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THE EFFECT OF SECTION 706 STATE AGENCY PROCEEDINGS UPON SUBSEQUENT TITLE VII CLAIMS

LARRY D. WEEDEN*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ "provides for consideration of employment discrimination claims in several forums."² A Title VII claimant may file a charge with a state agency or state court, a federal agency or a federal court. Under the deferral scheme of section 706 of the Act, the Equal Employment Opportunity Commission (EEOC) may designate a qualified state entity as a section 706 agency to first consider a charge of employment discrimination.³ The EEOC is required to give the designated section 706 agency a chance to settle a Title VII complaint. If the section 706 agency fails to settle the complaint to a claimant's satisfaction, he or she may file a charge with the EEOC.

The deferral of an employment discrimination complaint to a state agency, as authorized by section 706, is possible only if the state or local government has a law in force prohibiting employment discrimination.⁴ The deferral to state agencies is an implementation of congressional intent to allow state and federal authorities to work together to eliminate employment discrimination.⁵ Those legislators who sponsored Title VII intended for the federal protections against employ-

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981).

2. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

3. 706 Agency Designation Procedures, 29 C.F.R. § 1601.70 (1982). Under the section 706 deferral scheme, the EEOC has designated several states and local fair employment practice agencies as 706 agencies. The qualifications for designation under section 706(c) are as follows:

(1) That the state or political subdivision has a fair employment practice law which makes unlawful employment practices based upon race, color, religion, sex or national origin; and
(2) That the state or political subdivision has either established a state or local authority or authorized an existing state or local authority that is empowered with respect to employment practices found to be unlawful, to do one of three things: to grant relief from the practice; to seek relief from practice; or to institute criminal proceedings with respect to the practice. *Id.*

4. *Id.*

5. Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1492-1501 (1981).

ment discrimination to supplement state protections.⁶

The actions of state section 706 agencies take various forms. Some agencies perform an investigatory function to determine if cause exists to believe that an employer has unlawfully discriminated against the complainant. A good deal of state agency work is devoted to the reconciliation of differences between the employer and the complainant. Some state agencies conduct adjudicatory hearings which facilitate a full consideration of the merits of an employment discrimination claim. They act, in effect, as judicial forums.

Some state administrative agency procedures provide for the judicial review of agency decisions by the state's appellate courts.⁷ After the state agency has issued its final orders a complainant may seek review of the agency action by the state's courts, and, if still unsatisfied, file a charge with the EEOC. However, the complainant may forego state judicial review and file a charge directly with the EEOC.

If the complainant files a charge with the EEOC, that agency is required to conduct an investigation to determine whether there are reasonable grounds to believe that the discrimination charge is true.⁸ In making its determination, the EEOC must accord substantial weight to a state agency's final orders.⁹ If it finds no reasonable cause to believe that the charge is true, the EEOC dismisses the charge and the complainant may bring suit in federal court.

A federal court considering an employment discrimination claim which was first brought in a section 706 state agency must decide what effect to afford the state agency action. The well-established rule is that decisions made by a state agency acting as a judicial forum are afforded preclusive effect.¹⁰ The Supreme Court suggested in *Kremer v. Chemical Construction Corp.*¹¹ that it would not grant full faith and credit to the decision of a section 706 agency acting as a judicial forum. Such a failure to grant preclusive effect is a misapplication of both *res judicata* and collateral estoppel concepts.

The *Kremer* Court articulated the view that since decisions by the EEOC do not preclude a trial *de novo* in federal court, "it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own court."¹² The *Kremer* Court's state-

6. *Id.*

7. *See, e.g.*, N.Y. EXEC. LAW § 298 (McKinney 1972 & Supp. 1981-82).

8. 29 C.F.R. § 1601.19 (1983).

9. 42 U.S.C. § 2000e-5(b) (1976).

10. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966), and cases cited therein.

11. 456 U.S. 461, 470 n.7 (1982).

12. *Id.*

ment that administrative decisions unreviewed by state courts are not entitled to the protection of the full faith and credit provisions, merely because EEOC decisions are properly denied the protection of the preclusion rational, has inadvertently effected an "implied repeal" of section 1738¹³ and section 1739¹⁴ without a proper analysis.

This article criticizes the *Kremer* dicta and posits a basis for a proper relationship between the limited deferral provisions of section 706(c) of Title VII and the full faith and credit clause.¹⁵

II. FACTS OF THE *KREMER* DECISION

In 1973 Rubin Kremer was hired by respondent Chemical Construction Corporation [Chemico] as an engineer. Two years later he and other employees were laid off. Subsequently, some of the other laid off employees were rehired, but Kremer was not. In 1976 Kremer filed a charge with the EEOC alleging that he was discriminated against because of his Jewish national origin and religious beliefs, in violation of Title VII of the Civil Rights Act of 1964.¹⁶ Because of Title VII's deferral provisions,¹⁷ the EEOC was required to refer Kremer's charge to the New York State Division of Human Rights (NYHRD), the agency charged with enforcing the New York law prohibiting employment discrimination.

After investigating Kremer's complaint, NYHRD concluded there was no probable cause to believe that Chemico had been discriminatory and dismissed the complaint. The NYHRD's determination was "upheld by its Appeal Board" as "not arbitrary, capricious or an abuse of discretion."¹⁸ The Appeal Board's decision was affirmed by the Appellate Division of the New York Supreme Court.¹⁹ Subsequently, an EEOC official ruled there was no reasonable cause to believe the dis-

13. 28 U.S.C. § 1738 (1982). In a state or political subdivision which comes under the scope of section 706(c), 42 U.S.C. 2000e-5(c) (1976 & Supp. V 1981), the Supreme Court cannot deny full faith and credit to unreviewed decisions of a section 706 agency without effecting an implied repeal of section 1738.

14. 28 U.S.C. § 1739 (1982). In language similar to section 1738, section 1739 provides that all nonjudicial records or books kept in public office are entitled to full faith and credit if such a nonjudicial record were to be afforded preclusive effect in a state's own courts.

15. U.S. CONST. art. IV, § 1 provides: "Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every state. And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

16. Title VII provides that it shall be an unlawful employment practice for an employer to discriminate against an individual with respect to his or her employment privileges because of his religion or national origin. 42 U.S.C. § 2000e-2(a) (1976).

17. *Id.* § 2000e-5(c) (1976). Under Title VII's deferral provision, the EEOC cannot consider a claim before a state agency having jurisdiction over employment discrimination complaints has had sixty days to adjust the complaint.

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

19. *Id.*

crimination charge was true and issued a right-to-sue letter. Kremer filed a Title VII action in federal district court. The district court claim was dismissed on grounds of res judicata and the Second Circuit Court of Appeals affirmed.²⁰ The Supreme Court granted certiorari "to resolve this important issue of federal employment discrimination law over which the Courts of Appeals are divided."²¹

III. AN ANALYSIS OF THE *KREMER* OPINION

The *Kremer* Court relied on the provisions of 28 U.S.C. § 1738, which requires federal courts to afford to a state court judgment the same full faith and credit that would apply in the state's own courts. In an opinion delivered by Justice White, the Court reasoned that section 1738 precludes the relitigation of an employment discrimination issue in federal court unless Congress intended that Title VII cases be exempt from the general preclusion rule.²² The majority's reasoning was attacked in a dissenting opinion by Justice Blackmun, joined by Justices Brennan and Marshall. The Blackmun dissent rejected the majority conclusion that there is "nothing in Title VII inconsistent with the application of the general preclusion rule of 28 U.S.C. § 1738 to the state court's affirmance of the state agency's decision."²³

The Blackmun dissent's argument is more persuasive than the majority's, but it may not be accurate. The legislative history of Title VII does not explicitly demonstrate that Congress contemplated relitigation of a discrimination claim in federal court, except where "the complainant had already lost a trial on the merits in the state court."²⁴ The flaw in Justice Blackmun's analysis indicates that he may have unwittingly accepted the majority's poorly articulated rationale for applying the res judicata concept to a full judicial hearing on the merits, but not to a full administrative hearing on the merits in a Title VII claim.²⁵ Justice Blackmun indicated that he was willing to apply the res judicata principle to state judicial hearings where the employee had a full opportunity

20. *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786 (2d Cir. 1980).

21. *Kremer*, 456 U.S. at 466 n.5. "Three Courts of Appeals have held that a federal court may not attribute preclusive deference to prior state court decisions reviewing state agency determinations." *Smouse v. General Elec. Co.*, 626 F.2d 333 (3d Cir. 1980) (per curiam); *Unger v. Consolidated Foods Corp.*, 657 F.2d 909 (7th Cir. 1981); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980). The Second Circuit's holding in *Kremer* was in conflict with these three circuits. See also *Kremer* where the holding was in conflict with these three circuits. See also *Aleem v. General Felt Indus., Inc.*, 661 F.2d 135, 137 (9th Cir. 1981).

22. *Kremer*, 456 U.S. at 476.

23. *Id.* at 486 (Blackmun, J., dissenting).

24. *Id.* at 508.

25. *Id.* See also *id.* at 494 n.10. "[T]he policies favoring preclusion under 28 U.S.C. § 1738 would be considerably stronger if the merits of the discrimination claim had been settled by the state court itself."

to litigate his claims on the merits. He did not, however, indicate a desire to apply preclusion principles to judicially unreviewed state administrative decisions. The full faith and credit provision of section 1738 dictates that courts apply the *res judicata* concept to both state judicial and administrative determinations.²⁶ Justice Blackmun describes "the Court's decision [as] artificial[ly] separat[ing] the proceeding before the reviewing state court from the state administrative process."²⁷ However, he appears ready to adopt the rule of preclusion when a Title VII plaintiff has had a full and fair adjudication on the merits in state court, as articulated in *Moosavic v. Fairfax County Board of Education*,²⁸ without applying traditional *res judicata* concepts to certain administrative decisions.

In *Kremer*, the majority stated that Blackmun's reading of *Moosavic* suggests he agrees with the majority's mechanical application of the full faith and credit provisions to full judicial hearings without according any of the preclusion principles to state administrative decisions that have not been subjected to judicial review.²⁹ The majority opinion should not have artificially separated the proceedings before the reviewing court and the administrative agency because section 1738 requires that full faith and credit be given to both judicial and administrative decisions.

Justice Stevens stated in a separate dissenting opinion that "the majority concedes that state agency proceedings will not bar a federal claim under Title VII and Justice Blackmun assumes *arguendo* that a state court decision on the merits of a discrimination claim would create such a bar"³⁰ The majority opinion improperly reasoned [s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.³¹

The majority opinion fails to critically evaluate the nature of decisions

26. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966).

27. *Kremer*, 456 U.S. at 490 (Blackmun, J., dissenting) (emphasis added).

28. 666 F.2d 58 (8th Cir. 1981) (Title VII plaintiff collaterally estopped in federal court after a full hearing and trial in state court resulting in a decision). See also *supra* note 25.

29. "Although a superficial reading of section 1738 might suggest otherwise, the more reasonable view is that the section applies to final unreviewed administrative decisions rendered in a judicial capacity. Both the full faith and credit clause and section 1738, by their terms, apply only to judicial proceedings. Although a reading of this language that excludes administrative decisions is tenable, the purposes of section 1738, accepted rules of *res judicata*, and the case law all point to a broader construction. To decide whether certain types of hearings are 'judicial proceedings,' courts should ignore the label affixed to the deciding tribunal and evaluate the actual nature of the proceedings." Jackson, Matheson & Piskorski, *supra* note 5, at 1520-21.

30. *Kremer*, 456 U.S. at 508-09 (Stevens, J., dissenting).

31. *Id.* at 470 n.7.

rendered by the EEOC under Title VII since the EEOC does not have any adjudicatory decision making powers in Title VII litigation.³² State administrative agencies often do have such adjudicatory power.

Under Title VII's deferral provisions, if an act of employment discrimination takes place in a state or local government entity which has adequate laws forbidding unfair employment practices, the EEOC must refer the charge to the local or state agency. If the local or state authority fails to resolve the complaint in a timely fashion, the complainant may file his complaint with the EEOC.³³ The EEOC investigates the charge. If the EEOC investigation establishes reasonable cause to believe that illegal employment discrimination has taken place, it will use conciliation to try to correct the unlawful employment practice.³⁴ If conciliation fails, the EEOC can enforce the act by filing a civil action in the appropriate federal court.³⁵

The *Kremer* Court's conclusion is correct that a decision rendered by the EEOC should not be awarded preclusive effect under res judicata principles. Title VII's legislative history clearly demonstrates that Congress did not want the EEOC to have adjudicatory powers because it wanted the employer to have a hearing in a federal court and not be subjected to the EEOC's perceived institutional bias.³⁶ The *Kremer* Court is correct in concluding that an EEOC decision under Title VII does not prevent a federal trial *de novo*. The Court fails to demonstrate with adequate analysis its basis for reasoning that state administrative decisions unreviewed by state courts should automatically be denied res judicata effect, while those state decisions which have been reviewed by state courts are automatically granted preclusive effect. Justice Blackmun says in *Kremer*³⁷ that Title VII claimants get a trial *de novo* in federal court but at that trial the federal court must adopt state court findings because of 28 U.S.C. § 1738. Thus, a claimant does not get a real trial *de novo* when he appeals the state administrative hearing result to the state court. When the claimant appeals to state court, he does not get a trial *de novo* in federal court because the federal court will adopt the findings of the state court because of section 1739 res

32. See 42 U.S.C. § 2000e-5(b) (1976).

33. *Id.*

34. *Id.*

35. *Id.* § 2000e-5(f). The [EEOC] may bring a civil action against any respondent not a government, governmental agency or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States District Court. *Id.*

36. *Kremer*, 456 U.S. at 474 n.15 and authorities cited therein.

37. *Id.* at 504 (Blackmun, J., dissenting).

judicata. The only way a claimant can get a trial *de novo* is if he does not appeal the state agency decision to state court but files a claim in federal court instead.

Congress did not intend to allow the limited EEOC nonjudicial administrative investigation to prevent the Title VII litigant from his day in a federal court.³⁸ It is equally clear that Congress did not intend for the EEOC to adjudicate Title VII claims on their merits. It is not clear what relationship exists between Title VII's limited deferral provisions under section 706 and the full faith and credit provisions of sections 1738 and 1739 for those state administrative agencies in states which may have adequate laws to resolve Title VII complaints through administrative adjudication rather than administrative investigation. The *Kremer* Court merely describes the proper relationship under Title VII's limited deferral provisions between the EEOC and the appropriate state administrative agency,³⁹ which involves the EEOC's consideration of a discrimination complaint only after the state agency has had an opportunity to resolve the controversy. The *Kremer* Court does not properly describe the relationship between Title VII's deferral provisions, the appropriate state section 706 administrative agency's decisions, and the full faith and credit provisions.

The basis for the Court's unexplained rationale for refusing to apply the full faith and credit provision to an adjudicated state administrative decision is highlighted in the dictum.⁴⁰ The Court concludes in summary fashion that since Congress did not intend for the EEOC's adjustment of a Title VII complaint to prevent a trial *de novo*, it necessarily follows that state administrative decisions not reviewed by a state court should not be given preclusive effect.⁴¹ The Court's rationale will not stand close scrutiny because the Court ignores the broader purpose of the full faith and credit section of Title 28. Further, the *Kremer* Court could "have ignored the label affixed to the deciding tribunal, and evaluate[d] the actual nature of the [administrative agency] proceedings" before deciding whether the agency decision was entitled to preclusive effect.⁴² The effect of the automatic denial of preclusive effect to unreviewed state administrative decisions takes away the incentive for states to adopt substantive and procedural provisions identical to those of Title VII. The Supreme Court has unfortunately equated the role of state administrative agencies in resolving Title VII complaints to that of the

38. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Chandler v. Roudabush*, 425 U.S. 840 (1976).

39. *Kremer*, 456 U.S. at 468-69. Clearly, Congress intended that state anti-discrimination laws play an important role in the fight against employment discrimination.

40. *Id.* at 470 n.7.

41. *Id.*

42. See *supra* note 29.

EEOC. However, the two entities often employ different procedures. "Most states afford both investigatory review similar to that provided by the EEOC and full scale evidentiary hearings before an administrative tribunal."⁴³

The EEOC is not authorized to conduct a full scale evidentiary hearing on Title VII charges. A charge of discrimination is filed with the EEOC to trigger investigatory and conciliatory procedures of that agency under 42 U.S.C. § 2000e 5(b), and not to trigger a lawsuit.⁴⁴ In deciding whether there is probable cause to believe that a person's charge of discrimination is true, the EEOC is not bound by the determination of a state or local deferral agency. The Commission is required to accord only substantial weight to final findings and orders made by state or local authorities in proceedings conducted under the requirements of Title VII deferral provisions.⁴⁵

The *Kremer* decision presents more than a question of deferral to a state or local authority. The broad policy issue presented by the *Kremer* decision requires analysis of the relationship between the full faith and credit provisions of Title 28 and the substantive and procedural rights of a Title VII litigant who files a charge in a jurisdiction where the EEOC is required to give substantial weight to the findings of state or local proceedings.

The dissenting opinion of Justice Blackmun points out that "the Court, as it must, concedes that a state *agency* determination does not preclude a trial *de novo* in federal district court. . . . Congress made it clear beyond doubt that state agency findings would not prevent the Title VII complainant from filing suit in federal court."⁴⁶ Justice Blackmun's assertion concerning the role of state agencies may not be valid. Congress was careful to draft legislation defining the limited role it wanted the EEOC to have in investigating and not adjudicating Title VII complaints.⁴⁷ Congress was not clear about what effect full faith and credit provisions should have on adjudicated unreviewed state ad-

43. Jackson, Matheson & Piskorski, *supra* note 5, at 1486; e.g., CAL. GOVT. CODE §§ 12963, 12967-69 (Deering Supp. 1981); FLA. STAT. ANN. § 760.06 (West 1984); ILL. REV. STAT. ch. 68, §§ 7-102(c), 8-106 (1982); MICH. STAT. ANN. § 3.548 (602) (1978); N.Y. EXEC. LAW §§ 294, 297 (McKinney 1972 & Supp. 1980); OHIO REV. CODE ANN. § 4112.05 (Page 1980) *cited in* Jackson, Matheson & Piskorski, *supra* note 5, at 1486 n.8.

44. Smith v. Joseph Horne Co., 438 F. Supp. 1207 (W.D. Pa. 1977).

45. 42 U.S.C. § 2000e-5(b) (1976).

46. *Kremer*, 456 U.S. at 487 (Blackmun, J., dissenting).

47. See, e.g., H.R. REP. NO. 914, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. CODE CONG., & AD NEWS 2355, 2487, 2515 (additional views of Representatives McCulloch, Lindsay, Cahill, Shriver, McGregor, Mathias, and Bromwell). "As the title was originally worded the [EEOC] would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary." *Id.* at 2515.

ministrative decisions rendered pursuant to Title VII deferral provisions.⁴⁸ "Nothing in the Act prevents a complainant from suing in federal court after a state has adjudicated his claim."⁴⁹

The important question for consideration under 42 U.S.C. § 2000e 5(b) is not whether Congress intended for state proceedings to have preclusive effect on the EEOC. Rather, the question is whether this deferral "provision which is addressed to EEOC rather than the Courts"⁵⁰ is indicative of a congressional policy to abandon the general rule that a legal claim once decided in an administrative forum of competent jurisdiction is to be afforded the protection of the full faith and credit doctrine where such a decision would be afforded preclusive effect in a state's own courts.⁵¹

Res judicata is typically applied only where there has been a prior judicial proceeding. However, the Supreme Court has stated that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."⁵²

The Supreme Court should decide at the appropriate time whether a federal court in a Title VII case should give preclusive effect to a section 706 state administrative agency's adjudication of an employment claim when the parties have had "a full and fair opportunity to litigate"⁵³ and the administrative decision would be res judicata in the state's own courts. As a general rule, "the full faith and credit clause and section 1738 require application of preclusion principles to unreviewed state administrative adjudications."⁵⁴

Title VII substantial weight directives and preclusion principles were designed to increase deference to state decisions.⁵⁵ The *Kremer* Court correctly rejected the contention that Title VII's "substantial weight directive"⁵⁶ implicitly overruled section 1738's application to state court

48. "The unusual circumstances surrounding Title VII's enactment make analysis especially difficult [citation omitted]. Unfortunately, courts interpreting Title VII do not have the benefit of legislative reports, which are traditionally considered among the most illuminating and reliable indicators of Congress's intent." Jackson, Matheson & Piskorski, *supra* note 5, at 1493.

49. *Id.* at 1495.

50. *Batiste v. Furnco Constr. Corp.*, 503 F.2d 447 (7th Cir. 1973).

51. *Utah Constr. & Mining Co.*, 384 U.S. at 421-22.

52. *Garner v. Giarruso*, 571 F.2d 1330, 1336 (5th Cir. 1978) (quoting *Utah Constr. & Mining Co.*, 384 U.S. at 422).

53. *Allen v. McCurry*, 449 U.S. 90, 100 (1980).

54. Jackson, Matheson & Piskorski, *supra* note 5, at 1521 n.206 (citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 443 (1943)).

55. 42 U.S.C. § 2000e-5(b) (1976). "In determining whether reasonable cause exists the Commission shall accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under state or local law pursuant to the requirements of subsections (c) and (d). . . ."

56. *Kremer*, 456 U.S. at 470 n.8.

decisions. "Since enactment of Title VII, the deferral provision has presented problems in interpretation."⁵⁷ "The inclusion of the 'substantial weight' provisions was made without comment by the Senate and the intended meaning of the words cannot be determined from legislative history."⁵⁸ The *Kremer* Court stated that Congress intended that the "substantial weight" requirement indicate "only the minimum level of deference that the EEOC must afford all state determinations."⁵⁹ The *Kremer* Court reasoned that the "substantial weight" requirement does not bar affording greater preclusive effect and rejected Justice Blackmun's "interpretation of that provision as a ceiling on the deference federal courts are obligated to give state court judgments."⁶⁰ The *Kremer* Court's rationale does not support a principled distinction between judicial decisions and judicially unreviewed administrative decisions for purposes of applying Title VII's substantial weight provision and section 1738's full faith and credit directive. The Court's no full faith and credit statement in *Kremer*⁶¹ has the effect of requiring federal courts to give only substantial weight to all Title VII section 706 agency administrative decisions. However, under *Kremer*, any state judicial decision which meets the minimum requirement of the fourteenth amendment due process clause will deny a Title VII litigant a right to a federal *trial de novo*.

IV. PRECLUSION PRINCIPLES APPLY TO ADMINISTRATIVE DECISIONS

In *Utah Construction*, the Supreme Court held that preclusion doctrines apply to unreviewed adjudicatory administrative decisions.⁶² In *Kremer*, the Supreme Court has, by implication excluded the application of the *Utah Construction* preclusion doctrine to administrative decisions involving Title VII's substantial weight directive. In *Kremer*, Justice White cites *Utah Construction* for the proposition that "res judicata applies to decisions of an administrative agency acting in a judicial capacity."⁶³ However, Justice White also stated that unreviewed administrative determinations by state agencies should not preclude a

57. Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 867 (1972). For instance, the EEOC has satisfactorily worked out a procedure whereby it forwards complaints to state agencies when complainants have first filed a charge with the EEOC, in spite of the directive of 42 U.S.C. § 2000e-5(b) that no charge be filed with the EEOC until 60 days after the beginning of state proceedings.

58. *Id.* at 866-67 n.279. "This failure to indicate the specific meaning of the term [substantial weight] leaves an unknown factor in the law." *Id.*

59. *Kremer*, 456 U.S. at 470. See also Jackson, Matheson & Piskorski, *supra* note 5, at 1505. "Interpreted in light of its purpose, the substantial weight directive would seem to state only the minimum weight, that the E.E.O.C. must give to state findings, not an implicit maximum."

60. *Id.* at 470 n.8.

61. *Id.* at 470 n.7.

62. *Utah Constr. & Mining Co.*, 384 U.S. at 394.

63. *Kremer*, 456 U.S. at 484-85 n.26.

trial *de novo* in Title VII cases because "it is settled that the decision of the EEOC does not preclude a trial *de novo* in federal court."⁶⁴ In *Kremer* the Court's refusal to apply preclusion principles to unreviewed administrative decisions is subject to the same criticism directed at the Second Circuit.⁶⁵

The Second Circuit refuses to grant preclusive effect to purely administrative decisions, even if the administrative agency employed formal, adversarial procedures. It will, however, apply preclusion doctrines to state administrative decisions if the complainant has initiated state court review of those decisions. This formalistic distinction . . . misconstrues Title VII's intent, section 1738, and traditional preclusion principles.⁶⁶

The *Kremer* Court's refusal to grant preclusive effect to unreviewed state administrative decisions is difficult to support with the Court's limited analysis. Justice White did not reconcile his conclusion that unreviewed state administrative decisions are not entitled to the protection of the preclusion doctrine with the Court's holding in *Utah Construction*.⁶⁷ It is clearly more consistent with general rules for the Supreme Court to subsequently decide that Title VII's substantial weight requirement does not implicitly repeal section 1738 as it relates to the application of full faith and credit to unreviewed state administrative decisions. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . ."⁶⁸ Section 1738, as a specific statute, should not be controlled by the provisions of Title VII. One may conclude from Justice Stevens' dissenting opinion and the holding of the Court in *Kremer* that the Court has adopted the position that the 1972 amendments show that the substantial weight requirement implicitly restricts a federal court's authority to apply the full faith and credit doctrine to unreviewed state administrative decisions.⁶⁹ Justice Stevens said, "Both the text of Title VII and its legislative history indicate that Congress intended the claimant to have at least one opportunity to prove his case in a *de novo* trial in court."⁷⁰ The Court may effect at least a partial repeal of section 1738 in a subsequent case where the *Kremer* unreviewed administrative decision issue is presented. Congress intended for a complainant to bring a Title VII suit despite the termination of his state agency "proceedings" without

64. *Id.* at 470 n.7.

65. See Jackson, Matheson & Piskorski, *supra* note 5, at 1519-23.

66. *Id.* at 1521-22.

67. *Id.* at 1521, "The narrow issue in *Utah Construction* concerned the effect that a federal court must give to federal administrative adjudications."

68. Radzanover v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

69. *Kremer*, 456 U.S. at 508-10.

70. *Id.* at 511 (Stevens, J., dissenting).

regard to the nature of those administrative decisions.⁷¹ Thus, the Court could reason that Congress referred to state administrative processing of discrimination claims and not judicial review of agency decisions, when it referred to "proceedings" in sections 706(b) and (c). Simultaneously, the Court could also state that Congress intended to exclude a state court trial on the merits of the complainant's claim as beyond the scope of the term "proceedings."

Such a hypothetical decision would be buttressed by the fact that the procedures available in state court closely approximate those available in federal court. Moreover, the policies favoring preclusion under 28 U.S.C. section 1738 would be considerably stronger if the merits of the discrimination claim had been settled by the state court itself.⁷²

The *Kremer* Court inappropriately concluded that "state proceedings need to do no more than satisfy the minimum procedural requirements of the fourteenth amendment's due process clause in order to qualify for full faith and credit guaranteed by federal law."⁷³ A Title VII case "in which an adverse agency decision has been reviewed and upheld by a state court"⁷⁴ should require more than merely meeting due process standards to qualify for full faith and credit. Justice Blackmun's dissenting opinion criticizes the majority's due process logic.

[T]he Court concluded that minimal due process standards provide safeguards sufficient to warrant denying a discrimination victim federal remedies if a state court rejects his request to overturn an adverse state agency decision. In Title VII, Congress wanted to assure discrimination victims more than bare due process it wanted them to have the benefit of a vigorous effort to eliminate discrimination. By affording some discrimination complainants less, the Court contravenes the congressional intent behind Title VII.⁷⁵

Justice Stevens has suggested a more appropriate test which includes more than minimal due process considerations for determining when an adverse agency decision should be given preclusive effect. If the judicial review "is the equivalent of a *de novo* trial on the merits, then I would agree that the analysis in the Court's opinion leads to the conclusion that 28 U.S.C. § 1738 forecloses a second lawsuit in federal court."⁷⁶ Justice Stevens concludes that the judicial review in *Kremer* is not the equivalent of a trial *de novo* on the merits and therefore

71. *Id.* at 494 n.10. (Blackmun, J., dissenting).

72. *Id.*

73. *Id.* at 481.

74. *Id.* at 509 (Stevens, J., dissenting).

75. *Id.* at 498-99 (Blackmun, J., dissenting).

76. *Id.* at 509-10 (Stevens, J., dissenting). "But as Justice Blackmun has demonstrated, [citations omitted] that is not the character of the relevant judicial review in *New York*. The *New York* court's holding that the agency decision was not arbitrary or capricious merely establishes as a matter of law that a rational adjudicator might have resolved the discrimination issue either way. It is therefore entirely consistent with § 1738 for a federal district court to accept the *New*

should not bar a federal claim under Title VII.⁷⁷ Neither Justice Stevens' dissenting opinion nor the majority opinion attempts to support with consistent analysis Justice White's suggestion in dictum that it is clear that unreviewed administrative determinations by state agencies should not preclude a litigant from a federal trial *de novo* even if such a decision were to be afforded preclusive effect in a state's own courts.⁷⁸ Justice White's comments do not suggest whether such an agency decision would prevent a trial *de novo* in state court.

V. *KREMER* DICTUM: AN IMPLIED REPEAL OF 28 U.S.C. § 1738

Ironically, the Court's decision in *Kremer* is premised on the conclusion that 28 U.S.C. § 1738 requires federal courts to afford the same full faith and credit to state court judgments that would apply in the state's own court.⁷⁹ The Court created a paradox: it suggested that unreviewed state administrative decisions are not subject to application of the full faith and credit doctrine. In making this suggestion, the Court did not consider or discuss whether such a denial of full faith and credit has the effect of repealing section 1738's application to unreviewed state administrative decisions rendered as a result of Title VII's section 706(c) proceedings. It is well-established that a section 706(c) proceeding is required when an alleged incident of employment discrimination takes place in a state or locality which has laws prohibiting such discriminatory conduct. The state or locality must have established an "authority to grant or seek relief from such [unlawful conduct] or to institute criminal proceedings with respect thereto."⁸⁰ The EEOC will not process a charge of discrimination until the state remedy has been utilized and sixty days have lapsed, or the state proceedings have ended.⁸¹

Articulating a principled rationale for the implied repeal of section 1738 in a Title VII section 706(c) proceeding involving an unreviewed administrative decision is a difficult task because "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."⁸² In analyzing whether the Court should, in a subsequent decision, effect a repeal of 28 U.S.C. § 1738 in a section 706(c) proceedings, the Court should decide whether Title VII's limited

York judgment as having settled that proposition and then to proceed to resolve the discrimination issue in a *de novo* trial."

77. *Id.*

78. *Id.* at 470 n.7.

79. *Id.* at 466.

80. *Id.* at 469.

81. 42 U.S.C. § 2000e-5(c) (1976).

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

deferral provisions and the full faith and credit provisions are "in irreconcilable conflict in the sense that there is a positive repugnancy between them or that they cannot mutually coexist."⁸³ Courts must give effect to two statutes which can exist at the same time, unless Congress has expressed a contrary intent.⁸⁴ "The intention of the legislature to repeal must be clear and manifest."⁸⁵ Title VII, by its express terms, does not prevent a litigant from suing in federal court after he has litigated his cause of action before either a state administrative agency or a state court.⁸⁶ However, the available legislative history of Title VII indicates that Congress never intended to grant a Title VII litigant an absolute right to relitigate his claim in federal court.⁸⁷ Senator Dirksen strongly opposed the litigation of a single claim before both state courts and federal courts:

What a layering upon layer of enforcement. What if Court orders differed in their terms or requirements? There would be no assurance that they would be identical. Should we have the Federal forces of justice pull on one arm, and the State forces of justice tug on the other? Should we draw and quarter the victim?⁸⁸

Congress wanted to apply preclusion rules "completely to 'adequate' state decisions."⁸⁹ This does not mean that *res judicata* will automatically be granted to a state court decision so as "to bind the federal courts."⁹⁰ "Other well defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738."⁹¹ The *Kremer* Court did not adequately identify or discuss appropriate policy objections against granting preclusive effect to the unreviewed decisions of state administrative agencies. Specifically, the Court did not discuss the need to examine the state agency decision to determine whether the complainant had been afforded an opportunity to have his claim fully judged on its merits. This need arises because of the different types of state agency action, which range from investigatory and conciliatory procedures to hearings designed to adjudicate the claim and afford complainants a full opportunity to participate in the hearings. If federal courts give preclusive effect to state agency decisions that are not the result of an adjudicatory process, claimants are thereby

83. *Radzanever*, 426 U.S. at 155.

84. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

85. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

86. 42 U.S.C. § 2000e-5(c) (1976).

87. *Jackson, Matheson & Piskorski*, *supra* note 5, at 1496.

88. *See* 110 CONG. REC. 6449 (1964) (remarks of Sen. Dirksen).

89. *Jackson, Matheson & Riskorski*, *supra* note 5, at 1496.

90. *Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 274 (2d Cir. 1979).

91. *Id.* (quoting *American Manneto Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972)).

denied the opportunity to have the merits of their claim considered at any level of the Title VII process.

VI. *ALEXANDER* AND *MITCHELL* RECONSIDERED

The *Kremer* Court should have fully discussed its policy justification for suggesting that the preclusion principles of section 1738 do not apply in those cases involving Title VII's "deferral" provisions, by reconsidering the broad policy issues articulated in both *Alexander v. Gardner-Denver Co.*⁹² and *Mitchell v. National Broadcasting Co.*⁹³ In *Alexander* a black employee filed a grievance under a collective bargaining agreement after he was discharged by his former employer, Gardner-Denver. The collective bargaining agreement provided that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry."⁹⁴ The employee alleged that he was discharged because of racial discrimination. After Gardner-Denver rejected the claim of racial discrimination, the employee's claim was heard before an arbitrator, pursuant to a collective bargaining agreement between the employee's union and the employer. Before the arbitration hearing, the employee filed, with the Colorado Civil Rights Commission, a racial discrimination complaint which was referred to the EEOC. Under the collective bargaining agreement, the employer retained "the right to hire, suspend or discharge [employees] for proper cause."⁹⁵ The arbitrator ruled that the employee was discharged for cause. After the EEOC's subsequent decision that there was no reasonable ground to believe that the employer had violated Title VII, the employee filed an action in federal district court alleging that he was discharged because of his race. The district court granted the employer's motion for summary judgment, holding that the employee was bound by the prior arbitral decision and had no right to sue under Title VII.⁹⁶ The Court of Appeals for the Tenth Circuit affirmed.⁹⁷ The Supreme Court reversed and held that an employee's claim in a trial *de novo* under Title VII is not precluded by prior submission of the claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement.⁹⁸

In *Mitchell* a black female employee was dismissed by her employer, National Broadcasting Company. After her dismissal, the employee filed a complaint with the New York State Division of Human Rights

92. 415 U.S. 36 (1974).

93. 553 F.2d 265 (2d Cir. 1979).

94. *Alexander*, 415 U.S. at 39.

95. *Id.*

96. *Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012 (D. Colo. 1971).

97. *Alexander v. Gardner-Denver Co.*, 466 F.2d 1209 (10th Cir. 1972).

98. *Alexander*, 415 U.S. at 36.

(NYHRD), charging that she had been denied "equal terms, conditions and privileges of employment because of her race and color."⁹⁹ The NYHRD conducted an investigation. The investigation was not extensive¹⁰⁰ and consisted of two informal conferences attended by the dismissed employee, officials of the NYHRD and National Broadcasting Company attorneys. The regional director of NYHRD dismissed the complaint "on grounds of lack of probable cause."¹⁰¹ The decision was affirmed by the NYHRD Appeal Board and subsequently by the Appellate Division of the New York Supreme Court. The former employee also filed a charge of discrimination with the EEOC complaining that her former employer had violated Title VII. The EEOC did not act on her complaint for almost a year, and then issued a separate finding of no probable cause with respect to the employee's charges of racial discrimination. Although the employee received notice of a right-to-sue letter from the EEOC, a Title VII proceeding was never begun in the federal courts. Instead the employee filed a complaint under 42 U.S.C. § 1981 in federal district court. The complaint, alleging that the employee's dismissal was racially motivated, sought punitive damages and injunctive relief. The district court dismissed the complaint by granting a summary judgment in favor of the former employer on res judicata grounds.¹⁰² The Second Circuit Court of Appeals affirmed, holding that "a state administrative determination, upheld in the state courts, is res judicata of a subsequent federal civil rights action."¹⁰³

The *Kremer* Court made explicit that "our statement in *Alexander v. Gardner-Denver* that 'final responsibility for enforcement of Title VII is vested with federal courts' . . . should not be read to imply, that by vesting 'final responsibility in one forum,' Congress intended to deny finality to decisions in another."¹⁰⁴ The Court's statement in *Alexander* that in general a submission of a Title VII claim to one forum "does not preclude a later submission to another"¹⁰⁵ is now the exception rather than the rule. A reasonable interpretation of the Court's holding in *Kremer* indicates that, as a general rule, submission of a Title VII claim to a judicial forum will preclude a litigant from a Title VII trial

99. *Mitchell*, 553 F.2d at 266 n.1.

100. *Id.* at 267.

101. "Before the State Division may dismiss a complaint of discrimination for lack of probable cause, 'it must appear virtually that as a matter of law the complaint lacks merit.'" *Id.* at 270 (quoting *Mayo v. Hopeman Lumber & Mfg. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 695 (1970)).

102. *Mitchell v. National Broadcasting Co.*, 418 F. Supp. 462 (S.D.N.Y. 1976).

103. *Mitchell*, 553 F.2d at 266.

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

105. *Alexander*, 415 U.S. at 48.

de novo because of the full faith and credit provisions.¹⁰⁶ A Title VII litigant who submits his claim to a state administrative forum without judicial review will be allowed to pursue his Title VII rights under applicable federal statutes.¹⁰⁷ The denial of finality to a decision of an administrative forum suggests an implied repeal of 28 U.S.C. § 1738 or an exception to the Court's ruling in *Utah Construction*.¹⁰⁸

"In *Allen v. McCurry* the Supreme Court recognized the need to develop preclusion rules that accommodate specific federal policies."¹⁰⁹ *Allen* states that an exception to 28 U.S.C. § 1738 will not be recognized unless a subsequent statute contains an express or implied partial repeal.¹¹⁰ Therefore, a proper reading of the *Kremer* Court's suggestion that full faith and credit will not be given to an unreviewed state administration agency decision has effected a partial repeal of 28 U.S.C. § 1738. "There is no claim here that Title VII expressly repealed § 1738."¹¹¹

[There] are two well settled categories of repeal by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . .¹¹²

The *Kremer* Court has implicitly determined that Title VII section 706 agency proceeding and 28 U.S.C. § 1738's application to unreviewed administrative determination are in irreconcilable conflict. The Court has interpreted the civil action to follow a decision by federal and state administrative agencies to be a trial *de novo*.¹¹³ The *Kremer* Court has by implication placed the same limits on the state agency proceedings that Congress explicitly placed on the EEOC. Under the rationale of the *Kremer* Court, neither federal nor state administrative decisions can prevent a federal trial *do novo*.¹¹⁴

The *Kremer* Court's rationale creates a conflict with 28 U.S.C. § 1738 in a section 706 agency hearing because the Court has apparently reasoned that Congress never intended for either a state or federal administrative determination to finally adjudicate a Title VII claim. The

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

107. *Id.* at 470 n.7.

108. *Utah Constr. & Mining Co.*, 384 U.S. at 422.

109. Jackson, Matheson & Piskorski, *supra* note 5, at 1513 (citing *Allen*, 449 U.S. at 416-18).

110. *Allen*, 449 U.S. at 99.

111. *Kremer*, 456 U.S. at 468.

112. *Id.* (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1963)).

113. *Kremer*, 456 U.S. at 469.

114. *Id.* at 470 n.8.

Court created an identical role for the state and federal fair employment agencies. This may be hard to accept since state agencies, unlike the EEOC, are given the power to adjudicate and often "conduct a quasi-judicial evidentiary hearing" if it finds a complaint to be based upon probable cause.¹¹⁵ The relationship of Title VII to section 1738 does not fall within the second category of a later act intended as a substitute for an earlier one because Congress enacted Title VII to eliminate racial discrimination.¹¹⁶

VII. SUBSTANTIAL POLICY REASONS REQUIRE PARTIAL REPEAL OF 28 U.S.C. § 1738

There are two arguments in favor of a partial repeal of 28 U.S.C. § 1738 as it applies to section 706 agency proceedings: the importance of agency conciliation efforts in civil rights litigation, and the undesirability of allowing state agency proceedings to preempt claims brought under Title VII.¹¹⁷ Without judicial review of the state agency determination, a number of considerations would weigh against barring¹¹⁸ a subsequent federal trial *de novo* on grounds of the full faith and credit provision of section 1738. These include "the undesirability of allowing the deferral of a Title VII claim to a state agency to foreclose"¹¹⁹ a Title VII action and "the usefulness of having a state administrative agency attempt the conciliation of discrimination claims prior to filing an action in federal court."¹²⁰ The deferral requirements of Title VII do not contemplate resort to state judicial review.¹²¹ It is clear from the *Kremer* decision that the Court has construed the section 706(b) substantial weight provision so as to simultaneously and paradoxically effect a partial repeal of section 1738 as applied to section 706 administrative proceedings. The Court reached this conclusion even though the statutory provisions for section 706 judicial proceedings are neither in irreconcilable conflict with nor intended as a substitute for section 1738.¹²² The Court stated in *Kremer* that both Title VII's limited deferral and its substantial weight provisions are directed toward administrative cooperation and lend no evidence of Congressional intent to compromise or circumscribe the validity of state judicial proceedings.¹²³ Under the Court's administrative cooperation logic, a

115. Jackson, Matheson & Piskorski, *supra* note 5, at 1519.

116. *Kremer*, 456 U.S. at 468; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

117. *Mitchell*, 553 F.2d at 268.

118. *Id.* at 275.

119. *Id.*

120. *Id.* (citing *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975)).

121. *Mitchell*, 553 F.2d at 275.

122. *Kremer*, 456 U.S. at 470 n.8.

123. *Id.*

section 706(b) agency decision will be given substantial weight. The Court has implicitly repealed section 1738 by construing section 706(b) as a ceiling on the deference federal courts are permitted to give state agency proceedings.

Justice Blackmun incorrectly interpreted section 706(b) as a “ceiling on the deference federal courts are obligated to give state court judgment.”¹²⁴ The *Kremer* Court has effected a partial repeal of 28 U.S.C. § 1738 through what Justice Blackmun’s dissenting opinion correctly describes as a “schizophrenic reading of section 706(b).”¹²⁵ He stated that:

According to the Court, when Congress amended 706(b) so that state “proceedings” would be accorded “substantial weight,” it meant two different things at the same time: it intended state agency “proceedings” to be accorded only “substantial weight” while simultaneously, state judicial “proceedings” would be accorded “substantial weight and more”—that is, “preclusive effect.”¹²⁶

The Court implicitly concedes, when it permits trial *de novo* suits in federal court at the conclusion of section 706 agency proceedings, that substantial weight “is a very different concept from ‘preclusive effect.’”¹²⁷ The former does not foreclose a subsequent Title VII suit while the latter requires that a subsequent Title VII suit be foreclosed by full faith and credit. The *Kremer* Court has construed section 706(b) so as to apply the concept of preclusive effect to state judicial proceedings only.

The first argument in favor of a partial repeal of section 1738 under the *Kremer* Court’s preclusion rationale is that Title VII claimants should have a choice as to whether or not they wish to have their discrimination claims adjudicated in a judicial forum despite prior administrative attempts at dispute resolution. The second argument rests on the premise that partial repeal would prevent a situation where an employer’s appeal of a state agency decision to a state court would have the effect of denying a Title VII claimant the opportunity to have his claim heard on the merits in a trial *de novo* in an appropriate judicial forum.

In *Mitchell*, the court stated, “if res judicata applies in these [similar] circumstances, then deferral to state agencies pursuant to Title VII creates the risk that by appealing any agency determination favorable to claimant, the respondent can force the claimant into state court and foreclose a federal action under a section 1981 claim.”¹²⁸ The Second

124. *Id.*

125. *Id.* at 489 (Blackmun, J., dissenting).

126. *Id.*

127. *Id.*

128. *Mitchell*, 553 F.2d at 275 n.13; Comment, *Civil Rights - Civil Procedure: State Appellate*

Circuit extended the *Mitchell* rule to Title VII cases in *Sinicropi v. Nassau County*.¹²⁹ The partial repeal of section 1738 in a section 706 agency case would take away the incentive for a prudent discrimination complainant to make every "effort to prevent the state agency from reaching a final decision."¹³⁰ Without a partial repeal, a complainant who prevails after a full hearing runs the risk that his adversary may seek judicial review. The Title VII complainant could find himself closed out of federal court if a state court decides that the agency's adverse decision is unsupported by sufficient evidence.¹³¹ In some future case, the Court should find such a result "inimical to Title VII"¹³² and hold that such reviewed administrative determinations should not preclude a trial *de novo* in federal court, even "if such a decision were to be afforded preclusive effect in a state's own court. . . ."¹³³ In denying preclusive effect to an employer-initiated appeal of a section 706 agency decision, the Court should reject the argument that permitting an employee to have his claim considered in both the administrative and judicial forums would be unfair since this would mean that the employee but not the employer would be entitled to apply the preclusion principles of section 1738.¹³⁴ An employer does not receive unfair treatment with respect to such a judicially reviewed administrative "decision for the simple reason that Title VII does not provide employers with a cause of action against employees."¹³⁵ Moreover "[a]n employer cannot be the victim of discriminatory employment practices."¹³⁶ The Second Circuit Court of Appeals has suggested that limiting the application of the preclusion rules to section 706 administrative decisions that were subjected to judicial review at the claimant's solicitation is indispensable to protecting the claimant's right to choose a trial *de novo* in federal court. "Although *Sinicropi* suggests that complainants were meant to have such a choice, nothing in Title VII's legislative history supports that assertion."¹³⁷ However, Title VII's legislative history does not contradict the position of the *Sinicropi* court.¹³⁸

Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, 62 MINN. L. REV. 987, 1000-04 (1978). The author of the comment correctly predicted the *Mitchell* decision would apply in Title VII cases. *Mitchell* held that judicial review of a state agency decision in 42 U.S.C. § 1981 (1976) would bar a subsequent federal action because of res judicata. 553 F.2d at 265. "Before *Mitchell* res judicata had rarely been applied to bar a federal employment discrimination claim." Comment, *supra*, at 1000.

129. 601 F.2d 60 (per curiam), *cert. denied*, 444 U.S. 983 (1979).

130. *Kremer*, 456 U.S. at 504 n.18 (Blackmun, J., dissenting).

131. *Id.*

132. *Id.*

133. *Id.* at 470 n.7.

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

135. *Id.* at 54.

136. *Id.*

137. Jackson, Matheson & Piskorski, *supra* note 5, at 1522.

138. *Id.*

The *Sinicropi* court characterized the fact that the claimant submitted her case to the state courts for review as a "crucial factor" in its determination that subsequent litigation in federal court was barred by res judicata.¹³⁹ A partial repeal of section 1738 which denies finality to a state court judgment rendered as a result of the employer choosing a state court forum would clearly eliminate the incentive for a complainant to "thwart all state proceedings."¹⁴⁰ A successful state discrimination complainant should not be barred by section 1738 because the employer pursued judicial review of a section 706 administrative agency decision.

CONCLUSION

Prior to *Kremer*, the rule of *Utah Construction* required federal courts to give preclusive effect to state administrative agency decisions made when the agency acted in a judicial capacity. *Kremer* has suggested that the *Utah Construction* rule is no longer applicable in Title VII cases. Instead of looking to the proceedings of the state section 706 agency to determine whether or not it has acted in a quasi-judicial capacity as an adjudicator of the employment discrimination claim, the *Kremer* Court looked to whether the agency order had been reviewed by the state's courts. Those agencies' decisions adequately reviewed by a state court are to be given preclusive effect. The *Kremer* Court suggests that unreviewed agency decisions cannot be given preclusive effect, whether or not the state agency has adjudicated the employment discrimination claim upon its merits.

Traditional preclusion rules require that unreviewed state agency determinations be separated into those which have been the result of the agency acting as a judicial forum and those which have not. Congress intended that Federal Title VII remedies supplement the employment discrimination remedies of the states. Therefore, section 1738 must be impliedly repealed to allow federal courts to deny res judicata effect to unreviewed state agency decisions when the agency has adequately provided an adjudication upon the merits to an employment discrimination complainant.

139. *Sinicropi*, 601 F.2d at 62 (citing *Mitchell*, 553 F.2d at 275-76).

140. *Kremer*, 456 U.S. at 504 n.18 (Blackmun, J., dissenting).