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*Kremer v. Chemical Construction Corp.:* Federal-State Comity in Employment Discrimination

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 broadly prohibits discrimination in employment practices and establishes administrative and judicial procedures for employment claim adjudication. Senate and House members who drafted Title VII were aware that many states had existing statutes which similarly prohibited employment discrimination and which provided for claim adjudication procedures. In enacting Title VII, Congress made clear its intention not to supplant those state systems. Congress made it equally clear, however, that federal courts need not accord res judicata or collateral estoppel effect to decisions reached by state administrative agencies. Thus, traditional preclusion principles as embodied in federal case law and statutes
do not prevent a federal court from addressing issues already decided by a state agency.

The preclusive effect of state judicial resolutions of employment discrimination claims upon subsequent Title VII actions was not decided until 1982, in *Kremer v. Chemical Construction Corp.* In this case, the U.S. Supreme Court addressed a situation in which an equal employment litigant first brought his claim to a state agency and then, after having his claim dismissed by that agency, appealed to the state’s appellate court. The appellate court limited its review to a determination of whether the state agency abused its discretion in dismissing the claim. The Court held that 28 U.S.C. § 1738 and the principles of federal-state comity which it embodies required the federal courts to accord full faith and credit to the state appellate court’s decision because that decision had res judicata effect in the state’s own courts. The petitioner in *Kremer* contended that Title VII provided an exception to section 1738 which required that federal courts grant no preclusive effect to outcomes under state judicial proceedings. The Supreme Court rejected this argument, stating that Title VII’s exception to section 1738 extends only to state administrative agency decisions.

The *Kremer* decision has had a direct impact on the manner in which equal employment claims are now being resolved. Specifi-

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Title VII provides, however, that an equal employment litigant who initially brings proceedings with a state or local agency with authority to grant appropriate relief is allowed to bring a Title VII action within three hundred days of the alleged violation or within thirty days of notification of the termination of state proceedings, whichever is earlier. 42 U.S.C. § 2000e-5(e) (1976).


9. *Id.* at 466. Section 1738 provides that:

The records and judicial proceedings of any court of any State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.


Recent cases exemplify the Court’s adamance in adhering to the principles of comity embodied in § 1738. See *Allen v. McCurry*, 449 U.S. 90 (1980) (Court held that 42 U.S.C. § 1983 did not provide an exception to § 1738); *Montana v. United States*, 440 U.S. 147 (1979) (plaintiff, United States, collaterally estopped from challenging prior judgment of state supreme court because it exercised sufficient control over the state court litigation and because to further litigate in federal court would be to redetermine issues previously resolved).

10. 456 U.S. at 476.

11. *Id.*
cally, prior to *Kremer*, three circuits did not afford preclusive effect in similar situations.\(^\text{12}\) *Kremer*'s narrow holding now requires that full faith and credit be afforded in these circumstances.\(^\text{13}\) Furthermore, when the holding of *Kremer* is applied in different factual contexts, there may be a danger to federal-state comity that the *Kremer* Court perhaps did not anticipate. In *Davis v. United States Steel Supply*,\(^\text{14}\) for example, the Third Circuit, relying on *Kremer*, allowed an equal employment plaintiff who was victorious at the state agency level to be forced by an appellant-defendant to pursue his state remedies to the exclusion of his federal remedies.\(^\text{15}\) The *Davis* decision thus may make it attractive for such plaintiffs to circumvent the state remedies altogether.

This note examines the Court's resolution of the issues in *Kremer* and explores the decision's future impact. The majority opinion's application of modern claim preclusion principles in the context of Title VII is first examined. This note then addresses the possible exception that Title VII provides to the full faith and credit requirements of 28 U.S.C. § 1738. Finally, the policy considerations inherent in the principles of federal-state comity that underlies the Court's decision are discussed. This note concludes that the *Kremer* decision, as interpreted by lower courts, may actually adversely affect these interests.

\(^{12}\) Smouse v. General Elec. Co., 626 F.2d 333 (3d Cir. 1980) (decision in class action brought before state agency and affirmed by state Supreme Court did not preclude subsequent Title VII action); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1975) (Iowa Supreme Court's finding that a bona fide occupational qualification excluding females from obtaining particular jobs at state reformatory for men existed was not res judicata in subsequent Title VII action); Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974) (application of § 1738 in Title VII context rejected even though plaintiff had continued proceedings at the state level beyond the sixty day requirement of 42 U.S.C. § 2000e-5(2) and had litigated certain issues in a state court because of defendant's appeal to that court).


\(^{14}\) 688 F.2d 166 (3d Cir. 1982).

\(^{15}\) *Id.* at 168-69, 176 n.12. See also infra notes 190-205 and accompanying text.
BACKGROUND

Res Judicata

The Constitution provides that each state shall accord "full faith and credit" to the judicial proceedings of every other state.\textsuperscript{16} 28 U.S.C. section 1738 extends this principle by directing the federal courts to accord preclusive effect to state judicial proceedings.\textsuperscript{17} In enforcing this statutory provision, courts have been guided by traditional principles of res judicata and collateral estoppel in determining whether it is appropriate to accord preclusive effect to a previous decision.\textsuperscript{18} Generally, if the same cause of action has previously been raised or if the identical issue has already been litigated in a prior action, application of section 1738 will be appropriate.\textsuperscript{19}

The federal judiciary’s consistent adherence to section 1738 is rooted in a desire to preserve federal-state comity and to promote judicial efficiency.\textsuperscript{20} That application of preclusion doctrines in appropriate circumstances will conserve judicial resources is readily apparent. The preservation of federal-state comity, however, is a more complicated matter. Preservation of comity has long been viewed as necessary to the health of the Union; despite its abstract nature, it is a concept that has guided the application of the doctrine of federal abstention\textsuperscript{21} as well as the enforcement of section 1738.\textsuperscript{22} Of course, in the section 1738 context, the

\begin{footnotesize}
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\item \textsuperscript{16} U.S. CONST. art. IV, § 1.
\item \textsuperscript{17} See supra note 9. Congress enacted the predecessor of 28 U.S.C. § 1738 almost immediately after the adoption of the Constitution (Act of May 26, 1790, ch.11, 1 Stat.122).
\item \textsuperscript{18} See supra notes 5-6.
\item \textsuperscript{19} Id.
\item \textsuperscript{21} The abstention doctrine was judicially created in the case of \textit{Railroad Comm'n of Texas v. Pullman Co.}, 312 U.S. 496 (1941). The \textit{Pullman} Court held that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay proceedings to provide the state courts a chance to settle the state law question. The federal courts’ abstention avoids the possibility of unnecessarily deciding a constitutional question. The Supreme Court, however, has indicated that the doctrine should not be applied if doing so would permanently deprive the litigant of federal rights. Harris County Comm’rs Court v. Moore, 420 U.S. 77, 83 (1975); Zwicker v. Koota, 389 U.S. 241, 248 (1967).
\end{enumerate}
\end{footnotesize}
statute mandates federal deference, but principles of comity guide the enforcement of the statute if its applicability to a given case is uncertain.

Judicial comity has been defined as the principle in accordance with which the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation, but out of deference and respect. Justice Black, in a now-famous passage, emphasized that comity involves a "proper" respect for state functions and a recognition that the national government will function more effectively if the states perform their functions in their own ways. In the section 1738 context, Justice Black's principle of according a "proper" respect to state functions may mean that a moderate, sensible approach should be taken when deciding whether principles of comity mandate the application of section 1738 in uncertain cases.

While section 1738 governs the preclusive effect that a federal court should give to a state court in most circumstances, it is possible that later-enacted federal statutes may provide an exception to section 1738 in special situations. The Supreme Court has emphasized, however, that section 1738 will control unless the subsequent statute evinces a clear Congressional intention to leave section 1738 inoperative in the particular situation. Although repeals by implication have not been favored, the Court has acknowledged that an implied exception will be recognized to the extent that the later statute and section 1738 irreconcilably conflict and Congress's intention to leave section 1738 inoperative is "clear and manifest."

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25. This conclusion is inferred from Justice Black's statement that "the concept does not mean blind deference to 'States Rights' any more than it means centralization of control over every important issue in our National Government and its courts." Id. at 44.
27. In Allen v. McCurry the Court specifically held that a later-enacted statute must expressly or implicitly repeal § 1738 to be in order for § 1738 to be inoperative in a given case. Id.
28. In Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976), the Court held that the
Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 to assure equal employment opportunities by making it unlawful for employers to discriminate on the basis of race, color, religion, sex, or national origin.\(^29\) Congress preferred that cooperation and voluntary compliance be the means to achieve this goal.\(^30\) To that end, it created the Equal Employment Opportunity Commission ("EEOC"), establishing a framework within which existing state and local employment discrimination agencies and the EEOC would have an opportunity to settle disputes before the aggrieved party was permitted to file a lawsuit.\(^31\)

Under the 1964 Act, the EEOC's powers were limited to facilitating appearances of witnesses, coordinating efforts with state and local agencies, providing technical legal services, and referring matters to the Attorney General with recommendations to institute or to intervene in civil proceedings.\(^32\) These powers were expanded in 1972 when Congress amended Title VII to give the EEOC further authority to perform investigations of discrimination charges, to promote voluntary compliance with Title VII, and to bring civil actions against violators of Title VII requirements.\(^33\)

The EEOC, however, does not have any direct powers of enforcement. If disputes under Title VII cannot be resolved through agreement of the parties, any further action must take place in federal court.\(^34\) If the Commission finds reasonable cause that a violation has occurred, it may bring an action against the
employer.\textsuperscript{35} In the absence of such reasonable cause, the Commission will not bring an action but must instead notify the individual that he or she may bring a federal action.\textsuperscript{36} Title VII authorizes federal courts to enjoin violations and to order appropriate affirmative action to remedy the effects of unlawful employment practices.\textsuperscript{37}

In addition to lacking direct enforcement power, the EEOC is not authorized to consider the merits of charges brought before it if a state agency has jurisdiction over employment discrimination complaints and that agency has not had at least sixty days to resolve the matter.\textsuperscript{38} Any attempt within the state to resolve the dispute is referred to generally by Title VII as "state proceedings."\textsuperscript{39} Prior to the Kremer decision, the Supreme Court indicated that the word "proceeding" in Title VII was used to refer to all the different types of proceedings in which employment discrimination claims are heard, that is, state and federal, administrative and judicial.\textsuperscript{40} Under a 1972 amendment, Title VII directs the EEOC to accord "substantial weight" to outcomes under state proceedings when determining whether a charge is supported by reasonable cause.\textsuperscript{41}

Because litigants are allowed to bring federal actions after the termination of proceedings before state administrative bodies under specific provisions of Title VII,\textsuperscript{42} it is clear that final decisions of these administrative bodies are not entitled to preclusive effect under section 1738.\textsuperscript{43} Whether state judicial review proceedings that are deferential to the agency proceedings deserve preclusive effect was the issue before the Kremer Court.

\textsuperscript{36} 42 U.S.C. § 2000e-5(b) (1976). See \textit{supra} note 7. The administrative prerequisite to bringing an action are different for an individual than those for the EEOC.
\textsuperscript{37} 42 U.S.C. § 2000e-5(g) (1976). An individual's right to sue is, of course, supplemental to other rights he or she may have. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), for example, the Supreme Court held that the doctrine of election of remedies did not preclude a plaintiff who had received an adverse ruling in an employment discrimination arbitration hearing from suing his employer under Title VII. \textit{Id.} at 59-60.
\textsuperscript{40} New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 62-63 (1980).
\textsuperscript{43} See \textit{supra} note 7 and accompanying text.
KREMER V. CHEMICAL CONSTRUCTION

Factual Context

Complainant Rubin Kremer filed a charge with the Equal Employment Opportunity Commission alleging that his employer had discharged and subsequently failed to rehire him because of his national origin and Jewish faith. 44 Under federal law, the EEOC could not consider the claim until the state agency having jurisdiction over employment discrimination in New York had at least sixty days to resolve the matter. 45 Accordingly, the Commission referred the complaint to the New York State Division of Human Rights ("NYHRD"), the agency charged with enforcing the New York employment discrimination statute. 46 After an investigation, the NYHRD ruled that there was no probable cause to believe that Kremer's employer had engaged in the alleged discriminatory practices. 47 The state agency based its ruling on the finding that neither Kremer's creed nor his age was a factor in the employer's failure to rehire him. 48 The NYHRD's ruling was upheld by its appeals board as "not arbitrary, capricious, or an abuse of discretion." 49

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44. Kremer was one of many employees included in a general layoff. His claim focused on his employer's failure to rehire him. 456 U.S. 461, 463 (1982).
45. See supra text accompanying note 38.
46. The section empowering the NYHRD to review claims arising under New York's employment discrimination statute states, in relevant part:
   The [Human Rights] division, by and through the commissioner or his duly authorized office or employee, shall have the following functions, powers and duties . . . [t]o receive, investigate and pass upon complaints alleging violations of this article . . .
   N.Y. EXEC. LAw § 295-6(a) (McKinney 1982).
47. 456 U.S. at 464.
48. Two facts supported this finding. First, one of Kremer's former colleagues whom the company did choose to rehire after the layoff had greater seniority than Kremer. Second, another person who was rehired filled a lesser position than that previously held by Kremer. Id.
49. Id. The appeals board review was consistent with New York statutory enactments, which provide that:
   The [Human Rights Appeal] board may affirm, remand or reverse any order of the [Human Rights] division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the order of the division is . . . supported by substantial evidence on the whole record, or not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
   N.Y. EXEC. LAw § 297-a-7 (McKinney 1982).
Kremer then filed a petition with the Appellate Division of the New York Supreme Court to set aside the adverse administrative decision. Under New York law, the scope of the Appellate Division’s review was limited to a determination that there was substantial evidence supporting the NYHRD’s decision and that the ruling was not “arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Meanwhile, Kremer had brought his complaint before the EEOC a second time. After the New York Appellate Division’s ruling, an EEOC District Director ruled that there was no reasonable cause to believe that the charge of discrimination was true, and thereupon issued to Kremer a right-to-sue notice. The District Director denied Kremer’s request for reconsideration.

Kremer then brought his Title VII action in federal district court alleging discrimination on the basis of national origin and religion. The district court held that the doctrine of res judicata barred Kremer’s action because the issues had already been resolved in state court. The Court of Appeals for the Second Circuit affirmed and the Supreme Court granted certiorari.

The Majority Opinion

The Kremer majority stated that it was according section 1738 preclusive effect to the New York Appellate Division’s decision in upholding the NYHRD ruling. While according preclusive effect to the NYHRD determination itself would have conflicted directly with Title VII, the Court concluded that according preclusive effect to the lower court ruling did not conflict with Title VII.
Justice White, speaking for the majority, divided the Court's analysis of fact and law into two sections.

In the first section, the Court addressed Kremer's contention that Title VII relieves federal courts of their usual obligation to grant finality to state court decisions. The Kremer majority based its analysis of whether Title VII partially repeals section 1738 on statutory construction guidelines provided by several Supreme Court decisions. The Court noted that in its decision in Allen v. McCurry it had held that exceptions to section 1738 are not to be recognized unless a later statute contains an express or implied partial repeal. Because there was no claim that Title VII expressly repealed section 1738, the Court limited its focus to an examination of whether there was any repeal by implication. The Court then stated that "[i]t is ... a cardinal principle of statutory construction that repeals by implication are not favored."

More significant to the Kremer Court's analysis was the principle delineated in Radzanower v. Touche Ross & Co., which it applied in determining whether Title VII impliedly repealed section 1738. The Court stated that the Radzanower rule limits the situations in which an implied repeal will be recognized to two. First, where provisions of the two statutes are in irreconcilable conflict, the later statute repeals the earlier one to the extent of the conflict. Second, when the later statute covers the entire subject matter of the earlier one, it will repeal the earlier statute. The Radzanower Court emphasized, however, that in either of the two situations there must also be a showing that the legislature had a "clear and manifest" intention to repeal.

The Kremer Court's use of these categories easily led to its conclusion that Title VII did not partially repeal section 1738. The second category did not pose difficulty, because Title VII is clearly not a substitute for section 1738. The Court had more difficulty disposing of the first category's restrictions, but ultimately decided that there is no irreconcilable conflict between Title VII

63. 456 U.S. at 468.
64. Id.
66. 456 U.S. at 468.
67. Id.
68. Id. The Radzanower Court relied upon its holding in Posadas v. National City Bank, 296 U.S. 497, 503 (1936).
69. 456 U.S. at 468.
and section 1738. The majority relied upon two factors in reaching its conclusion. First, the Court emphasized the language in Title VII that provides for the states' continued role in the overall scheme dealing with employment discrimination. The statute provides that a litigant may press his claim before the EEOC only after affording a state agency opportunity to resolve the complaint. The statute further stipulates that the EEOC should "accord substantial weight to final findings and orders made by State and local authorities in proceedings commenced under State or local law." The Court interpreted this latter clause as indicating only the minimum level of deference the EEOC must accord to all state determinations. Thus, the Court concluded that Title VII does not bar the according of section 1738 preclusive effect if "judicial action is involved."

The Court also drew upon Title VII's legislative history in concluding that there is no irreconcilable conflict between Title VII and section 1738. The Court cited for support the comments made by several senators during debates over the proposed statute. The majority particularly highlighted Senator Humphrey's desire that the states be given adequate opportunity to resolve discrimination issues. In addition, the Court noted Senator Dirksen's concern that under the Title VII scheme federal and state courts may call for conflicting remedies in the same cases, as well as the statement made by Senators Clark and Case that Title VII specifically provides for the continued effectiveness of state and local laws and procedures in the employment discrimination area. The Court concluded that these statements indicated that Congress did not intend for Title VII to operate as an exception to section 1738.

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70. Id.
71. See supra note 38 and accompanying text.
72. See supra note 41 and accompanying text.
73. 456 U.S. at 470.
74. Id.
75. Id.
76. Id. at 472-76. The Court did not emphasize discussions in the House. This is probably because the Senate prepared the bill that was ultimately passed. The House, instead of arranging for the usual conference to settle points of disagreement with the Senate's amended version of the bill, merely voted to accept the measure as amended by the Senate. 110 Cong. Rec. 15,981 (1964). See BUREAU OF NATIONAL AFFAIRS, supra note 32, at 22.
77. 456 U.S. at 473.
78. Id. at 474 n.14.
79. Id. at 472-73 n.12.
80. Id. at 476.
The Court further relied upon Senate discussions occurring at
the time the 1972 amendments to Title VII were being prepared. At that time Senator Hruska had introduced an amendment that would have eliminated many of the “duplicative” remedies for employment discrimination by mandating that actions filed under Title VII provide exclusive remedies for a particular case. Senator Hruska wanted to eliminate the possibility of litigants pressing their grievances in successive actions pursuant to various contractual and statutory provisions, including collective bargaining agreements, the National Labor Relations Act, state fair employment practices laws, the Civil Rights Act of 1866, and Title VII.

Senator Javits, on the other hand, did not believe that the amendment was necessary because he believed that the doctrine of res judicata would prevent repetitive litigation. Relying on Senator Javits’ reference to res judicata principles, the Court concluded that the Senate’s rejection of the Hruska amendment (by an evenly divided vote) reflected an intention to allow section 1738 preclusion principles to remain operative in the context. The Court reached this conclusion even though the Hruska amendment, under a specific exception, would not have provided that state remedies be merged into Title VII remedies when a Title VII action and a state action are pending at the same time.

After determining that Title VII does not circumvent section 1738, the majority disposed of Kremer’s claim that the New York procedures accorded him were not sufficiently extensive to merit res judicata effect in federal court. Kremer had argued that Title VII vested in him the right to have a judicial authority eventually address the merits of his claim. Because the New York Appellate Division’s review was merely deferential to the state agency’s findings, Kremer contended that to accord

81. Id. at 475-76.
82. Id.
83. Id.
84. Id.
85. Id.
86. Describing his proposed amendment, Senator Hruska indicated that “there would be a further exception and that would [provide that] proceedings in a State agency . . . could continue notwithstanding the pendency of an employer’s action under . . . Title VII.” Id. (quoting 118 CONG. REC. 3369 (1972)).
87. Id. at 479.
88. Id. at 492 (Blackmun, J., dissenting).
89. See supra note 49 and accompanying text.
that review preclusive effect would be to deny this federal right.\textsuperscript{90} The majority disagreed, holding that the New York procedure, including the agency hearings, need only satisfy minimum Constitutional due process requirements in order to be given full faith and credit.\textsuperscript{91} Moreover, the Court also cited authority which indicated that the New York courts did in fact pass upon the merits of employment discrimination claims.\textsuperscript{92}

Throughout its opinion, the majority emphasized that federal-state comity should be preserved. Rebutting the contention that the \textit{Kremer} decision would deter equal employment litigants from seeking relief in a state forum, the Court stated that “[d]epriving state judgments of finality not only would violate basic tenets of comity and federalism . . . but also would reduce the incentive for states to work towards effective and meaningful discrimination systems.”\textsuperscript{93}

\textbf{The Dissenting Opinions}

Justice Blackmun, writing in dissent, disagreed with the majority on each point of its analysis. He first addressed the majority’s refusal to find that Title VII provides an exception to section 1738. Examining the statutory language relied upon by the majority that directs the EEOC to accord “substantial weight” to outcomes under state proceedings, Justice Blackmun arrived at a conclusion opposite to that of the majority.\textsuperscript{94} Justice Blackmun reasoned that if any state employment discrimination proceedings were intended to have preclusive effect, Congress would not merely have instructed that these proceedings be given “substantial weight.”\textsuperscript{95} Moreover, Justice Blackmun continued, the majority had acknowledged that state agency proceedings standing by themselves are not accorded preclusive effect under the Title VII scheme even though they were included in Congress’s definition of state proceedings that were to be given substantial weight.\textsuperscript{96} To say that state judicial review proceedings should be accorded preclusive effect in federal courts therefore means that

\textsuperscript{91} 456 U.S. at 481.
\textsuperscript{92} \textit{Id.} at 481 n.21. \textit{See infra} notes 186-89 and accompanying text.
\textsuperscript{93} \textit{Id.} at 478.
\textsuperscript{94} \textit{Id.} at 488-90 (Blackmun, J., dissenting). \textit{See supra} text accompanying note 73.
\textsuperscript{95} 456 U.S. at 488-90 (Blackmun, J., dissenting).
\textsuperscript{96} \textit{See supra} note 61 and accompanying text.
the term "substantial weight" has a different meaning, depending on which type of proceeding has occurred.97 Because there is no reference in Title VII to such a double meaning, Justice Blackmun believed that such a conclusion would be misplaced, and the term "substantial weight" thus should be interpreted as requiring that no preclusive effect be given to state judicial proceedings.98

Justice Blackmun further believed that, even granting the majority's conclusion that Title VII provides no exception to section 1738, the majority had misapplied the preclusion rules of section 1738 in according full faith and credit to the New York Appellate decision.99 In order for a previous decision to be granted preclusive effect, he contended, the legal matters raised in the second case must be the same as those determined in the first case.100 In Kremer, the state agency ruled on the merits of the discrimination claim; the Appellate court only examined whether the state agency's ruling was arbitrary or capricious, without examining the merits of the claim.101 Thus, Justice Blackmun concluded that the majority was either granting preclusive effect to the state agency's decision, which clearly violates Title VII, or granting preclusive effect to a state court decision that did not address the issue before the federal court.102

Justice Stevens dissented separately. He agreed with the majority that Title VII provides no exception to section 1738.103 He agreed with Justice Blackmun, however, that the issues decided in the New York court were not the same as those facing the federal court, and that consequently there should have been no section 1738 bar.104

THE COURT'S RES JUDICATA RATIONALE

Beginning its analysis of the res judicata issue, the Kremer majority stipulated that state proceedings need only satisfy the minimum procedural requirements of the fourteenth amendment's

97. 456 U.S. at 488-89 (Blackmun, J., dissenting).
98. Id. (Blackmun, J., dissenting).
99. Id. at 493. (Blackmun, J., dissenting).
100. Id. See supra notes 5 and 6.
101. 456 U.S. at 493 (Blackmun, J., dissenting).
102. Id. at 494 (Blackmun, J., dissenting).
103. Id. at 511 (Stevens, J., dissenting).
104. Id. (Stevens, J., dissenting).
due process clause in order to be granted preclusive effect by the federal courts under 28 U.S.C. § 1738. In deciding whether New York's law satisfied due process in this case, the Court framed the issue simply as "whether they (the procedures) should be deemed so fundamentally flawed as to be denied recognition under section 1738." The Court accorded full faith and credit to the state court decision and barred Kremer's federal claim because it concluded that the New York procedures, including those at the state agency level, passed this test.

Close examination, however, reveals difficulties with the test that the Court employed. The majority considered only whether New York accorded Kremer due process under New York law. Having answered this question in the affirmative, the Court concluded that this standard transferred easily to the federal domain and caused the preclusion principles to bar a claim brought there. Analysis of precedent, however, seems to cast doubt on this conclusion.

Comparison of Kremer with previous Supreme Court decisions suggests that the Kremer Court did not consider the addition to classical res judicata analysis which Title VII arguably requires. Specifically, the Kremer Court's view that New York procedure could "substitute" for federal statutory procedure in this circumstance does not recognize that the issue of due process vis à vis res judicata should be decided in the context of the litigant's

105. 456 U.S. at 481.
106. Id. at 480.
107. The Court cited several cases that emphasize the "flexible" nature of due process, including Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Inland Empire Council v. Minnis, 325 U.S. 697 (1945). The Court went on to summarize the New York procedures that it believed to satisfy due process requirements:

We have no hesitation in concluding that this panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause. Only where the evidence submitted by the claimant fails, as a matter of law, to reveal any merit to the complaint may the Department make a determination of no probable cause without holding a hearing ... And before that determination may be reached, New York requires the Commission to make a full investigation, wherein the complainant has full opportunity to present his evidence, under oath if he so requests.

456 U.S. at 484-85. Kremer made clear in his brief, however, that he did not "call into question the fairness of the state procedures." Pet. Reply Brief at 10, Kremer v. Chemical Constr. Corp., 456 S. 461 (1982). The gist of Kremer's contention was that the state procedures "are simply not equivalent to those in a Federal district court." Id. See infra notes 111-13 and accompanying text.
108. 456 U.S. at 481.
109. Id.
rights, whether rooted in statute or common law. In addition to focusing on whether New York provided procedures adequate to decide Kremer’s claim, the Court here should have decided whether the judicial system had given Kremer all the process granted to him by Congress. Under Title VII, Congress conferred the right to a judicial trial de novo after a state agency had been given the statutory period in which to resolve the matter. Because New York could not accord Kremer his right to a trial under New York law, it was arguably left to the federal courts to carry out this Congressional mandate. The Supreme

110. This idea was expressed in Mitchell v. W. T. Grant: “Due process of law guarantees no particular form of procedure; it protects substantial rights,” 416 U.S. at 610 (quoting NLRB v. MacKay Co., 304 U.S. 333, 351 (1938)). Thus, due process cannot be analyzed in a vacuum; any scheme that purports to judge the adequacy of process should do so in the context of the individual's legal rights. More recently, the Supreme Court implied that a mode of analysis similar to that proposed here is appropriate in the Title VII context. In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), the complainant obtained in a state agency adjudication all the relief she had claimed except for an award of attorney's fees. The Court agreed that she could sue for the attorney fees in a subsequent Title VII action. In so deciding, the Court commented:

Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. 706(f)(1). One aspect of complete relief is an award of attorney's fees, which Congress considered necessary to the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII. For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy.

Id. at 67-68. See also Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (Court held that Federal courts cannot borrow state statutes of limitations in Title VII actions).

111. This modification of the preclusion principle is consistent with previous Supreme Court decisions. In Montana v. United States, 440 U.S. 147 (1979), the Court pointed to three factors to consider in deciding whether collateral estoppel bars federal actions:

Whether the issues presented . . . are in substance the same . . . ; whether controlling facts or legal principles have changed significantly since the state court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.

Id. at 155 (emphasis added).

Arguably, the Court abandoned these factors in Allen v. McCurry, 449 U.S. 90 (1980), when it limited its focus in determining whether the party against whom the earlier decision is asserted had a “full and fair opportunity” to litigate that issue in the earlier case. Id. at 95. The Court's due process analysis in Kremer is therefore very similar to the approach taken in McCurry.


113. Justice Stevens arrived at the same conclusion, but did so without articulating a clear rule of res judicata analysis. 456 U.S. at 511 (Stevens, J., dissenting). Justice
Court analysis, limited to Kremer and his procedure under New York law, did not even reach this point of consideration.

The Court justified its limited focus by implying that consideration of the broader context of litigants' rights would require federal courts to employ their own rules of res judicata in determining the effect of state judgments. As the Court explained, this would violate the precepts of section 1738.114

The Court had previously recognized in Alexander v. Gardner-Denver, however, that federal courts should not so limit their review when, as here, Congress has given the litigant a right to sue supplemental to other rights the individual may have. In Alexander, the Court acknowledged that Title VII did not expressly address the relationship between federal courts and the grievance-arbitration machinery of collective bargaining agreements; nevertheless, it emphasized that Title VII vests federal courts with "plenary" powers to enforce the statutory requirements. Reversing the lower court holding that the doctrine of election of remedies prevented a subsequent Title VII action, the Court implied that there is a presumption in favor of preserving the supplemental right to sue unless there is evidence in the "statutory scheme" to rebut it.117

The Kremer majority acknowledged Alexander, but distinguished it because in Alexander the earlier proceeding was an

Blackmun contended that Title VII provided for trials de novo in federal court no matter how thorough the process afforded by a state. Id. at 487-90 (Blackmun, J., dissenting). See also infra notes 160-96 and accompanying text. Such a conclusion is reached through statutory interpretation unrelated to the res judicata analysis employed here.

114. The majority opinion noted:
As we recently noted in Allen v. McCurry . . . "though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." 449 U.S. at 96.

456 U.S. at 481-82 (quoting Allen v. McCurry, 449 U.S. 90, 96 (1980)).


116. 415 U.S. at 48-49.

117. Id. at 47. Compare with this the Kremer Court's presumption against implied repeal of 28 U.S.C. § 1738. Supra note 69 and accompanying text. In Alexander, Justice Powell noted that Title VII vests federal courts with plenary powers to enforce the statute and specifies with precision the two jurisdictional prerequisites that, if satisfied, allow an individual to file a lawsuit. First, the individual must file a timely charge with the EEOC. Second, he must receive and act upon the EEOC's statutory right-to-sue notice. 415 U.S. at 47.
This dismissal of Alexander seems to overstate the relative importance to the Alexander Court of the differences between arbitrative and judicial determinations. At the same time this dismissal does not appear to give sufficient weight to the basis used by the Alexander Court to support its holding. This basis of the Alexander decision, that Congress provided supplemental remedies (and thus supplemental rights) in enacting Title VII, should have been applied in Kremer. Indeed, the Alexander Court noted that the policy reasons which led it to reject the election of remedies doctrine in the Title VII context would apply equally to the doctrines of res judicata and collateral estoppel.

Thus, the Kremer Court should have examined whether the judicial system had afforded Kremer all the rights granted to him by Congress instead of limiting its analysis to due process under New York law. Had it done so, it would have arrived at a conclusion consistent with that of the Alexander Court and upheld Kremer’s right to bring his claim de novo.

By analyzing the res judicata issue outside the context of Kremer’s statutory rights, the Kremer majority’s analysis synergistically applied res judicata doctrines. The Court at first appeared to recognize that the NYHRD determination was not entitled to preclusive effect. Moreover, it was not possible to accord preclusive effect to the limited appellate review standing alone. The Court, however, ostensibly rendered full faith and credit based on the cumulative effect of these two proceedings. Justice Blackmun perceived the problem with this in his dissent. In effect, the Court did grant preclusive effect to the NYHRD determination, because the New York appellate court

118. 456 U.S. at 477. In doing so, the Court emphasized that arbitrations effectuate the intent of parties to an agreement, while courts enforce requirements of legislation. Because the New York Appellate Division in Kremer was reviewing an agency decision applying law similar to Title VII, the Court saw fit to accord full faith and credit under § 1738.

119. The Alexander majority devoted one paragraph to a discussion of the differences between the arbitrative and judicial settings but spent several pages emphasizing the supplemental nature of the federal employment discrimination scheme.

120. 415 U.S. at 49 n.10.

121. See supra note 61 and accompanying text.

122. See supra note 91 and accompanying text.

123. Id. The Court emphasized that due process was satisfied by proceedings occurring at both the New York administrative and appellate judicial levels.

124. See supra notes 99-102 and accompanying text.
review was one intended only to detect arbitrariness or capriciousness. 125

Admittedly, the majority was not completely unresponsive to the contention that equal employment claimants deserve judicial reviews more probing than a review for “capriciousness” if they are to be barred thereafter from asserting a federal claim. Addressing Justice Blackmun’s dissent, the majority cited authority indicating that the New York Supreme Court Appellate Division’s review was as a practical matter quite stringent in equal employment cases. 126 The Court did not say, however, that a more stringent appellate review would be necessary to uphold application of section 1738.

TITLE VII AS AN EXCEPTION TO 28 U.S.C. section 1738

The Kremer majority held that Title VII did not create an exception to section 1738. 127 Such an exception presumably would have meant that equal employment litigants could not be precluded under section 1738 from bringing Title VII actions even if states were to grant agency hearings followed by trials de novo equivalent to federal trials de novo. 128 In reaching its conclusion that Title VII did not partially repeal section 1738, the Court employed the test it had originally set forth in Radzanower v. Touche Ross & Co. 129 The Court’s use of the Radzanower test in its analysis, however, is questionable. The use of a more appropriate rule of statutory construction would have led to the conclusion that Title VII does provide an exception to 28 U.S.C. section 1738.

The Radzanower Court held that the broad venue provisions of the Securities Exchange Act, which allow for a suit to be filed in any district where the defendant may be found, do not repeal the narrow venue provision of the National Bank Act. 130 Before the Radzanower Court employed its two-part test 131 it focused upon the particular relation between the two statutes by noting a “basic” principle of statutory construction that a statute cover-

125. Id.
126. 456 U.S. at 480-81 n.21.
127. Id. at 476.
128. Id. at 488 (Blackmun, J., dissenting).
130. 426 U.S. at 158.
131. See supra text accompanying notes 66-67.
ing a broad area does not repeal an earlier enacted statute dealing with a narrow, precise, and specific subject.\textsuperscript{132}

Within this narrow context, then, the \textit{Radzanower} Court applied its test. The test’s requirements are difficult to meet, but necessarily so, because when interpreting a later general statute, there is a significant risk that the Court will act as a legislature if it finds repeal by implication.\textsuperscript{133} In \textit{Kremer}, however, the issue was whether a later-enacted \textit{specific} statute repealed an earlier \textit{general} statute.\textsuperscript{134} The danger against which the \textit{Radzanower} test operates therefore did not exist in the \textit{Kremer} situation because the specificity of the later statute lessened the danger of judicial “legislation.” Thus, the Court used a strict test designed to safeguard against a risk that did not exist in \textit{Kremer}.\textsuperscript{135}

Courts and scholars have suggested a more appropriate test for situations such as \textit{Kremer} in which a later enacted special statute arguably partially repeals an earlier general one. As early as 1883, the Supreme Court recognized that it is “familiar law” that a specific statute controls over a general one “without regard to priority of enactment.”\textsuperscript{136} Subsequent cases, including \textit{Radzanower}, have expressed identical axioms.\textsuperscript{137} Sutherland, in his treatise on statutory construction, also agrees that a nar-

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\textsuperscript{132} 426 U.S. at 153.
\textsuperscript{133} Sutherland notes that basic to the presumption against implied repeal is the notion that existing statutory law is the result of popular will. For a court to unnecessarily infer a repeal would be to substitute its will for the popular will. 1A SUTHERLAND, \textit{STATUTES AND STATUTORY CONSTRUCTION} § 23.16 (1972).
\textsuperscript{134} See supra notes 9, 128 and accompanying text.
\textsuperscript{135} The \textit{Kremer} majority also relied heavily on \textit{Posadas} v. National City Bank, 296 U.S. 497 (1936). The \textit{Posadas} Court considered whether portions of the Federal Reserve Act of 1913 were repealed by the equally specific Organic Act of 1916. Reliance upon \textit{Posadas} was also thus misplaced, because the \textit{Kremer} Court was deciding the effect of a later-enacted specific statute upon an earlier general one, not the relationship between two equally specific statutes.
\textsuperscript{136} Townsend v. Little, 109 U.S. 504, 512 (1883).
\textsuperscript{137} 426 U.S. at 153; Bulova Watch Co. v. United States, 365 U.S. 751, 758 (1961). Moreover, even the \textit{McCurry} Court implied that a different analysis would be appropriate when faced with determining the effect of a later-enacted specifically worded statute upon § 1738. 449 U.S. at 99. In upholding § 1738 preclusion of 42 U.S.C. § 1983 actions, the Court distinguished the habeas corpus statute, under which federal actions are less easily precluded by state actions. The \textit{McCurry} majority noted that the habeas statute expressly defines the effect of state-court criminal judgments at 28 U.S.C. § 2254(b), and that it further presumes a state court resolution to be correct except in eight specific circumstances, enumerated in 28 U.S.C. § 2254(d). 449 U.S. at 99. C. WRIGHT, A. MILLER & E. COOPER, also note that the analogy between § 1983 and the habeas statute is imperfect. 18 C. WRIGHT, A. MILLER, & E. COOPER, supra note 5, at § 4471.
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rowly drawn statute controls over a more generally worded one.138

In his discussion, Sutherland notes that a general statute applies to all persons and localities within its jurisdictional scope, while a "special" statute may exist to treat part of the subject matter of the general statute with more particularity.139 The special statute repeals pro tanto the provisions of the general statute with which it irreconcilably conflicts. More importantly, the special statute will operate as an exception to the general statute even when there is no irreconcilable conflict between the two.140

The use of this rule, which is better tailored to address the Kremer situation than the Radzanower rule, compels the conclusion that Title VII does provide an exception to section 1738.141 Title VII treats a phase of the same general subject matter in a more minute way than does section 1738. In unequivocal language, the statute provides that a charge may be filed sixty days "after proceedings have been commenced under state or local law, unless such proceedings have been earlier terminated."142 The only way this language can be interpreted as being consistent with section 1738 is to infer "proceedings" as limited to state agency proceedings. There is nothing in Title VII, however, to suggest this limitation, as the Supreme Court previously concluded in New York Gaslight Club, Inc. v. Carey.143 Therefore,

138. 1A SUTHERLAND, supra note 133, § 23.16.
139. Id.
140. Id.
141. The legislative history of Title VII is not as important under the Sutherland test as under the Radzanower test. Under the Sutherland test, the legislative history is not examined unless an ambiguity in the underlying statute warrants it. See infra note 148. Nevertheless, Title VII's legislative history does not alter conclusions reached under the Sutherland test. See infra notes 147-70 and accompanying text.
142. Previous Supreme Court decisions interpreted the relevant Title VII provisions in a straightforward manner. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court held that a complainant's right to bring suit under Title VII is not limited to charges for which the EEOC has made a finding of reasonable cause. In doing so the Court outlined the steps a litigant need follow to get a trial in federal district court:
   Respondent satisfies the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U.S.C. § 2000e-5(a) and § 2000e-5(e).
411 U.S. at 798. In addition to delineating the jurisdictional prerequisites to a federal action, the Court made clear that "we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." Id. at 798-99.
143. See Kremer, 456 U.S. at 488-89 (Blackmun, J., dissenting).
the two statutes were not meant to be consistent and the narrower Title VII applies over the broader section 1738.

Additional language in the statute also indicates that federal courts are not to accord preclusive effect to outcomes under state law. In 1972, Congress amended Title VII by directing that the EEOC “accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under state or local law.” As the Kremer dissenters persuasively argued, this was as far as Congress intended to defer to the states in equal employment matters. Moreover, Congress gave the federal courts the power to, “in [their] discretion, stay further proceedings for not more than sixty days pending the termination of state or local proceedings . . . or [pending] further efforts of the Commission to obtain voluntary compliance.”

The language of Title VII, while not addressing the issue faced by the Kremer Court, thus seems to outline the jurisdictional prerequisites to a federal Title VII action. The closest it comes to hinting that section 1738 survives the specific jurisdiction given to the federal courts in Title VII actions is its mandate that substantial weight be accorded by the EEOC to state findings and orders. Justice Blackmun argues persuasively that Congress did not intend to leave section 1738 operative by inserting this clause.

The final basis for the Court’s decision was its conclusion that Congress, as shown by the legislative history of Title VII, did not intend to provide an exception to section 1738 in Title VII cases. At the outset, it is questionable whether the Court should have undertaken this inquiry, given the simple specificity of Title VII’s jurisdictional prerequisites. Moreover, if a depar-

145. See supra text accompanying notes 95-98. Justice Blackmun’s conclusion is supported by the Court’s analysis in Chandler v. Roudebush, 425 U.S. 840 (1976). In Chandler, the Court extensively reviewed the 1972 amendments to Title VII and noted that Congress had rejected proposals to create a Federal administrative agency to hear and determine employment discrimination cases subject to limited judicial review of the administrative record. Congress’ choice to continue providing trials de novo arguably reflects an intent not to accord full faith and credit to results under schemes such as that employed by New York. See supra notes 110-13 and accompanying text.
147. See supra note 98 and accompanying text.
148. Sutherland notes that “it is often declared with reference to various aids to interpretation that they can be used only to resolve ambiguity and never to create it.” 2A SUTHERLAND, supra note 133, § 46.04. Sutherland states that a clear and unambiguous statutory provision generally is one that is not contradicted by other language in the same act. Id. See also comments of Senators Dirksen and Clark infra notes 154-60 and
ture was to be made from the straightforward wording of the statute, it should only have been on the basis of a clearly articulated purpose found in legislative history.\footnote{149}

In supporting its conclusion that Congress did not intend to circumvent section 1738 principles in the Title VII context, the majority pointed to discussion in Senate debates that emphasized the importance of the states’ continuing role in equal employment opportunity.\footnote{150} The Court further cited a statement by Senator Humphrey that was inconclusive on the section 1738 issue,\footnote{151} and then stated that “[n]othing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court.”\footnote{152}

The majority found additional historical support for its conclusion in various speeches by sponsoring members of Title VII. In supporting its contention that “Congress agreed . . . [that] the federal system should defer only to adequate state laws,”\footnote{153} the majority quoted the interpretive memorandum of Senators Clark and Case. This memorandum indicated that Title VII did not overrule any state or local law that is consistent with its terms but rather contemplated the continued operation of these laws.\footnote{154}

accompanying text. See generally Dickerson, The Interpretation and Application of Statutes 139 (1975).

149. See, e.g., Litchfield Securities Corp. v. United States, 325 F.2d 667 (2d Cir. 1963) (legislative history examined only to make certain that in applying the strict letter of Congressional enactment that violence is not done to Congress’ goals).

150. 456 U.S. at 473. See supra text accompanying notes 71-73.

151. The Court quoted the statement in full as follows:

“We recognized that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and equal employment opportunity. We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government.” 110 Cong. Rec. 12,725 (1964).

456 U.S. at 473. Indeed, Senator Humphrey’s reference to premature interference by the Federal Government could actually be construed as supportive of a partial repeal of § 1738 in Title VII cases. Such a construction of Senator Humphrey’s remarks is reasonable in light of his earlier statement that “to avoid the possible imposition of onerous state requirements for initiating a proceeding, [42 U.S.C. 2000e-5(c)] provides that to comply with the requirement of a prior resort to the state agency, an individual need merely send a written statement of the facts to the state agency by registered mail.” 110 Cong. Rec. 12,723 (1964).

152. 456 U.S. at 473. The Court’s reasoning here is consistent with its use of the Radzanower statutory construction rule. See supra notes 66-68 and accompanying text.

153. 456 U.S. at 472.

154. Id.
The portion of the memorandum cited by the majority, however, does not address the *Kremer* issue. Later in the same memorandum, Senators Clark and Case did address this issue when they discussed the Title VII clause that empowers the EEOC to, in its discretion, agree with state and local agencies that these agencies handle certain cases exclusively. The Senators rejected a proposed provision that would have automatically granted states exclusive jurisdiction when the remedies for employment discrimination within the state were deemed adequate. The Senators emphasized that such a plan would be unworkable due to the difficulty of determining when state remedies are adequate. Thus, the Senators' interpretive memorandum appears to favor a construction of Title VII as providing an exception to section 1738.

The Court also relied heavily on Senator Dirksen's expressed desire to avoid multiple suits and conflicting court orders arising out of the same discrimination. Senators Clark and Case, however, spoke to Senator Dirksen's concern in their memorandum. Their answer was that "[i]n any event, there cannot be contrary and conflicting orders from State and Federal agencies, because of the doctrine of Federal supremacy."

The *Kremer* majority further relied upon the Senate's rejection in 1972 of the proposed Hruska amendment to Title VII in concluding that Congress never intended that section 1738 be inoperative in the Title VII context. Senator Hruska introduced an amendment designed to eliminate much of the potential for a multiplicity of actions based on the same offense. The Court emphasized that Senator Javits had argued against the bill by saying that application of res judicata doctrines would eliminate the multiplicity problem. Because the Senate then rejected the amendment, the *Kremer* majority inferred that the legislature

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155. 110 CONG. REc. 7214 (1964).
156. Id.
157. Id. The *Kremer* Court, however, simply noted that the New York statute is "at least as broad as Title VII." 456 U.S. at 479 n.20.
158. 456 U.S. at 474 n.14.
159. Part of the memorandum was devoted to enumerating Senator Dirksen's questions and answering them specifically.
160. 110 CONG. REc. 7216 (1964).
161. 456 U.S. at 475-76.
162. 118 CONG. REc. 3369 (1972). The bill provided that, with certain exceptions, Title VII remedies would be exclusive for actions filed under that statute.
163. 456 U.S. at 475.
endorsed the application of preclusion doctrines in the Title VII context.\textsuperscript{164}

There are three problems with the Court’s reliance on the rejection of the Hruska amendment. First, the amendment was proposed only in the Senate; its rejection indicates nothing with respect to the views of House members on the issue. Second, reliance on the history of rejected legislation is even more questionable than drawing conclusions from the history of legislation voted into law, because the failure of a proposed statute can be the result of many different factors.\textsuperscript{165} With respect to the Hruska amendment, there were at least two reasons in addition to the one emphasized by the \textit{Kremer} majority that could have prompted the Senators to vote against the bill. The first reason, highlighted in Senator Javits’ main argument against the amendment, was that the range of remedies available to equal employment litigants should, as a matter of national policy, be preserved.\textsuperscript{166} Further, Senator Javits indicated there was no need for the amendment, because employers were generally not complaining of harassment due to the broad range of remedies.\textsuperscript{167} It appears, then, that the \textit{Kremer} majority’s inference from the Hruska amendment’s failure is tenuous, because a congressional desire to leave section 1738 operative is only one of several explanations for its defeat.

A third argument undercutting the Court’s interpretations with respect to the Hruska amendment is based on the actual provisions of the amendment. The proposed amendment itself provided that equal employment actions filed under Title VII would provide exclusive remedies for the complainant, with certain exceptions.\textsuperscript{168} One exception provided that state proceedings could continue despite the pendency of the employee’s action under Title VII.\textsuperscript{169} Thus, viewing the Hruska amendment in its entirety, it is difficult to interpret the remarks of Senator Javits as advocating application of section 1738. Because of the exception in the proposed amendment that allowed state proceedings to con-

\textsuperscript{164} Id. at 476.
\textsuperscript{166} 118 Cong. Rec. 3369-70 (1972).
\textsuperscript{167} Id. at 3370.
\textsuperscript{168} Id. at 3369.
\textsuperscript{169} Id.
tinue notwithstanding the pendency of a Title VII action, Senator Javits had no reason to even consider the section 1738 issue.

The history of Title VII in relation to the issue presented in Kremer is at best inconclusive. The Kremer majority ultimately recognized this when it stated that “[i]nterpretation of Title VII is hampered by the fact that there are no authoritative legislative reports.” Because strict adherence to the language of the bill leads to the conclusion that Title VII provides an exception to section 1738, the Kremer majority should not have applied section 1738 in this instance and Kremer should have been allowed his federal claim.

**IMPLICATIONS AND POLICY GOALS**

The comity and federalism interests embodied in section 1738 were primary considerations of the Court in according full faith and credit to the New York Appellate Division’s decision to uphold the NYHRD determination. Kremer’s rationale, however, may actually hinder comity interests in the future.

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170. 456 U.S. at 471 n.9. The Supreme Court’s conclusion as to the usefulness of the legislative history is not surprising, given the outlook of Senate members toward establishing a definitive legislative history. See, e.g., 110 Cong. Rec. 6441 (1964) (illustrating one Senator’s views on the development of legislative history).

Senator Dirksen expressed more colorfully his doubts about the usefulness of the legislative history of what was to become Title VII. Before the Senate was to debate whether to send the Civil Rights Act to the Senate Judiciary Committee, the Senator commented:

> There has been great discussion about the intent of Congress. The courts will take a look at the language in the bill, and out of it they will finally come to a conclusion as to what was the intent. I believe that one of the most scholarly legal articles I have ever read on the subject of intent of Congress appeared in the Harvard Law School Journal. Whoever wrote it did a very good job, because the very first line in that article was:
> The intent of Congress is a fiction.
> The second sentence was: The intent of Congress is what the courts say it is.

Id. at 6442.

171. See supra note 93 and accompanying text.

172. Two cases illustrate the potential hindrance. See infra notes 181-205 and accompanying text. Other courts have had occasion to follow Kremer, but only in narrow contexts similar to that in Kremer. See, e.g., Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983) (Kremer used to support upholding § 1738 in context of Sherman Anti-Trust Act); Weise v. Syracuse Univ., 553 F. Supp. 675 (N.D.N.Y. 1982) (plaintiff did not take her action to state court; Kremer rule not applicable); Snow v. Nevada Dept. of Prisons, 543 F.Supp. 752 (D. Nev. 1982) (plaintiff did not appeal state agency decision to state
The *Kremer* majority was unclear as to what standard of review it required of the New York Appellate Division before it granted full faith and credit to its holding. In finding that the degree of appellate review provided by the Appellate Division, coupled with the agency proceedings, satisfied due process, the Court noted that "judicial review . . . is available to assure that a claimant is not denied any of the procedural rights to which he was entitled and that the NYHRD's determination was not arbitrary and capricious." This appears to permit a rather weak level of judicial review. Earlier in the opinion, however, the Court implied that it required a more stringent level of review.

Responding to Justice Blackmun's and Justice Stevens' complaint that the New York court's holding did not constitute a finding "one way or the other" on the merits of Kremer's claim, the Court cited several New York cases in which the Appellate Division carefully reviewed the NYHRD findings. The cases cited appeared to indicate that for the Appellate Division to affirm the NYHRD's summary dismissal, it must find "that the complaint lacks merit as a matter of law." Further, the Court explicitly referred to these decisions as being "on the merits." Thus, reading the *Kremer* opinion as a whole leaves one uncertain as to what level of review to demand of a state appellate court in order to invoke section 1738 preclusion.

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173. See supra note 91 and accompanying text.
174. 456 U.S. at 484.
175. *Id.* at 480-81 n.21.
176. *Id.* at 481.
177. See infra note 178.
179. 456 U.S. at 481 n.21. *Kenneth Culp Davis, supra* note 7, § 21.5, contended that courts interpreting *Kremer* would require state appellate review "on the merits." He could explain the Court's holding only by noting that "[b]ecause the majority could not have intended to change the fundamentals of res judicata, the Court's holding may be in the nature of a mistake in blacks and whites. The continuing law has to be that a decision can be res judicata only of what is decided, and a court that holds that an agency's
The standard of review that the Supreme Court will ultimately require impinges on the federal-state comity interest at stake. Arguably, if equal employment litigants understand that their cases will be accorded reviews deferential to state agency determinations, they will be more inclined to abandon state proceedings before reaching the review level and initiate federal trials de novo.\(^\text{180}\) If, however, these cases are accorded more scrutinizing levels of review, equal employment litigants will probably be more likely to pursue state remedies to their conclusions.

The Seventh Circuit faced the issue of the required level of review in \textit{Unger v. Consolidated Foods Corp.}\(^\text{181}\) The facts of \textit{Unger} are similar to those in \textit{Kremer},\(^\text{182}\) except that state action was pursued under Illinois law.\(^\text{183}\) In \textit{Unger}, the complainant contended that her Title VII action was not precluded under \textit{Kremer} because the standard of the appellate review afforded by the Illinois Appellate Court was not as stringent as the review the Supreme Court determined that New York courts applied in \textit{Kremer}.\(^\text{184}\)

The \textit{Unger} Court of Appeals rejected this argument by concluding that the Supreme Court in \textit{Kremer} required only a weak decision is not arbitrary does not decide what the agency decides." \textit{Id.}\(^\text{180}\)

See, e.g., New York Gaslight Club v. Carey, 447 U.S. 447 U.S. 54, 66 n.6 (1980), in which that Court expressed concern lest "the existence of an incentive to get into federal court . . . undermine Congress' intent to encourage full use of state remedies." Similar concerns were also expressed by the other circuits that previously did not accord full faith and credit in the \textit{Kremer} situation. See supra note 12. See also \textbf{LARSON. EMPLOYMENT DISCRIMINATION} § 49.73 (1983). The incentives to avoid state adjudication are thus apparent for plaintiffs who lose at the agency level. As indicated \textbf{infra} notes 190-205 and accompanying text, the incentives may be stronger for plaintiffs who achieve a "nominal" victory at the agency level.

\(^{181}\) 693 F.2d 703 (7th Cir. 1982).

\(^{182}\) In \textit{Unger}, the plaintiff filed a complaint before the Illinois Fair Employment Practices Commission (FEPC) alleging that her first discharge from her job with Consolidated Foods was discriminatory and that her second discharge was retaliatory. A hearing examiner found for the plaintiff on the second discharge but against her on the first discharge. The full Commission, however, found against plaintiff on both counts. Plaintiff then sought administrative review in the Circuit Court of Cook County, which reversed the FEPC. Defendant appealed to the Illinois Appellate Court. While that appeal was pending plaintiff filed the Title VII action in Federal District Court.

\(^{183}\) The Illinois prohibition against employment discrimination is at least as broad as Title VII. \textbf{ILL. REV. STAT.} ch. 48, § 833 (1981). At an FEPC hearing, the parties may be represented by counsel, testimony is under oath, cross-examination is permitted, the rules of evidence used in Illinois courts apply, and compulsory process is available. 693 F.2d at 705.

\(^{184}\) 693 F.2d at 706. The complainant in \textit{Unger} was relying on the Supreme Court's reference to the cases indicated \textit{supra} note 178. 693 F.2d at 706.
level of review. The Unger court acknowledged that the Kremer Court had reviewed the relevant New York decisions and had noted a stringent standard of review. According to the Seventh Circuit, however, Justice White was selectively citing the New York authority in order to rebut certain arguments of Justice Blackmun. When examined in their entirety, the Seventh Circuit reasoned that these same New York decisions appeared to direct their review toward arbitrariness and capriciousness rather than the merits of the case. Moreover, the Kremer Court indicated in its opinion that the lower level of review would satisfy section 1738 requirements. Thus, the Seventh Circuit read Kremer as requiring only a minimal state appellate review. As interpreted by the Seventh Circuit, Kremer thus leaves equal employment litigants with an incentive to circumvent their state remedies.

A Third Circuit decision has made it even more attractive for equal employment litigants to circumvent the state courts as quickly as possible by allowing an appellant-defendant to force an equal employment plaintiff to pursue her state remedies to the exclusion of her federal remedies. In Davis v. United States Steel Supply, plaintiff Davis complained that she was discharged from her job due to her race. She first brought her charge before the City of Pittsburgh Commission on Human Relations ("PCHR"). The PCHR found that U.S. Steel had violated section 8(6) of the Pittsburgh Human Relations Ordinance because it had treated her differently from other employees. U.S. Steel appealed this decision to the Allegheny County Court of Common Pleas, which concluded that the PCHR's decision was supported by substantial evidence and was neither arbitrary nor capricious. U.S. Steel appealed again, this time to the Commonwealth Court of Pennsylvania. That

185. 693 F.2d at 706-07.
186. Id. at 706.
187. Id.
188. Id. at 706-07.
189. Id. See supra note 91 and accompanying text.
190. 688 F.2d 166 (3d Cir. 1982) (en banc). Ten circuit judges participated in the consideration and decision of this case.
191. Id. at 168.
192. Id.
193. Id.
194. Id. at 168-69.
195. Id. at 169.
court reversed the Court of Common Pleas on the ground that there was inadequate support for the conclusion that the Pittsburgh ordinance had been violated.\textsuperscript{196}

Davis did not appeal this decision to a higher Pennsylvania court.\textsuperscript{197} Instead, she filed suit in federal district court, alleging that her discharge by U.S. Steel constituted a violation of 42 U.S.C. § 1981.\textsuperscript{198} The issue faced by the Third Circuit, on appeal from the district court, was whether the doctrine of res judicata barred Davis' federal action.

Davis argued that her action was not barred because she did not initiate the review in the state courts.\textsuperscript{199} The Third Circuit disposed of this argument with a direct application of Kremer. Judge Garth, concurring, reasoned that Justice White, in Kremer, must have been aware of Justice Blackmun's dissent.\textsuperscript{200} Justice Blackmun believed that a plaintiff should not be precluded from a federal action under section 1738 when he had not initiated judicial review of the administrative ruling but had instead been forced into a state court by an appellant-defendant. Because Justice White did not even address Justice Blackmun's concern, Judge Garth inferred that it makes no difference under the Kremer Court's res judicata rationale that the plaintiff may not have voluntarily chosen the state court forum.\textsuperscript{201}

Judge Gibbons, of the circuit court, dissented in Davis and illustrated the danger of this ruling to federal-state comity. First, he noted that not all local governments enthusiastically support antidiscrimination legislation.\textsuperscript{202} According to Judge Gibbons, it will therefore not be long before local agencies may reach the conclusion that Title VII claimants can be deprived of a federal action merely by granting them a "scintilla" of relief at the state agency level and forcing them into state court via the appeals process.\textsuperscript{203}

Whether the Kremer majority contemplated results such as those in Davis is unclear. In any event, the Davis result is difficult to justify under the Kremer rationale, because the plaintiff

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\textsuperscript{196} \textit{Id.}  \\
\textsuperscript{197} \textit{Id.}  \\
\textsuperscript{198} \textit{Id.}  \\
\textsuperscript{199} \textit{Id.} at 176-77 n.12.  \\
\textsuperscript{200} \textit{Id.} at 178 (Garth, J., concurring).  \\
\textsuperscript{201} \textit{Id.} (Garth, J., concurring).  \\
\textsuperscript{202} \textit{Id.} at 189 (Gibbons, J., dissenting).  \\
\textsuperscript{203} \textit{Id.} (Gibbons, J., dissenting).
\end{flushright}
was not the party that sought state court review. Justice White’s opinion in *Kremer* acknowledged that equal employment litigants have a right under Title VII to abandon state proceedings in favor of federal proceedings after the conclusion of state administrative proceedings.\(^{204}\) Depriving these litigants of this right against their wishes appears to be contrary even to the spirit of *Kremer* and to prior Supreme Court decisions.\(^{205}\) The language of *Kremer* used by the Third Circuit in *Davis*, however, allowed this result.

**CONCLUSION**

The *Kremer* majority rested its decision upon two critical determinations. First, the Court concluded that, in the Title VII context, process which satisfies minimum Constitutional requirements is sufficient to support a later assertion of section 1738 preclusion, regardless of the right to trial de novo granted under Title VII. Second, the Court believed that a later statute will provide an exception to section 1738 only if it so expressly provides or if it irreconcilably conflicts with section 1738. The *Kremer* Court held that Title VII did not irreconcilably conflict with section 1738 even though it specified detailed jurisdictional prerequisites for the federal courts.

The *Kremer* decision, as interpreted by lower courts, may hinder an equal employment plaintiff’s efforts to bring his claim in a trial de novo. This will be especially true if the plaintiff wins at the state agency level and the defendant-employer appeals to a state court, thus making the section 1738 provisions applicable to a later federal proceeding.

**JOHN NOELL**

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204. *See supra* note 61 and accompanying text.

205. *See England v. Medical Examiners*, 375 U.S. 411 (1964). There, the plaintiffs sought relief in federal district court for an alleged fourteenth amendment violation. The district court abstained, reasoning that the state courts could resolve certain issues of state law in such a manner as to preclude the necessity of addressing the constitutional issue. After the Louisiana Supreme Court ruled adversely to the plaintiffs, they again filed suit in federal district court. This time the federal court dismissed the action because it had no power to review the state proceedings. Plaintiffs then appealed this dismissal to the United States Supreme Court.
In an opinion by Justice Brennan, the Court reversed the district court’s dismissal. In so doing, it emphasized that there are “fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court’s determination of those claims.” Id. at 415. The Court further noted that a plaintiff forced to litigate in a state court could preserve his right to later file a federal action by “informing the state courts that he is exposing his federal claims there only for the purpose of complying with [Government Employees v. Windsor, 353 U.S. 364 (1957)], and that he intends, should the state courts hold against him... to return to the District Court for disposition of his federal contentions.” 375 U.S. at 421.

If the England Court’s rationale can be extended to the Title VII context, equal employment plaintiffs may try to avoid the problem found in Davis v. United States Steel Supply by similarly attempting to reserve their right to a federal trial. This could be done by informing the state agencies and courts that the particular dispute is submitted to them only to satisfy Title VII’s jurisdictional prerequisites.

It should be noted, however, that the Supreme Court has been hesitant to extend the holding of England beyond the context of the federal judiciary’s abstention from federal constitutional issues. See Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980).