describing what the "no probable cause" decision means. In the written paper on which she bases her remarks this morning, she indicates that to avoid a "no probable cause" finding, a complainant must convince an investigator that he or she will probably win. That is not what a "no probable cause" finding means, and I do not accept that, as a matter of law or as a matter of practice. That standard sounds very much like what one needs to get an injunction in court. My experience is that the "probable cause" fact finding is more like a summary judgment proceeding, albeit done on an informal basis and perhaps on an ex parte basis. In other words, both sides may not be put in the same room with the right to cross-examine one another.

In the investigatory phase, the complainant has a full opportunity to present evidence to form the record. Indeed, the complainant is given unlimited breadth to present written or oral evidence, hearsay or otherwise. No limitations are imposed on what the complainant can put into the record. This is not the case in a typical court proceeding, where there are evidentiary rules that preclude you from presenting various kinds of evidence. In addition, one has the opportunity to ask the state agency to subpoena evidence. If the complainant makes a case for issuing a subpoena, it will always be issued. One also has the opportunity to see everything that is put into the record by the employer. If the employer chooses to put anything in the record, the complainant will be given an opportunity for rebuttal. Again, that rebuttal is not limited in scope or by evidentiary rules.

So I believe that there is, in the traditional sense, a full opportunity for the complainant to be heard in a state agency investigation. And although this opportunity will not include cross-examination of adverse witnesses, if there is a fact-finding conference held, the complainant would be permitted to suggest questions to the agency representative who conducts the conference. I therefore view the probable cause determination as very much like a summary judgment determination because, in practice, if the complainant has put forth anything that leads the state agency to believe that complainant might prevail, a probable cause finding will issue and the case will go to public hearing.

I believe that the issue posed in the *Kremer* case is not only a narrow one in terms of legal precedent, but frankly one which will be of little practical significance in the future. Any complainant can avoid the risk of being precluded from proceeding in federal court simply by not appealing an adverse state agency decision to the state appellate courts. And I do not believe that there is great risk that an employer can drag an unsuccessful and unwitting complainant into state court and obtain a decision with preclusive effect there.

The *Kremer* decision thus is of narrow practical significance because if a complainant wants to proceed through the state administrative procedures and then wants to appeal an adverse ruling to the state court, he or she has that choice. And if on the other hand, the complainant is intent upon pursuing a Title VII action in a Federal court, he or she is able to do so. That may

not be of much help to poor Mr. Kremer, who apparently did not know the score when he went into state court, but that is a potential problem for every litigant. Frankly, I do not believe that our sympathy for Mr. Kremer and his personal plight ought to change our views on how our legal system should operate. Also, I have searched in vain through the District Court opinion, the Court of Appeals opinion, the Supreme Court majority and dissenting opinions, and Pamela's very extensive and thoroughly researched paper, for one word suggesting that Mr. Kremer had any valid claim of discrimination. There is no evidence that there was, indeed, any *bona fide* discrimination issue here, or that he was prejudiced in the least by the procedures followed.

In my view, the dissenting justices in the *Kremer* decision overstate the harm that they see resulting from the outcome of this particular decision. They suggest that complainants who proceed before state agencies will avoid state court review in order to file Title VII actions in federal court and that this will result in a deterioration of the states' anti-discrimination agencies because of the absence of regular state judicial review. This thesis is entirely theoretical, and is unsupported and unconvincing. If a complainant goes through a full-blown agency proceeding with a trial on the merits and believes there have been mistakes made that can be corrected through state court appellate review, that is the remedy that the complainant will pursue. And if, on the other hand, the complainant wants to start over again with a Title VII action, that choice is available.

Having said all of this in apparent defense of the *Kremer* decision, I would conclude only by commenting that I do not personally believe that the result in *Kremer* is necessarily the best possible result. I would not have been concerned had it been decided the other way. As I indicated, I do not believe that the *Kremer* decision does terrible harm to the enforcement of the anti-discrimination laws, nor do I believe that an opposite result in that case would have done terrible harm to the concern for comity and repose.

Frankly, common sense would suggest that if a complainant has gone through a full-blown trial before the state anti-discrimination agency and has lost, the concern for comity and repose favors giving preclusive effect to that administrative decision even if no state court review is sought. Certainly, a more compelling case can be made there than in the factual setting of the *Kremer* case.

RESPONSE

LEROY D. CLARK: I basically agree with the thrust of Professor Mann's paper but let me suggest some problems that I see with it. In the first place, I think a major problem that was not dealt with in her paper, nor in the *Kremer* opinion, is exactly the point that former-Professor Jacoby mentioned, namely that the charging party was without counsel. While the charging party was represented at some later stages in the New York state court proceedings, he was not represented when he made the critical decision to seek an appeal in the state court system. Had the charging party been in federal court, he would have had the right to appointed counsel. It is possible that Kremer might have claimed the state proceeding was completely null and void because the state failed to appoint counsel for him in the state court appeal, but the law on the right to counsel in civil (as opposed to criminal) cases is primitive. As I recollect, the Supreme Court has gone as far as to say that a court does not have to appoint counsel for litigants in civil cases even where the state is attempting to take custody of a child. This lack of protection may have dissuaded the attorney for Kremer from raising such a claim.

Secondly, I agree with Mr. Jacoby that the decision probably does not have enormous implications for the future. It would probably be unwise, after *Kremer*, for any charging party to appeal a decision where the state administrative agency had found "no probable cause." The thing to do would be to get out of the state forum right away and go immediately into the federal system. There, at least, one would have the option of a trial *de novo*, precluded here by what Professor Mann called the "very narrow scope" of the New York court's review.

What I am more concerned about, however, are the post-*Kremer* cases, which Professor Mann discusses in her paper, involving charging parties who might previously have obtained federal jurisdiction, but were forced to stay in the state court system because the defendant employer appealed in the state court system. This appeal effectively limited the charging party to inferior relief than what she might have received in a trial *de novo* in the federal court. Again, however, a large part of my concern here is that the charging party may be unrepresented in the state court proceeding which can then be used to preclude her from a trial *de novo* in federal court.

Now I would like to make a couple of criticisms of Professor Mann's approach. In the first place, I would read the Supreme Court decision in *Kremer* as applying specifically to the kind of administrative agency involved in the case. State administrative agencies in the anti-discrimination arena are not like courts in that they take a totally neutral view toward the parties in the action. Indeed, such state administrative agencies have a quasi-prosecutorial role; they have a statutory responsibility to eradicate discrimination. By and

large, they are going to look quite sympathetically at the allegations of the charging party. Perhaps the Supreme Court decision therefore has to be read in the following light — where you have a state agency that is likely to protect the charging party, and that agency decides that there is no case, if there is subsequent review by a state court, then the charging party is precluded from subsequent federal review.

I also disagree with Professor Mann's hypothesis that the agency might have found "no probable cause" because of a case load problem, rather than as a result of investigation. Any state agency can deal with caseload problems straightforwardly. If they do not want to hear a case because they do not have the resources or the time, they just do not have to deal with it at all. They could simply direct the charging party to the federal agency (EEOC). They do not have to take the case, and then say falsely that there is no probable cause. Further, while the dissent in *Kremer* quarrels with the majority's characterization of what dismissal in the state court meant, or rather what the finding of "no probable cause" meant, the Court very clearly says that they are treating the finding of "no probable cause" pretty much as a finding that as a matter of law there was nothing to the charging party's case. I think that only those state agency determinations that have that character ought to be given preclusive effect. I have one other minor criticism of Professor Mann's paper: she poses the scenario of a state agency that is hostile to the charging party, and, I assume, deliberately gives the charging party half a loaf. This would presumably enable the employer to take an appeal to the state court, thereby precluding the charging party from getting full relief. Now I just think that scenario is unreal. The political realities of 1984 are quite different from the conditions which existed before 1964. I do not believe that you can show that any southern state agency today, explicitly or covertly, systematically sells minorities or women short. Blacks are too strong politically in the south, as we are going to see with Reverend Jesse Jackson's campaign for president, and women are certainly more politically conscious and active today. Those are the two major groups I think that one has to be concerned about. By and large, I think that state agencies, certainly the ones that I had contact with when I was General Counsel at the Equal Employment Opportunity Commission, are sincere and anxious to perform their role well. When they do a bad job it usually is not their fault, but a problem created by the state legislature not providing them with the financial resources to do a better job. Therefore, I just do not believe that the scenario she paints of a subversion of Title VII rights by hostile state administrative agencies is likely.

RESPONSE

JONATHAN HYMAN: I would like to touch on several reverberations of this case. On its face the case presents a very narrow issue. It involves a complicated procedural arrangement established by Title VII, a multi-faceted state procedural system and the technical question of how to meld these two schemes. But I see in the decision of the case three larger themes that I think help to explain why the Court decided it as it did. The first is what I might call the triumph of parity, that is, the notion that state judicial or administrative procedures are entirely equivalent to federal courts and federal procedures. The second is a diminished notion of due process coupled with a bit of a revival of a distinction between rights and privileges. The third theme that I see is an interest that the Court has in finding means to resolve disputes other than formal litigation.

Let me describe each of these in a little more detail. This case indicates the triumph of the notion of parity because it seems to establish, as several other cases have, that there is nothing preeminent about the federal courts. While federal law is supreme, and both federal and state courts are obliged to follow it where it applies, there has recently been some question as to whether that supremacy goes a little bit further and implies that the federal courts are supreme over the state courts. There was some judicial language to that effect at the height of the civil rights movement in the 'fifties and 'sixties when the Supreme Court was trying to desegregate the South, but it has been pretty well abandoned. Instead, the tenth and eleventh amendments have been given new life by the Supreme Court, increasing the sense of the importance and independence of the state courts. This carries with it a corresponding impression that the federal government is no more than a fifty-first state. As a mere fifty-first state, its courts have no greater claim to judicial power and no greater obligation to be open to people claiming violations of federal law than the courts of any other state.

This is apparent in the *Kremer* decision, in the way the Court handles section 1738 of the Judicial Code, the "full faith and credit" statute. The Court used a broad reading of Section 1738 to turn the *Kremer* issue into a deceptively simple one of statutory construction. Section 1738, which requires full faith and credit for prior state decisions, appears to conflict with Title VII, which authorizes a de novo trial in the federal court. How should the Court put these together? To say, as the Court does, that the earlier and more general statute prevails buries a lot of presumptions and tendencies that the Court does not explain to us. This is not unique to Title VII issues. The Burger Court has on other occasions taken general jurisdictional statutes and by interpreting them in a broad and literal way has created powerful rules that keep parties out of federal court. The statutes are vague and general; there is no

legislative history or other substantial indication of precisely how Congress meant to handle this problem if it came up. Nevertheless, the Court has thought it appropriate to interpret a general statute in a way that precludes federal court jurisdiction. The Court somewhat obscures the significance of its action by implying that Congress could always change the result. That does not explain, however, why the general statute that prevents federal jurisdiction should be favored over the specific statute that could plausibly be read to authorize it. The Court puts the burden of overcoming legislative inertia (if I may use a phrase of Dean Schmidt of Columbia in this forum) on the parties that favor federal court jurisdiction. Congress has at times acted to change a judicial interpretation, but not often, and particularly not now, when the strong civil rights consensus of the 1960's has disappeared.

To close the issue of parity, let me note that the Court is making the issue simpler than it really is. It is not satisfactory to say that the courts of the United States are just like the courts of a fifty-first state. The United States is not a fifty-first state. It does not have a separate geographical jurisdiction. It does not have a general body of substantive law that governs the primary relations of the citizens within it. Federal law is not just interstitial either, doing little more than filling gaps in state law. Federal and state laws are largely interlaced. The state and federal rights we carry with us are all mixed up the same bundle. The analogy between "full faith and credit" between two states and "full faith and credit" between the federal and state governments is not complete. Because of this, the parity notion, which the Court is so anxious to use to enforce the finality of state court judgments, becomes a flawed tool for handling the problem of parallel pending actions, one in state court and one in federal court. If you follow the cases that have tried to deal with this problem, which is a spinoff of the abstention doctrine, you find that the Court is in a real muddle. It does not have any clear idea of how it should decide which forum is to be preferred. Since the idea that the federal government is a mere fifty-first state cannot resolve the recurring and troublesome problem of parallel suits, the Court has yet to give a satisfactory explanation of why it should be used to prevent federal court adjudication of federal law in cases like *Kremer*.

Let me talk briefly about the other two themes that I see in this case. One is a limited state-oriented concept of due process. Although the due process issue is not explored in the *Kremer* decision itself, I detect here a kind of deference to the state's authority to provide whatever process it wants to, as long as it is state law that the state is enforcing. The *Kremer* Court gave *res judicata* effect to the state decision without establishing that the state process was the substantial equivalent of a federal court trial. If the state wants to define rights on some very narrow or minimal basis, the state can also provide a limited administrative procedure for enforcing those rights. When it comes to plaintiff's claim, which is what we're talking about here, the due process limits on what the state can do are very minimal. The *Logan* case that Pam mentioned sets a limit: the state cannot randomly decide which discrimina-

tion cases to hear. But beyond that, the state can define rights and define procedures accompanying those rights in a very minimal way and the Supreme Court will give deference to that. This is probably a one way street. Although plaintiffs can be given a very limited kind of procedure, due process would probably require more when defendants are trying to resist the enforcement powers of the state.

The third theme that I see in this case is an attempt to find alternate methods of resolving these disputes apart from litigation. The Court favors an informal investigatory process as a substitute for trial. The result of *Kremer* is to uphold the result of the informal investigatory process conducted by the state agency. Although Mark mentioned that in New York the plaintiff has the option of a trial — which everyone would agree is the standard model of due process — there is nothing in *Kremer* that suggests that this right is a necessary part of the Court's holding. The Court is quite happy to encourage the use of informal investigatory decision-making rather than formal adjudication because it is very much interested in getting cases resolved while keeping them out of court. One of the faults of the *Kremer* decision is its failure to analyze the implications of this.

Let me discuss it by way of analogy with criminal procedure. In criminal procedure there is a similar distinction between the Anglo-American method of conducting criminal trials — the accusatory system — and the continental inquisitorial system. The continental system does not permit the development and presentation of cases, as here. Instead magistrates investigate the case, take evidence and present a neat bundle to the adjudicatory body. That body basically reviews the evidence that has been collected and analyzed by this independent administrative investigator. The argument has been made by several people that the criminal justice system in this country would be better if we adopted such a system instead of relying on the model of a full blown adversarial trial to resolve disputes.

One of the problems with adopting such a system is the great difference in how these bureacratic systems work in Europe and in the United States. In Germany, for instance, the investigating magistrates are controlled by a central bureaucracy. It is a full-time profession with substantial prestige. It incorporates a lot of control and training, and inspires a lot of trust that it is capable of producing a fair and accurate determination of guilt and innocence. But it is difficult to say the same thing about the criminal law field in American jurisdictions. We have numerous local criminal law jurisdictions, many quite different from each other, and many are deeply influenced by politics. Many officials are elected. There is no tradition of bureaucratic excellence. There is no tight control from the top.

These same concerns apply to an administrative, bureaucratic system such as the New York system in the *Kremer* case. The investigator is given great power; should we trust its use? In *Kremer* the investigator looked at the facts and made a determination; but why should we trust his judgments? Are

investigators trained well enough? Is this a long term career pattern that has good controls from the top? How do we correct for excesses? How do we correct for blindness or partial vision in some of these people? How do we know what's going on in their heads?

We have heard very different characterizations from Pam and Mark of what the very same investigators do. Pam, speaking from experience working on behalf of complainants, tells us that unless the investigator is struck by the overwhelming wrongness of what went on, the investigator will not pursue the case any further. Mark, who comes at it primarily from experience representing defendants, says these investigators will jump if they see the least bit of evidence that suggests discrimination.

I do not know which one to believe. We do not have a good system for deciding when the bureaucracy and the inquisitory investigatory type of system produces results that we trust. So, instead of that, we rely on the adversarial process, in which the parties retain much more control over the development of facts, of showing the implications of the facts, the presentation of implications to be drawn from the facts and the effort to persuade a factfinder. The Court in *Kremer* is favoring an administrative way of resolving a dispute but has not made any effort to describe what might be the criteria for a fair or proper alternative to the judicial system.

I would expect that in the next five to ten years we will see more developments along these lines. Whenever the Court has a choice between favoring state proceedings or favoring federal proceedings, it will tend to favor state proceedings. Whenever the Court has an opportunity to describe narrowly the due process rights of plaintiffs with state claims, it will do so. And whenever it has the opportunity to favor a system of dispute resolution other than formal adjudication, it will do so, but silently, without elaborating alternative standards for resolving disputes.