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Access to the Federal Courts for Title VII Claimants in the *Post-Kremer* Era: Keeping the Doors Open

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I. INTRODUCTION

In *Kremer v. Chemical Construction Corp.*,[1] the Supreme Court held that a state judicial affirmance of an administrative determination rejecting a state employment discrimination claim has preclusive effect with respect to the employee's Title VII[2] claim in federal court. In the Court's view, neither the language nor the legislative history of Title VII implies that Congress intended to modify the mandate of 28 U.S.C. § 1738[3] ("section 1738") which requires federal courts to give the same preclusive effect to state judgments that the courts of the rendering state would give. This application of section 1738 is consistent with other recent Supreme Court cases on claim and issue preclusion[4] in the civil rights area,[5] reflecting an

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1. 456 U.S. 461 (1982).

2. 42 U.S.C. § 2000e-2(a)(1) (1982). Title VII prohibits differential treatment in hiring, promotion, salaries, and other ". . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ." *Id.*

3. In pertinent part, 28 U.S.C. § 1738 (1982) provides that:

> The . . . judicial proceedings of any court of any such State . . . 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 . . . ."

Unlike the Full Faith and Credit Clause of Article IV of the Constitution which requires that only state courts give full faith and credit to judgments of sister states (*see* Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941)), § 1738 requires that the state judgment be given full faith and credit by the federal courts as well. American Sur. Co. v. Baldwin, 287 U.S. 156, 166 (1932). Thus, when the first suit is in a state court and the second is in a federal court, the requirement of full faith and credit is statutory in origin, not constitutional. The objectives underlying § 1738 are the furtherance of federal-state comity and the conservation of judicial resourses. *See Kremer*, 456 U.S. at 467 n.6.

4. Under principles of claim preclusion (otherwise referred to as res judicata), a final judgment on the merits precludes the parties or their privies from relitigating in a subse-

underlying premise of the current Court that an individual does not have an unfettered right to a federal forum for the adjudication of his federal claims.[6] Rather, the vindication of federal rights may be entrusted to state courts with a concomitant savings in federal resources.[7]

Numerous commentators have been critical of the efforts to limit the role of the federal judiciary in vindicating civil rights.[8] The *Kremer* decision has been particularly criticized because it gives a state judgment preclusive effect even where the state court did not review the merits of the discrimination claim de novo.[9] Thus, the

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quent proceeding matters that were or could have been raised in the prior proceeding. Allen v. McCurry, 449 U.S. 90, 94 (1980). Claim preclusion includes the common law doctrines of merger and bar. In general, the principle of merger provides that when a final judgment is rendered in favor of plaintiff, the plaintiff's claim is extinguished and merged into the judgment. Plaintiff may then sue on the judgment, but he cannot sue again on his claim. The principle of bar provides that when the defendant prevails on the merits, the plaintiff's claim is extinguished and the judgment bars a subsequent action on the claim. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1982). *But see* Martin, *Restatement (Second) of Judgments: An Overview*, 66 CORNELL L. REV. 404 (1981). Professor Martin favors abandonment of the win/lose distinction and associates merger with conservation of judicial resources and bar with the avoidance of inconsistent results.

Under principles of issue preclusion (otherwise referred to as collateral estoppel), once a court decides an issue of law or fact necessary to a final judgment on the merits, that judgment precludes relitigation of the same issue on a different claim between the same parties or their privies. Montana v. United States, 440 U.S. 147, 153 (1979).

Both claim and issue preclusion give effect to the finality of judgment and thereby "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decision, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980).

5. *See, e.g.*, Allen v. McCurry, 449 U.S. 90 (1980); (issue preclusion applies in a 42 U.S.C. § 1983 action so as to foreclose a state criminal defendant from relitigating matters that were decided by a state court after a full and fair opportunity to litigate); Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984) (claim preclusion applies in § 1983 action).

6. *Allen*, 449 U.S. at 103. In the Court's view, it is more important to give full faith and credit to state court judgments than to ensure separate forums for federal and state claims. Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 897 (1984). Stated otherwise, the litigant is not guaranteed a federal fact-finding forum for his federal claims.

7. *Allen*, 449 U.S. at 105; Sumner v. Mata, 449 U.S. 539, 549 (1981). *See generally* O'Connor, *Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 813-15 (1981).

8. For the view that federal courts are more receptive to civil rights claims than state courts, see generally Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

9. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4471 (Supp. 1984); Note, *A Tragi-Comity: Kremer v. Chemical Construction Corp.*, 15 CONN. L. REV. 799, 816-17 (1983); Note, Kremer v. Chemical Construction Corp.: *Federal-State Comity in Employment Discrimination*, 15 LOY. U. CHI. L.J. 121 (1983); Note, *Res Judicata,*

impact of *Kremer* may be not only to limit the role of the federal courts in the adjudication of Title VII claims,[10] but also to limit the de novo adjudication of federal employment claims in *any* judicial forum.[11]

The criticism of *Kremer* may, however, be overdrawn. The *Kremer* decision is appealing on a policy level insofar as it seeks to rationalize and make more efficient the somewhat cumbersome operation of employment discrimination litigation, involving separate federal and state administrative agencies and separate federal and state judicial forums. *Kremer* is objectionable only if, in the pro-

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Collateral Estoppel, and Title VII: Tool or Trap for the Unwary?, 62 NEB. L. REV. 384, 404-06 (1983); Note, *Kremer v. Chemical Construction Corporation: Eviscerating Title VII*, 17 SUFFOLK L. REV. 987, 1017 (1983).

10. In his *Kremer* dissent, Justice Blackmun suggested the opposite result. He predicted that complainants would bypass review in state courts or possibly not even exhaust state remedies in order to preserve the right to bring their Title VII claims in federal court. *Kremer*, 456 U.S. at 504. Several commentators critical of the *Kremer* decision have made similar predictions. *See generally* Mahoney, *A Sword as Well as a Shield: The Offensive Use of Collateral Estoppel in Civil Rights Litigation*, 69 IOWA L. REV. 469, 479 (1984); Note, Kremer v. Chemical Construction Corp.: *Federal-State Comity in Employment Discrimination*, 15 LOY. U. CHI. L.J. 121, 122-23 (1983).

To some extent, complainants may be consciously bypassing judicial review. *See* Jones v. Progress Lighting Corp., 36 Fair Empl. Prac. Cas. (BNA) 25 (E.D. Pa. 1984); Snow v. Nevada Dep't of Prisons, 543 F. Supp. 752 (D. Nev. 1982); Wiese v. Syracuse Univ., 553 F. Supp. 675 (N.D.N.Y. 1982) (since plaintiff had not appealed an adverse administrative determination, *Kremer* rationale does not apply).

Justice Blackmun's prediction, however, is based on the premise that complainants will tailor their litigation strategy to the *Kremer* opinion. That may very well be the case for those who are represented by counsel. But many charging parties appear pro se before state agencies. Kremer, for example, was not represented by counsel until he appeared before the Second Circuit. These pro se complainants, in particular, are unaware of the preclusive impact of their litigation decision until it is too late. For this reason, Blackmun also suggests that the majority has constructed a trap for the pro se or poorly represented plaintiff. *Kremer*, 456 U.S. at 506.

11. *Kremer* is a case in point. Under New York's Human Rights Law, Kremer had the initial option to process his charge with the New York State Division of Human Rights ("NYHRD") or to forego his administrative remedies and seek direct judicial redress. N.Y. EXEC. LAW § 297(9) (McKinney 1982). Under the New York statute, however, once a party files his charge with the NYHRD, he is precluded from commencing a judicial action unless his charge is dismissed for administrative inconvenience. N.Y. EXEC. LAW § 297(9) (McKinney 1982); *see* Emil v. Dewey, 49 N.Y.2d 968, 406 N.E.2d 744, 428 N.Y.S.2d 887 (1980). Furthermore, an adverse administrative determination by the NYHRD is only subject to a deferential standard of review. N.Y. EXEC. LAW § 297(a) (McKinney 1982). Thus, once he chose to pursue his state claim with the NYHRD, his only recourse with respect to his statutory rights was to exhaust his administrative remedies, and thereafter, seek judicial review if the agency rendered an adverse determination. Consequently, Kremer's resort to state administrative remedies constituted a statutory election of remedies foreclosing his right to a full adjudication of his state claim in state court. Then, by appealing the adverse administrative determination to state court, he was also precluded, under the *Kremer* rationale, from a full adjudication of his federal discrimination claim in federal court.

cess of giving preclusive effect to state court judgments, the rights Congress accorded employees in Title VII are diluted, either substantively or procedurally.

This article demonstrates that *Kremer* can be implemented in a manner consistent with both the remedial purposes of Title VII and the principles of comity that underlie section 1738. It is most important, however, that *Kremer* not be improperly extended to preclude complainants who did not affirmatively seek state court redress. Thus, where the state reviewing court reverses an administrative determination favorable to the employee, and it is the *employer* who sought judicial review, the *Kremer* rationale should not apply. Otherwise, the prospective Title VII claimant would be stripped of his statutory right to opt for a de novo judicial determination, in contravention of Congress's express intent.

This article will give an overview of Title VII's procedural scheme and review the *Kremer* decision itself. It will then proceed to illustrate how the federal courts should implement *Kremer* when confronted with a preclusion defense. Finally, it will discuss how *Kremer*, properly interpreted, can lead to an effective meshing of federal and state employment discrimination remedies.

II. The Title VII Procedural Scheme

Title VII makes unlawful employment discrimination based on race, color, religion, sex, or national origin.[12] Its enactment in 1964 marked the first comprehensive attempt by Congress to rectify the pernicious effects of employment discrimination on a national level.[13] Although other federal remedies existed prior to 1964,[14] an employee who thought he had been discriminated against had to rely primarily on a crazy-quilt of state fair employment practice statutes that varied in the scope of their protection and the remedies available.[15] Even in those states with legislation, enforcement was often hampered by "inadequate legislation, inade-

12. 42 U.S.C. § 2000e-2(a)(1) (1982).

13. The Supreme Court has referred to Title VII as a "complex legislative design directed at a historic evil of national proportions." Albermarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).

14. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 141-87 (1982); Railway Labor Act, 29 U.S.C. §§ 151-88 (1982); Fair Labor Standards Act, 29 U.S.C. § 206(d)(1) (1982); 42 U.S.C. § 1981 (1982). *See generally* M. Sovern, Legal Restraints on Racial Discrimination in Employment (1966).

15. At the time Title VII was enacted, approximately one-half of the fifty states had fair employment statutes. 110 Cong. Rec. 7203 (1964) (remarks of Senator Joseph Clark).

quate procedures, or inadequate budget."[16]

As important as Title VII was to become in combating employment discrimination, it was never intended to be an exclusive remedy. In Congress's view, the most effective way to eradicate the harmful effects of employment discrimination was to permit parallel and overlapping remedies whereby an individual could pursue independently his rights under other applicable state and federal statutes.[17] Accordingly, just as proposals to defer completely to states with effective fair employment statutes were defeated,[18] so were attempts to make Title VII an exclusive federal remedy.[19] Thus, while an aggrieved employee can resort to Title VII's substantive protection, Title VII was not intended to supplant other statutes; rather, it supplements existing rights, and, in effect, serves

16. *Id.* at 7205, *reprinted in* 1 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3344 (1968) [hereinafter cited as "1964 LEGISLATIVE HISTORY"]. *See generally* Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws (Part II)*, 42 N.Y.U. L. REV. 1035 (1967).

17. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974). For example, Senator Clark, one of the sponsors of the bill, introduced an interpretive memorandum which stated: "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." Similarly, in 1972 Senator Javits, one of the managers of the 1972 amendments to Title VII, quoted with approval a statement by a representative of the U.S. Department of Justice:

> In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination. . . . At this juncture, when we are all agreed that some improvement in the enforcement of Title VII is needed, it would be . . . unwise to diminish in any way the variety of enforcement means available to deal with discrimination in employment.

118 CONG. REC. 3369-70 (1972).

18. The original House version of the bill gave exclusive jurisdiction to those states that were adequately combating employment discrimination. The Equal Employment Opportunity Commission ("EEOC") was to have the authority to determine the adequacy of state agency procedures. If they were found to be adequate, the EEOC was directed to enter into written agreements with the state agency. In such states, individuals could not bring Title VII claims in federal court. H.R. 7152, 88th Cong., 2d Sess., § 708(b) (1963). The Senate rejected this approach and provided for the limited deferral to state agencies, which was finally adopted. 110 CONG. REC. 12817 (1964).

19. In 1964 Congress rejected an amendment that would have made Title VII the exclusive federal remedy for employment discrimination. 110 CONG. REC. 13,650-52 (1964), *reprinted in* 1964 LEGISLATIVE HISTORY, *supra* note 16, at 3321-25. Similarly, another attempt to make Title VII the exclusive federal remedy for employment discrimination was defeated in 1972. *See* H.R. Rep. No. 238, 92d Cong., 2d Sess. 17, *reprinted in part* in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2181-82 (1972) (House version providing that Title VII be exclusive remedy was withdrawn); 3 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1382-1407 [hereinafter cited as "1972 LEGISLATIVE HISTORY"].

as a national floor of protection.[20]

To enforce Title VII, Congress devised an intricate interplay of state and federal administrative and judicial remedies. In an attempt to encourage conciliation of disputes, Congress conditioned judicial redress on initial resort to administrative remedies.[21] Prior to commencing a Title VII action in court, a complainant must file a timely charge with the Equal Employment Opportunity Commission ("EEOC").[22] Upon receipt of the charge, the EEOC is au-

20. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) ("Title VII was designed to supplement, rather than supplant existing laws and institutions relating to employment discrimination.").

Many state fair employment statutes are broader than Title VII in terms of the classes they protect, and the remedies they provide. In addition to prohibiting discrimination on the bases of sex, race, religion or ethnic origin, as Title VII does, many state statutes prohibit discrimination based on: (1) marital status (e.g., CAL. GOV'T CODE § 12940 (West 1980 & Supp. 1984); N.Y. EXEC. LAW § 296 (McKinney 1982)); (2) sexual preference (e.g., D.C. CODE ANN. § 1-2512(a) (1981)); or (3) history of treatment of mental disorders (e.g., MASS. GEN. LAWS ANN. ch. 151B, § 4(9A) (Michie/Law. Co-op. 1976)).

With respect to relief available, the prevailing Title VII claimant is limited to equitable relief which usually takes the form of reinstatement and/or back pay (42 U.S.C. § 2000e-5g (1982)) and reasonable attorney's fees (42 U.S.C. § 2000e-5k (1982)). State statutory schemes, in contrast, may allow recovery of compensatory damages. *See, e.g.*, FLA. STAT. § 725.07 (1984); MICH. COMP. LAWS ANN. § 37.2801 (West Supp. 1984); N.Y. EXEC. LAW § 297(4)(c)(iii) (McKinney 1982). State law may provide for recovery for mental anguish, pain and suffering (*see* Moll v. Parkside Livonia Credit Union, 525 F. Supp. 786 (E.D. Mich. 1981)), and out-of-pocket expenses (*cf.* Sarantis v. New York State Div. of Human Resources, 41 A.D.2d 885, 342 N.Y.S.2d 594 (1973)). *See generally* Wald, *Alternatives to Title VII: State Statutory and Common Law Remedies for Employment Discrimination*, 5 HARV. WOMEN'S L.J. 35 (1982).

Not all state fair employment practice statutes, however, provide as much relief as Title VII. *See* TEX. REV. CIV. STAT. ANN. art. 6252-16(2) (Vernon 1980) (limited to injunctive relief); GA. CODE ANN. § 89-1716(i) (1980) (attorney's fees not recoverable).

Notwithstanding the vagaries of state law, either in terms of the protection afforded or the effectiveness of enforcement, a covered employee, wherever he works, is guaranteed the substantive protection of Title VII and a fairly uniform procedure of enforcement within the federal system.

21. 42 U.S.C. § 2000e-5(e) (1982).

22. The charge must identify the parties involved and describe generally the complained of acts or practices. EEOC Procedural Regulations, 29 C.F.R. § 1601.12(b) (1984). The filing requirement mandates that the complainant file the charge within 180 days of the alleged discriminatory practice. 42 U.S.C. § 2000e-5(e) (1982). This time period is extended to 300 days in deferral states, that is, states that have enacted their own employment discrimination statute and have established agencies to grant adequate relief. *Id.* The 300 day time period, however, is somewhat deceiving. In a deferral state, the complainant must wait 60 days or until the state fair employment practice agency completes its determination (whichever is earlier) before filing is effective with the EEOC. Because of the 60-day waiting period in deferral states, the filing requirement with the EEOC is effectively reduced to 240 days. Mohasco Corp. v. Silver, 447 U.S. 807 (1980). *See generally* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, 265-361 (1980)

thorized to begin its investigation. It may (1) dismiss the charge,[23] (2) make a determination that there is no reasonable cause to believe that Title VII was violated, or (3) make a determination of reasonable cause, in which case it will attempt conciliation.[24] If the EEOC dismisses the charge or finds no reasonable cause, it issues a right-to-sue letter authorizing the charging party to commence a civil action.[25] The charging party, however, need not wait until the EEOC completes its investigation or concilation attempts; rather, he is entitled to a right-to-sue letter no later than 180 days after effective filing with the EEOC.[26] Thus, Congress guaranteed that regardless of the EEOC's disposition of the charge, the complainant has a right to a de novo judicial determination of his Title VII claim.

To encourage states to develop their own effective remedies against employment discrimination and in the interest of comity, Congress created an additional procedural layer in Title VII's enforcement scheme. In those states that have their own employment discrimination statutes and agencies to grant adequate and effective relief, filing with the EEOC is conditioned on filing with the appropriate state or local agency.[27] The state or local agency is thus given the initial, albeit limited, opportunity to resolve the dispute under state discrimination law. The EEOC, however, is authorized to commence its own processing of the charge either sixty days after state filing or on termination of state proceedings, whichever occurs first.[28]

Since completion of state proceedings will rarely occur within sixty days,[29] it is complainant's option after the sixty-day period to continue to press his state claim before the state agency and/or go before the EEOC with his Title VII charge.[30] Under Title VII's

23. Among other reasons, the charge may be dismissed if it is not filed on a timely basis, if the charging party does not cooperate with the EEOC, or if he cannot be located. EEOC Procedural Regulations, 29 C.F.R. § 1601.19(a), (c), (d) (1984).

24. EEOC Procedural Regulations, 29 C.F.R. § 1601.19-21 (1984).

25. 42 U.S.C. § 2000e-5(f)(1)(3) (1982). The charging party must commence his civil action within 90 days of receipt of the right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1) (1982).

26. EEOC Procedure Regulations, 29 C.F.R. § 1601.28(a)(1) (1984).

27. The complainant in a deferral state may file his charge directly with the state agency or with the EEOC which will then refer it to the local agency. 42 U.S.C. § 2000e-5(c), (d) (1982).

28. EEOC Procedural Regulations, 29 C.F.R. § 1601.13(b) (1984).

29. In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 66 n.6 (1980), the Supreme Court indicated that few states could provide complete relief from discriminatory practices even within 240 days of filing the charge.

30. If the complainant's remedies are broader under state law, he will often proceed

procedural scheme, he is not required to exhaust state administrative remedies as a condition to seeking relief under Title VII.[31]

In sorting out the interplay of state and federal remedies, the Supreme Court had made it clear, prior to *Kremer*, that an individual could seek redress in several forums and still be guaranteed a federal trial de novo of his Title VII rights. Specifically, the Court held that submission of a discrimination claim to binding arbitration pursuant to a collective bargaining agreement did not affect one's right to a de novo determination under Title VII's procedural scheme.[32] As the Court stated, an individual had substantive and procedural rights under Title VII, aside from his contractual rights, that he could exercise at his option. Similarly, a person could exhaust his state or local administrative remedies without waiving his Title VII rights, including the enforcement procedures contained in the statute.[33] Even within Title VII's own procedural scheme, exhaustion of federal administrative remedies left an individual's right to resort to the federal courts unimpaired.[34] In essence, the Court considered the federal judiciary to be the ultimate enforcers of Title VII.[35] Accordingly, it concluded that findings of no employment discrimination by non-judicial factfinding bodies did not deprive the individual of a de novo determination of his Title VII rights by the federal courts. The question before the Court in *Kremer*, however, was whether a state *judicial* determination of no employment discrimination under state law barred a complainant from pressing his Title VII rights in the federal system.[36]

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with his state remedies. If he does not get adequate state redress, the typical complainant usually then resorts to his federal remedies.

31. EEOC Procedural Regulations, 29 C.F.R. § 1601.13(b)(2)(iii) (1984).

32. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).

33. *See* Chandler v. Roudebush, 425 U.S. 840, 844-45 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974); *cf.* Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) (Court interpreted similar deferral provision under the Age Discrimination Employment Act, 29 U.S.C. § 633(b) (1976), to allow federal trial de novo following state agency determination).

34. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 799 (1973) (federal trial de novo required after EEOC determination of no reasonable cause to believe discrimination claim); Chandler v. Roudebush, 425 U.S. 840, 844-45 (1976).

35. *E.g.*, Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

36. Several commentators had examined the issues subsequently resolved in *Kremer*. *See* Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485 (1981); Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. ILL. L.F. 1049.

III. THE *KREMER* DECISION

A. The Majority and Dissenting Opinions

The plaintiff in *Kremer* filed a Title VII employment discrimination charge with the EEOC alleging that he had been discriminated against on the basis of his national origin and religion.[37] Pursuant to the deferral provision of Title VII,[38] the EEOC referred the charge to the New York State Division of Human Rights ("NYHRD") which was responsible for enforcing New York's law prohibiting employment discrimination. Kremer maintained before the NYHRD that he had been discriminated against on the basis of his age and religion. Specifically, Kremer contended that his discharge from his position as an engineer and the subsequent failure to be rehired were because of his age and Jewish faith.[39] After a preliminary investigation, the NYHRD found no probable cause to believe that the employer had engaged in the discriminatory practices alleged by Kremer.[40] The agency's determination was upheld by its appeal board as neither arbitrary, capricious, nor an abuse of discretion.[41] Undaunted by the loss of his appeal within the state agency, Kremer returned to press his Title VII rights before the EEOC. At the same time, however, he petitioned the state court of New York to set aside the adverse state agency determination. Without reviewing the claim de novo, the state court upheld the agency's determination that there had been no unlawful discrimination under state law. At this juncture, Kremer received his right-to-sue letter from the EEOC and commenced a Title VII action in federal district court alleging discrimination on the basis of national origin and religion.[42] The Supreme Court, in a 5-4 decision, held that principles of preclusion[43] barred Kremer from asserting his Title VII claim in federal district court.

37. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982).

38. 42 U.S.C. § 2000e-5(c) (1982). Title VII gives states with fair employment agencies the initial opportunity to resolve employment discrimination claims. Accordingly, even if a charge is first filed with the EEOC, the EEOC cannot process the charge; it must wait until 60 days after referral to the state agency or termination of state proceedings, whichever occurs first. *See supra* notes 22, 27 and accompanying text.

39. On the state agency level, Kremer did not charge discrimination on the basis of national origin. Yet, for purposes of issue preclusion, the Supreme Court considered the national origin claim under Title VII to be the same as his religious claim under state law. *Kremer*, 456 U.S. at 465 n.4.

40. *Id.* at 464.

41. *Id.*

42. *Id.* at 465.

43. There was some confusion over whether the Court applied state law principles of claim or issue preclusion in *Kremer*. *See infra* notes 69-78 and accompanying text.

As the Court noted, section 1738 requires federal courts to give the same preclusive effect to state court judgments that the judgments would have in the state rendering the judgment.[44] It was apparently undisputed that under New York law, Kremer would be precluded from relitigating his state discrimination claim in state court.[45] Accordingly, Kremer maintained that (1) Congress, in enacting Title VII, intended to modify the statutory obligation that federal courts grant full faith and credit to state court decisions; and (2) the state proceedings were so lacking in procedural due process that their determination should not be given preclusive effect.[46]

In the Court's view, there was no "clear and manifest intent" that Congress in passing Title VII abrogated the "historic respect

44. *Kremer*, 456 U.S. at 488-89; Union & Planters' Bank v. Memphis, 189 U.S. 71, 75 (1903). Some commentators have maintained that § 1738 represents only the minimum full faith and credit a federal court must give a prior state judgment. Thus, even if the state of rendition would not give preclusive effect to its own judgments, the federal court, pursuant to common law doctrines of claim and issue preclusion, may give it greater preclusive effect than the state. *See generally* C. WRIGHT & A. MILLER, *supra* note 9, § 4467, at 644-47; Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981); Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1512-14 (1981); Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968).

Since according greater deference gives the state judgment at least the deference accorded by the state's own courts, it may be argued that greater deference does not undermine the notions of comity embodied in § 1738. The greatest objection against this view focuses on the situation where the rendering state adheres to mutuality of issue preclusion and the federal court does not. Can the federal court give the judgment greater preclusive effect than the rendering state would? The argument is made that a person who proceeds in state court should be able to rely on the preclusion rules of that state; accordingly, to give a state judgment greater preclusion than the rendering state would not only violate notions of comity, but it would also be violative of due process. *See generally* C. WRIGHT & A. MILLER, *supra* note 9, § 4467, at 467-68; Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978); Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 773 (1976).

The Supreme Court has recently rejected the notion that the federal courts can accord state judgments greater preclusive effect than would the rendering state. Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265, 4267-68 (U.S. Mar. 5, 1985) (even with respect to claims that are within the exclusive jurisdiction of the federal courts, the federal courts must first look to state law to determine the preclusive effect of a prior state judgment on a litigant's federal claim); Haring v. Prosise, 103 S. Ct. 2368, 2373 n.6 (1983).

45. Under New York's statutory scheme, the complainant has the initial option of resorting to his administrative remedies or seeking direct judicial redress. But once a complainant proceeds with his administrative remedies, his choice constitutes an election of remedies, thereby precluding him from commencing a civil action on his claim. N.Y. EXEC. LAW § 297(9) (McKinney 1982); Emil v. Dewey, 49 N.Y.2d 968, 406 N.E.2d 744, 428 N.Y.S.2d 887 (1980).

46. *Kremer*, 456 U.S. at 467-68.

that federal courts accord state court judgments."[47] The majority initially considered the Title VII provision that permits a party to bring a civil action if the EEOC finds no reasonable cause. While it may be true that an aggrieved party is entitled to a de novo trial following an EEOC determination, the provision does not imply that a final judgment of a state court is subject to a redetermination.[48] Nor did the provision directing the EEOC to give "substantial weight" to findings made in state proceedings reflect a modification of section 1738.[49] Rather, the majority interpreted the "substantial weight" requirement as a minimum level of deference that the EEOC must accord all state proceedings, including administrative proceedings.[50] The provision was to guarantee that the EEOC consider state agency determinations, not to lessen what would otherwise be the preclusive effect of a final state judgment.[51]

In the majority's view, the interests of comity and federalism embodied in section 1738 would be furthered by the application of preclusion principles in Title VII actions. Moreover, such application would be consistent with the statutory scheme of Title VII itself. The drafters of Title VII sought to strengthen the states' role in combating employment discrimination by giving the states the initial opportunity to resolve discrimination charges. Depriving final state judgments preclusive effect would reduce the incentive for effective state and local enforcement schemes, thereby undercutting the purpose of Title VII's deferral scheme.[52]

The Court also rejected the contention that New York's administrative proceedings and judicial review were so lacking in procedural due process that the state judgment should not be given preclusive effect under section 1738. For purposes of section 1738, state proceedings need only meet minimum due process stan-

47. *Id.* at 471-72. Since the federal courts' obligation to accord full faith and credit to state judgments is statutory, not constitutional (*see supra* note 3), Congress has the power to modify its application, either expressly or by implication. In *Kremer*, however, the Court reaffirmed its position that modification by implication is disfavored. *Id.* at 468. *Accord* Allen v. McCurry, 449 U.S. 90, 97-98 (1980); Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984).

48. *Kremer*, 456 U.S. at 469-70.

49. In 1972 Congress amended Title VII to require the EEOC to accord substantial weight to the findings reached in state proceedings when determining whether a charge is supported by reasonable cause. Prior to *Kremer*, most circuits which addressed the question interpreted the term "state proceedings" to include state judicial proceedings. *E.g.*, Smouse v. General Elec. Co., 626 F.2d 333 (3d Cir. 1980).

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

51. *Id.*

52. *Id.* at 478.

dards.[53] According to the Court, these standards were amply met by the New York administrative and court proceedings. Those provisions which guaranteed the claimant a full and fair opportunity to litigate his claim included, among others, the right to present evidence on the record, to call and cross-examine witnesses, to be represented by an attorney, and to ask the division to issue subpoenas.[54]

While the majority stated it was giving preclusive effect to a state court judgment, it clearly reaffirmed prior decisions that unreviewed state administrative determinations would not have such preclusive effect.[55] Under the *Kremer* rationale, then, neither an initial resort to a state's fair employment practices agency ("FEP agency"), nor an agency determination on his state claim, will deprive the complainant of a trial de novo in federal court of his Title VII rights. Only a state court decision will have preclusive effect.[56] The state court, however, need not have decided the discrimination issues de novo.

The dissenting opinion of Justice Blackmun disputed the majority's conclusion that Congress, in drafting Title VII, did not intend to modify the effect of section 1738.[57] In his view, when Congress directed the EEOC to give state proceedings "substantial weight," the term "proceedings" included judicial as well as administrative "proceedings."[58] Accordingly, Congress did not intend state judicial proceedings to have preclusive effect. Moreover, section 706(c) of Title VII specifically states that the complainant may bring a Title VII suit in federal court despite the conclusion of state

53. *Id.* at 481.

54. It was irrelevant for preclusion purposes that Kremer had not availed himself of all these procedural rights; the critical question was whether they were available.

55. *Kremer*, 456 U.S. at 469-70 & n.7.

56. The Court reasoned that since an EEOC determination did not preclude a trial de novo in federal court, an unreviewed state administrative determination could not have preclusive effect even if the state were to give it preclusive effect in its own courts. *Id.* at 470 n.7. Thus, neither an agency's reasonable cause determination nor a determination after a full administrative hearing will have preclusive effect with respect to one's Title VII claim. *See infra* notes 85, 86 and accompanying text.

57. *Kremer*, 456 U.S. at 461. Justice Brennan and Justice Marshall joined this opinion. Justice Stevens also dissented from the Court's decision, but on a different basis. He concurred with the majority's view that Congress, in enacting Title VII, did not intend to modify § 1738 with respect to Title VII claims. Nevertheless, he thought Congress had intended claimants to have at least one opportunity to have a trial de novo in court on their discrimination claim. Since, in his view, the New York reviewing court had not determined the facts de novo, Kremer was still entitled to a trial de novo on the discrimination issues raised by him. Accordingly, if the state court had heard the case de novo, Justice Stevens would have given the state judgment preclusive effect. *Id.* at 511.

58. *Id.* at 488 (Blackmun, J., dissenting).

proceedings.[59] Once again, Blackmun viewed state court review of an agency determination as part of the term "proceedings."[60] Thus, Congress assumed that the complainant could bring a Title VII claim in federal court after state court review of an agency determination.

Even assuming that section 1738 was not modified by Title VII, Justice Blackmun concluded that the state reviewing court had not made a determination of the discrimination issue before the federal court. Under New York state law, the reviewing court did not examine the facts de novo; rather, it applied a deferential standard of review.[61] In effect, the state court did not address the merits of the discrimination charge; it merely decided that the agencies decision in finding no probable cause was neither arbitrary nor capricious. Thus, the merit of the discrimination claim before the federal court was not resolved by the state court.[62]

Rather, as Justice Blackmun stressed, the only state proceeding to address the merits of the claim was that of the state agency.[63] In view of the deferential standard of review, it was really the state agency's determination and not that of the state court that the *Kremer* majority was according preclusive effect.[64] Yet, as the majority conceded, Title VII permits a trial de novo in federal court notwithstanding an adverse state agency decision. Thus, the

59. 42 U.S.C. § 2000e-5(c) (1982).

60. *Kremer*, 456 U.S. at 490 (Blackmun, J., dissenting).

61. *Id.* at 491 (Blackmun, J., dissenting).

62. In essence, the employee in the state court had a heavier burden of persuasion than he had in federal court. Before the state reviewing court he had to establish that there was no substantial evidence in the record or that the agency acted in an arbitrary or capricious manner. If he had been permitted to assert his Title VII rights de novo in federal court, he would merely have to prove by a preponderance of the evidence that he was discriminated against. Although a different burden of persuasion in the first and second forums militates against granting the first judgment preclusive effect, the Court did not consider whether the state would apply such an exception since New York had a statutory election of remedies provision. *See supra* note 11. The election of remedies provision allows an individual to process his or her charge with the NYHRD or to forego the administrative remedy and seek direct judicial redress.

63. *Kremer*, 456 U.S. at 491 (Blackmun, J., dissenting). In his view, the effect of *Kremer* was to make the state administrative forum the exclusive remedy for employment discrimination when Congress clearly intended that there be overlapping state and federal remedies.

64. *Id.* at 493 (Blackmun, J., dissenting). Justice Blackmun's view is in accord with the RESTATEMENT (SECOND) OF JUDGMENTS' position that judicial review is part of the administrative process. Affirmance of an agency decision is a factor that gives the agency determination greater force for preclusion purposes, but it is still the agency determination that is being given preclusive effect. RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982) (fact that agency determination was upheld by judicial tribunal is a factor that supports giving it preclusive effect).

Kremer decision, in his view, directly contravened the express intent of Congress to provide for a judicial determination of one's Title VII rights subsequent to an administrative determination.

According to Justice Blackmun, one effect of the *Kremer* decisions would be to frustrate Congress's intent to strengthen state enforcement schemes.[65] For, after *Kremer*, a complainant will be encouraged to forego state court review of state agency decisions in order to preserve his or her right to a trial de novo in federal court. With such a reduction in court review, he predicted that the quality of the agency decisionmaking process would deteriorate. Indeed, a litigant may avoid exhaustion of state administrative remedies altogether for fear that even a favorable ruling may be appealed by the employer thereby precluding access to federal court.[66] Moreover, he predicted that the *Kremer* ruling would become a trap for the unwary. Many charging parties proceed at the state agency level on a pro se basis.[67] Unaware of the sophisticated legal prinicples of preclusion, they may not realize that by exhausting their state remedies, they will be foreclosing their right to a trial de novo of their Title VII claim.[68] Such a result only undermines Congress's commitment to eradicate discrimination in the workplace.

B. The Scope of the Kremer *Rationale*

Among the reasons the *Kremer* decision has attracted much comment is the ambiguity in the Court's opinion. For example, even the federal courts themselves have been divided over whether the *Kremer* decision was based on application of state principles of issue preclusion or claim preclusion.[69] The distinction between

65. *Kremer*, 456 U.S. at 498 (Blackmun, J., dissenting).

66. *Id.* at 504 (Blackmun, J., dissenting). Arguably, a proper interpretation of the majority's result would not allow this. *See infra* notes 209-33 and accompanying text.

67. *Id.* at 506.

68. The Supreme Court, however, has stated that preclusion principles are not to be over-ridden by public policy or manifest injustice considerations. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

69. *Compare* Gonsalves v. Alpine Country Club, 727 F.2d 27 (1st Cir. 1984) and Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550 (6th Cir. 1983) (*Kremer* claim preclusion), *aff'd*, 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985) *with* Unger v. Consol. Food Corp., 693 F.2d 703 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1801 (1983) and Warren v. McCall, 709 F.2d 1183 (7th Cir. 1983) (*Kremer* issue preclusion).

Much of the disagreement has been because of the ambiguous language of the Court itself. At one point, it suggested that claim preclusion was involved. Specifically, it stated in footnote 22:

> While our previous expressions of the requirement of a full and fair opportunity to litigate have been in the context of collateral estoppel or issue preclusion, it is

claim and issue preclusion is important in order to ascertain the effect a prior judgment will have. Under issue preclusion, a final judgment on the merits precludes a party or his privy from relitigating factual or legal issues that were actually decided and necessary to the prior judgment.[70] Claim preclusion, in contrast, bars the relitigation of the same claim.[71] A claim, moreover, does not simply consist of those rights arising under a single statute or theory of relief. The modern transactional definition of a claim includes all theories of relief that arise from a common core of operative facts.[72] Accordingly, claim preclusion bars litigation of

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clear from what follows that invocation of *res judicata* or claim preclusion is subject to the same limitation. . . . *Res judicata* has recently been taken to bar claims arising from the same transaction even if brought under different statutes . . . .

Kremer, 456 U.S. at 481-82 n.22.

The Court went on, however, to rest its decision on issue preclusion:

> It may be that petitioner would be precluded under res judicata from pursuing a Title VII claim. However that may be, it is undebatable that petitionor is at least estopped from relitigating the issue of employment discrimination arising from the same events.

Id. at 482 n.22.

70. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). *See generally* 1B MOORE, FEDERAL PRACTICE §§ 0.441-0.448 (1983); C. WRIGHT & A. MILLER *supra* note 9, at §§ 4416-26.

71. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1982). Under common law principles of merger, once a party obtains a valid and final personal judgment his claim is extinguished and merged into the judgment; thereafter, he can only maintain an action on the judgment. Under common law principles of bar, a valid final judgment for the defendant bars plaintiff from maintaining another action on the same claim. *See generally* A. VESTAL, RES JUDICATA/PRECLUSION chs. 4-6 (1969).

72. Section 24 of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) provides:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (*see* §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Comment a to § 24 states:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories of rights. The transaction is the basis of the litigative unit or entity which may not be split.

Many states apply the transactional view of claim preclusion. *E.g.*, Schneider v. Colegio de Abogados de Puerto Rico, 546 F. Supp. 1251, 1272 (D.P.R. 1982); Morris v. Union

all matters that were or *could have been raised* in the proper proceeding, not just matters that were actually decided. To some extent, then, the effect of claim preclusion is broader, and consequently the repercussion greater, than that under issue preclusion.[73]

Despite some confusion in the opinion, the *Kremer* holding itself rests on state law principles of issue preclusion as applied by the federal courts through operation of section 1738. Specifically, the Court concluded that Kremer's allegation under state law that he had been discriminated against on the basis of national origin was the same as his allegation under Title VII that he was discriminated against because he was Jewish. Since the prior state proceeding had determined the legal issue of discrimination, he was precluded from relitigating that issue in federal court, just as he would have been precluded from relitigating the issue under state law.[74]

Although *Kremer* did not decide specifically whether section 1738 mandates federal courts in a Title VII action to give the same *claim* preclusion effect to a state judgment as the rendering state would,[75] its rationale appears to apply to claim as well as to issue preclusion.[76] The Court held that nothing in the language or legis-

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Oil Co. of California, 96 Ill. App. 3d 148, 157, 421 N.E.2d 278, 285 (1981); Kradoska v. Kipp, 397 A.2d 562, 569 (Me. 1979); MacKintosh v. Chambers, 285 Mass. 594, 596, 190 N.E. 38, 40 (1934).

Other states still apply a narrower test. *E.g.*, Federal Deposit Ins. Corp. v. Echhardt, 691 F.2d 245 (6th Cir. 1982) (Ohio law is that determination of two distinct claims depends on whether different proofs are required to sustain the claims); Harth v. United Ins. Co., 266 S.C. 1, 221 S.E.2d 102 (1975) (both involve the same primary right of the plaintiff and duty of the defendant); Griggs v. Griggs, 214 S.C. 177, 184, 51 S.E.2d 622, 626 (1949) (common evidence required).

73. Brown v. Felsen, 442 U.S. 127, 132 (1979) ("Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry.").

74. *Kremer*, 456 U.S. at 479 n.20; *see also* Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265, 4267 (U.S. Mar. 5, 1985) (that *Kremer* represented the application of state issue preclusion principles).

75. In *Kremer*, the issues arising under the state and federal statutes were identical and actually litigated and determined. Accordingly, it was not necessary to determine whether claim preclusion was applicable in a Title VII action. If, in his state proceeding, Kremer had failed to raise his national origin/religion-based discrimination charge, though he had the opportunity to do so, the Supreme Court would have had to address the claim preclusion question.

76. In Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 898 (1984), the Court indicated that the test for repeal of § 1738 by implication would be the same with respect to the issue and claim preclusion. In *Migra* the Court was asked to decide whether a prior state judgment has claim preclusion effect, as well as issue preclusion effect, in federal § 1983 actions. Writing for the entire Court, Justice Black-

lative history of Title VII reflected a congressional intent to partially repeal section 1738. If section 1738 remains in full force and effect with respect to Title VII actions, the state's total preclusion rules should apply absent a countervailing federal policy expressed in the statute itself.[77] Indeed, lower federal courts have applied

"If § 1738 created an exception to the general preclusive effect accorded to state judgments, such an exception would seem to require similar treatment of both issue preclusion and claim preclusion. Having rejected in *Allen* the view that state court judgments have no issue preclusive effect in § 1983 suits, we must reject the view that § 1983 prevents the judgment in petitioner's state court proceeding from creating a claim preclusion bar in this case." *Id.* at 898. *See generally* C. WRIGHT & A. MILLER, *supra* note 9, § 4471, at 110 (Supp. 1984) (state claim preclusion principles apply).

77. It has been suggested that § 1738 should not apply where the federal courts have exclusive jurisdiction of the federal claim. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) comment c, illustration 2 (1982); Atwood, *State Court Judgments in Federal Litigation Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 104 (1983). The grant of exclusive jurisdiction, it is argued, reflects congressional intent to modify the mandate of § 1738. Brown v. Felsen, 442 U.S. 127 (1979) (in view of Congress's intent to vest exclusive jurisdiction over the matter at bar to bankruptcy court, claim preclusion does not apply to earlier state judgment involving same debt). Thus, if the federal courts have exclusive jurisdiction over Title VII, a question the Supreme Court has not yet resolved, one might argue that the federal courts need not accord the same preclusive effect as the state courts would. In *Kremer*, however, the Court rejected such reasoning with respect to issue preclusion. In the majority's view, § 1738 applied regardless of whether federal courts have exclusive or concurrent jurisdiction over Title VII claims. *Kremer*, 456 U.S. at 506 n.20.

Since the rendering state would have accorded the judgment against Kremer issue preclusive effect and since Congress had not impliedly repealed § 1738, the federal court was bound to apply the same issue preclusive effect as would the rendering state.

Recently, the Supreme Court has held that the *Kremer* approach applies equally to the application of claim preclusion principles with respect to claims within the exclusive jurisdiction of the federal courts. Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265 (U.S. Mar. 5, 1985). In *Marrese*, plaintiffs asserted a federal antitrust claim in a federal action even though they had had the opportunity to raise a comparable state antitrust claim in a prior state court action. The threshold question was whether § 1738 was applicable at all. The Seventh Circuit reasoned that since the state courts had no jurisdiction to hear federal antitrust claims, the claimed preclusive effect of the state proceeding had to be determined by federal preclusion principles and not by those of the rendering state, as § 1738 would mandate. Applying federal preclusion principles, it went on to hold that since plaintiffs could have raised the antitrust matter in their state common law action, they could not assert their federal antitrust claim in federal court. In its view, it was immaterial, for preclusion purposes, that a federal antitrust claim could not be heard by a state court. Because of the similarity between the state antitrust claim they could have raised and the federal antitrust claim they sought to raise in the subsequent federal action, claim preclusion applied even though federal courts have exclusive jurisdiction over federal antitrust claims.

The Supreme Court held that the Seventh Circuit erred in failing to apply § 1738. Even if the claim sought to be precluded is within the exclusive jurisdiction of the federal courts, the federal court must still look first to state preclusion principles to determine the claim preclusive effect of the prior state judgment. If state law would bar the subsequent claim, then, and only then, should the federal court determine whether, as an exception to § 1738, it should refuse to give preclusive effect to the state court judgment. Since the Seventh Circuit had ignored the mandate of § 1738, the Court remanded the case for a

claim preclusion as well as issue preclusion in Title VII actions.[78]

Another source of confusion concerned the level of judicial review that had been exercised by the state reviewing court in *Kremer*. In response to Justice Blackmun's criticism, the majority took the position that the state court had reviewed the merits of the discrimination claim.[79] This statement might lead one to interpret *Kremer* as requiring more than an appellate standard of review for state judgments to have preclusive effect in Title VII actions.[80] It is clear, however, that under New York law there is a deferential review of administrative determinations. As long as the agency decision is supported by substantial weight of the evidence (after full adjudication before the agency) or was not arbitrary, capricious or an abuse of discretion (after a probable cause hearing),[81] the decision should be affirmed. Since the *Kremer* decision, it has been generally assumed, and correctly so, that a deferential standard of review is sufficient for purposes of section 1738.[82]

Resolution of these ambiguities, however, only begins to address the problems created by *Kremer*. There remains a need to develop an analytical framework under which federal courts can apply the *Kremer* rationale when faced with a preclusion defense in a Title VII action.

IV. Analytical Framework for Applying *Kremer*

The main concern from a plaintiff's perspective is that *Kremer*

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determination of what preclusive effect Illinois would give to its judgment. The Court declined, at this juncture, to determine whether the grant of exclusive jurisdiction over federal antitrust claims constituted an implied partial repeal of § 1738.

78. Cajigas v. Banco de Ponce, 741 F.2d 464 (1st Cir. 1984); Hickman v. Electronic Keyboarding, Inc., 741 F.2d 230 (8th Cir. 1984); Kutzik v. Young, 730 F.2d 149 (4th Cir. 1984); Burney v. Polk Community College, 728 F.2d 1374 (11th Cir. 1984).

79. *Kremer*, 456 U.S. at 492.

80. Davis v. United States Steel Supply, 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983) (suggesting that preclusion would not apply if the scope of review is limited); *see also* Consolidated Foods Corp. v. Unger, 456 U.S. 1002 (Blackmun, J., concurring); Note, Kremer v. Chemical Construction Corp.: *Federal-State Comity in Employment Discrimination*, 15 Loy. U. Chi. L.J. 121, 148 (1983) (if a deferential standard of review is sufficient, complainants will be inclined to abandon state proceedings before they reach the review stage).

81. N.Y. Exec. Law §§ 297-299 (McKinney 1982).

82. *See, e.g.*, Unger v. Consolidated Food Corp., 693 F.2d 703 (7th Cir. 1982); C. Wright & A. Miller, *supra* note 9, § 4471, at 109 (Supp. 1984).

In fact, it is unclear why the *Kremer* majority thought it was even necessary to show that the state court independently reviewed the merits of the claim. Arguably, § 1738 forecloses any inquiry into the nature of the state court judgment if the state would give preclusive effect to the judgment and due process has been satisfied. *Unger*, 693 F.2d at 706 n.7.

will deprive him of a full judicial determination of his Title VII rights and thereby eviscerate the statute's effectiveness. From the defendant's perspective, however, there clearly was a need to rationalize multiple state and federal remedies so as to avoid duplication of effort, fragmentation of remedial relief, and potentially conflicting obligations.[83] *Kremer* may be viewed as an attempt to accommodate the legitimate concerns of both sides.

The federal courts, though, must be sensitive in their application of preclusion principles. This is necessary in order to minimize the adverse impact on private complainants and to harmonize the overlapping remedial schemes. With such sensitivity, the congressional purpose of guaranteeing a federal threshold of protection and a trial de novo of one's Title VII rights can be reconciled with the comity concerns articulated in *Kremer*.

To illustrate the possible permutations of *Kremer*, let us assume that in a Title VII action before a federal court, defendant makes a summary judgment motion to dismiss the claim on the ground that a prior state determination precludes plaintiff from maintaining the action.[84] How should the federal court give effect to *Kremer*?

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83. This is not to suggest that the benefits of preclusion or the *Kremer* decision itself are all one-sided. A prevailing state complainant can rely on preclusion when he seeks additional relief under Title VII in cases where the relief available under the state's fair employment statute is more limited than under Title VII. *See* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). Similarly, favorable determinations of fact may be binding on the defendant employer when the complainant commences a subsequent action asserting theories of liability that could not have been asserted in the prior state proceeding. For example, a complainant might file a state charge with his state FEP agency; after prevailing there, he may commence a state court action to assert common law claims that may afford him more comprehensive relief than the state statutory scheme provides. Since the common law claims could not have been asserted before the FEP agency, he is not precluded from commencing a second action. Furthermore, while the second forum will resolve the legal issue of liability under state common law as well as any additional factual disputes not decided in the first suit, findings of fact essential to the first judgments may be binding in the second proceeding.

Notwithstanding the potential benefits for successful state complainants, the *Kremer* decision has generally been invoked by defendants to preclude a complainant from asserting Title VII rights in federal court subsequent to an unfavorable decision in a state forum on complainant's state claim. This pattern is understandable inasmuch as many state FEP statutes are broader than Title VII in terms of the classes they protect and the relief they afford. Accordingly, a complainant who prevails on his state FEP claim will seldom commence a subsequent Title VII action. Thus, this article focuses on the typical scenario of an employee commencing a Title VII action after he has lost on his state claim.

84. Since a ruling on a preclusion defense will often involve matters beyond the scope of the pleadings, a Rule 56 motion for summary judgment is a commonly used procedural device to determine the preclusion defense. If the matters necessary to establish preclusion appear on the face of the complaint the defendant can make a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See* Jones v. Local 520, IUOE, 34 Fair Empl. Prac.

A. Is the Prior State Determination a Judicial One?

When confronted with a motion to dismiss on the ground of preclusion, the initial question for a federal court is whether the prior state determination was an administrative or judicial determination. As *Kremer* indicated, unreviewed state administrative determinations, even those made upon a full hearing with a full panoply of procedural safeguards, are not entitled to full faith and credit with respect to a Title VII claim.[85] Thus, if the prior determination is an administrative one, the summary judgment motion should be rejected.[86]

Cas. (BNA) 634 (S.D. Ill. 1981). For a discussion of the procedural methods available in federal court to raise the preclusion defense see A. VESTAL, *supra* note 71, at ch. 17.

85. *Kremer*, 456 U.S. at 470 n.7. *Accord* Jones v. Progress Lighting Corp., 36 Fair Empl. Prac. Cas. (BNA) 25 (E.D. Pa. 1984); Weise v. Syracuse Univ., 553 F. Supp. 675 (N.D.N.Y. 1982); Snow v. Nevada Dep't of Prisons, 543 F. Supp. 752 (D. Nev. 1982); *cf.* Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981). *Contra* O'Hara v. Board of Educ., 36 Empl. Prac. Dec. (CCH) ¶ 34,942 (D.N.J. June 27, 1984); Buckhalter v. Pepsi-Cola Gen. Bottlers, 35 Fair Empl. Prac. Cas. (BNA) 881 (N.D. Ill. 1984).

The Supreme Court has held that where an administrative agency acts in a judicial capacity, its decision may have preclusive effect. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). Yet, in view of Title VII's procedural scheme in which the EEOC determinations are not accorded preclusive effect, the *Kremer* Court reasoned that Congress did not intend unreviewed state administrative decisions to have preclusive effect on Title VII claims. *Kremer*, 456 U.S. at 470 n.7. Notwithstanding the clear language in *Kremer*, the courts in *Buckhalter* and *O'Hara* held that an unreviewed state administrative determination has preclusive effect in Title VII actions. Specifically, the *Buckhalter* court, relying on *Utah Construction*, held that since the Illinois FEP agency acted in a judicial capacity, the *Kremer* dictum did not apply; in its view, to apply the *Kremer* dictum to agencies acting in a judicial capacity would contradict the general precedent established in *Utah Construction* that determination of agencies acting in a judicial capacity come under the mandate of § 1738. Thus, the *Buckhalter* court considered footnote 7 to apply only to state agencies acting in a purely administrative capacity.

Yet, the Supreme Court in *Kremer* recognized that the specific procedural scheme of Title VII reflects congressional intent to modify what would otherwise be the mandate of § 1738 to accord unreviewed administrative decisions the same preclusive effect as the rendering state would. In other words, Title VII litigation *does* represent an exception to the general rule enunciated in *Utah Construction*. Moreover, since the New York state agency involved in the *Kremer* litigation does act in a judicial capacity, it is unlikely that the *Kremer* Court intended to limit its language to state agencies acting in a non-judicial capacity.

86. The Supreme Court has not resolved whether unreviewed administrative determinations have preclusive effect with respect to employment discrimination claims brought under other federal statutes. *Compare* Moore v. Bonner, 695 F.2d 799 (4th Cir. 1982) (unreviewed administrative decision made in judicial capacity does not preclude claim brought under § 1981) *with* Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550 (6th Cir. 1983), *aff'd on other grounds*, 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985) *and* Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981) (§ 1983 claim not barred, but administrative determination bars relitigation of facts).

The courts that deny preclusive effect to unreviewed administrative decisions in federally-based employment cases other than Title VII reason that plaintiffs should not be forced to choose between foregoing the opportunity to resolve their claims before a state

B. Is The Prior Judgment a Qualifying Judicial Determination For the Purpose of Preclusion?

Assuming that the prior determination was judicial, the *Kremer* rationale is operative. Since the directive of section 1738 is that federal courts must first determine whether the courts of the state rendering the judgment would deem the prior judgment to preclude litigation of the discrimination matters arising under Title VII, the federal court must apply state law preclusion prinicples.[87] These principles can be divided into several components. With respect to both issue and claim preclusion, it is generally required that the prior judgment be a (1) final one, (2) on the merits, and (3) the party to be precluded from litigating the matter was a party to the prior suit or in privity with such a party. Further, with respect to issue preclusion, the issue sought to be precluded must be identical to the one litigated and necessarily decided in the prior litigation; with respect to claim preclusion, on the other hand, there must be an identity of claims.

In addition to analyzing each of these elements as the state of rendition would, the federal court is to incorporate any limitations the state court would consider, for under the directive of section 1738, the entire body of law the rendering state has developed with respect to preclusion applies.[88] Thus, even though these elements

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administrative agency and relinquishing congressionally mandated access to a federal forum. Moore v. Bonner, 695 F.2d 799 (4th Cir. 1982). Moreover, a complainant's § 1981 or § 1983 claim is often joined with a Title VII claim. Since complainant will be able to proceed on his related Title VII claim notwithstanding the administrative adjudication, to give administrative determinations preclusive effect with respect to § 1981 or § 1983 claims would not achieve the goals of finality and repose preclusion is designed to achieve.

87. It has been suggested that Haring v. Prosise, 103 S. Ct. 2368 (1983), represents a modification of the full faith and credit principles enunciated in *Kremer*. In *Haring*, the Court held that a guilty plea in state court did not preclude the party from subsequently raising a § 1983 claim in federal court that evidence had been seized in violation of his fourth amendment rights. In the unanimous opinion, the Court stated that § 1738 "generally requires" federal courts to give the same preclusive effect the rendering state would. *Id.* at 2373. It further stated that issue preclusion should not be given where there was no full or fair opportunity to litigate the matter or when "special circumstances warrant an exception to the normal rules of preclusion." *Id.* at n.7 (citing Montana v. United States, 440 U.S. 147, 155 (1979)). Even if this language is interpreted as a retreat from *Kremer*, the *Haring* Court agreed that the threshold question was whether the rendering state's preclusion rules would bar litigation of the issue. *Id.* at 153. *See generally* C. WRIGHT & A. MILLER, *supra* note 9, at § 4471 (Supp. 1984) (minimizing the import of the Court's language in footnote 7).

88. *See* Warren v. McCall, 709 F.2d 1183 (7th Cir. 1983); Concordia v. Benedkovi, 693 F.2d 1073 (11th Cir. 1982); Davis v. United States Steel Supply, 688 F.2d 166, 182 (3d Cir. 1982) (Garth, J. concurring), *cert. denied*, 460 U.S. 1014 (1983).

Moreover, preclusion is an affirmative defense which the defendant must establish.

are satisfied, many states will not apply issue preclusion if it was not foreseeable that the issue would arise in the context of a subsequent action, or the party did not have the incentive or opportunity to litigate the issue fully in the prior proceeding, or the burden of persuasion has shifted or is different in the second proceeding. With respect to claim preclusion, a state may also recognize the party's right to split his claim if the court or agency hearing the first proceeding did not have the subject matter jurisdiction to render complete relief. Or, the state may recognize the right of parties to agree to permit plaintiff to split his claim.[89] This article will explore some of these exceptions in specific contexts, but suffice it to say, here, that the federal courts must be alert to all the state exceptions whenever faced with a preclusion defense.

1. Was the Prior State Judgment a Judgment "On the Merits?"

To preclude complainant's Title VII action, the prior state judgment must be a final judgment[90] "on the merits." Thus, when a state court dismisses a complaint on jurisdictional grounds, such a judgment is generally not treated as being on the merits by the state,[91] and therefore, the federal court should not give it binding

Davis v. United States Steel Supply, 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983).

89. *See generally* A. VESTAL, *supra* note 71, at ch. 13; RESTATEMENT (SECOND) OF JUDGMENTS §§ 26, 28-29 (1982). Whatever these limitations may be, under the mandate of § 1738, the federal court must apply them as the state court would. The only federally fashioned limitation is that minimum due process be satisfied. Allen v. McCurry, 449 U.S. 90, 113 (1980) (Blackmun, J., dissenting). *But see* Haring v. Prosise, 462 U.S. 306, 311 n.7 (1983) ("special circumstances warrant an exception to the normal rules of preclusion").

90. Whether the prior state judgment is "final" for purposes of preclusion has not been a critical question in those reported cases where preclusion is raised as a defense in a Title VII action. It has been stated that a judgment is final with respect to a claim "if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement . . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment b (1982). Also, as long as an appeal does not have the effect of vacating the judgment of the trial court, a judgment otherwise final remains so despite the taking of an appeal; the pendency of an appeal, however, may suspend the second court resolving the preclusion issue. *Id.* at comment f. *See generally* A. VESTAL, *supra* note 71, at 233-38. With respect to issue preclusion, it has been suggested that if the issue was adequately deliberated and firm, it is not necessary that a final judgment be entered. RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment g (1982). For a discussion of finality, see Note, *The Finality of Judgments in the Conflict of Laws*, 41 COLUM. L. REV. 878 (1941).

91. RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982). When a judgment dismissing a complaint is not on the merits, it is conclusive only as to what was actually decided. Thus, if a complaint is dismissed for failure to join an indispensable party, the complainant's claim is not barred, but the determination that a particular person is an indispensable party is binding on complainant.

effect in a subsequent Title VII action.[92] On the other hand, when the state court resolves the substantive issues of a case, the judgment is clearly on the merits.[93]

Under generally stated principles of preclusion, however, a court need not consider the substantive issues for the judgment to be "on the merits." For example, the charging party may have had his state discrimination claim dismissed for failure to file on a timely basis. Or a complainant may have commenced his state proceeding on a timely basis, but the complaint was dismissed for failure to prosecute or refusal to comply with court directives or rules. Although such dismissals are procedurally based, in contrast to substantive or jurisdictional dismissals, state law may view them as "on the merits" for preclusion purposes.[94] Accordingly, the plaintiff cannot reassert in a subsequent state action the same theory of liability or other theories he could have raised in the first proceeding.[95] In light of *Kremer*, may the complainant proceed in the federal system on his Title VII claim, even though he would be barred from raising the same state discrimination matters in state proceedings?

Kremer has been interpreted to constitute a bar in such a situation.[96] The *Kremer* decision itself, however, rests on the assumption that Congress intended every charging party to be heard at least once on his discrimination claim.[97] Since Kremer had his opportunity on the state level, he could not have a second bite of the apple. Indeed, the majority went to pains to emphasize that the New York court had reviewed the "merits" of Kremer's case. Of

92. Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550 (6th Cir. 1983) (since failure to perfect timely appeal is considered jurisdictional under state law, state judgment does not bar federally-based discrimination charge); *see also* Superior Oil Co. v. City of Port Arthur, 553 F. Supp. 511 (E.D. Tex. 1982).

93. The state court need not have a full trial on the merits of the claim however. A judgment entered on (1) defendant's default; (2) upon a motion for summary judgment or failure to state a claim upon which relief may be granted; or (3) on consent of the parties is considered on the merits under common law principles of preclusion. 1B MOORE, FEDERAL PRACTICE § 409 (1984). In addition, a state may treat an administrative determination affirmed by a reviewing court as on the merits though the court did not resolve the disputed substantive issues de novo; and, as *Kremer* illustrates, if the state treats the judgment as on the merits so must the federal courts.

94. RESTATEMENT (SECOND) OF JUDGMENTS § 19 comments e, f (1982); Kahn v. Kahn, 68 Cal. App. 3d 372, 137 Cal. Rptr. 332 (1977) (failure to comply with discovery order).

95. *See supra* notes 71-73 and accompanying text.

96. *See* Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 558 (6th Cir. 1983), *aff'd*, 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985); Santos v. Todd Pacific Shipyards, 35 Fair Empl. Prac. Cas. (BNA) 681, 683-84 (C.D. Cal. 1984).

97. *Kremer*, 456 U.S. at 477.

course, it is clear that under New York law the *Kremer* state court did not make de novo determinations of the merits of the claim. Nevertheless, to the extent that a reviewing court finds a substantial basis for the agency's decision, an affirmance based on a deferential standard of review may be a decision on the merits of the claim in a substantive sense. Accordingly, it would not contravene Congress's intent to provide a judicial forum for Title VII matters where there has been a prior state determination of the substantive discrimination issues. Yet, in view of the *Kremer* Court's emphasis on the state reviewing the "merits" of the case, it is doubtful that the Court will give preclusive effect if the state judgment is completely unrelated to the substance of the case.[98] To do so would deprive the complainant of his procedural right to have the merits of his Title VII claim determined by some judicial forum. Moreover, Congress intended that Title VII serve as a national threshold of protection. Consistent with this congressional purpose, where there has been no state court determination of the substantive grounds of the charge, preclusion should not apply.

Aside from the thrust of the *Kremer* opinion, it is doubtful that section 1738 requires that a procedurally-based dismissal of one's state fair employment claim preclude litigation of one's Title VII rights in federal court.[99] It is true that a judgment dismissing a claim on the basis of the state's statute of limitations will generally have preclusive effect within the state. In the context of the interstate system, however, if the state statute of limitations is one that bars only the remedy, the dismissal establishes only that the action cannot be brought in the same jurisdiction in which the statute is applicable. Notwithstanding the obligation of each state to accord full faith and credit to a sister state's judgment, the claim may be

98. *See* Griffin v. George B. Buck Consulting Actuaries, 551 F. Supp. 1385, 1386 n.6 (S.D.N.Y. 1982) (*Kremer* does not apply where there has been no state judicial review on the merits of the state agency's determination, but only an affirmance based on a procedural deficiency); Gargiul v. Tompkins, 704 F.2d 661 (2d Cir. 1983) (where reviewing court does not review legal arguments of complainant but dismisses for procedural reasons, § 1738 is not operative); Truvillion v. King's Daughters Hosp., 614 F.2d 520 (5th Cir. 1980) (dismissal of EEOC suit for failure to meet procedural prerequisite no bar to private action).

99. This assumes that the Title VII theory could not have been raised in the prior state proceeding. If it could, principles of claim preclusion would be operative. *See infra* notes 146-53 and accompanying text. Thus, the Title VII claim would be barred not because an identical state law claim had been dismissed but because the state proceeding could have heard the timely Title VII claim. For a discussion on whether state courts have concurrent jurisdiction over Title VII claims, see *infra* notes 173-203 and accompanying text.

raised in another state.[100] Similarly, the federal courts should not give such dismissals preclusive effect in a Title VII action even though dismissal of the state claim is deemed a final judgment on the merits within the state.[101]

Moreover, even if the state's time period operates as a limitation of the right, a dismissal of the state fair employment practice claim for failure to file on a timely basis should not foreclose a comparable Title VII claim in a subsequent suit. Clearly, each state legislature, in creating rights to protect persons against emloyment discrimination, may establish a time period which it thinks appropriate. Its choice of an extremely short time period may reflect a concern for the adjudication of stale claims in its courts or a desire to protect the prospective defendant class. No one can quarrel with the state's right to do this and the obligation of other jurisdictions to recognize such a time bar. Congress, however, in enacting Title VII, decided what the appropriate time period for the assertion of a federally created right would be.[102] This decision should

100. Where the time period only goes to the remedy, it is treated as a procedural matter to be governed by the law of the forum state. RESTATEMENT (SECOND) OF JUDGMENTS § 19 comment f (1982); RESTATEMENT (SECOND) OF CONFLICTS § 110 (1971). *But see* C. WRIGHT & A. MILLER, *supra* note 9, at § 4441.

101. *See* Jimenez v. Calero Toledo, 576 F.2d 402 (1st Cir. 1978) (where state court had only reached issue of time bar, plaintiff not precluded from bringing § 1983 claim in federal court alleging unlawful dismissal); Chapman v. Aetna Finance Co., 615 F.2d 361 (5th Cir. 1980); Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622, 625 (W.D. Pa. 1979), *rev'd on other grounds*, 613 F.2d 482 (3d Cir. 1980); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90, 94-95 (D. Conn. 1975) (dismissals by reviewing court because of untimely appeals not a judgment "on the merits"). *But see* Santos v. Todd Pacific Shipyards, 35 Fair Empl. Prac. Cas. (BNA) 681 (C.D. Cal. 1984) (state court's affirmance of state FEP agency's dismissal of untimely state discrimination charge bars otherwise timely § 1983 claim arising from same operative facts); C. WRIGHT & A. MILLER, *supra* note 9, at § 4471.

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983), is likewise not inconsistent with the position taken in this article. There, the court held that a federal court's dismissal of one's Title VII claim for failure to comply with the statute's filing requirements bars a subsequent § 1983 claim for unalwful employment discrimination. Under the terms of Rule 41(b), the dismissal on statute of limitation grounds was one "on the merits" and therefore all timely claims that could have been raised in the first forum were precluded by the judgment. That a dismissal based on a statute of limitations should bar complainant from asserting a related federal claim in federal court is consistent with the view that such judgments are treated as "on the merits" within the system that rendered it. *See also* PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2d Cir. 1983). Moreover, in *Nilsen*, the plaintiff could have raised the timely claim in the first action. That would not be the case if the complainant brought his state claim to an FEP agency since the agency's jurisdiction is limited to the state statutory claim. The complainant's only opportunity to assert his timely federal claim would be in a subsequent proceeding. Therefore, dismissal of his state statutory claim for statute of limitations reasons, even if affirmed on review, should not bar other timely claims.

102. In many cases the Title VII time period is shorter than that under comparable

not be subverted by a state decision unrelated to Congress's concerns in enacting Title VII.[103] If Congress had wanted federal rights to be governed by state statutes of limitations it could have deferred to the states on the matter; it chose not to. Accordingly, even if the state time period goes to the right created, a dismissal of a state claim for failure to file on a timely basis should not preclude a timely Title VII action which otherwise comports with the procedural prerequisites of Title VII.

A similar question arises in the context of penalty dismissals, whereby a state-based discrimination charge may have been dismissed because plaintiff failed to prosecute the claim or comply with discovery directives. Is such a dismissal, which is unrelated to the substance of the charge, "on the merits" for purposes of section 1738? Arguably, the federal court should support the attempts of the state court to compel adherence to its rules and, thereby, give full faith and credit to the state sanction.[104] On the other hand, such a result would deprive the complainant of any determination on the substance of his charge and disregard the *Kremer* premise that claimant is entitled to one adjudication of his Title VII claim.[105] Furthermore, effectiveness of the state court sanction would not be materially undermined since the judgment would have preclusive effect within the state system.

2. Is There an Identity of Parties?

Preclusion principles are clearly operative where the parties in the first proceeding are the same as those in the second. But a prior judgment may have binding effect not only on a party named

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state fair employment statutes. *See, e.g.*, N.Y. EXEC. L. § 297(5) (McKinney 1982) (one year). In others it is longer. *See, e.g.*, PA. STAT. ANN. tit. 43 § 959(g) (Purdon's Supp. 1984) (90 days).

103. In Burnett v. Grattan, 104 S. Ct. 2924 (1984), which held that state FEP administrative time limitations are not applicable to claims brought under 42 U.S.C. §§ 1981, 1983, 1985 (1982), the Supreme Court recognized the policy concerns that underlie a state statute of limitations. These may include the state legislatures' view of the importance of the underlying claim, the need for repose and considerations of judicial or administrative economy. In its view: "State legislatures do not devise their limitations period with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Id.* at 2931 (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977)).

104. Evans v. Syracuse, 704 F.2d 44 (2d Cir. 1983) (dismissal for failure to prosecute state claims has preclusive effect in Title VII action).

105. *Cf.* Chapman v. Aetna Fin. Co., 615 F.2d 361 (5th Cir. 1980); Griffin v. George B. Buck Consulting Actuaries, 551 F. Supp. 1385 (S.D.N.Y. 1983).

in the prior action, but also on those in privity with him.[106] Moreover, in the specific area of issue preclusion, many states have rejected the requirement that there be mutuality of preclusion.[107] Thus, a stranger to the first proceeding, that is, one who was neither a party nor in privity with a party in the earlier proceeding, may invoke the prior judgment against one who was a party in the first action or his privy. In essence, these states permit the stranger to the first suit to rely on the prior judgment, although it has no binding effect on him.[108] Other states have retained the rule of mutuality.[109]

Problems of privity and mutuality will seldom arise in successive

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106. *See generally* A. VESTAL, RES JUDICATA OF PRECLUSION 120-29, 291-300 (1969); RESTATEMENT (SECOND) OF JUDGMENTS §§ 39, 41, 43-61 (1982).

107. The rule of mutuality is based on the notion that since a person not a party to the first action is not bound by the judgment, he should not be entitled to claim the benefits of the prior adjudication. In other words, only those parties involved in the prior proceeding and who therefore may be bound by the first judgment can invoke its preclusive effect. Application of the mutuality rule may be illustrated as follows:

1. F_1 - *A v. B* Determination of an essential issue unfavorable to *B*.
2. F_2 - *A v. B* *A* sues *B* on a different claim. Since *A* would be bound by determinations made in F_1 unfavorable to him, *A* can invoke preclusion against *B*.

But suppose the second action was as follows:

2. F_2 - *C v. B* Since *C* was not a party or in privity with a party involved in F_1, under constitutional principles of due process, *C* would not be bound by determinations made in F_1 favorable to *B*. Accordingly, the rule of mutuality prevents *C* from invoking the first judgment to bind *B* on the issues decided unfavorably to him in F_1.

For discussions on the mutuality rule see generally Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971); Bernard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942).

108. *See e.g.*, Bernard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 807, 122 P.2d 892 (1942); Schwartz v. Pub. Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); Bahler v. Fletcher, 257 Ore. 1, 474 P.2d 329 (1970).

Even in those jurisdictions that have accepted non-mutuality of preclusion, the courts will consider various factors that might justify relitigation of the issue. These factors include (1) whether the party had a full and fair opportunity to litigate the issue in the first proceeding (Hicks v. De la Cruz, 52 Ohio St. 2d 71, 369 N.E.2d 776 (1977)); whether procedural opportunities in the presentation of issues are greater in the second forum than the first (Fred Olson Motor Serv. v. Container Corp., 81 Ill. App. 3d 825, 401 N.E.2d 1098 (1980)); and (3) whether the party invoking preclusion could have effected joinder in the first proceeding (B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967)). Thus, even if the judgment raised in the subsequent federal action is from a state that has adopted non-mutual preclusion, the federal court must consider those factors the state court would in determining whether to permit relitigation.

109. *See, e.g.*, Standage Venture, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977); Norfolk & Western Railway Co. v. Bailey's Lumber Co., 332 Va. 638, 272 S.E.2d 217 (1980).

individual employment suits. Since filing with the EEOC is only effective against those defendants also named in the state FEP charge, the complainants and defendants in the federal Title VII action will often be the same as those in the prior state proceeding. Yet, in those limited number of cases in which it does arise, the federal court will have to consider state law on privity and mutuality.

a. Are the parties to the Title VII action in privity with the parties to the prior state action?

"Privity" is an elusive concept which defies exact definition.[110] It applies to those non-parties who derive their rights from the party in the first action, or whose interests are so clearly related that the law considers them in privity.[111] In addition, the non-party's interest may have ben adequately represented by the named party so that a court will treat the prior judgment as binding on both.[112]

In the context of Title VII litigation, the question of privity may arise when the named plaintiff in the first proceeding is a union or state FEP agency asserting the rights of an individual employee. *Hickman v. Electronic Keyboarding, Inc.*,[113] illustrates the context in which the privity issue may arise. There, the state FEP agency had brought an unsuccessful state claim on behalf of the charging party. The employee subsequently brought a Title VII action. The issue before the federal court was whether the individual employee was foreclosed from maintaining a Title VII action because she was in privity with the losing party to the first proceeding.

To determine whether preclusion with respect to the non-party is appropriate, it is common under state law to ascertain the amount of control the non-party had over the prior litigation; that is, did he actually have the opportunity to protect his interest? In addition, the court should examine factors that affected the named-party's litigation posture: was it motivated to press the individual's interests or did it have its own interests to serve?[114]

110. *See* Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950) ("Privity . . . is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within *res judicata*."). The RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 13-14, 34-61 (1982), has rejected the generalized term "privity" in favor of specified relationships that might lead to preclusion.

111. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 43-61 (1982).

112. RESTATEMENT (SECOND) OF JUDGMENTS §§ 39, 41, 42 (1982).

113. 35 Fair Empl. Prac. Cas. (BNA) 1281 (8th Cir. 1984).

114. Because of institutional limitations or internal conflicts, an organization might

For example, in her attempt to avoid preclusion, the plaintiff in *Hickman* argued that institutional considerations, aside from the merits of her individual claim, may have affected the litigation strategy of the state agency. More specifically, she maintained that financial limitations might induce the agency to favor some claims over others. Although the court rejected the plaintiff's argument in this instance,[115] the case illustrates the importance of analyzing the degree of control the individual has over the course of the state litigation, and the extent to which the interests of the non-party were represented.[116] Only if these considerations are satisfied is it appropriate to treat the employee as being in privity with the party in the prior proceeding.

b. Does the rendering state adhere to mutuality of preclusion?

The federal court faced with a preclusion defense will only be concerned with the mutuality rule of the rendering state when the party invoking the prior state judgment was neither a party nor in privity with a party involved in the prior state proceeding. The mutuality question may arise in different contexts. For example, assume that employee *A* obtains a judgment against his employer under state law. May fellow-employee *B*, who was not a party in the first suit nor represented by employee *A*, maintain in his own Title VII action that certain factual and legal determinations essential to the first judgment are binding on the employer?[117] Con-

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not press forcefully the rights of the individual it is representing. For example, in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 284-85 (1976), the union admitted that in representing a group of employees who had been discharged for joint misconduct, it might have to compromise the rights of some individuals to secure the retention of others.

115. In the court's view, the agency was acting for the employee's benefit and the relationship between the two was close enough to treat the two as being in privity.

116. *See also* Jones v. Bell Helicopter Co., 614 F.2d 1389 (5th Cir. 1980) (individual foreclosed from private lawsuit where court had dismissed previous EEOC action brought on private claimant's behalf); Telephone Workers v. New Jersey Bell Tel. Co., 18 Fair Empl. Prac. Cas. (BNA) 298 (3d Cir. 1978) (finding that male employees were under-represented in a clerical position in action brought by union, binding on female clerical employee in her subsequent suit alleging employment discrimination where members had been sufficiently represented by the union in the prior action).

117. Since employee *B* was not a party to the first suit, he would not be bound by an adverse judgment against a fellow employee because, in general, co-workers are not in privity. Grann v. City of Madison, 35 Fair Empl. Prac. Cas. (BNA) 296 (7th Cir. 1984) (company employees are not privies under state law since they neither derive their rights to be free from discrimination from each other; nor, in this case, were the employees in the second suit in control or represented in the prior litigation). *Accord* Local 1006 v. Wurf, 558 F. Supp. 230, 235-36 (N.D. Ill. 1982). However, even though the second employee is not bound by the prior judgment, he can invoke the judgment against a party to the first action if the mutuality rule is inapplicable.

versely, assume that one complainant has asserted claims in successive employment suits against different companies involving identical legal or factual issues. Clearly, separate claims are involved and a prior determination against one company is not binding against an unrelated company that was not involved in the first suit. Nevertheless, may the second company invoke adverse factual or legal findings against the complainant in his Title VII action where the complainant had a full and fair opportunity to litigate the issue in a prior proceeding?

In both these examples, the federal court should consider state law on mutuality. If the state rendering the prior judgment requires that the party invoking issue preclusion in a subsequent action have been a party or in privity with a party in the prior proceeding, preclusion should not apply.[118] If the rendering state, however, has rejected the rule of mutuality and only requires that the party against whom issue preclusion is invoked have been a party or in privity with a party in the prior suit, then the federal court should apply that rule.[119]

3. Is There an Identity of Issues or Claims?

When defendant seeks dismissal of the Title VII action on the

118. An example of employees suing the same employer in separate suits is illustrated in Hellings v. Delta Airlines, 15 Fair Empl. Prac. Cas. (BNA) 955 (S.D. Ohio 1976). In the first employee's action, the company's employment policy of grounding stewardesses in their fifth month of pregnancy was considered unlawful. In an action brought by another employee, the company was precluded from relitigating the policy's lawfulness under Title VII. The application of issue preclusion in this context is an example of offensive non-mutual preclusion; that is, a stranger to the first litigation precludes the defendant from relitigating an issue he lost in an earlier proceeding. *See also* EEOC v. Pacific Press Pub. Ass'n, 34 Fair Empl. Prac. Cas. (BNA) 1165 (N.D. Cal. 1981).

An example of defensive non-mutual preclusion is illustrated by the employee who brings successive actions against unrelated companies. In Stebbins v. Nationwide Mutual Ins. Co., 3 Fair Empl. Prac. Cas. (BNA) 1217 (E.D. Va. 1971), *aff'd on other grounds*, 469 F.2d 268 (4th Cir. 1972), an individual sued an insurance company for denying him a position as a claims adjuster. It was determined that he was unqualified to serve as an adjuster. In a subsequent action against another insurance company, the individual was precluded from relitigating the factual issue of his qualifications. This use of preclusion is defensive in that it is used by defendant to preclude plaintiff from relitigating an issue he litigated and lost in a prior proceeding.

The question of non-mutual preclusion may also arise in the context of determinations made by non-FEP agencies, such as unemployment compensation boards. There, the board might deny benefits on the ground that the employee was justly dismissed. If the employee maintains that his discharge was the result of a discriminatory practice and the allegation is ultimately rejected, may the employer, who was a stranger to the first action, rely on the judgment for preclusion purposes? *See supra* notes 132-42 and accompanying text.

119. *But see supra* note 44.

basis of a prior state judgment, the federal court must also determine whether the rendering state would find an identity of issues or claims to warrant preclusion. This task involves a comparison of federal and state law to determine whether the protection available under Title VII, including the standard of liability, burdens of persuasion and relief available, is narrower than or identical to the protection afforded under state law.

To the extent that identical issues were actually decided and essential to the state judgment, prinicples of issue preclusion will apply.[120] To the extent that rights identical to those under Title VII could have been asserted in the state proceeding, but were not, claim preclusion applies.[121] Preclusion should not apply with respect to those Title VII matters that are broader than the rights under state law and which could not have been raised in the state proceeding.[122] Thus, the federal court judge, in implementing *Kremer*, must scrutinize carefully the rights afforded under state and federal law respectively, and what the prior state proceeding actually decided or could have decided.

a. Identity of factual and legal issues

The Supreme Court in *Kremer* considered the federal and state legal issues raised by the plaintiff in his successive suits to be identical, thereby making issue preclusion appropriate.[123] The application of isue preclusion is not always so clear-cut. Although it may appear that the same discrimination charge was at issue in the state proceeding, different standards of liability may be involved. The crucial question is not whether there was a prior finding of no unlawful discrimination, but whether the state forum applied antidiscrimination principles identical with those mandated by Title

120. *Kremer*, 456 U.S. 461; Unger v. Consolidated Foods Corp., 693 F.2d 703 (7th Cir. 1982) (state statute was at least as broad as Title VII thereby justifying issue preclusion). Where the rights under Title VII are narrower, a rejection of the state claim would logically foreclose litigation of complainant's Title VII claim.

121. *Kremer*, 456 U.S. at 465 n.4.

Claim preclusion will also apply if the complainant could have asserted in the state proceeding federal rights that are as broad as the rights arising under Title VII.

122. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982). Whether those matters peculiar to Title VII could have been raised in the first proceeding depends on the authority of the state's adjudicatory body to hear Title VII claims. *See infra* notes 146-53, 173-203 and accompanying text.

123. The Supreme Court observed that "the alleged discriminatory acts are prohibited by both federal and state laws," and that "[t]he elements of a successful employment discrimination claim are virtually identical (under the two statutes)." *Kremer*, 456 U.S. at 479.

VII.[124]

For example, under federal law, unlawful discrimination may be found where a facially neutral employment policy has a disparate impact on a protected class, without regard to whether there is any intent to discriminate. Accordingly, if state law does not provide for a disparate impact theory, a finding of no discrimination should not be binding on the issue of legality under Title VII.[125]

Similarly, the state might have a narrower definition of unlawful discrimination. For example, in *Reynolds v. New York State Department of Correctional Services*,[126] the claimant failed to prevail under New York's fair employment statute in state proceedings because the employer's conduct rested on a bona fide occupational qualification ("BFOQ"). He subsequently brought a Title VII claim in federal court. Notwithstanding the procedural similarity with *Kremer*, the federal court held that preclusion did not apply. It reasoned that the claimant's state claim of unlawful discrimination was rejected on the basis of a state BFOQ defense that was broader than that under Title VII. Thus, the claimant might be entitled to relief under Title VII even though the state system rejected his apparently similar charge under state law.[127] Accordingly, whether the employer had acted lawfully under a BFOQ defense would be decided de novo under federal law.

On occasion, however, a federal court has merely assumed that the legal issue of employment discrimination is the same under state and federal law. In *Davis v. United States Steel Supply*,[128] complainant had brought a claim under a local discrimination ordinance for, in part, termination of her employment on the basis of

124. *Id.* at 479 n.4; *cf.* Brown v. Felsen, 442 U.S. 127 (1979) (if, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those of § 17 [of the federal Bankruptcy Act], then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court.); Unger v. Consolidated Foods Corp., 693 F.2d 703 (7th Cir. 1982) (state statute prohibiting unlawful discrimination as broad as Title VII thereby justifying issue preclusion).

125. For example, it is questionable whether disparate impact theory is recognized under Nebraska's FEP statute. *See* Physicians Mut. Ins. Co. v. Duffy, 191 Neb. 223, 214 N.W.2d 471 (1974); Willborn, *Employment Discrimination Laws in Nebraska: A Procedural Labyrinth*, 62 NEB. L. REV. 708, 728 (1983). Accordingly, a legal finding of no discrimination under Nebraska law should not be binding with respect to a federal claim pursuant to principles of issue preclusion.

126. 568 F. Supp. 747 (S.D.N.Y. 1983).

127. Even though issue preclusion does not apply, if the state proceeding had the authority to hear Title VII matters, claim preclusion may. *See infra* notes 146-53, 173-203 and accompanying text.

128. 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983).

race. The local agency, which had jurisdiction to hear only claims arising under the city's civil rights ordinance, found that United States Steel Supply (USSS) had discriminated unlawfully. Its legal determination was based on several findings of fact. On USSS's appeal, the state court concluded that the agency's determination was supported by substantial evidence. On further appeal to the intermediate state court, the agency's determination of racial discrimination was reversed.[129] The reversal was not based on the lack of substantial evidence to support the agency's findings of fact. Rather, the reviewing court concluded that the findings of fact did not support the legal conclusion that the ordinance had been violated.

The complainant subsequently brought a federal employment claim under section 1981.[130] The Third Circuit, relying on *Kremer*, indicated that issue as well as claim preclusion would be applicable to bar the complainant from litigating her employment discrimination claim under section 1981. In its view, the state court had found that there was insufficient evidence to establish that Ms. Davis had been discriminated against on the basis of race. The court did not think it relevant that the local agency's jurisdiction was limited to claims arising under the local ordinance; nor did it determine whether the local standard of liability was identical to that under federal law. But clearly, the state court judgment could not have been based on whether the agency's findings of fact constituted unlawful discrimination under section 1981 since the agency had no jurisdiction over a section 1981 claim.[131] That issue of law under section 1981 had not been determined, either by the agency or the reviewing court. Therefore, without a determination that liability under the city and federal standard was identical, issue preclusion should not bar litigation of whether the employer engaged in discriminatory practices under federal law. Similarly, a Title VII claim should not be barred unless the standard of liability under state law is identical to that under Title VII.

The problem of ascertaining whether there has been a prior determination of the same issue also arises with respect to non-FEP agencies, such as unemployment compensation boards and personnel panels. In determining whether a person has been properly discharged, such agencies may hear and determine allegations of

129. *Id.* at 169. Members of the Third Circuit disagreed whether the state court reversal rejected only complainant's specific claim of racially motivated discharge or the broader charges of racial discrimination as well. *Id.* at 182 (Gibbons, J., dissenting).

130. 42 U.S.C. § 1981 (1982).

131. *Davis*, 688 F.2d at 187 (Gibbons, J., dissenting).

discriminatory practices. Of course, the agency decision affirmed by the state court in *Kremer* was that of an agency primarily responsible for the enforcement of the state's fair employment statute. Therefore, one might argue that agencies that do not have the same expertise or mandate as state FEP agencies should not affect one's Title VII rights. Yet, it appears that the mandate of section 1738 applies to judicial affirmance of non-FEP agencies as well.[132] The first question, then, is whether the state would give preclusive effect to judicial affirmances of determinations by state agencies not primarily responsible for the enforcement of the state's fair employment practices statute.[133] If it would not, the employee can relitigate those issues in his Title VII action. If the state would accord such determinations preclusive effect with respect to discrimination issues arising under state law, the federal court is obligated to give the findings preclusive effect with respect to identical Title VII issues.

One, however, must not lose sight of the fact that only identical issues are precluded. In this regard, a finding of just cause for dismissal should not necessarily preclude a subsequent Title VII charge of discriminatory practices. In *Knox v. Cornell University*,[134] for example, a black employee was fired allegedly for his failure to adhere to university regulations concerning time off. When he applied for unemployment benefits, a hearing was held by the employment compensation board to determine whether he had been discharged because of his own misconduct. The hearing officer's determination, which was affirmed on review, concluded that complainant had "lost his employment as a direct result of his own misconduct in failing to adhere to the employer's regulations concerning time off." Apparently, the complainant did not specifically allege that he had been the victim of a discriminatory dis-

132. In *Kremer* it was the state court judgment and not the particular expertise or subject matter jurisdiction of the administrative agency that determined the federal court's full faith and credit obligation. Burney v. Polk Community College, 34 Fair Empl. Prac. Cas. (BNA) 727 (11th Cir. 1984); Ross v. Comsat, 34 Fair Empl. Prac. Cas. (BNA) 260 (D. Md. 1984) (rejecting argument that *Kremer* is limited to court review of FEP agencies).

133. *See* Umberfield v. School Dist. No. 11, 522 P.2d 730 (Colo. 1974) (teacher tenure board determinations have preclusive effect though state had established specialized agency to hear employment discrimination claims); Hinfey v. Matawan Regional Bd. of Educ., 77 N.J. 514 (1978) (Department of Education has concurrent jurisdiction with Division on Civil Rights with respect to unlawful discrimination in the public schools). *But see* Comment, *Application of Res Judicata*, 52 DEN. L.J. 595 (1975) (that non-FEP agency determinations should not have preclusive effect with respect to state employment discrimination claims).

134. 30 Fair Empl. Prac. Cas. (BNA) 433 (N.D.N.Y. 1982).

charge under the state's fair employment practices statute. Nevertheless, the federal court dismissed his subsequent Title VII action on the ground that the just cause determination barred him under state principles of issue preclusion from litigating whether the discharge was unlawful under Title VII.[135]

In these cases, as with those in which a state FEP agency rejects a state FEP claim, one should inquire (1) whether the issue of unlawful discrimination was actually litigated and necessarily decided, and (2) if it was, whether the agency used the same standard of liability that a federal court judge would use in a Title VII action. Contrary to the court's holding, the issue of just cause resolved by the *Knox* state court under the state's unemployment law was not the same legal issue as whether the discharge was the result of an unlawful discriminatory policy. The employee may very well have engaged in some type of misconduct that would justify in dismissal. Yet if the employer applied different standards with respect to its black employees, the employer's action would be clearly in violation of Title VII.[136] In fact, Knox alleged in his Title VII complaint that blacks were held to a stricter standard of performance than whites. Since that issue of disparate treatment was never decided by the state agency, principles of issue preclusion should not have barred him from litigating that question.[137] Because preclusion was applied, Knox was improperly deprived of the substantive rights Title VII accords him.

Moreover, even assuming that the discharged employee had

135. *Id.* at 435-36.

136. In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), black and white employees had misappropriated property; yet, the black employees were maintained and certain white employees were fired. Although the employees' misconduct was a legitimate basis for the termination of their employment, the Court held that the firing may be a violation of Title VII if the employment policy is not applied equally.

137. The court in Rawson v. Sears, Roebuck & Co., 554 F. Supp. 327 (D. Colo. 1983), recognized the important distinction between the issue of just cause for dismissal and that of discriminatory practices. There, the agency found that the employee had been dismissed for questionable job performance and failure to properly administer employer procedures. The state court, which was limited to reviewing the record below, affirmed. The court held that since neither state proceeding court had heard or decided the issue of age discrimination, the employee was not collaterally estopped from raising the issue in a subsequent federal action. Simply stated, the issue of age discrimination had not been actually litigated or decided. *But see* Harding v. Ramsay, Scarlett & Co., 36 Fed. Empl. Prac. Cas. (BNA) 717 (D. Md. Nov. 30, 1984), where the court, in connection with denying unemployment benefits to a dismissed worker, the state forum considered it irrelevant that other employees had not been dismissed for the same activity. Nevertheless, the state determination that dismissal was justified establishes that there was a legitimate purpose for the dismissal under Title VII. As to whether claim preclusion would be applicable, see *infra* notes 146-72 and accompanying text.

claimed before the unemployment compensation board that he had been the victim of unlawful discrimination and that issue was necessarily decided by the board,[138] one must examine how unlawful discrimination is defined by the statute or regulations the agency is authorized to enforce. Specifically, with respect to the denial of unemployment benefits, one must determine the basis on which the board would find an otherwise just discharge to be the product of discriminatory conduct.[139] If the state standard is not as broad as Title VII, the state judgment should not have preclusive effect on the legal question of discrimination under Title VII.[140]

Furthermore, even if these elements of issue preclusion are satisfied, it may be appropriate to ask whether there was an incentive to litigate fully. Thus, if a particularly small amount was at stake before the unemployment compensation board, the litigant might

138. *See, e.g.*, Burney v. Polk Community College, 34 Fair Empl. Prac. Cas. (BNA) 727 (11th Cir. 1984) (dismissed counselor raised racial discrimination as defense in proceedings before hearing conducted by community college's board of trustees—dismissal upheld by state reviewing court); Ross v. Comsat, 34 Fed. Empl. Prac. Cas. (BNA) 260 (D. Md. 1984) (allegation of sexual harassment actually litigated and decided by unemployment compensation board); Gonsalves v. Alpine Country Club, 563 F. Supp. 1283 (D.R.I. 1983), *aff'd*, 727 F.2d 27 (1st Cir. 1984).

139. An analogous problem of issue preclusion exists with respect to determinations made by the NLRB. Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982), makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." In Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (1971), the employer maintained that a finding of no unlawful discrimination by the NLRB was binding on the employee's subsequent Title VII action for unlawful discharge. Yet, with respect to the NLRA, discrimination is prohibited if it interferes with the employees' right to act in concert; Title VII prohibits discrimination in employment without regard to the effect on the employees' right to unite. Since the standard for discrimination under the two statutes was different, the court held that issue preclusion was inapplicable. *See generally* Vestal & Hill, *Preclusion in Labor Controversies*, 35 OKLA. L. REV. 281 (1982); Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. ILL. L.F. 1049.

140. Thus, if the state employs a restrictive intent standard, a finding of no discrimination should not be binding with respect to one's Title VII rights. Although this is usually not a problem with respect to state FEP agencies, which often embrace Title VII's disparate impact standard (e.g., Iowa Dep't of Social Services v. Iowa Merit Employment Dep't, 13 Fair Empl. Prac. Cas. (BNA) 1332 (Iowa 1976); Giles v. Family Court of Delaware, 411 A.2d 599 (Del. 1980)), state agencies that are not responsible for enforcing their own state's fair employment practices statute may not employ such evidentiary standards.

In addition, the federal court would have to consider any other factors a state court would in determining the preclusive effect of the prior state determination. For example, it should be decided whether the parties had the incentive and opportunity to litigate the matter fully or whether the burden of persuasion was different in the agency proceeding from that of the Title VII action.

not be precluded under state law principles since he did not have the incentive to litigate fully.

Of course, even assuming that a state judgment is not binding on the legal question of discrimination under Title VII, certain findings of fact may be.[141] In the *Knox* case, the referee made certain findings of fact. They included findings that (1) Knox had been absent on a number of occasions; (2) that he had failed to request time off in writing; and (3) that he was dismissed on January 4th after an unexcused absence on the prior day.[142] All these findings were necessary to the unemployment compensation board's determination that Knox was not entitled to unemployment benefits. Accordingly, under general state principles of preclusion, they would be binding on Knox in subsequent litigation.

As with preclusion of legal issues, the federal court must be attentive to what factual issues were actually decided and necessary to the prior state judgment. For example, in *Davis v. United States Steel Supply*,[143] the state appellate court reversed the agency on its legal finding of unlawful discharge. Apparently, of all the factual determinations, the state court set aside only one as being clearly erroneous.[144] That particular factual determination was unrelated to the charge of unlawful termination, and accordingly, should not have had a binding effect in a subsequent action.[145] Even if the court had set aside a factual finding related to the termination is-

141. The traditional view of preclusion did not give binding effect to findings of "evidentiary fact," only to an "ultimate fact" or issue of law. The modern view rejects the distinction between ultimate and evidentiary facts and treats as binding those issues actually decided and essential to the judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment j (1982); C. WRIGHT & A. MILLER, *supra* note 9, § 4471, at 110.

142. Knox v. Cornell Univ., 30 Fair Empl. Prac. Cas. (BNA) 433, 434 (N.D.N.Y. 1982).

143. 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983); *see supra* notes 128-31 and accompanying text.

144. *Davis*, 688 F.2d at 169, 187.

145. In this regard, the result in *Davis* is particularly interesting. In her Title VII action, the employee alleged discriminatory conduct in basically two respects. 688 F.2d at 169. First, she alleged that employer's supervisors tacitly condoned and failed to correct a pattern of racial abuse directed at her by co-workers. Second, she alleged that in response to her complaints of racial harassment, she was discharged and that this discharge constituted unlawful discrimination. The agency determined that under municipal law she had been unlawfully discharged. The agency's findings of fact included:

> 5. The first year of complainant's employment went without major incident, but beginning in 1966 Complainant experienced difficulties with other employees and was the victim of name calling (*i.e.*, racial slurs) and suffered damage to personal property, the only employee to experience such.
>
> 6. Complainant had, on several occasions, reported the incidents to her immediate supervisor but in all cases little or no credence was given them, with the word of the other employees taken for value.

sue, it is questionable whether issue preclusion should apply. Since the reviewing court also determined that the agency's findings did not constitute unlawful discrimination under state law, the reversal of factual findings arguably would not be essential to the judgment, and therefore, not binding.

Similarly, if a state court reverses an agency finding of discrimination on the grounds of a procedural deficiency, the court has not rejected the findings of fact. Accordingly, the court judgment dismissing the discrimination claim would not, under principles of issue preclusion, bar litigation of those factual issues in a subsequent Title VII case since no factual determinations were made by the state court that were essential to its judgment.

b. Identity of claims

Under state law principles of claim preclusion, a final judgment on the merits precludes litigation of all matters arising from a common core of operative facts that *could have been raised* in the prior proceeding, as well as those actually decided and necessary to the judgment. It is not significant, for preclusion purposes, that the rights complainant believes have been violated derive from different statutes or common law theories of relief.[146] If he failed to

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7. Complainant experienced difficulties in the Flexograph Room and was transferred to the File Room but the difficulties continued.

8. On February 2, 1970, when Complainant went to the then acting manager to complain concerning damage to her boots, she was summarily dismissed from the employment of the United States Steel Supply Division.

9. The Complainant was dismissed on the spot and no apparent effort was made to determine the validity of her complaint of the incident.

10. Various employee conflicts apparently occurred in the office where Complainant worked and the supervisor and management appeared unable or unwilling to ameliorate these employee problems. On investigation by Commission on Human Relations staff after the dismissal of the employee, it appeared that Complainant's records were kept in a different fashion than the records of other employees, and letters involving other employees, critical of Complainant, were kept in the Complainant's file.

Id. at 169-70.

The reviewing court, in reversing the agency, apparently found that only the sixth finding was clearly erroneous. *Id.* at 187. But let us assume that it set aside all the factual findings. Assuming that the reviewing court only reversed the agency on the issue of unlawful discharge, at the very most, only those factual findings necessary to support that judgment should be binding in the subsequent Title VII action. The factual findings that related to the allegation that the supervisors condoned and failed to correct a pattern of racial abuse directed at Davis by her co-workers, that is, findings 5, 6, 7 and 10, would be irrelevant to the court's judgment and therefore should not be binding under principles of issue preclusion.

146. *Kremer*, 456 U.S. at 481 n.22 (res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes).

assert those matters when he had the opportunity, he cannot do so in another action.[147] Thus, in the context of employment discrimination, claim preclusion will not depend on whether the party could have asserted a "Title VII claim" per se in the prior state proceeding, but whether in seeking relief under state law he could have raised the discrimination matters Title VII prohibits in the earlier state proceeding.

To illustrate this point, assume that a transaction or series of transactions gives rise to federal and state discrimination claims on the basis of gender and race. Assume further that the claimant unsuccessfully asserts a claim in state proceedings solely on the basis of gender discrimination. Since the parties have not litigated the issue of race discrimination in the prior proceeding, issue preclusion will not bar the federal court from deciding the racial discrimination issue under Title VII.[148] Yet, since the claimant could have brought the racial discrimination matter in the state proceeding, he or she will be precluded from bringing the claim in federal court under principles of claim preclusion.[149] Thus, where an indi-

147. *Id.* at 465 n.4 ("[A] party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding.").

148. *Id.* at 466-67 n.6.

149. *Id.* at 465-67 nn.4 & 6; Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982) (since issue of racial discrimination could have been raised before state proceedings under state law, plaintiff barred from raising issue under § 1981); Carpenter v. Reed, Civ. No. 83-1021 (10th Cir. Jan. 11, 1985) (Title VII racial discimination charge precluded if complainant could have raised racial discrimination matter under state law during termination hearings before state personnel board); C. WRIGHT & A. MILLER, *supra* note 9, § 4471, at 75. *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982) (state judgment will not have claim preclusive effect with respect to federal claims over which the state courts lack subject matter jurisdiction even if prior state litigation involved rights under analogous state statute).

The Supreme Court opinion in Marrese v. American Academy of Orthopaedic Surgeons, 53 U.S.L.W. 4265 (U.S. Mar. 5, 1985), is particularly interesting in this regard. In *Marrese*, the plaintiffs asserted a federal antitrust claim in federal court even though they had had the opportunity to raise a comparable state antitrust claim in a prior state court action. The threshold question before the Seventh Circuit was whether § 1738 was applicable at all. A plurality opinion reasoned that since state courts have no jurisdiction over federal antitrust claims, the claim preclusive effect of the prior state judgment had to be determined by federal preclusion principles, not those of the rendering state. Applying federal preclusion principles, the court went on to conclude that since plaintiffs could have raised the antitrust matter under state law in the prior proceeding, they could not subsequently assert their federal antitrust claim in federal court. It was immaterial, for preclusion purposes, that the state forum lacked the competence to hear federal antitrust claims. Because of the similarity between the state antitrust matters they could have raised in state court and the federal antitrust matters they sought to raise in the subsequent federal action, the Seventh Circuit held that principles of claim preclusion applied.

The Supreme Court stated that the Seventh Circuit had erred in assuming that § 1738 did not apply to claims within the federal courts' exclusive jurisdiction. Even where the

vidual's rights under the state discrimination law are as broad as those provided by Title VII, an individual who pursues his state rights through state proceedings will be precluded from subsequently bringing a Title VII claim in federal court.[150] Simply

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claim sought to be precluded is within the exclusive jurisdiction of the federal courts, the federal courts must first look to state preclusion law in determining the claim preclusive effect of a prior state court judgment. If under state law the claim would be barred, the federal court should then, and only then, consider whether Congress intended to impliedly repeal § 1738 with respect to federal antitrust laws.

The Court's holding that § 1738 applies to federal claims within the federal courts' exclusive jurisdiction is not surprising in light of its *Kremer* opinion. In the context of issue preclusion the *Kremer* Court had held that § 1738 applied regardless of whether the federal courts have exclusive or concurrent jurisdiction over Title VII claims. *Marrese* simply extended *Kremer* to claim preclusion.

In another respect, however, the *Marrese* opinion suggests a departure from the reasoning of the *Kremer* decision. In *Marrese*, the Court states that general state law principles will not accord claim preclusive effect where the state court lacks the competence to hear rights arising under a particular statute. Thus, it assumes that state law will not preclude federal antitrust claims even though the state court had the competence to hear analogous state antitrust claims. *Marrese*, 53 U.S.L.W. at 4267 & n.3. In *Kremer*, however, the Court stated that under general principles of claim preclusion, claims arising from the same transaction are precluded even though they may arise under different statutes. *Kremer*, 456 U.S. at 465 n.4. Thus, if a plaintiff failed to raise a matter arising under one statute, he could not raise the same matter in subsequent litigation even if that matter arose under a different statute: all discrimination matters that could have been raised in the prior litigation are precluded. For example, in *Kremer* itself, the New York State fair employment practices agency did not have the jurisdiction to adjudicate rights arising under Title VII; its authority extended only to claims arising under the state's human rights law. Nevertheless, the Supreme Court held that application of state issue preclusion principles was mandated by § 1738.

In the wake of *Kremer*, federal courts have invoked claim preclusion regardless of whether the state forum had the competence to hear a Title VII claim as such. Thus, if, in a prior state proceeding, a discharged employee failed to raise a state discrimination charge identical to that under Title VII, federal courts have held that, under the mandate of § 1738, he is precluded from subsequently bringing a Title VII claim in federal court. *See* notes 146-172 and accompanying text.

Contrary to the assumption made by the Supreme Court in *Marrese*, then, it is far from clear that state law principles will not invoke claim preclusion with respect to federal statutory rights that state courts lack the competence to hear if those courts have the competence to hear identical state matters. If state law principles would invoke claim preclusion under such circumstances, the Supreme Court will have to resolve the question it did not have to address in *Marrese*; that is, whether § 1738 is partially repealed with respect to claim preclusion of federal antitrust matters. Similarly, the Court may be called upon to address the specific issue of claim preclusion in the context of Title VII, that is, if the state courts lack the competence to hear claims arising specifically under Title VII, should a federal court give effect to state claim preclusion principles that would bar the litigation of rights arising under Title VII because the complainant failed to assert the identical matters under state law in the prior state proceeding.

150. Whether the rights under state law are broader than those under Title VII depends on several factors. These factors include the classes protected, the type and extent of relief available, whether actual discriminatory intent must be demonstrated, the burdens of persuasion, and the extent of exceptions such as bona fide occupational qualifications. Since the complainant's right arising under Title VII might be greater in some

stated, the individual could have raised those discrimination matters covered by Title VII within the state system.

Where the rights under Title VII are broader than those under state law, one must determine whether the state court had the authority to hear the matter peculiar to Title VII. For this purpose, it is useful to inquire into whether the complainant appealed an agency determination to state court,[151] or whether he sought direct judicial redress. In the situations where the complainant appealed a state agency determination, the scope of the state court's jurisdiction on review is determined by state law. As a general rule, the reviewing court's jurisdiction will be no broader than the agency's;[152] the agency, in turn, is limited to hearing those matters the state legislature has given it the authority to hear.[153] Thus, if the FEP agency cannot hear matters peculiar to Title VII, the reviewing court's jurisdiction will be similarly limited. Accordingly, the complainant's right to a de novo trial on those substantive Title VII matters that are broader than the rights afforded under state law is preserved.

Where the complainant seeks direct judicial redress, however, the state court's jurisdiction may not be so limited. Rather, it may have concurrent jurisdiction to adjudicate Title VII rights. If it does, and that, of course, is a question of federal law, those broader aspects of Title VII could have been raised in the prior state court proceeding, and therefore, cannot be litigated in a subsequent action.

i. Where the complainant appeals an agency determination to the state reviewing court

Often a complainant will seek state redress of his employment claim before a state fair employment practices agency with the spe-

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respects than others, the federal court judge should examine all relevant aspects. For example, a state might provide for more extensive relief than Title VII. Yet, if comparable worth is not accepted as a theory of recovery under state law, as it may be under Title VII, the standard of liability would be narrower. Thus, even if the state proceedings have rejected complainant's state FEP claim, he should not be barred from raising a theory of comparable worth under Title VII.

151. With respect to whether an employee should be precluded from litigating his Title VII claim de novo where the employer sought court review, see *infra* notes 212-38 and accompanying text.

152. *See* Local 1006 v. Wurf, 558 F. Supp. 230, 239-40 (N.D. Ill. 1982) (interpreting North Dakota law); Mortenson v. Syracuse Univ., 46 A.D.2d 1002, 362 N.Y.S.2d 104 (1974).

153. Other courts may authorize the reviewing court to hear additional matters. *See* Lee v. City of Peoria, 685 F.2d 196, 201 (7th Cir. 1982) (interpreting Illinois law).

cific authority to resolve disputes arising under the state's fair employment statute.[154] In other cases, the complainant may first raise his charge of discrimination before a non-FEP agency such as an unemployment compensation board or a state personnel board which is not primarily responsible for the enforcement of the state's discrimination laws. In both situations, agency adjudications are typically subject to only a deferential standard of review.[155] Yet, as *Kremer* firmly establishes, a de novo adjudication by the state reviewing court is not necessary for the court judgment to have preclusive effect in the complainant's subsequent Title VII action as long as the rendering state would give it preclusive effect.[156]

Even under state preclusion rules, the state judgment only precludes those matters that could have been raised in the state system.[157] Accordingly, where the agency did not have the jurisdiction to hear the matters covered by Title VII and the reviewing court is limited to the agency record,[158] the right to a federal trial de novo on those matters is not affected.[159] Thus, if an

154. This pattern is not at all unusual since the procedural scheme of Title VII requires deferral to state and local FEP agencies.

155. *E.g.*, GA. CODE §§ 45-19-39(b)(5) to 39(b)(6) (Michie Supp. 1984) (state court shall uphold special master's order unless it is arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence); N.Y. EXEC. LAW §§ 297, 298 (McKinney 1982); N.Y. CIV. PRAC. LAW. § 7803(3)(4) (1982); OHIO REV. CODE ANN. § 4112.06(E) (Page 1980) (Commissioner's findings will be conclusive if supported by reliable, probative and substantive evidence in the record). *But see* MICH. STAT. ANN. § 3.548(606) (Callaghan 1984) (de novo review).

Even within a state the standard of review applied to state and local FEP agencies may differ. For example, in Nebraska, the state court has only limited power of review with respect to the Lincoln City FEP agency and yet broader review powers with respect to the state FEP agency and other local FEP agencies. Willborn, *supra* note 125, at 707-08.

156. Not surprisingly, the federal court may disagree as to the preclusive effect the state court will give its own judgment. *See* Allen v. Greenville County, 712 F.2d 934 (4th Cir. 1983).

Even within a state, judgments of a reviewing court may be treated differently for purposes of claim preclusion. Under Nebraska law an affirmance of a local FEP agency of no discrimination has no preclusive effect, while that of a state FEP agency does. Therefore, whether a complainant's Title VII claim will be precluded may ultimately turn on with which of two agencies within the state the complainant happened to file. Willborn, *supra* note 125, at 722-23 n.122 and accompanying text.

157. *See* Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 559 n.13 (6th Cir. 1983) (federal court could hear procedural due process claim since under Ohio law the state administrative agency lacked the authority to hear it), *aff'd*, 53 U.S.L.W. (U.S. Mar. 19, 1985).

158. *See supra* note 152.

159. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); Rawson v. Sears, Roebuck & Co., 554 F. Supp. 327 (D. Colo. 1983); *cf.* Unger v. Consolidated Foods Corp., 693 F.2d 703 (7th Cir. 1982); Gonsalves v. Alpine Country Club, 727 F.2d 27 (1st Cir. 1984) (state statute was at least as broad as Title VII thereby justifying issue preclu-

individual is entitled only to a cease and desist order under the state FEP scheme and he prevails on the state level, basic rules of preclusion do not treat his entire claim as merged with his state judgment.[160] Since he could not have asserted a claim in the state agency for back pay, the individual is still entitled to seek such relief in federal court under Title VII.[161] In addition, where the prior forum did not have the jurisdiction to hear a particular theory of relief, a party is not precluded from raising it in a subsequent forum.[162] Of course, with respect to legal and factual issues that were actually decided and necessary to the state judgment, issue preclusion would apply.[163]

Assume, however, that complainant failed to raise an issue he could have raised before the state agency, such as racial discrimination. Further assume that the reviewing court is limited to hearing matters that were raised below. Does the judgment of the reviewing court have preclusive effect with respect to the racial discrimination issue that could have been raised before the agency? In other words, for purposes of claim preclusion in a subsequent Title VII action, does one look to the jurisdiction of the agency or of that of the reviewing court?

Courts, in the wake of *Kremer*, have focused on the scope of the agency's authority to determine the preclusive effect of the reviewing court's judgment. In *Carpenter v. Reed*,[164] for example, the

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sion); Reynolds v. New York State Dep't of Correctional Services, 568 F. Supp. 747 (S.D.N.Y. 1983) (Title VII broader than state FEP statute).

160. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) & comment d (1982).

161. RESTATEMENT (SECOND) OF JUDGMENTS § 85 comment a (1982); Boykins v. Ambridge Area School Dist., 621 F.2d 75 (3d Cir. 1980) (where a state forum could not have awarded damages, federal civil rights claim is different for claim preclusion purposes).

162. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982); Rawson v. Sears, Roebuck & Co., 554 F. Supp. 327, 329 n.1 (D. Colo. 1983) (issue of age discrimination was unlikely to have been resolved fully before unemployment compensation board); *Davis*, 688 F.2d at 183-85 (Gibbons, J., dissenting).

If there is any question as to the scope of the agency's authority, a cautious litigant will raise all potential theories of relief on the agency level. Otherwise, when he commences his federally-based action, he may find that since the agency could have heard the discrimination matter, he is precluded from raising it in federal court.

163. Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968) (complaint based on Securities Exchange Act § 10(b) not barred under res judicata by prior state court action based on claim of breach of fiduciary duty although plaintiff would be estopped from relitigating facts determined in prior proceeding).

164. Civ. No. 83-1021 (10th Cir. Jan. 11, 1985). On December 21, 1984 the court had withdrawn its original opinion to correct a clerical oversight. Since then, the court has vacated the district court's judgment and remanded the case for further proceedings to determine the actual scope of the state agency's jurisdiction over discrimination matters. If nothing else, *Carpenter* illustrates the need for the federal district court to know

plaintiffs had been dismissed from their positions as state highway patrolmen. They appealed their dismissal to the Oklahoma State Personnel Board which upheld the dismissals on the ground that the plaintiffs had violated department policy. The dismissed employees did not allege before the personnel board, however, that their dismissals were a result of racial discrimination. When they subsequently brought a Title VII and section 1981 claim alleging racial discrimination, the federal district court invoked claim preclusion. In its view, the personnel board had the authority to hear allegations of racial discrimination under Oklahoma's civil rights statute. Having failed to raise it before the personnel board, they were precluded from raising it under Title VII or section 1981. On appeal, the Tenth Circuit ultimately remanded the case for further proceedings to determine whether the personnel board actually had the jurisdiction to hear the state discrimination matters. Yet, even under the rationale of the appellate court, the critical state forum for purposes of claim preclusion was the state agency; if plaintiffs could have raised the matters before the state agency, they could not do so in their Title VII action.[165]

The *Kremer* decision makes it clear, however, that with respect to Title VII rights, it is only the state court judgment, not the agency determination, that has preclusive effect. The agency determination, in and of itself, has none. Thus, to rest preclusion on the scope of the state administrative hearing is at odds with the *Kremer* rationale that it is the state court judgment that has claim preclusion effect. So even if the rendering state would give the judicial judgment preclusive effect with respect to matters not raised at the agency level, it is questionable whether the federal court should do so with respect to Title VII matters. Rather, the federal court should focus on the scope of the state court's reviewing authority. If the plaintiffs in the prior state action could have raised a discrimination matter covered by Title VII before the state reviewing court, but failed to do so, claim preclusion would be appropriate. If they could not, claim preclusion, at least with respect to their Title VII rights, would be inconsistent with the *Kremer*

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the exact interrelationship between state agencies responsible for administering the state's fair employment practices statute.

165. *Id. Accord* Local 1006 v. Wurf, 558 F. Supp. 230, 239 (N.D. Ill. 1982). There, the state reviewing court refused to pass on complainants' claim that they had been dismissed as a result of an unlawful conspiracy since the conspiracy theory had not been raised in the agency below. Claim preclusion nevertheless applied since the agency could have heard the charge if they had raised it. *See also* Frazier v. East Baton Rouge Parish School Bd., 363 F.2d 861 (5th Cir. 1966) (failure of teacher to raise racial discrimination issue before school board precludes her from raising issue in subsequent § 1983 action).

rationale.[166]

Finally, it should be noted that the scope of a state's claim preclusion law may also bar discrimination issues that could have been raised as counterclaims in the state proceeding. Generally, under the mandate of section 1738, a federal court will give effect to the rendering state's compulsory counterclaim rule.[167] Thus, an employee who failed to assert a compulsory discrimination counterclaim is barred from raising the same matter in federal court. The question remains, however, whether he will be so precluded absent a compulsory counterclaim rule.

The general rules of preclusion do not require an individual to assert permissive counterclaims in the forum selected by the plaintiff; one can preserve one's counterclaim for the forum of one's choice.[168] An important exception, however, applies to those counterclaims that would undermine the integrity of the first judgment.[169] This exception might be invoked to preclude discrimination claims that the employee failed to assert as a counterclaim in the state proceedings.

Assume that an employer commences a state administrative hearing to dismiss an employee on the ground of inadequate performance. The employee does not assert employer discrimination either as an affirmative defense or a counterclaim, and offers no evidence to that effect. Thus, the issue of discriminatory conduct is neither litigated nor decided on the administrative level. The agency, though, does determine that good cause for the discharge existed. On the basis of the agency record below, the state reviewing court affirms the agency's decision. In his subsequent Title VII

166. Consistent with this approach, if, under state law, a reviewing court could hear matters the agency would not even have the authority to hear, claim preclusion would be applicable. *See* Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982); Umberfield v. School Dist. No. 11, 522 P.2d 730 (Colo. 1974) (reviewing court empowered to hear state law discrimination matters not raised below).

167. *E.g.*, Texas Gulf Citrus & Cattle Co. v. Kelly, 591 F.2d 439 (8th Cir. 1979); Trimmel v. General Electric Credit Corp., 555 F. Supp. 264 (D. Conn. 1983); A. VESTAL, RES JUDICATA/PRECLUSION 163-71 (1969); C. WRIGHT & A. MILLER *supra* note 9, § 4467, at 643 (1981); RESTATEMENT (SECOND) OF JUDGMENTS § 22 (1982); *contra* Chapman v. Aetna Fin. Co., 615 F.2d 361 (5th Cir. 1980). The counterclaim rule may be distinguished from other "procedural" rules in that it is designed not only for the procedural convenience of the first forum, but also, to further the value of repose by adjudicating all related claims.

168. RESTATEMENT (SECOND) OF JUDGMENTS § 22(1) (1982). Of course, to the extent that matters comprising the counterclaim were actually litigated and necessarily determined, principles of issue preclusion apply.

169. Martino v. McDonald's Sys., Inc., 598 F.2d 1079 (7th Cir. 1979). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 22(b) (1982); Atwood, *supra* note 77, at 88-91.

action, should the employee be prevented from asserting his federally-based discrimination charge because he failed to assert an identical state counterclaim in state proceedings? Stated otherwise, should preclusion be invoked on the ground that a favorable ruling on his discrimination discharge would vitiate the state determination that his employment had been terminated for good cause?[170]

A finding of good cause for termination is not necessarily undermined by a finding of job discrimination. In the first instance, the employer may have good cause to dismiss the employee within the terms of the employee's labor contract. Notwithstanding the contract, however, the employer's conduct may be discriminatory within the terms of Title VII.[171] Thus, to permit the Title VII action to proceed would not necessarily vitiate the good cause determination by the state court.

This criticism aside, the application of the counterclaim preclusion rule is unobjectionable only to the extent that the state reviewing court had jurisdiction to consider the state discrimination matters as broad as those under Title VII. If it could not have determined issues of unlawful discrimination identical to or at least as broad as Title VII, the counterclaim rule is not applicable and the state finding of good cause for dismissal should not bar litigation of the Title VII claim.[172]

ii. Where complainant had sought direct judicial redress

The prior state judicial determination raised by defendant in the Title VII action may have been based on a full de novo adjudication of the issues in dispute. Rather than simply review the

170. These facts are based on those in Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982). In *Lee*, however, the employee apparently raised the discrimination counterclaim for the first time on review. The reviewing court, though, took no evidence on the issue and, indeed, there was some question whether it could have heard the discrimination claim since the employee did not raise it before the agency. Nevertheless, the Seventh Circuit considered the discrimination matter to have been actually litigated and decided by the state reviewing court. Accordingly, it applied state principles of issue preclusion. As an alternate rationale, however, it rested its decision on claim preclusion. In its view, even if the discrimination counterclaim had not been litigated, a favorable determination on the discrimination charge now would vitiate the prior state judgment.

171. *See* discussion of McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) *supra* note 114; *see also* Stewart v. Wappingers Cent. School Dist., 23 Fair Empl. Prac. Cas. (BNA) 231 (S.D.N.Y. 1977) (fact that FEP agency found no discriminatory discharge does not mean that no breach of contract existed since that question was not before the agency).

172. *See* Rawson v. Sears, Roebuck & Co., 554 F. Supp. 327 (D. Colo. 1983). There, complainant could assert age discrimination claim notwithstanding previous state determination of rightful discharge. Claim preclusion did not apply since the State Industrial Commission could not grant the relief requested under federal law.

agency's finding, the state court may have been the primary factfinder. This can occur in several ways. Some state fair employment practices statutes permit complainants direct judicial redress.[173] Others have a waiting period comparable to that in Title VII during which time the state agency has the opportunity to resolve the discrimination claim. Once the period has elapsed, the complainant may initiate a civil action and have his state fair employment claim adjudicated de novo.[174] Aside from these possibilities, a complainant may have asserted in a state action only his common law claims arising from the alleged discriminatory practices.[175] Suppose that in each case, the complainant was unsuccessful. Having litigated his state statutory or common law claims in state court, what should the preclusive effect be with respect to his Title VII rights?[176]

Clearly, the complainant is barred from raising matters under Title VII that are identical to those rejected by the state court. Yet, if the federal court determines that Title VII is broader in some respects than the rights available under state laws, it must then decide if the state courts have concurrent jurisdiction over Title VII claims.[177] Only if the state court has concurrent jurisdiction over Title VII claims would those broader Title VII issues be precluded by the state judgment.

Title VII expressly authorizes the federal courts to adjudicate claims arising under the statute.[178] Indeed, the Supreme Court has stated, on more than one occasion, that Congress intended the final

173. *E.g.*, 1984 MICH. COMP. LAWS ANN. § 37.2801-03 (West Supp. 1984); N.J. STAT. ANN. § 10:5-13 (West Supp. 1982); N.Y. EXEC. LAW § 297 (McKinney 1982); 43 PA. CONS. STAT. ANN. § 962(c) (Purdon Supp. 1984).

174. CAL. GOV'T CODE § 12965(b) (West 1980) (judicial action permitted after waiting period of 150 days); MASS. GEN. LAWS ANN. ch. 151B, § 9 (West 1982) (civil action permitted after expiration of 90 days).

Still other jurisdictions provide for a de novo review of the claim after exhaustion of administrative remedies. KAN. STAT. ANN. § 44-1011 (1981) (reviewing court can receive additional evidence and is charged with making an independent finding); MICH. COMP. LAWS ANN. § 37.2606 (West Supp. 1984); MICH. STAT. ANN. § 3.548(606)(1) (Callaghan 1980) (trial de novo of agency determination).

175. *E.g.*, Kotzik v. Young, 704 F.2d 149 (4th Cir. 1984).

176. The same question arises with respect to federal rights the complainant actually litigated or could have litigated. To the extent that those rights are co-extensive with Title VII, preclusion principles bar him from litigating his Title VII rights. If Title VII is broader, one must determine whether the state court could have heard the Title VII matters.

177. If, under state law, a reviewing court can hear any additional claims the appealing party may have, including those under federal law, the following discussion on exclusive and concurrent jurisdiction may apply as well.

178. 42 U.S.C. § 2000e-5(f) (1982).

responsibility for enforcement of Title VII to rest with the federal courts.[179] The Court, however, has never determined whether the federal court's jurisdiction is exclusive of the state's.

That Congress expressly grants to the federal courts the jurisdiction to adjudicate claims arising under a particular federal statute does not, in and of itself, prevent state courts from exercising concurrent jurisdiction.[180] On the contrary, there is a presumption that concurrent jurisdiction exists.[181] This presumption can be rebutted by explicit statutory directive, by unmistakable implication from legislative history, or clear incompatibility between state court jurisdiction and federal interest.[182]

When Congress enacted Title VII, it did not expressly provide for exclusive jurisdiction.[183] The statute itself authorizes complainant to commence a "civil action" upon receipt of his right-to-sue letter; it does not specify a federal action.[184] Thus, there is no explicit statutory directive rebutting the presumption of concurrent jurisdiction. Further, there is no clear incompatibility between state court jurisdiction and the federal interest. On the contrary, Congress expressly provided for limited deferral to adequate state remedies. In its view, both the states and the federal government were critical in the fight against employment discrimination. Thus, if exclusive jurisdiction is to be found at all, it must be found by implication.

While it is true that an express provision for federal jurisdiction does not deprive the state courts of concurrent jurisdiction, Title VII does more than simply confer jurisdiction on the federal courts. It makes detailed references to the federal procedures to be used once the action is commenced. Thus, it provides for the appointment of a special master in accordance with Federal Rule 53

179. *Kremer*, 456 U.S. at 477-78; Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); *see also* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) (the ultimate authority to secure compliance with Title VII resides in the federal courts).

In *Kremer* the Court specifically refrained from deciding whether the federal courts have exclusive jurisdiction over Title VII. 456 U.S. at 506 n.20. Nonetheless, in language reminiscent of that in earlier cases, the Court stated again that the federal courts have final responsibility for enforcing Title VII. *Id.* at 477-78.

180. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

181. Chaffin v. Houseman, 93 U.S. 130 (1876); 3 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3527 (1972).

182. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981).

183. 42 U.S.C. § 2000e-5(f) (1982), provides that the federal district court shall have jurisdiction over actions brought under Title VII, but it does not specify that it shall be exclusive of the states.

184. 42 U.S.C. § 2000e-5(e) (1982).

if the Title VII claim cannot be tried within 120 days;[185] that appeals are subject to 28 U.S.C. §§ 1291, 1292;[186] and that injunctive relief be issued in accordance with Rule 65.[187] Do these specific references to federal procedure imply that Congress intended the federal courts to have exclusive jurisdiction over Title VII claims?

Arguably, these provisions merely reflect Congress's concern with the workings of the federal system. Rather than reflecting a preference for exclusive federal adjudication, the lack of reference to state courts merely indicates that Congress was unconcerned with, and indeed has no authority over, the workings of the state judicial system. By setting forth certain procedures it could ensure the speedy adjudication of claims brought to federal court. It did not necessarily intend to strip the state courts of what would otherwise be concurrent jurisdiction. Thus, the argument is made that although the federal courts might be the primary enforcers of Title VII rights, they are not necessarily the sole enforcers.[188]

Moreover, when Congress authorized the Attorney General to seek injunctive relief against discriminatory patterns and practices, it made specific reference to bringing the "civil action in the appropriate district court of the United States."[189] With respect to private civil suits, however, no such reference is made. Some lower federal courts have seized upon this difference as evidence that Congress did not intend the federal courts to have exclusive jurisdiction over private Title VII claims.[190]

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185. 42 U.S.C. § 2000e-5(f)(5) (1982).

186. 42 U.S.C. § 2000e-5(j) (1982).

187. 42 U.S.C. § 2000e-5(f) (1982). In addition, § 706(f)(3) contains special venue provisions that identify the judicial district in which the action is to be brought. This provision may also evince congressional intent to give the federal court exclusive jurisdiction. *See generally* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 22, at § 3.14.

188. Willborn, *supra* note 125, at 735-37.

189. 42 U.S.C. § 2000e-5(f)(1) (1982).

190. *E.g.*, Bennum v. Board of Governors of Rutgers Univ., 413 F. Supp. 1274, 1279 (D.N.J. 1976).

In this regard one might question whether the federal courts have a unique expertise that would speak in favor of exclusive jurisdiction. Since many states have fair employment statutes similar to Title VII, one could argue that state court judges are familiar with the legal principles that arise under Title VII. *See* Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 515 (1957) (that antitrust laws, because of the fact that state courts frequently enforce similar state laws, may more appropriately be made concurrent). *But see* Klein v. American Luggage Works, Inc., 206 F. Supp. 924 (D. Del.) *rev'd on other grounds*, 323 F. 2d 787 (3d Cir. 1962); Otis Elevator Co. v. Reynolds, 81 Misc. 2d 314, 366 N.Y.S.2d 256 (Sup. Ct. 1975) (federal courts have impliedly found exclusive jurisdiction over Sherman antitrust claims notwithstanding comparable state statutes).

Another factor to be considered where Congress is silent on the subject is whether a need for uniform application of Title VII supports a finding of exclusive jurisdiction. *See*

One may equally argue that the references to federal procedure reflected an assumption that the federal courts would be the ultimate and *only* judicial enforcers of Title VII rights. For example, section 706, which authorizes the bringing of a private "civil action," goes on to provide that the court may appoint counsel for complainant and permit commencement of the action without payment of fees, costs, or security.[191] Another provision designed also for the complainant's benefit is the preference for referral to a special master to hear the case.[192] It is fair to say that Congress viewed the procedural mechanisms contained in Title VII as an integral part of a complainant's rights under Title VII.[193] Yet, Congress could have no control over state court operations. Accordingly, the implication can be drawn that Congress intended the cases to be brought in the federal courts.

In addition, the 1964 legislation is replete with references to the federal courts' role in the adjudication of Title VII rights. In this regard, the original House version provided that if conciliation failed and the EEOC failed to bring suit, the complainant could bring a civil action in a "U.S. district court." In explaining the House bill, the Clark-Case interpretive memorandum made specific reference to the aggrieved party bringing his claim in federal court.[194] Admittedly, the final Senate version that was ultimately adopted by the House dropped the reference to "U.S. district court" and just reads "a civil action." One might argue that the change constitutes a preference for concurrent jurisdiction, but no reference is made to it in either Senator Humphrey's or Senator Dirksen's explanation of the Senate changes.[195] Indeed, the main focus of the changes in that part of the bill concerned the deferral to state and local agencies. Both Senators seemed to assume that the federal courts would hear the charge after the EEOC issued its

generally Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 331-34 (1976) (exclusive jurisdiction to be implied with respect to those statutes that give the judiciary wide latitude in developing federal rights, whereas concurrent jurisdiction is appropriate where the scope of the federal right is clearly detailed).

191. 42 U.S.C. § 2000e (1982).

192. 42 U.S.C. § 2000e-5(f)(5) (1982).

193. 110 CONG. REC. 12721-25 (remarks of Sen. Javits), 1964 LEGISLATIVE HISTORY, *supra* note 16, at 3004, 3006 (1968).

194. 110 CONG. REC. 7212-15 (1964) (interpretative memorandum on the House bill H.R. 7152 submitted jointly by Sen. Clark and Sen. Case).

195. *See* 110 CONG. REC. 12721-25 (1964) (remarks of Sen. Humphrey), 1964 LEGISLATIVE HISTORY, *supra* note 16, at 3003-08; 110 CONG. REC. 12818-20 (1964) (remarks of Sen. Dirksen), 1964 LEGISLATIVE HISTORY, *supra* note 16, at 3017-21.

right-to-sue letter.[196] In fact, the provision for the federal court appointing counsel for indigent defendants was introduced in the Senate version ultimately passed.[197] The legislative history, then, is far from clear on this question, and, understandably, the lower federal courts are sharply split on the issue.[198]

One should also consider whether the remedial purpose of the statute is better served by exclusive jurisdiction.[199] The vindication of Title VII rights is facilitated where the complainant has the option to select his forum. In a case where state statutory and common law claims exist, it may be more convenient and less expensive for the complainant to join all claims in a state action. Of course, a complainant may attempt to join his claims in federal court under the doctrine of pendent jurisdiction.[200] However, since the exercise

196. 1964 LEGISLATIVE HISTORY, *supra* note 16, at 3004. One reason that the proponents of Title VII may have assumed that individual suits would be brought in federal courts was a general doubt, at the time, that the state courts in the south would vigorously enforce civil rights.

197. *Id.*

198. The only court of appeals to address the issue has held that federal courts have exclusive jurisdiction over Title VII claims. Valenzuela v. Kraft, Inc., 739 F.2d 434 (9th Cir. 1984). *Accord* Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978); Fox v. Eaton Corp., 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976); Lucas v. Tanner Bros. Contracting Corp., 10 Fair Empl. Cas. (BNA) 1109 (Ariz. 1974). *Contra* Greene v. County School Bd., 524 F. Supp. 43 (E.D. Va. 1981); Bennum v. Bd. of Governors of Rutgers Univ., 413 F. Supp. 1274 (D.N.J. 1976); Vason v. Carrano, 31 Conn. Supp. 338, 330 A.2d 98 (1974); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 389 A.2d 465 (1978).

Commentators have also split on the question. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 22, at § 3.14; Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 104 (1982). *Compare* Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1514 n.164 (1981) (federal courts have exclusive jurisdiction) *with* Willborn, *Employment Discrimination Laws in Nebraska: A Procedural Labyrinth*, 62 NEB. L. REV. 708, 735-37 (1983) (state courts have concurrent jurisdiction).

199. In attempting to determine congressional intent on a matter which Congress did not specifically consider, one should consider the remedial purpose of the statute. United Steel Workers of Am. AFL-CIO-CLC v. Wever, 443 U.S. 193, 202-04 (1979). *See generally* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 325 (1976) (advocating case-by-case analysis of the legislative history and needs of the federal system to determine if states have concurrent jurisdiction over federal claims).

200. Pendent jurisdiction is a judicially created doctrine that permits a party to join a claim over which the federal courts do not have subject matter jurisdiction with a claim the courts do have the authority to hear. As long as the federal and non-federal claims arise from a common nucleus of operative facts and Congress did not impliedly negate the right of the federal courts to exercise pendent jurisdiction over the non-federal claims; that is, those for which there is no independent basis for subject matter jurisdiction, the courts have the judicial power to exercise jurisdiction over the non-federal claim. A federal court, though, is not required to exercise pendent jurisdiction. Rather, it must determine whether in the interest of comity, judicial economy, convenience and fairness

of pendent jurisdiction is discretionary, he may not always be able to do so.[201] Especially where the state claims are novel, the federal courts will probably decline jurisdiction.[202] If the state courts were not to have concurrent jurisdiction, the complainant in such circumstances would be forced to proceed in two forums. A finding that federal courts have exclusive jurisdiction, then, would make the full vindication of one's discrimination claim only more cumbersome—a result that Congress surely would have wanted to avoid.

In addition, litigation in two forums is not simply a burden to the complainant. It constitutes a waste of judicial resources and is burdensome to the defendant as well. Furthermore, concurrent jurisdiction still gives the parties the option to select a federal forum for the resolution of the dispute if they so desire. The plaintiff can initially commence his employment discrimination action in federal court or, if he does not, the defendant can remove the action to federal court. Concurrent jurisdiction simply permits the state courts to adjudicate a Title VII claim if the parties so desire. In any event, until it is finally established whether state courts have

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to the litigants, it is appropriate to exercise pendent jurisdiction in a particular case. *See generally* 3 C. WRIGHT, A. MILLER & C. COOPER, *supra* note 181, at § 3567; Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U.L. REV. 778, 788-816 (1983).

201. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

202. *Id.* at 726 (in the interest of comity, federal courts should avoid making determinations on unsettled questions of state law). For Title VII actions in which the federal court declined to exercise pendent jurisdiction because state law was unsettled, see Bell v. Owens-Corning Fiberglass Corp., 28 Empl. Prac. Dec. (CCH) § 32,589 (D. Kan. 1982); Lazic v. Univ. of Pa., 513 F. Supp. 761, 770 (E.D. Pa. 1981); Wagner v. Sperry Univac, 458 F. Supp. 505, 515 (E.D. Pa. 1978). *See generally* Catania, *supra* note 200, at 808-16.

Indeed, some courts have held that they do not have the judicial power to exercise pendent jurisdiction over related claims. *E.g.*, Haroldson v. Hospitality Systems, Inc., 596 F. Supp. 146 (D. Colo. 1984); Jong-Yul Lim v. Int'l Inst. of Metropolitan Detroit, 510 F. Supp. 722 (E.D. Mich. 1981). *Contra* Phillips v. Smalley Maintenance Services, Inc., 32 Empl. Prac. Dec. (CCH) § 33,802 (11th Cir. 1983). Although the author agrees with the Eleventh Circuit holding that federal courts have the judicial power to exercise pendent jurisdiction over related state claims where the sole basis of subject matter jurisdiction is Title VII, she disagrees with the analysis of the court. The Eleventh Circuit employed the two-part test of *Gibbs*, pursuant to which it asked (1) whether the state and federal claims arose from a common nucleus of operative facts such that the district court had the constitutional power to exercise pendent jurisdiction; and (2) whether the lower court abused its discretion in exercising pendent jurisdiction. In the writer's view, the Eleventh Circuit also should have inquired whether the court below had the statutory power to exercise jurisdiction, that is, whether Congress in enacting Title VII expressly or impliedly negated the power of the federal courts to exercise pendent jurisdiction over related state claims. It is the writer's view that Congress did not impliedly limit pendent jurisdiction in the Title VII actions, and for this reason, she is in agreement with the Eleventh Circuit decision.

concurrent jurisdiction over Title VII claims, this aspect of claim preclusion will remain unsettled and the preclusive effect of a state judicial determination with respect to those matters peculiar to Title VII will vary among the jurisdictions.[203]

C. Did the Complainant Receive Minimum Due Process?

Notwithstanding the mandate of section 1738, federal courts are not to give state court judgments preclusive effect if the state proceedings fail to comport with minimum due process standards.[204] As the *Kremer* Court stated, however, "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause."[205]

Practically speaking, the minimum due process standard is a low threshold to meet.[206] The state preclusion requirement that litigants have the incentive and fair opportunity to litigate the issues fully in the first proceeding will generally guarantee complainants a meaningful opportunity to litigate at least to the same degree as the due process requirement would. Thus, where state procedures are so deficient as to raise due process concerns, the state itself will probably not give the judgment preclusive effect.[207]

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203. In those states where the state's highest court and the federal district court hold that state courts have concurrent jurisdiction over Title VII, a state judgment would preclude all those matters that could have been raised under Title VII and which arose out of the same transaction from which the state law claim arose. It would be irrelevant for preclusion purposes that the federal rights under Title VII may be broader than those under state law. Yet, in jurisdictions where the federal courts have not recognized that state courts have concurrent jurisdiction over Title VII matters, the state judgment would not have preclusive effect with respect to those matters unique to Title VII and which were not litigated in state court. Thus, the preclusive effect of a state judgment with respect to Title VII depends not only on the state's law of preclusion but also on the nature of the federal court's jurisdiction over the Title VII claim.

This is not to say that a state judgment will have no preclusive effect if it is determined that federal courts have exclusive jurisdiction. To the extent that rights under state law are identical to or as broad as those under Title VII, the failure to raise those rights in state court may preclude the complainant from doing so in a subsequent action.

204. *Kremer*, 456 U.S. at 481. ("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").

205. *Id.*

206. Only when the state procedures are "fundamentally flawed" can a state judgment be denied recognition under § 1738. *Id.*

207. For example, under the procedures of some local FEP agencies in Nebraska, discrimination charges can be resolved even though the employee is not a party to the adjudicatory hearing. It is questionable whether such procedures satisfy minimum due process. However, since the state itself does not accord preclusive effect to state court affirmances of such decisions, the issue of minimum due process need not be addressed. *See* Willborn, *supra* note 125, at 723 n.128.

Nevertheless, the federal court should determine independently whether minimum due process was afforded complainant on the state level. It is doubtful that state court proceedings will be constitutionally deficient in this regard. As for FEP agencies, most permit complainant the opportunity to appear before the agency, be represented by counsel, present evidence and cross-examine witnesses.[208] Most, then, will satisfy minimum due process.

Furthermore, it is not essential that the complainant actually avail himself of the procedural safeguards afforded by the state; they need only have been available to him.[209] Thus, an administrative finding of no probable cause based only on an informal hearing is sufficient under the *Kremer* decision.[210] Even where the agency determination results from an informal hearing based on unsworn testimony, without benefit of cross-examination, or subpoenaed production of relevant documents, an affirmance by the court has been treated as the equivalent of a summary judgment and, as such, on the merits for preclusion purposes.[211] Thus, it will be the

208. Most states provide for investigation of the charge similar to that conducted by the EEOC and full scale evidentiary hearings before the state FEP agency. *E.g.*, CAL. GOV'T CODE §§ 12963, 12967-69 (West Supp. 1984); FLA. STAT. ANN. § 23,166 (West 1981); ILL. REV. STAT. ch. 68, ¶¶7-102(c), 8-106 (1983); N.Y. EXEC. LAWS §§ 294, 297 (McKinney & Supp. 1983). Some FEP agencies have discovery comparable to that permitted in a civil action, e.g., CAL. GOV'T CODE §§ 12930, 12963 (West Supp. 1984). Others are more limited, e.g., MICH. COMP. LAWS ANN. § 3.548 (602) (1982) (interrogatories, right to request documents); Rules Fla. Comm'n on Human Relations, § 22T-8.19, 3 EMPL. PRAC. GUIDE (CCH) § 21,829.19 (1981) (discovery availability may be limited by hearing officer); Ill. Human Rts. Comm'n Rules & Practice & Procedure § 7, 3 EMPL. PRAC. GUIDE (CCH) § 22,475.07 (1981) (interrogatories and document requests permitted, but limitation on access to depositions).

Although most FEP agencies have provisions for discovery, non-FEP agencies may not. In this regard, it is significant that the Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974), stated that absence of discovery was one factor in not giving preclusive effect to arbitration proceedings in a subsequent Title VII action. *See also* McDonald v. City of West Branch, 104 S. Ct. 1779 (1984).

209. *Kremer*, 456 U.S. at 485 (a party's "fail[ure] to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy").

210. Kremer himself had only informal hearings before the NYHRD. For a pre-*Kremer* view that giving state determinations based on informal hearings preclusive effect in Title VII actions is contrary to congressional intent, see Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485 (1981) (preclusive effect should be given to both state administrative and state judicial determinations as long as they were based on a full adjudication of the merits). Of course, the *Kremer* Court declined to make a distinction between informal and full adjudicatory hearings. The distinction the Court drew for preclusion purposes was between unreviewed and reviewed administrative determinations.

211. Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977). It has been suggested that because of limited resources and a pressing case load, some state and local agencies may make no probable cause determinations for institutional reasons unrelated to the merits of the case. *See generally* Jackson, Matheson & Piskorski, *supra* note 207, at

rare case where the minimum due process standard will be invoked successfully to bar application of state preclusion principles.

Nevertheless, if due regard is paid to the proper application of state preclusion principles, the *Kremer* decision can be applied without infringing upon the substantive and procedural rights afforded under Title VII. The complainant is free to exhaust state administrative remedies, and, in the event he loses, still resort to the full panoply of Title VII's procedural and substantive rights. Of course, if he unsuccessfully appeals an adverse administrative determination, a final state court judgment on the merits will have preclusive effect with respect to legal or factual issues that were necessarily decided or which could have been raised before the state proceedings. Yet, to the extent that Title VII substantive rights were not and could not have been resolved in state court proceedings, those rights may still be adjudicated in the manner set forth in Title VII. The only serious infringement to Title VII's scheme would occur if the complainant were forced to have a state reviewing court hear his discrimination claim, and if he thereby lost his right to a de novo judicial adjudication of his Title VII rights. It is that situation this article addresses next.

D. Did the Employee Seek State Judicial Review of the Agency Determination?

Kremer appealed the state FEP agency's determination of no probable cause to the state judiciary. Having invoked state court review and lost, he was deprived of a trial de novo on his Title VII claim. The clear message of *Kremer*, then, is that a litigant who wishes to preserve his right to a trial de novo on his federal claim should not appeal an adverse state administrative determination.[212] Suppose, however, that the plaintiff in our Title VII action had prevailed on the state administrative level but, upon the employer's appeal, the agency's determination was reversed by the state court. Should the complainant who did not seek state judicial redress be bound by the prior state judgment? Or should preclusion apply only if he freely submitted his claim to state court?[213] Once again,

1519 n.198; Willborn, *supra* note 125, at 258-59 n.222; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims*, 60 VA. L. REV. 250, 300 (1974).

212. *Kremer*, 456 U.S. at 470 n.8 (Blackmun, J., dissenting).

213. The Second Circuit, which had given preclusive effect to state court judgments on review prior to the *Kremer* decision, had suggested that only charging parties who voluntarily sought review would be bound. Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir. 1979) ("The crucial factor is that appellant chose to submit her [employment dis-

the preclusive effect to be given the state determination depends, at the outset, on state law. If the state would make such a distinction, the federal court's inquiry ends; it should likewise deny the state judgment preclusive effect. If the state would not make the distinction, the federal court must then decide whether Congress intended to modify what would otherwise be the mandate of section 1738.[214]

While the circuits addressing the issue have applied the *Kremer* rationale regardless of which party sought judicial review,[215] such an application is inconsistent with Title VII's procedural scheme and is not warranted by the *Kremer* decision. It is one thing to deprive complainant of his statutory right of trial de novo when he affirmatively seeks limited court review, as was the case in *Kremer*, but it is quite another thing to so deprive him of his option to resort to Title VII's enforcement scheme when he is involuntarily brought before the state court. Simply stated, application of *Kremer* to a non-appealling employee would dilute the procedural rights Congress specifically provided for in Title VII.

In this regard, one cannot over-emphasize the fact that Congress accorded complainants a statutory right to a trial de novo of their Title VII claims.[216] Indeed, in 1972, it had been proposed that the EEOC act as the primary factfinder in the adjudication of discrimination charges, subject only to appellate review by the federal courts. This view was rejected in favor of giving the federal courts the plenary power to enforce Title VII's substantive rights.[217] Thus, where conciliation attempts of the agency fail, the courts were deemed to be the more impartial and expeditious forum to

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crimination] case to the state courts for review and she cannot now relitigate the same issues in federal court."). *Id.* at 62; *see also* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

214. Justice Blackmun in his *Kremer* dissent suggested that where the agency decision is favorable to the employee and reversed on appeal, it would be inimical to Title VII to give the judgment preclusive effect. 456 U.S. at 475 n.17. The majority expressed no view on the question.

215. Hickman v. Electronic Keyboarding, Inc., 35 Fair Empl. Prac. Cas. (BNA) 1281 (8th Cir. 1984); Gonsalves v. Alpine Country Club, 727 F.2d 27 (1st Cir. 1984); Unger v. Consolidated Foods Corp., 693 F.2d 703, 710 n. 11 (7th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983) (dictum); Davis v. United States Steel Supply, 688 F.2d 166, 176 n.12 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983) (in § 1981 actions, mandate of § 1738 applies against party who did not seek court review; court specifically did not address question in context of Title VII); Capers v. Long Island RR, 31 Fair Empl. Prac. Cas. (BNA) 668 (S.D.N.Y. 1983).

216. Chandler v. Roudebush, 425 U.S. 840, 844-45 (1976); Alexander v. Gardner-Denver, 415 U.S. 36, 38 (1974).

217. *Chandler*, 425 U.S. at 853-54; *Alexander*, 415 U.S. at 45.

resolve the discrimination charge.[218]

Prior to *Kremer*, the Court consistently gave effect to Congress's preference for a full judicial determination. Given Title VII's procedural scheme, the Supreme Court held that a complainant could press his discrimination charge in other forums without limiting his right to a de novo trial under Title VII. Thus, an adverse determination by other forums would not preclude complainant from seeking redress in federal court.

The guaranteed right of a de novo judicial determination under Title VII was forcefully expressed in *Alexander v. Denver-Gardner Co.*[219] There, an arbitral finding of no discrimination was held not to bar a de novo determination of one's Title VII right. In the Court's view,

> the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.[220]

Also, in terms of the adjudicatory process itself, the Court recognized that the procedural incidents of a civil action, such as formal evidentiary rules, had advantages over more informal procedures.[221]

Similarly, in *McDonnell Douglas Corp. v. Green*,[222] the Court made it clear that a finding of no reasonable cause by the EEOC did not bar resort to one's judicial remedies. Even though the EEOC might have particular expertise in the area, the complainant's right to a trial de novo was preserved.[223] In *Chandler v. Roudebush*,[224] the Court held that public employees had a right to a trial de novo notwithstanding an adverse determination by the

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218. *See Chandler*, 425 U.S. at 851. As Senator Dominick, the chief proponent of giving final resolution of disputes to the federal courts, stated:

> Determination of employment civil rights deserves and requires non-partisan judgment. This judgment is best afforded by Federal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection and supported by historical judicial independence.

1972 LEGISLATIVE HISTORY, *supra* note 19, at 493; *see also* remarks of Senator Dominick, *id.* at 495, 1442-53 (federal courts can adjudicate civil rights claims more expeditiously than the EEOC).

219. 415 U.S. 36 (1974).

220. *Id.* at 57.

221. *Id.* at 57-58.

222. 411 U.S. 792 (1973).

223. *Id.* at 807.

224. 425 U.S. 840 (1970).

United States Civil Service Commission. Thus, neither an adverse arbitral decision nor an adverse administrative determination by a federal agency affected the procedural scheme Congress devised.

Included in this list by *Kremer*, as well as by earlier Court decisions, were adverse state administrative determinations. Of course, *Kremer* did hold that state judicial affirmance of an adverse administrative determination bars a trial de novo under Title VII. Thus, by appealing an adverse administrative decision, the employee, in effect, loses his statutory right to a trial de novo. The question after *Kremer*, though, is whether any state judgment, regardless of which party sought review, strips the complainant of this statutory right. Disregarding the line of cases before *Kremer*, lower federal courts view the decision as rejecting the position that complainants have the right to opt for a trial de novo.[225] Accordingly, they have applied the *Kremer* rationale even when the employee did not seek state court review.[226]

To apply preclusion against the non-appealing employee may be consistent with the view that preclusion applies to plaintiffs and defendants equally.[227] In addition, a state court that reverses an agency determination probably scrutinizes more closely the merits of the case than an affirmance of a finding of no discrimination. For when the court reverses the agency determination, it is saying that on review of the entire record there is no substantial evidence to support a finding of discrimination. Thus, the court in effect is rendering an independent judgment that the claim is meritless rather than deferring to the agency's judgment.[228] Notwithstand-

225. *See* cases cited *supra* note 215.

226. *Id.*

227. *See generally* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 333 (1978); RESTATEMENT (SECOND) OF JUDGMENTS § 22 comment a (1982); C. WRIGHT & A. MILLER, *supra* note 9, at § 4447.

To apply *Kremer* to a non-appealing complainant also appears to be consistent with the current Court's view that parties do not have an unencumbered right to a federal forum for the vindication of their federal rights. As stated in Allen v. McCurry, 449 U.S. 90, 104 (1980): "There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." Yet, although the party precluded in *Allen* was a defendant on the state level, he raised the fourth amendment issue in state court. More importantly, he had a full judicial adjudication of the issue.

228. In addition, one can only speculate as to whether application of *Kremer* to a non-appealing employee will reduce exhaustion of state administrative remedies, and thereby undermine Congress's intent to give states the opportunity to resolve discrimination claims. Where the state agency has a reputation of being sympathetic to such claims, a potential Title VII complainant might not avoid state administrative remedies for fear that if it prevails on the administrative level, the defendant may force him into state court

ing these arguments, however, *Kremer* should be limited to cases where the employee voluntarily entered the state court system. This position derives from several factors.

First, Title VII, even as interpreted by *Kremer*, recognizes complainant's right to exhaust state administrative remedies without sacrificing his right to a federal trial de novo. Even if the state gives preclusive effect to administrative determinations, the scheme of Title VII indicates that Congress did not intend section 1738 to be applicable. Lower federal courts, in the wake of *Kremer*, have permitted a trial de novo on one's Title VII claim where the complainant lost at the administrative level, but failed to appeal.[229] One might question why the complainant should be in a worse position if he has prevailed at the state administrative level. If he has the option of a judicial adjudication, should he not be able to exercise that option regardless of the posture he finds himself in at the conclusion of administrative hearings?

If Title VII guarantees one bite of the judicial apple, be it state or federal, it would be violative of Title VII's scheme to apply preclusion when the complainant did not affirmatively seek judicial review, but was forced into state court. Indeed, such a policy would encourage an employer who lost on his state claim to appeal to state court with the hope of foreclosing a Title VII action. Simply stated, to apply preclusion principles against a complainant who did not seek review would vitiate congressional intent to permit exhaustion of state administrative remedies without jeopardizing one's right to a federal fact-finding forum.

In addition, the more recent decision of *Migra v. Warren City School District*,[230] suggests that only the party seeking court review should be bound by the state judgment. Specifically, in *Migra*, Justice Blackmun drew a distinction between applying preclusion against a party who had been in an offensive position in state court and applying it against a party who had been in a defensive

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on review. Justice Blackmun was concerned that fear of state court reversal might have just this effect. *Kremer*, 456 U.S. at 504 n.18. Even if the employee is not deterred from exhausting his administrative remedies, the argument itself misses the point for *Kremer* recognizes that all complainants can freely exhaust their state administrative remedies and still resort to any of the rights accorded them in Title VII.

229. Jones v. Progress Lighting Corp., 36 Fair Empl. Prac. Cas. (BNA) 25 (E.D. Pa. 1984); Snow v. Dep't of Prisons, 543 F. Supp. 752 (D. Nev. 1982); Weise v. Syracuse, 553 F. Supp. 675 (N.D.N.Y. 1982). *Contra* O'Hara v. Board of Educ., 36 Empl. Prac. Dec. (CCH) ¶ 34,942 (D.N.J. June 27, 1984); Buckhalter v. Pepsi-Cola Gen. Bottlers, 35 Fair Empl. Prac. Cas. (BNA) 881 (N.D. Ill. 1984).

230. 104 S. Ct. 892 (1984).

position.[231]

When her contract for employment was not renewed, the plaintiff in *Migra* commenced a state civil action for breach of contract and wrongful interference with her contract rights. She prevailed on the state court level and was awarded reinstatement and compensatory damages. Thereafter, she commenced a federal action alleging, in part, claims under sections 1983 and 1985. The thrust of her federal action was that her contract had not been renewed to punish her for the exercise of her first amendment rights. Since the plaintiff could have raised the federal claims in state court, the mandate of section 1738 precluded her from doing so in federal court. As Justice Blackmun observed, plaintiff could have brought a federal action initially, rather than going to state court as she chose to do.[232] She did not have the right to proceed in state court, and then turn to federal court for the adjudication of her federal claims.

Yet, Title VII, in contrast to many other legislative schemes, requires deferral to state FEP agencies as a condition to pursuing one's right in the federal system. Accordingly, the complainant cannot be said to submit his claim freely to state administrative proceedings. Of course, the complainant is not required to exhaust his state administrative remedies. The critical question, though, should be whether the employee freely submitted his claim to state court, not whether he voluntarily submitted it to the administrative agency.[233]

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231. *Id.* at 898 n.7.

232. *Id.*

233. *See* Montana v. United States, 440 U.S. 147, 165 (1979) (preclusion may be inappropriate when the claimant did not freely and without reservation submit his federal claims for decision by the state courts . . . and have them decided there") (quoting England v. Medical Examiners, 375 U.S. 411, 419 (1964)). Although it has been suggested that *Kremer* impliedly rejected any distinction between those claimants who voluntarily sought state court consideration and those who did not, see Hickman v. Electronic Keyboarding, Inc., 35 Fair Empl. Prac. Cas. (BNA) 1281 (8th Cir. 1984), the Court has more recently cited the *Montana* language with approval in *Haring*, 103 S. Ct. at 2373 n.7 (1983). *But see* Gonsalves v. Alpine Country Club, 727 F.2d 27, 29 (1st Cir. 1984) ("When [complainants] elected to proceed with their complaint filed with the [Rhode Island Commission on Human Rights] they set into motion a chain of events which they knew or should have known would in all probability lead to a subsequent state court appeal by the unsuccessful party. What is more, they were under no legal compulsion to press their RICHR complaint to a conclusion. . . . To that extent, they were in a very real sense the master of their own destiny at the state level. But once they made their election to proceed apace at that level, they are barred from thereafter proceeding in federal court on the same claim."). The irony in the position expressed by the *Gonsalves* court is that it views the administrative and judicial proceedings as one unit; that is, if complainant invokes his administrative remedies he is deemed to invoke his state judicial

Finally, *Kremer* itself is consistent with this approach. Kremer filed his charge with the EEOC which deferred it to the New York Division of Human Rights pursuant to Title VII's deferral scheme. It was no defense to preclusion that he was compelled to go to the state agency. Title VII, though, does not require exhaustion of state administrative remedies, only initial resort to such remedies. By choosing to exhaust his state administrative remedies, Kremer freely chose to submit his state discrimination claim to state administrative proceedings.[234] Under the state's statutory election of remedy provision, Kremer was thus precluded from a de novo judicial adjudication of his state discrimination claim.[235] Yet, up to the point of exhausting his state administrative remedies, he had not sacrificed a de novo adjudication of his Title VII claim.[236] It was only the appeal to state court that triggered preclusion with respect to Kremer's Title VII rights.

As the *Kremer* court stated, no provision of Title VII requires claimants to pursue in state court an unfavorable administrative decision.[237] Having done so, however, Kremer could not complain of the preclusive effect the state judgment might have. Accordingly, if complainant does not affirmatively seek review, the *Kremer* holding is not applicable. Otherwise, the right to bypass state judicial review would be meaningless. Congress did not intend deferral to state agencies to foreclose directly or *indirectly* an individual claimant's right to a de novo adjudication of one's Title VII claim.[238] Accordingly, the federal court should reject the employer's preclusion defense when the employee did not affirmatively seek state judicial review, even though the state of rendition would give the judgment preclusive effect.

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remedies as well. Yet, the rationale of the *Kremer* majority viewed the two proceedings as distinct units.

234. There might be some question whether Kremer actually had a real choice since, under New York law, once one opts for administrative redress, one is foreclosed from seeking direct judicial redress. Thus, failure to exhaust his administrative remedies would have amounted to abandonment of this state claim. In view of Congress's intent to encourage states to combat employment discrimination, it is doubtful that it intended to force complainants to abandon state administrative proceedings in order to protect their rights under Title VII.

235. Under New York's fair employment practices statute, a person has the right to seek direct judicial redress. Resorting to administrative remedies, however, constitutes an election of remedies precluding de novo adjudication. N.Y. EXEC. LAW § 297(9) (McKinney 1982).

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

237. *Id.* at 469.

238. *See* Davis v. United States Steel Supply, 688 F.2d 166, 188-89 (1982), *cert. denied*, 460 U.S. 1014 (1983) (Gibbons, J., dissenting).

V. RECONCILIATION OF TITLE VII AND *KREMER*

Using the framework discussed above, the potential Title VII litigant is guaranteed a right to a trial de novo of his Title VII rights if the federal courts in a Title VII action (1) carefully limit the preclusive effect of a prior judicial determination only to those Title VII matters that actually were or could have been litigated in the prior state court proceeding, and (2) limit the *Kremer* rationale to employees who seek state judicial review of unfavorable administrative determinations. In effect, this approach guarantees complainants the opportunity to opt for a judicial determination of their substantive rights under Title VII as Congress provided in the statute.

In those states where the administrative agency is the primary adjudicatory authority for state discrimination claims,[239] the complainant must make certain sacrifices to exercise this option. The complainant who loses at the conclusion of state administrative proceedings has to choose between (1) appealing within the state system and thereby triggering application of *Kremer*, or (2) abandoning his state statutory claim and proceeding with his Title VII remedies. Abandonment of one's state FEP claim may mean sacrificing a potential recovery greater than that afforded under Title VII. Yet, in states that have a deferential standard of review, the possibility of a reversal on one's state claim is not great. Thus, the complainant would not be sacrificing that much in exchange for a guaranteed de novo judicial determination of his Title VII claim. In addition, to hold him to such a choice would be consistent with the *Kremer* rationale that a complainant is entitled to only one judicial determination of his discrimination claim.[240]

In those few states that review agency determinations de novo,[241] the complainant's right to a full judicial adjudication of his discrimination claim is not so encumbered. He can proceed to state court after an unfavorable agency determination and, taking advantage of state judicial procedures, obtain a de novo determination of his rights under state law. On the other hand, if he prefers

239. *E.g.*, GA. CODE §§ 45-19-36 to -39; (Michie Supp. 1984); Ill. Human Rts. Act, ch. 68 § 8-111(D); ILL. ANN. STAT. ch. 68, ¶¶ 1-101, 7-102, 8-103, 107, 111 (Smith-Hurd Supp. 1984); OHIO REV. CODE ANN. §§ 4112.03-.06 (Page 1973).

240. Moreover, although the complainant may have to abandon his state FEP claims he may still assert state common law claims. Since those claims probably could not have been raised before the FEP agency, they would not be precluded under state preclusion principles.

241. *E.g.*, MICH. COMP. LAWS ANN. § 37.2606 (West Supp. 1984); MICH. STAT. ANN. § 3.548(606)(1) (Callaghan 1984).

the procedural incidents of the federal system, he can resort to Title VII's procedural scheme and substantive protection. Moreover, he may be able to join his state claims in federal court under the doctrine of pendent jurisdiction.[242] If he remains in the state system, however, the state court judgment will have preclusive effect as discussed in this article.

Where complainant is entitled to direct judicial redress on his state discrimination claim,[243] *Kremer* has limited effect on his right to a full judicial determination of his discrimination claim. Assuming that state courts have concurrent jurisdiction over Title VII, all federal and state theories of relief can be joined in state court. Even if federal courts have exclusive jurisdiction, complainant may be able to join all his related state claims in federal court. In this way, both the goals of conservation of resources and full judicial adjudication of discrimination claims are served. At worst, the complainant may have to commence separate state and federal actions; and unless the parties otherwise agree,[244] whichever action results in a judgment first will have preclusive effect.[245] The complainant still will have been guaranteed one full judicial adjudication of his claim. He should not be heard to complain that he did not have successive state and federal de novo judicial proceedings.

Implemented this way, *Kremer* does not undermine Title VII. After exhaustion of state administrative remedies, a complainant can still avail himself of Title VII's procedural scheme wherein the federal courts can ensure the level of substantive protection Congress intended. At the same time, defendant is not subjected to more than one judicial proceeding on the same claims.

Thus, even where state administrative proceedings are not as meaningful as those afforded in federal court, as long as the employee does not seek state review, these limitations will not adversely affect his substantive rights under Title VII nor the interplay of federal administrative and judicial forums. He still has his right to a de novo federal trial on his Title VII claim. Any state administrative inadequacies will only lessen enforcement of state

242. *See supra* notes 200-02 and accompanying text; Catania, *supra* note 200, at 831-32.

243. N.J. STAT. ANN. § 10:5-13 (West Supp. 1984); N.Y. EXEC. LAW § 297 (McKinney 1982); 43 PA. CONS. STAT. ANN. § 962(c) (Purdon Supp. 1984).

244. Parties may agree that a state judgment will not have preclusive effect in a subsequent proceeding. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a) comment a (1982). Presumably under the mandate of § 1738, if the state recognizes the validity of such stipulations, the federal court should as well. RESTATEMENT (SECOND) OF JUDGMENTS § 86 comment f, illustration 7 (1982).

245. RESTATEMENT (SECOND) OF JUDGMENTS § 14 (1982).

fair employment laws. Such an impact may be less than desirable and at odds with Congress's general commitment to encourage the states to eradicate discrimination in the workplace. In substantive terms, however, Congress sets its threshold of protection in Title VII, and as long as the enforcement of those rights are not diluted the basic remedial purpose of Title VII is served.

VI. CONCLUSION

Prior to *Kremer*, it was clear that an employee had a right to a de novo judicial determination of his Title VII rights. After *Kremer*, the employee still has the right to exercise that option as long as he does not appeal an adverse state administrative determination of his discrimination claim. Thus limited to state court *affirmances* of adverse agency determinations, *Kremer* strikes a proper balance between the employee's right to a full adjudication of his Title VII claim, and the employer's right to be protected from successive civil actions. Only if *Kremer* is extended to an employee whose favorable administrative finding is reversed on employer's appeal will the employee lose this important option. Given Congress's intent as expressed in Title VII's procedural scheme, such an extension, however, is unwarranted.