Cornell Law Review

Volume 73
Issue 4 *May 1988*

Article 4

Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line

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COLLATERAL ESTOPPEL EFFECTS OF ADMINISTRATIVE AGENCY DETERMINATIONS: WHERE SHOULD FEDERAL COURTS DRAW THE LINE?

Administrative agencies currently adjudicate more disputes than federal courts.[1] Predictably, issues determined in agency adjudications overlap substantially with issues determined in federal court actions. By accepting and relying on agency[2] determinations of fact,[3] federal courts can conserve the resources that judicial determination of those issues would require.[4] Courts increasingly realize these savings by applying collateral estoppel to preclude relitigation of issues adjudicated by administrative agencies.[5]

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1 *See* Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 454 (1983) ("In fiscal year 1978, federal administrative law judges conducted more than 200,000 agency adjudications as compared to 125,914 civil cases decided in the federal district courts.").

2 This analysis applies primarily to *federal* agency determinations. The full faith and credit clause and federal common law rules of preclusion constrain federal courts in granting collateral estoppel effect to state agency determinations.

The full faith and credit clause and its codification, 28 U.S.C. § 1738 (1982), require "federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982). Thus, federal courts must give judicially reviewed state administrative agency determinations the same preclusive effect as the state courts. Under "federal common-law rules of preclusion," if the state agency action satisfies the *Utah Construction* standards, federal courts must give unreviewed state agency determinations the same preclusive effect that the courts of the agency state would give, absent any countervailing federal public policies. University of Tenn. v. Elliott, 478 U.S. 788, 796 (1986); *see infra* notes 66-68 and accompanying text for a discussion of the *Utah Construction* requirements.

3 Agencies determine issues of fact, law, or a combination of both. "[C]ourts are more likely to apply the doctrine of collateral estoppel to conclude an issue of fact or of mixed fact and law than to conclude an issue purely of law." 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE 0.442[1], at 748 (2d ed. 1984); *see also* Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 237-41 (1954) (collateral estoppel most appropriate in precluding relitigation of factual issues); *infra* note 18. This Note concentrates on collateral estoppel of issues of fact, but the reader should be aware of the fact/law distinction.

4 *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21:9, at 78 (2d ed. 1983) ("The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm—something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once. The principle is as much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions—a very great extent—the law worked out for courts does and should apply to agencies.").

5 *See generally* Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65 (1977) (authored by E. Macey); Carlisk, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administra-*

Courts currently apply a flexible standard in determining whether to grant an agency determination collateral estoppel effect. The standard involves several elements. An agency must act in a "judicial capacity,"[6] adjudicate in a trial-like manner,[7] and follow procedures[8] that provide the litigant his "full and fair opportunity" to participate in the adjudicatory process.[9] Only then will courts grant collateral estoppel effect to the agency's decisions.

Agency procedures vary almost as much as agencies themselves.[10] All agency adjudications must comply with the minimum procedural requirements of the due process clause.[11] The exact procedural requirements of the due process clause shift with the interest affected,[12] but generally involve "some kind of hearing."[13] In addition, some agency adjudications must comply with the Administrative Procedure Act ("APA"), which requires full trial-type procedures for "formal" adjudication.[14]

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tive or Arbitral Determination Binding in a Court of Law, 55 FORDHAM L. REV. 63 (1986). For a critical view of the extent to which courts currently grant collateral estoppel effect to agency determinations, see Perschbacher, *supra* note 1.

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

7 *See infra* notes 77-80 and accompanying text.

8 For discussion of modern procedural requirements, see *infra* notes 92-109 and accompanying text.

9 United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (Board of Contract Appeals' findings of fact conclusive where parties before it had adequate opportunity to litigate); *see generally infra* note 88 and accompanying text.

10 *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 9-12 (1969) (discussing examples of discretionary agency action and attendant formalities of decisionmaking).

11 *See* Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (due process requires notice and hearing); *see also* Wolff v. McDonnell, 418 U.S. 539, 557 (1974) (state must provide "those minimum procedures appropriate under the circumstances").

12 Exactly what kind of hearing and when the agency must provide it is still unclear. For criticisms of the current approach, see Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjndication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (criticizing Court's attempt to formulate general due process standard for administrative adjudication in *Mathews* because Court focused on "technique" rather than on values); Searchinger, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017 (1986) (challenging courts' practice of limiting review in face of broad agency discretion as inversion of the correct approach).

13 *See* Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267 (1975) (discussing eleven possible elements of fair hearing—unbiased tribunal, notice of proposed action, opportunity to present opposing viewpoints, right to call witnesses, to know evidence against oneself, and to have decision based solely on evidence presented, right to counsel, record and statement of reasons, public attendance, and judicial review).

14 5 U.S.C. §§ 556, 557 (1978). Because these procedures clearly satisfy the procedural prerequisites for application of collateral estoppel, this Note focuses on "informal" adjudication rather than "formal" adjudication. A good working definition of "informal" adjudication is provided in Verkuil, *A Study of Informal Adjndication Procedures*, 43 U. CHI. L. REV. 739, 739 n.1 (1976) (Informal adjudication "broadly refers to administrative decisions that are not governed by statutory procedures, but which nevertheless affect an individual's rights, obligations, or opportunities. . . . In essence, informal adju-

Courts generally find the due process clause minimum requirements inadequate for application of collateral estoppel,[15] while the APA procedures clearly satisfy the procedural requirements. Currently, courts accept a "relaxed" level of agency procedural formality in order to maximize application of collateral estoppel.[16]

Uncertainty surrounds court application of the "judicial capacity" and the "full and fair opportunity" requirements. This uncertainty creates inefficiency and increased risks of unfairness to precluded litigants. Additionally, courts extend collateral estoppel effect to determinations made by agencies with relatively few procedural safeguards. This extension increases the risk of unfairness and threatens the speed and efficiency advantages of informal adjudication.

This Note proposes that courts adopt a rigid test for determining when to apply collateral estoppel. The rigidity itself would eliminate the inefficiency created by uncertainty. To maximize the fairness to a precluded party, courts should require a high level of agency procedural formality before granting an agency determination collateral estoppel effect. This combination of certainty and formality will advance the goals of collateral estoppel without sacrificing a party's opportunity to litigate and will preserve the speed and efficiency with which agencies can resolve disputes.

I

COLLATERAL ESTOPPEL

Collateral estoppel[17] governs the preclusive effect issue determinations made by one tribunal resolving one dispute will have

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dication is a residual category of procedural entitlement that grows or diminishes in "formality" more by judicial and administrative notions of fairness than by legislative plan or design.").

15 Due process requires only notice and a hearing. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("[S]ome form of hearing is required before an individual is finally deprived of a property interest."); Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) ("[T]hese principles require that a recipient have timely and adequate notice . . . and an effective opportunity to defend . . . ."). The *Utah Construction* test at its minimum requires more. *See infra* notes 66-88 and accompanying text; *see also* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974) (due process minimum requirements do not produce fairness in social welfare claims adjudication).

16 Perschbacher, *supra* note 1, at 458-62.

17 For examples of the use of the term "collateral estoppel" by courts, see Allen v. McCurry, 449 U.S. 90, 94 n.5 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). For alternative terminology, see Polasky, *supra* note 3, at 217 ("A victim of varying terminology, the concept has been applied under such aliases as 'estoppel by record,' 'estoppel by findings,' 'estoppel by verdict,' and 'estoppel by judgment,' among others." (footnotes omitted)). *See also* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981).

when a subsequent tribunal resolves a second dispute.[18] The doctrine, simply stated, provides that once a tribunal of competent jurisdiction finally determines an issue essential to judgment in the case before it, that issue is conclusively determined for all future actions involving the parties or those in privity with them. Courts today allow both defensive[19] and offensive[20] use of collateral estoppel. Consequently, once a court decides an issue adversely to a party, that party is precluded from relitigating the issue in all future actions against all future parties.[21]

Collateral estoppel increases fairness to litigants by allowing parties to rely on original determinations to guide future behavior. Otherwise, a losing litigant could extend a particular action indefinitely by relitigating in hopes of a favorable decision. Additionally, by limiting repetitive actions, preclusion enables the judicial system to function efficiently.

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18 In the administrative context, courts have hesitated to apply collateral estoppel effect to determinations of law. *See, see,* NLRB v. Markle Mfg. Co., 623 F.2d 1122, 1126 (5th Cir. 1980) ("collateral estoppel [is] not normally applied to conclusions of law made by administrative agencies") (citing Mosher Steel Co. v. NLRB, 568 F.2d 436 (5th Cir. 1978)). *But see* Wickham Contracting Co. v. Board of Educ., 715 F.2d 21, 26 (2d Cir. 1983) (allowing preclusive effect to agency determination of law). This Note focuses on agency determinations of fact. *See supra* note 3.

19 "Defensive" use of nonmutual collateral estoppel allows a defendant in a subsequent action who was not a party in the original action to preclude the plaintiff in the second action from relitigating issues determined adversely to the plaintiff in the original action. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 324 (1971).

20 "Offensive" use of nonmutual collateral estoppel allows a nonparty plaintiff to preclude a defendant from relitigating issues decided adversely to the defendant in the first action. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

For discussion about whether offensive collateral estoppel furthers the goals of collateral estoppel, see Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 ARIZ. ST. L.J. 45 [hereinafter *Offensive Collateral Estoppel*]; Callen, *Efficiency After All: A Reply to Professor Flanagan's Theory of Offensive Collateral Estoppel*, 1983 ARIZ. ST. L.J. 799; Flanagan, *The Efficiency Hypothesis and Offensive Collateral Estoppel: A Response to Professor Callen*, 1983 ARIZ. ST. L.J. 835 [hereinafter *A Response*]; *see also* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1032-37 (1967) (authored by Michael Kimmel).

21 Traditionally, courts required "mutuality" of estoppel, that is, involvement of *both* parties in both the original action and the action involving collateral estoppel, before the doctrine would apply. *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912) (stating that it is "a principle of general elementary law that the estoppel of a judgment must be mutual"). For commentary on mutuality, see Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961). Courts have since abandoned the mutuality requirement. *See, e.g.*, *Blonder-Tongue*, 402 U.S. at 350 ("it is apparent that the uncritical acceptance of the principle of mutuality of estoppel . . . is today out of place"). The seminal case rejecting mutuality is Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942) ("There is no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.").

A. Policies Behind Collateral Estoppel

Four major policies lie behind collateral estoppel. The doctrine promotes finality, promotes efficiency, prevents harassment of litigants, and fosters reliance on judicial decisions. The primary policy underlying collateral estoppel is finality[22]—at some point a dispute must end. As one commentator stated, "Underlying the entire area of res judicata is at least one important policy which gives reason to prior developments and aids in understanding current trends. A terse statement of this policy is that 'the interest of the state requires that there be an end to litigation.' "[23] The finality or repose that collateral estoppel enforces benefits the judicial system as well as the parties to a dispute.

Collateral estoppel conserves litigant and judicial resources by precluding relitigation of issues.[24] The court system should provide a litigant one full opportunity for a hearing on any issue,[25] but because of limited resources, only one opportunity.[26] The court system must be able to resolve finally and conclusively the issues before it. Courts frequently indicate the importance of this consideration in their analyses of offensive and defensive collateral estoppel.[27]

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22 University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986); Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398-99 (1981). For extension of the reasoning to the administrative context, see 4 K. DAVIS, *supra* note 4, § 21:9; RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b (1982); *cf.* Perschbacher, *supra* note 1, at 425.

23 Polasky, *supra* note 3, at 219 (quoting Reed v. Allen, 286 U.S. 191, 198 (1932)). Res judicata is claim preclusion; collateral estoppel is issue preclusion. Although this Note addresses issue preclusion only, the policies behind the two doctrines are identical.

24 Allen v. McCurry, 449 U.S. 90, 94 (1980); *see also* University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986); Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

25 Hansberry v. Lee, 311 U.S. 32 (1940) (discussing due process requirements of notice and opportunity to be heard in context of class actions). *See generally* Note, *Preclusion of Nonparties: A Due Process Violation?*, 13 SW. U.L. REV. 169 (1982) (authored by P. Lusky).

26 *See generally* Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95 (1984); Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Gray, *Collateral Estoppel: One Full and Fair Opportunity to Litigate Common Facts*, 39 J. MO. B. 405 (1983); *see also* Luneburg, *The Opportunity to Be Heard and the Doctrines of Preclusion: Federal Limits on State Law*, 31 VILL. L. REV. 81 (1986); Comment, *Offensive Collateral Estoppel Under the Full and Fair Opportunity Test*, 15 LAND & WATER L. REV. 247 (1980) (authored by Michael Deahl); Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383 (1983) (asserting "individual adversarial justice" checks expansion of collateral estoppel to nonparty litigants).

27 Discussing the abandonment of mutuality, the Supreme Court has noted the high cost duplicative litigation placed on defendants, especially in patent actions. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 334-48 (1971); *see also* Allen v. McCurry, 449 U.S. 90, 94 (1980) (conservation of judicial resources one of benefits behind collateral estoppel); Montana v. United States, 440 U.S. 147, 153 (1979) (issue preclusion conserves judicial resources); Parklane Hosiery Co. v.

Some commentators have challenged judicial economy as a valid reason for collaterally estopping a litigant,[28] and smaller net efficiency gains may result than first appears.[29] Nonetheless, courts clearly have accepted efficiency as a justification for the doctrine.

Collateral estoppel prevents litigant harassment by preventing repetitive and "vexatious" litigation involving the same underlying matter.[30] As one commentator noted, "Without some finality principle the losing party would be free to retry lawsuits continually in the hope of eventually obtaining a more favorable decision. A principle of preclusion prevents the harassment that results from these repetitious suits."[31]

Finally, by ensuring litigant repose and minimizing the possibility of inconsistent decisions, collateral estoppel fosters reliance on judicial determinations.[32] The finality of determination eliminates risks of unanticipated financial liabilities, encourages financial plan-

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Shore, 439 U.S. 322, 326 (1979) (collateral estoppel has dual purpose of relieving litigants of burden of relitigating same issue and promoting judicial economy by preventing needless litigation).

28 *See, e.g.*, Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 348-49 (1948) ("The final justification of the usual rule of res judicata, the saving in court time, is peculiarly unconvincing. *Courts exist for the purpose of trying lawsuits*. . . . The fact that a party may waive the defense of res judicata . . . indicates that saving the judge's time is more afterthought than reason." (emphasis added)).

29 Although almost universally cited as a reason for collateral estoppel, the overall savings from application of the doctrine are not as great as may first appear. First, collateral estoppel may encourage overlitigation of issues in anticipation of future litigation. Second, application of the doctrine may be complicated and time consuming. Third, application without consideration of the underlying policies may compromise those polices. Thus, although collateral estoppel promotes judicial economy, the net savings are somewhat less than the cost of resolving a disputed issue a second time. *See generally* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979) (offensive collateral estoppel may increase total litigation because plaintiffs will gain by not joining in original action). For a discussion of the complexity of application, see Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158. For a discussion of efficiency of the doctrine, see Flanagan, *The Efficiency Hypothesis*, *supra* note 20, at 840 (collateral estoppel is inefficient (1) where court denies its application, and (2) where application of doctrine expends more resources than would relitigation of the common issue).

30 United States v. Stauffer Chem. Co. 464 U.S. 165, 177-78 (1984) (White, J., concurring); *see also* Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

31 Note, *Collateral Estoppel Without Mutuality: Accepting the* Bernhard *Doctrine*, 35 VAND. L. REV. 1423, 1426 (1982) (authored by W. Byassee). Of course, claim preclusion provides more comprehensive protection, but collateral estoppel also shields litigants. *See* Flanagan, *Offensive Collateral Estoppel*, *supra* note 20, at 51 (although claim preclusion is "primary mechanism for preventing relitigation of the same issues between the same parties," issue preclusion also furthers this goal); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 26, Title E, introductory note, at 250 (1982) ("Courts laboring under a narrow view of the dimensions of a claim may on occasion have expanded concepts of issue preclusion in order to avoid relitigation of what is essentially the same dispute.").

32 Montana v. United States, 440 U.S. 147, 153-54 (1979).

ning, strengthens litigant faith in the system, promotes fairness, and provides inter-forum consistency of results.[33] These interrelated benefits embody the idea that the dispute resolution system and its participants benefit from consistency, reliability, and finality. Additionally, collateral estoppel fosters comity among decisionmaking tribunals.[34]

B. Procedural Requirements for Application of Collateral Estoppel

Courts require specific procedural criteria before granting a prior determination collateral estoppel effect. These requirements generally ensure that a competent public forum will give a precluded litigant at least one full and fair hearing.[35]

Collateral estoppel only applies if the disputed issue is the same as the issue determined in the original action.[36] Although courts struggle to define the parameters of a particular issue, no preclusive effect attaches unless the issues are the same "in all important respects."[37] A change in circumstances[38] or the presentation of addi-

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33 *See* Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After* Parklane Hosiery Co. v. Shore, 31 HASTINGS L.J. 755, 812 (1980) ("One more function, its most crucial, has largely been overlooked: collateral estoppel is of substantial utility in the ordering of extra-judicial relations."); Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 724 (1967) (authored by Mark Evans) (third goal of collateral estoppel is facilitating reliance on final judgments).

34 *See* Allen v. McCurry, 449 U.S. 90, 95-96 (1980) (collateral estoppel promotes comity between state and federal courts); *see generally* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 103 (1981) (fundamental principle of comity between federal courts and state governments essential to federalism); Younger v. Harris, 401 U.S. 37, 44 (1971).

35 *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971) (no party may be precluded on issue without having had at least one opportunity to litigate).

36 *Id.* at 323 (quoting Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal.2d 807, 813, 122 P.2d 892, 895 (1942)); *see also* 1B J. MOORE, J. LUCAS & T. CURRIER, *supra* note 3, 0.443[1], at 759 ("The issue to be concluded must be the same as that involved in the prior action."). For discussions of the identity of issues requirement in an administrative context, see Hercules Carriers, Inc. v. Claimant State of Florida, 768 F.2d 1558, 1578 n.13 (11th Cir. 1985) (one prerequisite to application of collateral estoppel is "that the issue at stake be identical to the one involved in the prior litigation" (citation omitted)); Lightsey v. Harding, Dahm & Co., 623 F.2d 1219, 1221 (7th Cir. 1980) ("For collateral estoppel effect to be given to an order of an administrative agency, the court must find that the same disputed issues of fact were before it as are before the court . . . ."), *cert. denied*, 449 U.S. 1077 (1981); 4 K. DAVIS, *supra* note 4, § 21:5, at 59 ("The question whether claims or issues are identical involves nothing more than discovering whether they differ substantially . . . .").

37 Union Mfg. Co. v. Han Baek Trading Co., 763 F.2d 42, 45 (2d Cir. 1985). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c (1982). For a case considering the substantial similarity requirement in an administrative context, see Compton v. United States Dep't of Energy, 706 F.2d 260 (8th Cir. 1983).

38 For administrative examples, see Second Taxing Dist. v. FERC, 683 F.2d 477 (D.C. Cir. 1982) (ratemaking proceedings involve a variety of shifting concerns and cir-

tional information[39] may cause a court to deny collateral estoppel effect to the original determination. The reasoning behind the identity-of-issues requirement is clear: one cannot have had a full and fair opportunity to litigate an issue if the issue is not the same as the issue determined in the original action.[40] Consequently, if the issues differ materially, courts will refuse to apply collateral estoppel.[41]

Because one of the goals of collateral estoppel is to enforce the finality of adjudicative determinations, those determinations must be final in the first place.[42] In general, the parties must fully litigate the issue[43] and the original tribunal must actually[44] and finally[45] adjudicate the issue on its merits.[46] The record must show actual litigation and determination before preclusive effect attaches.[47] No

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cumstances and are unsuited for collateral estoppel effect); Fred Wilson Drilling Co. v. Marshall, 624 F.2d 38 (5th Cir. 1980) (denial of collateral estoppel effect to ALJ finding appropriate because of rapid accumulation of knowledge and development of new safety procedures in field).

39 Springfield Television Corp. v. FCC, 609 F.2d 1014, 1019 (1st Cir. 1979) (no collateral estoppel if additional cogent and compelling information presented in subsequent action).

40 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c (1982) ("The [dimensions of an issue] problem involves a balancing of important interests: on the one band, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute.").

41 *See, e.g.*, Hill v. Coca Cola Bottling Co., 786 F.2d 550, 553 (2d Cir. 1986) (agency finding of termination for just cause does not preclude litigation of discrimination claim); Cook v. Pan Am. World Airways, Inc., 771 F.2d 635, 642 (2d Cir. 1985) (agency determination that integrated seniority list was negotiated in fair and equitable manner not same as subsequent issue raised in age discrimination claim), *cert. denied*, 474 U.S. 1109 (1986).

42 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment a (1982) ("The rules of res judicata state when a judgment in one action is to be carried over to a second action and given a conclusive effect there, whether by way of bar, merger, or issue preclusion. This Section makes the general common sense point that such conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered.").

43 *See, e.g.*, Keating v. Carey, 706 F.2d 377 (2d Cir. 1983) (refusing collateral estoppel effect to administrative agency determination that had not been fully litigated). Parties at least must have had the opportunity to litigate fully. *See* Vestal, The Restatement (Second) of Judgments: *A Modest Dissent*, 66 CORNELL L. REV. 464, 467-69 (1981).

44 *See* Lawlor v. National Screen Serv. Corp., 349 U.S. 322 (1955).

45 Davis v. United States Steel Supply Corp., 688 F.2d 166, 173 n.9 (3d Cir. 1982) (Pennsylvania rule requires finality), *cert. denied*, 460 U.S. 1014 (1983).

46 Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 n.6 (1982) ("once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties" (citing Montana v. United States, 440 U.S. 147, 153 (1979))); *see also* Nasem v. Brown, 595 F.2d 801, 805 (D.C. Cir. 1979) (In the administrative context, "[c]ollateral estoppel bars relitigation of an issue actually and necessarily litigated and determined in a prior final judgment." (citations omitted)).

47 Lawlor v. National Screen Serv. Corp., 349 U.S. 322 (1955); Boykins v. Ambridge Area School Dist., 621 F.2d 75 (3d Cir. 1980) (no collateral estoppel effect given

preclusive effect attaches to intermediate determinations.[48] Fairness requires that at least one tribunal actually litigate and determine an issue before a particular resolution binds a litigant for all future actions.[49] Furthermore, the issue must have been essential to the judgment in the original action.[50] If the original tribunal bases its judgment on alternative grounds, no preclusive effect attaches.[51] This requirement ensures that the parties fully litigated the issue and, more important, that the rendering tribunal actually determined the issue on its own merits.[52]

The precluded party, or one in privity with him, must have been a party to the original action.[53] Both parties,[54] however, need not have been parties in the original action. Due process only requires that the precluded party have had at least one opportunity to litigate a contested issue in cases affecting his rights and interests.[55]

A precluded party must have had a "full and fair" opportunity to litigate in the original action.[56] As the Court in *Allen v. McCurry*[57]

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to agency determination when record was unclear as to what exactly agency litigated and determined).

48 Catlin v. United States, 324 U.S. 229 (1945) (order dismissing landowners' challenge to condemnation proceeding not final decision); Gilbert v. Braniff Int'l Corp., 579 F.2d 411 (7th Cir. 1978) (prior action ending in order to dismiss without disposing of and fixing parties rights not final; courts will look to substance of order, not form, to determine finality).

49 *See* Polasky, *supra* note 3, at 221 ("Even where a vigorous application of collateral estoppel would tend to cause an early termination of litigation, other persuasive reasons can be found for not applying it. Of primary import is the doctrine that each person shall be accorded his full day in court.").

50 Allen v. McCurry, 449 U.S. 90, 94 (1980) (citing Montana v. United States, 440 U.S. 147, 153 (1979)); *see also* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 n.6 (1982). For administrative examples, see Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 710 (8th Cir. 1982); Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4 (1977)); *see also* Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 291 (1980).

51 Nasem v. Brown, 595 F.2d 801, 805 (D.C. Cir. 1979) ("If, however, a judgment could be based upon one of several alternate grounds and does not expressly rely on any, then none of the grounds is deemed concluded."); *see generally* F. JAMES & G. HAZZARD, CIVIL PROCEDURE 11.19 (2d ed. 1977); Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings*, 50 U. CHI. L. REV. 701 (1983).

52 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment h (1982).

53 For an administrative example, see Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706 (8th Cir. 1982) (union collaterally estopped from relitigating issue in federal court that was already decided by ALJ in action between union and former member).

54 For a discussion of the traditional requirement of "mutuality," *see supra* note 21.

55 Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480-81 (1982); Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971).

56 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-33 (1979); *see also* Bowen v. United States, 570 F.2d 1311, 1322 (7th Cir. 1978).

57 449 U.S. 90 (1980).

stated, "Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the court."[58] Due process requires that a party have the opportunity to contest fully a particular resolution of an issue in the original proceeding if that resolution will bind the party in the future.[59]

The full and fair opportunity requirement includes three elements: the precluded party must have had an adequate incentive to litigate the issue in the original action;[60] the precluded party reasonably must have foreseen the importance of the original determination in future actions at the time of the original action;[61] and the original tribunal must not deny the precluded party any substantial procedural safeguards or opportunities.[62]

II
COLLATERAL ESTOPPEL EFFECT OF AGENCY DETERMINATIONS

Collateral estoppel traditionally attached only to judicial determinations. In light of the modern expansion in administrative adjudicatory authority[63] and the attendant increase in procedural formality,[64] however, courts have recognized that extension of col-

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58 *Id.* at 101.

59 Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591 (1972) ("in a society committed to a representative form of government, private persons should have a meaningful opportunity to participate in government decisions which directly affect them"); Luneburg, *supra* note 26, at 128; RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1982) (collateral estoppel should not apply where "the party sought to be precluded . . . did not have an adequate opportunity to obtain a full . . . adjudication in the initial action").

60 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332 (1979); *see also* Otherson v. Department of Justice, I.N.S., 711 F.2d 267, 273 (D.C. Cir. 1983) ("Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial."); United States v. Karlen, 645 F.2d 635, 639 (8th Cir. 1981) (potential $57,000 damages assessment gave defendant adequate incentive to litigate in prior administrative proceeding); Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979) (use of collateral estoppel denied because substantive law at time of previous proceeding gave inadequate incentive to litigate issue).

61 *Parklane*, 439 U.S. at 323. In the administrative context, see Bowen v. United States, 570 F.2d 1311, 1322 (7th Cir. 1978) ("issue preclusion applies . . . when both parties were aware of the possible significance of the issue in later proceedings").

62 *Parklane*, 439 U.S. at 331 n.15 (1979).

63 *See* Perschbacher, *supra* note 1, at 453-54; *see also* E. GELLHORN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 132 (1972) ("Although comparative figures are inexact, the conclusion is indisputable that administrative trials far exceed the number of judicial trials."); B. SCHWARTZ, ADMINISTRATIVE LAW, § 8, at 23-24 (1976) (discussing expansion of agency jurisdiction into areas traditionally resolved by court system).

64 The procedural requirements for formal agency adjudication are equivalent to those provided by a court. *See* Administrative Procedure Act, 5 U.S.C. § 554 (1982).

lateral estoppel to agency determinations can advance the goals behind the doctrine without increasing the risk of unfairness to the precluded litigants.[65] Courts use the *Utah Construction* test to determine when to apply collateral estoppel. The very nature of administrative agencies, however, counsels in favor of restricted application of collateral estoppel to agency determinations. Additionally, current application of collateral estoppel creates both efficiency and fairness problems.

A. The *Utah Construction* Test

The Supreme Court in *United States v. Utah Construction and Mining Co.*[66] articulated a general standard for the application of collateral estoppel to administrative agency decisions.[67] Courts apply the *Utah Construction* test independent of the traditional requirements of collateral estoppel.[68] Application of collateral estoppel to an agency determination requires satisfaction of both the traditional elements of collateral estoppel[69] and the elements of the *Utah Construction*

There are no special procedural requirements for informal adjudication. *See supra* note 14.

65 Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 401-04 (1940). For examples of early applications of collateral estoppel to agency decisions, see Seatrain Lines, Inc. v. Pennsylvania Ry. Co., 207 F.2d 255, 259-60 (3d Cir. 1953) (allowing collateral estoppel effect to ICC determination); Goldstein v. Doft, 236 F. Supp. 730, 734 (S.D.N.Y. 1964) (arbitrator's determinations given preclusive effect), *aff'd per curiam*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966); *but see* Churchill Tabernacle v. FCC, 160 F.2d 244, 246 (D.C. Cir. 1947) (as general rule, collateral estoppel does not apply to administrative agency determinations).

66 384 U.S. 394 (1966). *Utah Construction* involved the interpretation of a contract clause that provided for proceedings for a contractor to apply for time extensions and additional compensation in the event of "changed circumstances." *Id.* at 400. The Advisory Board of Contract Appeals interpreted the clause pursuant to a dispute resolution agreement in the contract. *Id.* at 399 n.2. Although the Court based its decision on the parties' contract as modified by a statute, the Court noted that collateral estoppel also applied to those issues properly determined by the Board and over which the Board had jurisdiction. *Id.* at 421.

67 Specifically, "[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." *Id.* at 422.

68 *See* Long v. United States Dep't of the Air Force, 751 F.2d 339, 343-44 (10th Cir. 1984) (although *Utah Construction* requirements were met, court denied collateral estoppel because parties did not reasonably foresee future preclusive effect of agency decision).

69 *See infra* notes 36-62; *see, e.g.*, NLRB v. Master Slack and/or Master Trousers Corp., 773 F.2d 77, 81 (6th Cir. 1985) (issue preclusion only appropriate where issue was identical and precluded party has had full and fair opportunity to litigate); Frye v. United Steelworkers of Am., 767 F.2d 1216, 1220 (7th Cir.) (collateral estoppel applied to agency determination in part because there was identity of issues, final and valid judgment, and precluded party had full and fair opportunity to litigate before agency), *cert. denied*, 474 U.S. 1007 (1985).

test.[70]

The *Utah Construction* test[71] involves several requirements: (1) the agency must have jurisdiction to resolve the issue; (2) the agency must act in a judicial capacity; (3) the agency must properly resolve the dispute before it; and (4) the parties must have an adequate opportunity to litigate.[72]

1. *Jurisdiction*

An administrative agency must have had jurisdiction over the disputed issue before courts will grant collateral estoppel effect to its determination.[73] If the agency lacks either the authority to determine the issue or, in some circumstances, the power to grant appropriate relief, courts will deny the agency determination collateral estoppel effect.[74] In its statutory grant of adjudicatory power, Congress can either expressly limit agency jurisdiction[75] or grant the federal court system exclusive jurisdiction over certain issues.[76]

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70 *See, e.g.*, Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979) (analyzing *Utah Construction* factors only after determining that elements of collateral estoppel were met). *See also* Note, *supra* note 5, at 72-87 (discussing application of each traditional element in administrative context).

71 For examples of application of *Utah Construction* test, see University of Tenn. v. Elliott, 478 U.S. 788, 797-98 (1986); Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 820 F.2d 892 (7th Cir. 1987).

72 *Utah Construction*, 384 U.S. at 422.

73 *See generally* K. DAVIS, *supra* note 4; Lightsey v. Harding, Dahm & Co., 623 F.2d 1219, 1221 (7th Cir. 1980) (holding that because commission had no statutory authority to determine issue presented in appellant's suit, decision not entitled to preclusive effect), *cert. denied*, 449 U.S. 1077 (1981).

74 *See, e.g.*, Richardson v. Phillips Petroleum Co., 791 F.2d 641 (8th Cir. 1986) (no preclusive effect given to agency determination where agency lacked jurisdiction to adjudicate fact or award compensatory damages), *cert. denied*, 107 S. Ct. 929 (1987); Lightsey v. Harding, Dahm & Co., 623 F.2d 1219 (7th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) (no collateral estoppel effect given to agency determination in part because agency had no statutory authority to determine disputed issue); Boykins v. Ambridge Area School Dist., 621 F.2d 75 (3d Cir. 1980) (no preclusive effect given to agency determination in part because agency lacked jurisdiction to award compensatory damages).

75 Freedom Sav. & Loan Ass'n v. Way, 757 F.2d 1176, 1180 (11th Cir.) ("[W]hile the preclusive effect of an administrative decision will depend in part on the adjudicative quality of the agency action and on traditional principles of collateral estoppel such as finality, Congress can also limit the preclusive effect of an agency decision for the sake of some other public policy." (citation omitted)), *cert. denied*, 474 U.S. 845 (1985).

76 University of Tenn. v. Elliott, 478 U.S. 788, 799 n.7 (1986) ("Congress of course may decide, as it did in enacting Title VII, that other values outweigh the policy of according finality to state administrative factfinding."); Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co., 672 F.2d 580, 583-84 (6th Cir. 1982) ("An additional reason for denying collateral estoppel effect to the N.L.R.B.'s finding is that § 301(a) [of the LMRA] gives the federal courts exclusive jurisdiction over cases arising from the breach of collective bargaining agreements."). The legislature may also deny collateral estoppel effect to particular agency decisions. *See* Freedom Sav. & Loan Ass'n v. Way, 757 F.2d 1176, 1180 (11th Cir.) ("Congress can also limit the preclusive effect of an agency decision for the sake of some other public policy."), *cert. denied*, 474 U.S. 845

Consequently, where an administrative agency is neither authorized nor required to adjudicate a particular issue in the scope of its responsibilities, courts will not give preclusive effect to its determination in subsequent actions.

2. *Judicial Capacity*

Administrative agencies perform a variety of legislative, executive, and judicial functions.[77] Only those issues that an agency determines while acting in its judicial capacity can have collateral estoppel effect under the *Utah Construction* test.[78] Additionally, when acting in its judicial capacity, an agency must follow procedures sufficiently similar to those used during trials for collateral estoppel to apply.[79] And even if the agency provides otherwise adequate procedural safeguards, courts will not grant collateral estoppel effect to nonadversarial agency determinations.[80]

3. *Agency Properly Resolves the Issues Before It*

The agency must have fully adjudicated[81] those issues for which preclusion is sought in a subsequent action,[82] and the agency must

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(1985); California Assembly Bill 3950, eff. Jan. 1, 1987 (providing that decisions of California Unemployment Insurance Appeals Board will no longer be allowed collateral estoppel effect in subsequent litigation).

77 For a discussion of the difficulty of determining when an agency is adjudicating, *see supra* text accompanying notes 115-23.

78 *See, e.g.*, Chrysler Corp. v. Texas Motor Vehicle Comm'n, 755 F.2d 1192, 1197 n.4 (5th Cir. 1985) (collateral estoppel effect only granted in situations where the agency acted in a judicial capacity); Parker v. National Corp. for Hous. Partnerships, 619 F. Supp. 1061, 1065 (D.D.C. 1985) (administrative or investigative determinations by agency do not have subsequent collateral estoppel effect in federal actions), *rev'd on other grounds*, 46 Fair Empl. Prac. Cas. (BNA) 1638 (D.C. Cir. 1987); Dealy v. Heckler, 616 F. Supp. 880, 888 (W.D. Mo. 1984) (agency action must be adjudicative before collateral estoppel will apply). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b (1982).

79 *See infra* text accompanying notes 92-113.

80 *See, e.g.*, Plaine v. McCabe, 797 F.2d 713, 720 (9th Cir. 1986) (whether proceeding adversarial is factor to consider); Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979) (application of collateral estoppel to agency determinations emphasizes adversarial nature of proceeding: if agency proceedings are not adversarial, no preclusive effect attaches); Coulter v. Weinberger, 527 F.2d 224, 228 (3d Cir. 1975) (collateral estoppel inappropriate when agency proceedings are not adversarial in nature). *But see* Purter v. Heckler, 771 F.2d 682 (3d Cir. 1985) (calling *Coulter* into doubt).

81 Parker v. National Corp. for Hous. Partnerships, 619 F. Supp. 1061, 1065 (D.D.C. 1985) (only adjudicative determinations have preclusive effect in subsequent federal action), *rev'd on other grounds*, 46 Fair Empl. Prac. Cas. (BNA) 1638 (D.C. Cir. 1987).

82 Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters, 704 F.2d 1443, 1446-47 (9th Cir. 1983) (because agency concerned with unlawful discharge, and civil action involved tortious interference, collateral estoppel did not preclude inquiry into *all* issues); NLRB v. Markle Mfg. Co., 623 F.2d 1122, 1127 (5th Cir. 1980) (specific issue in subsequent action must have been litigated and determined in agency proceeding).

have decided solely on the basis of the evidence presented.[83] For example, in *Griffen v. Big Spring Independent School District*,[84] the Fifth Circuit denied a state agency determination collateral estoppel effect in part because the agency participated in potentially prejudicial ex parte communications, and allowed one party to prepare findings of fact and rulings of law for the court in support of that party's own position without allowing the opposing party's participation. Additionally, the chronology of the proceedings indicated that determination of the issue sought to be precluded may have occurred before the official ruling.[85] Thus, this requirement protects litigants from many abuses, including prejudicial ex parte conversations and communications[86] and other combination-of-functions dangers.[87]

4. *Agency Provides the Precluded Party a Full and Fair Opportunity to Litigate*

The agency must grant a litigant adequate procedural opportunities for a hearing before a court will apply collateral estoppel. The requirement is similar to the full and fair opportunity requirement for application of collateral estoppel in general, especially the requirement that the original proceding not deny the precluded litigant any procedural advantages or opportunities. In general, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."[88]

B. Judicial Interpretation and Application of the *Utah Construction* Test

Under the *Utah Construction* test, courts apply the flexible and uncertain standards of "judicial capacity" and "full and fair opportunity to litigate." In the full and fair opportunity requirement, courts applying the *Utah Construction* test must decide whether the agency denied the precluded party any procedural advantages available in federal court. No one mix of procedures is required; rather,

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83 *See, e.g.*, Thomas v. General Servs. Admin., 794 F.2d 661, 664 (Fed. Cir. 1986) (agency tribunal must decide on basis of "an adversary, litigated record"); Parker v. National Corp. for Hous. Partnerships, 619 F. Supp. 1061, 1065 (D.D.C. 1985) (elements of agency procedures required include findings of fact and conclusions of law based on evidence presented), *rev'd on other grounds*, 46 Fair Empl. Prac. Cas. 1638 (D.C. Cir. 1987).

84 706 F.2d 645 (5th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

85 *Id.* at 654-55.

86 *Id.* at 656.

87 *See supra* notes 120-27 and accompanying text.

88 Montana v. United States, 440 U.S. 147, 164 n.11 (1979). Although the Court was discussing prior judicial decisions, the analysis applies equally to prior agency decisions.

courts consider each agency's procedures in light of the general standards for granting collateral estoppel effect to an administrative agency determination.

At a minimum, agency adjudication must meet the procedures required by the due process clause.[89] This procedural minimum varies with the nature of the interest involved.[90] Courts have not yet established a firm procedural framework beyond due process minimum for determining when to apply collateral estoppel. Currently, they evaluate individual agency procedures ad hoc to determine their sufficiency.[91] In analyzing those procedures, courts consider a mix of essential and important procedures along with certain factors extrinsic to the agency procedures themselves. The courts do so under the rubric of the *Utah Construction* test.

1. *Essential Procedures*

Absent certain essential procedures, courts will not grant collateral estoppel effect to agency determinations. First, the administrative hearing must allow parties to present witnesses and to cross-examine the opposing party's witnesses.[92] For example, in *Nasem v. Brown*,[93] the court denied preclusive effect to factual determinations made by a federal agency. The court reasoned that the precluded party's inability to present live witnesses and to cross-examine in a proceeding that turued on retaliatory motive denied the litigants their required full and fair opportunity to litigate.[94]

Second, the record of the administrative adjudication must ade-

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89 Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-83 (1982) ("state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law").

90 *See supra* note 11.

91 The courts begin with a rebuttable presumption that agency procedures are fair; the party opposing application of collateral estoppel has the burden of showing particularized unfairness. *See, e.g.*, Frye v. United Steelworkers of Am., 767 F.2d 1216, 1221 (7th Cir.) ("when all factors required for collateral estoppel are present, it is the party opposing preclusion who must demonstrate that applying collateral estoppel in a specific case would result in particularized unfairness"), *cert. denied*, 474 U.S. 1007 (1985).

92 *See, e.g.*, City of Pompano Beach v. FAA, 774 F.2d 1529, 1539 n.10 (11th Cir. 1985) ("It follows that an agency proceeding which does not afford an opportunity to present live witnesses or to cross-examine opposing witnesses does not meet the test that parties were afforded a full opportunity to litigate."); Griffen v. Big Spring Indep. School Dist., 706 F.2d 645, 655 (5th Cir.) (no collateral estoppel effect afforded state administrative agency determination because no live testimony permitted), *cert. denied*, 464 U.S. 1008 (1983). *But see* EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 746 F.2d 375 (7th Cir. 1984) (collateral estoppel effect granted even though no live testimony allowed).

93 595 F.2d 801 (D.C. Cir. 1979).

94 *Id.* at 805.

quately support the agency's determinations.[95] As stated in *Thompson v. Schweiker*,[96] "Where the record is patently inadequate to support the findings the [administrative law judge] made, application of res judicata is tantamount to a denial of due process."[97] Additionally, the administrative agency must give reasons in the record supporting its conclusions.[98]

Third, the parties must have the right to judicial review of the agency decision.[99] Although courts limit review to errors of fact or law, a party may relitigate issues determined without the opportunity for review.[100] The precluded party need not have taken advantage of this opportunity, however. "If an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the . . . administrative decision simply by foregoing [the] right to appeal."[101]

Finally, the burden of proof must not be higher in the subsequent action than in the original administrative adjudication.[102] Binding a party to a determination made under one level of proof in a subsequent action requiring a higher level of proof would be unfair. This issue most often arises in subsequent criminal cases.[103]

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95 *See, e.g.*, Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 820 F.2d 892, 895 (7th Cir. 1987) (agency determination supported by detailed fourteen page ALJ opinion containing "thorough findings of facts, conclusions of law, and a cogent legal analysis applying the relevant facts" entitled to preclusive effect); Hill v. Coca-Cola Bottling Co., 786 F.2d 550, 554 (2d Cir. 1986) (examining record to determine what, exactly, was adjudicated in agency proceeding); City of Pompano Beach v. FAA, 774 F.2d 1529, 1539 (11th Cir. 1985) (preclusive effect given to agency decision if supported by substantial evidence); Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters, 704 F.2d 1443, 1446 (9th Cir. 1983) ("The requirements for the application of collateral estoppel are that the findings be made on material issues [and that] they be supported by substantial evidence . . . .").

96 665 F.2d 936 (9th Cir. 1982).

97 *Id.* at 941.

98 *See, e.g.*, Boykins v. Ambridge Area School Dist., 621 F.2d 75 (3d Cir. 1980) (collateral estoppel denied where record did not indicate what agency determined, and there were no reasons behind general finding of insufficient facts to support charge of racial discrimination).

99 *See, e.g.*, United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (preclusive effect available where both parties had opportunity to seek court review of any adverse findings); *see also* Moore v. Bonner, 695 F.2d 799 (4th Cir. 1982) (denying preclusive effect to unappealed state agency decision); Snow v. Nevada Dep't of Prisons, 543 F. Supp. 752, 756 (D. Nev. 1982) (judicial review opportunity essential for application of collateral estoppel).

100 RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment c (1982).

101 Plaine v. McCabe, 797 F.2d 713, 719 n.12 (9th Cir. 1986).

102 *See* University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986).

103 *See, e.g.*, United States v. Alexander, 743 F.2d 472 (7th Cir. 1984) (collateral estoppel effect will not be given to agency determination in subsequent criminal action). The California Supreme Court gave collateral estoppel effect to an agency determination in a subsequent criminal prosecution in People v. Sims, 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982), but that case is a departure from the general rule.

For example, in *City of Cleveland v. Cleveland Electric Illuminating Co.*,[104] the court refused to grant collateral estoppel effect to Nuclear Regulatory Board determinations in a subsequent criminal antitrust prosecution, in part because of the differing burdens of proof in the actions.[105]

2. *Important Procedures*

In addition to the essential agency procedural requirements, courts have considered a variety of other factors in determining whether or not to grant collateral estoppel effect to an agency determination. Courts engage in an ad hoc line-drawing exercise, weighing the availability of procedural opportunities against notions of due process and fundamental fairness. Some of the more prevalent factors considered include: the availability of representation by counsel,[106] the extent of discovery allowed,[107] the rules of evidence employed,[108] and the availability of subpoena power.[109]

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104 734 F.2d 1157 (6th Cir.), *cert. denied*, 469 U.S. 884 (1984).

105 *Id.* at 1165-66.

106 *See, e.g.*, Thomas v. General Servs. Admin., 794 F.2d 661, 664 (Fed. Cir. 1986) (issue preclusion normally applicable if, among other factors, precluded party was fully represented by counsel in agency proceeding); EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 746 F.2d 375, 377 (7th Cir. 1984) (in determining that agency action was adversarial proceeding entitled to collateral estoppel, court considered it significant that both parties were represented by counsel); Mother's Restaurant, Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1569 (Fed. Cir. 1983) (one prerequisite to collateral estoppel is that precluded party was fully represented by counsel in agency proceeding).

107 *See, e.g.*, Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 820 F.2d 892, 896 (7th Cir. 1987) (Illinois Human Rights Commission's findings given preclusive effect in subsequent federal civil rights action in part because Commission allowed parties extensive pre-hearing discovery opportunities); Boykins v. Ambridge Area School Dist., 621 F.2d 75, 79 (3d Cir. 1980) (no collateral estoppel effect given to agency determination because, due to discovery limitations, court could not determine effect state courts would give agency determination).

108 *See, e.g.*, Unger v. Consolidated Foods Corp., 693 F.2d 703, 705 (7th Cir. 1982) (upholding state agency decision in part because agency followed state rules of evidence), *cert. denied*, 460 U.S. 1102 (1983); Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 709 (8th Cir. 1982) (precluded party must not be denied any evidentiary opportunities at agency proceeding); United States v. Karlen, 645 F.2d 635, 639 (8th Cir. 1981) (preclusive effect granted to agency determination in part because precluded party was not denied any opportunities to present evidence).

109 *See, e.g.*, Bowen v. United States, 570 F.2d 1311, 1322 n.30 (7th Cir. 1978) (factual determination by National Transportation Safety Board of pilot negligence given preclusive effect in subsequent litigation under Federal Tort Claims Act in part because of opportunity to take depositions, submit written interrogations, and subpoena witnesses); *see also Unger*, 693 F.2d at 705 (court considered availability of compulsory process in granting preclusive effect to state agency determination); *Karlen*, 645 F.2d at 639 (court considered availability of subpoena power in determining adequacy of opportunity to litigate).

3. *Extrinsic Factors*

Courts also weigh several factors extrinsic to the agency procedures themselves, focusing on the fairness of the agency proceedings in general and on the equity of applying collateral estoppel in particular cases. Courts are more likely to grant collateral estoppel effect if the agency has special competence to resolve the disputed issue[110] and if granting collateral estoppel would prevent harassment through repeated attempts to enforce particular regulations.[111] Conversely, courts will deny collateral estoppel effect in cases of particularized unfairness to the precluded party[112] or in the face of countervailing public policies.[113] The balancing of all these factors occurs in a case-by-case, ad hoc manner.

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110 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (statutory construction by those charged with enforcement entitled to deference by courts); City of Cleveland v. Cleveland Elec. Illuminating Co., 734 F.2d 1157, 1166 (6th Cir. 1984) (no collateral estoppel effect granted in part because determination not within agency's field of expertise), *cert. denied*, 469 U.S. 884 (1984); Porter & Dietsch, Inc. v. FTC , 605 F.2d 294, 300 (7th Cir. 1979) (government not precluded from relitigating issue against respondent where agency charged with protecting "the public from both health risks and false advertising; it deals with a body of knowledge in the fields of medical and pharmacological science that is constantly increasing"), *cert. denied*, 445 U.S. 950 (1980).

111 *See, e.g.*, True Drilling Co. v. Donovan, 703 F.2d 1087, 1093 (9th Cir. 1983) (no collateral estoppel effect granted agency determination in part because no harassment despite repeated citation of defendant); Interuational Harvester Co. v. Occupational Safety and Health Review Comm'n, 628 F.2d 982, 986 (7th Cir. 1980) (no collateral estoppel in part because petitioner not subjected to agency harassment); Continental Can Co. v. Marshall, 603 F.2d 590, 596 (7th Cir. 1979) ("requiring Continental to relitigate the issue 'over and over in an untold number of hearings . . . is harassment of a capricious kind' " (citing United States v. American Honda Motor Co., 273 F. Supp. 810, 819-20 (N.D. Ill. 1967)); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 300 n.3 (7th Cir. 1979) (no collateral estoppel effect granted in part because petitioners had "not been the subject of government harassment in the form of repeated agency prosecutions"), *cert. denied*, 445 U.S. 950 (1980).

112 *See, e.g.*, Frye v. United Steelworkers of Am., 767 F.2d 1216, 1221 (7th Cir.) (considerations of fairness may make application of collateral estoppel inappropriate), *cert. denied*, 474 U.S. 1007 (1985); Thompson v. Schweiker, 665 F.2d 936, 940-41 (9th Cir. 1982) (collateral estoppel denied because application of doctrine would result in unfairness to precluded party); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 128 (6th Cir. 1971) (collateral estoppel rejected if application would result in manifest injustice).

113 The Supreme Court clarified the extent of the public policy exception in University of Tenn. v. Elliott, 478 U.S. 788, 795-96 (1986). For discussion of Title VII actions, see Note, *Res Judicata Effects of State Agency Decisions in Title VII Actions*, 70 CORNELL L. REV. 695 (1985) (authored by Susan Hurt). For discussion of section 1983 actions, see Note, *The Application of Res Judicata to Administrative Adjudications in the Section 1983 Context*, 32 WAYNE L. REV. 1137 (1986) (authored by M. Butler). *See also* United States v. ITT Rayonier, Inc., 627 F.2d 996, 1002 (9th Cir. 1980) (no countervailing policy reasons in Federal Water Pollution Control Act to abrogate res judicata); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 300 (7th Cir. 1979) (government not precluded from relitigation in "proceeding . . . to protect the public from both health risks and false advertising [especially when] it deals with a body of knowledge in the fields of medical and pharmacological science that is constantly increasing"), *cert. denied*, 445 U.S. 950 (1980).

C. The Nature of Administrative Agencies

The nature of administrative agency adjudication makes application of collateral estoppel unfair or inappropriate in many cases.[114] Agency adjudication may differ substantially from court adjudication. The agency may use the adjudication for setting larger policy goals as well as for resolving the particular dispute before it. And the methods by which the agency adjudicates may result in a non-neutral arbiter. Additionally, the threat of collateral estoppel may result in party reactions that threaten the speed and efficiency with which informal agency adjudication resolves disputes. Because of these differences, courts should restrict application of collateral estoppel to agency adjudications that employ a high level of procedural formality.

1. *Characterization of Agency Action*

Administrative agencies simultaneously perform all three primary governmental functions. Agencies legislate, execute and enforce their rules and laws, and resolve disputes arising under those rules and laws.[115] Courts in theory grant collateral estoppel effect only to agency adjudications. The differences between agency rulemaking and agency adjudication, however, may be difficult to discern. Although both courts and the APA have attempted to characterize particular agency actions as either adjudication or rulemaking,[116] most agency actions contain a measure of both.[117] Consequently, courts may have difficulty accurately classifying a par-

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114 This Note focuses on efficiency and fairness considerations. Collateral estoppel may advance the goals of finality and litigation repose irrespective of these considerations. However, Perschbacher notes that "the goals of judicial finality and avoidance of vexatious litigation are not ordinarily present, and judicial economy is the sole justification for applying collateral estoppel" in the administrative context. *Perschbacher, supra* note 1, at 425. *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b, at 269 (1982) ("The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.").

115 E. GELLHORN, *supra* note 63, at 7-9; J. LANDIS, THE ADMINISTRATIVE PROCESS 2-5 (7th ed. 1966); B. SCHWARTZ, *supra* note 63, §§ 2-3, at 5-7.

116 5 U.S.C. § 553 (1978) defines rulemaking; 5 U.S.C. § 554 (1978) defines adjudication. For court categorization, see Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1179 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980); Hercules, Inc. v. EPA, 598 F.2d 91, 106 (D.C. Cir. 1978); Wilson Farms Coal Co. v. Andrus, 518 F. Supp. 295 (E.D. Ky. 1981), *aff'd*, 705 F.2d 460 (6th Cir. 1982); *see also* E. GELLHORN, *supra* note 63, at 122-23 for definitions of the two terms.

117 LaTour, Houlden, Walker & Thibaut, *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258 (1976); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 924-25 (1965) (drawing workable distinction between rulemaking and adjudication difficult); *see* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 260 (1978) (the rulemaking/adjudication distinction "under attack").

ticular action as adjudication for collateral estoppel purposes.[118] Naturally, courts should not grant collateral estoppel effect to agency adjudicatory rulemaking, because the agency considers elements beyond those presented by the parties when making rules.[119]

2. *Decisionmaking Process*

Agencies do not always resolve disputes in the same manner as courts. Courts base decisions on the application of existing law to particular facts defined by evidence admitted according to strict limitations. Agencies, however, may use adjudication as a policymaking technique and focus as much on prospective policy goals and considerations as on the particular dispute before them.[120] Thus, unlike courts, agencies may legitimately use the determination in the particular case as an opportunity to create law. Additionally, because of the agency tribunal's expertise in the field,[121] it may resolve disputes based on its own predispositions rather than on purely neutral application of law to facts.[122] This decisionmaking process

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118 Additionally, an action classified as adjudication may have a substantial rulemaking component to it. *See generally* B. SCHWARTZ, *supra* note 63, § 65, at 183-90.

119 *See* Cramton, *supra* note 59, at 590 (One of the problems of court adjudication is that "[t]he focus on 'justice in the individual case' does not lend itself to intelligent forward planning, to rational consideration of major options and alternatives, and to a concern for the aggregate effects of individual decisions.").

120 Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 124 (1972); *see, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (in making new law, "an administrative agency must be equipped to act either by general rule or by individual orders"); *see also* E. GELLHORN, *supra* note 63, at 133. If agencies do focus purely on the case before them, they may compromise their efficacy as policymaking bodies. *See* Cramton, *supra* note 59, at 590.

121 *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) ("Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . . ."); *see also* Gardner, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 116 (M. Paulsen ed. 1959); Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363 (1976); Gholz, *Collateral Estoppel Effect of Decisions by the Board of Patent Interferences*, 65 J. PAT. OFF. SOC'Y 67, 103 (1983) (advantage of Board of Patent Interferences is knowledge of field, especially in light of complex nature of patent law).

122 Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 525 (1970) (citing studies of cases where National Labor Relations Board "sacrificed" individual litigants to provide policy). The particular expertise of an agency may increase the accuracy of its decisions, however. *See, e.g.*, FTC v. Texaco, Inc., 517 F.2d 137 (D.C. Cir. 1975) (application of collateral estoppel clearly appropriate in light of Power Commission's particular expertise on the factual issue involved), *cert. denied sub nom.* Standard Oil Co. v. FTC, 431 U.S. 974 (1977). For discussion advocating collateral estoppel effect to certain agency hearings, see Dawson, *Why a Decision by the NLRB Under 8(b)(4) Should Be Determinative on the Issue of Liability in a Subsequent Section 303 Damage Suit*, 27 OKLA. L. REV. 660, 674 (1974); Gholz, *supra* note 121; NATIONAL COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, *reprinted in* 80 F.R.D. 509, 593 (1979); Note, *Extending the Doctrine of Collateral Estoppel to Include*

increases both the risk of inaccurate factual determination and the risk of unfairness to parties precluded in future actions.[123]

3. *Potential Lack of Neutrality*

The very nature of agency operations creates fairness problems. Administrative agency personnel investigate, prosecute, and adjudicate alleged violations of agency rules.[124] For efficiency and efficacy reasons,[125] the same agency personnel may perform elements of all three functions in a single agency adjudication. This lack of separation of functions threatens the neutrality of the agency adjudication.[126] Additionally, ex parte discussions among agency personnel may deny a party effective access to the adjudicative process.[127] Fi-

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Determinations Made at Probation Revocation Hearings, 23 ARIZ. L. REV. 1417 (1981) (authored by Stephen Bressler).

123 Rules of evidence are enacted to minimize jury confusion and to prevent prejudicial misuse of evidence. Because agencies do not use juries as factfinding bodies, controlling the admissibility of evidence is of less concern. E. GELLHORN, *supra* note 63, at 136-37. However, an additional fairness problem arises in precluding parties to agency adjudication—the problem of agency nonacquiescence. As a result of the Supreme Court decision in Mendoza v. United States, 464 U.S. 154 (1984), private parties cannot collaterally estop the United States government. Because federal agencies are part of the executive branch, and all administrative agency adjudications involve the agency and a private party, B. SCHWARTZ, *supra* note 63, § 2, at 3, only the private party can be precluded in future litigation. This seeming unfairness is magnified by the decision in United States v. Stauffer Chem. Co., 464 U.S. 165 (1984), allowing the government to benefit from defensive nonmutual collateral estoppel. *See generally* Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985) (authored by William Buzbee) (discussing the Social Security Administration's continued review and termination of benefits to nearly 200,000 individuals despite court holdings that procedures involved were inadequate); Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847 (1986) (result that only those who can afford individually to enforce their rights will be guaranteed agency acquiescence to existing court decisions is anathema to notions of equal justice and full and fair opportunity to be heard). For a discussion of the *Mendoza* and *Stauffer* decisions, see Note, *Issue Preclusion, Demand, and the Government: A New Bundle of Principles?*, 46 U. PITT. L. REV. 487 (1985). For recent general discussions of the problem of nonacquiesce, see Note, *The Social Security Administration's Policy of Nonacquiescence*, 62 IND. L.J. 1101 (1987); Weis, *Agency Non-Acquiesence: Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845 (1987).

124 *See generally* E. GELLHORN, *supra* note 63, at 221-25.

125 There are important reasons for nonseparation of functions, including reduced costs of dispute resolution, increased accuracy, and maintaining the smooth running of agency operations without creating artificial "walls" between agency personnel. *Id.* at 225; *see also* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 760-61 (1981) (concluding that "separation of functions is appropriate and necessary in individualized adversary proceedings, but must be designed with great caution in order to minimize the costs in accuracy and efficiency that separation invariably entails").

126 Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Withrow v. Larkin, 421 U.S. 35, 47 (1975); B. SCHWARTZ, *supra* note 63, § 4, at 10 (court is neutral arbiter, while agency may not be).

127 *See generally* Asimow, *supra* note 125, at 780 (quoting *Withrow*, 421 U.S. at 47).

nally, risks of "agency capture" may threaten a particular agency's neutrality.[128]

4. *Collateral Estoppel Threat to Agency Adjudicative Advantages*

Application of collateral estoppel threatens the relative speed and efficiency with which agencies can resolve disputes. Critics already contend that agency "over-judicialization"[129] threatens these advantages. Risks of future preclusion exacerbate this problem by encouraging parties to overlitigate at the agency level. In spite of relatively minor stakes at the agency level, parties will be encouraged—indeed, well-advised—to litigate contested issues as fully as possible to prevent future civil liability.[130]

D. Fairness and Efficiency Problems in the *Utah Construction* Test

The uncertainty of the *Utah Construction* test creates efficiency and fairness problems in the application of collateral estoppel. It can create inefficiencies both in the particular case and in a larger, systemic sense. Similarly, use of the *Utah Construction* test may be unfair in a particular case or tend to generate unfairness in the aggregate.

1. *Inefficiency*

Because of the *Utah Construction* test's flexibility, agency litigants are uncertain about the potential collateral estoppel effect of the agency determinations. Litigants in an informal agency proceeding cannot be certain because courts evaluate agency procedures ad hoc. This uncertainty creates inefficiency at every level of the dispute resolution process because it increases the amount at risk in the agency adjudication and provides additional incentive for appeal both at the agency level and in subsequent civil actions.

Uncertainty increases the amount a rational litigant expends in an agency adjudication because it increases the amount at risk in that adjudication. In an agency adjudication with possible collateral estoppel effect, the litigant is risking not only the amount directly at

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128 B. SCHWARTZ, *supra* note 63, § 8, at 23 ("more and more, those regulated are the allies of the regulators").

129 Robinson, *supra* note 122, at 485 ("Few complaints about administrative law are pressed more insistently than the charge that the administrative process is 'over-judicialized.' "); Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 432 (1960) ("the regulatory agencies often tolerate delays up with which the judiciary would not put").

130 See the discussion of *Zanghi*, *infra* notes 150-70 and accompanying text. For an example of potential preclusion after a minor agency adjudication, see McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981).

stake, but also amounts potentially at stake in subsequent civil actions. If the court subsequently refuses to apply collateral estoppel to the agency's determinations, then the litigant and agency resources expended in the agency adjudication relative to the potential amounts at risk in the subsequent civil actions were unnecessary or "wasted."

Uncertain application of collateral estoppel creates inefficiency in another way. Once the agency tribunal makes its determination, the increased potential liability resulting from future civil actions increases the losing party's incentive to appeal, both within the agency adjudicative structure and to the federal court system. Again, this increased incentive creates excessive consumption of litigant and agency resources when a court in a subsequent civil action decides not to apply collateral estoppel. Even when a court applies collateral estoppel, this increased expenditure reduces or even eliminates the efficiency collateral estoppel provides.[131]

Finally, uncertainty causes inefficiency in the subsequent civil actions because it provides additional incentive to litigate the collateral estoppel issue both at the trial level and on appeal. This inefficiency results whether or not the court decides to apply collateral estoppel.

United States v. Karlen[132] illustrates the potential inefficiencies that may result from the current application of collateral estoppel. In *Karlen* the United States, as trustee of Indian land, sued in trespass for damages caused by excess hay harvesting. The dispute arose under a contract between the defendant and the Lower Brule Sioux Indian Tribe allowing the defendant to harvest a certain amount of hay from the Indian land.[133]

The dispute originally came before a local Bureau of Indian Affairs (BIA) superintendent, who terminated the contract and assessed damages at $56,235.[134] The BIA's Area Director rejected Karlen's requested formal hearing and affirmed the assessment. As a result, a de novo hearing was held before an administrative law judge (ALJ), who affirmed cancellation of the lease based on excess haying by Karlen. However, the ALJ lacked jurisdiction to calculate or enter judgment for damages. The Interior Board of Indian Appeals affirmed the ALJ's decision, and Karlen chose not to seek judicial review.[135]

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131 *See generally* Flanagan, *A Response*, *supra* note 20, at 840 (collateral estoppel inefficient where application expends more resources than would relitigation).

132 645 F.2d 635 (8th Cir. 1981).

133 *Id.* at 637.

134 *Id.*

135 *Id.*

The Government then sued in trespass on behalf of the Tribe seeking damages for excess haying and animal trespass, to the extent defendant grazed excess cattle on the land. The district court held that the defendant was collaterally estopped from litigating the interpretation of the contract term or trespass for excess haying on the basis of the ALJ's decision. The jury returned a $32,845 verdict for plaintiff, of which $32,325 represented damages from the excess haying.[136] The appellate court upheld the district court on the appeal of the appropriateness of application of collateral estoppel.[137]

Assuming Karlen acted rationally, inefficiencies likely occurred at several levels in this case. First, the potential liability created incentives to overlitigate, both before the agency and in the subsequent civil suit. Overlitigation in this sense means the expenditure of more resources than the amount at risk normally would have warranted.[138] In this case, if no collateral estoppel effect had attached to the agency's decision, Karlen would only have litigated the lease termination before the agency tribunal. Karlen would have based litigation expenditures on the value of the lease multiplied by the probability of success. However, Karlen could not determine whether collateral estoppel applied, and litigated at the agency level as if the entire potential liability—originally determined in excess of $56,000—were at stake. The uncertainty of collateral estoppel application increased the amount at risk because of the possibility that the agency determination could become binding on the issue of liability for damages.[139] Consequently, the amount Karlen rationally expended at the agency proceeding increased.

Second, the uncertainty of collateral estoppel application

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136 *Id.* at 638.

137 *Id.* at 640.

138 The actual amount a rational litigant spends depends on risk preferences. Assuming risk-preference neutrality, if $100,000 were at risk, with a 50% chance of loss, a rational defendant would expend up to $50,000 in litigation. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5 (3d ed. 1986). The uncertainty of application of collateral estoppel created additional incentives for Karlen to litigate at the agency hearing. *See* Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 287 (1973) (arguing that likelihood of settlement prior to litigation increases if amount of award uncertain); Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical, and Strategic Implications for Criminal and Civil Litigation*, 70 GEO. L.J. 1079, 1116-19 (1982) (even in criminal prosecutions, as risk of being bound in future civil actions increases, accused parties have additional incentive to expend resources defending prosecution); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 95 (1983) (reasoning that higher stakes in outcome of litigation will induce parties to invest more in case).

139 Uncertainty of application meant that the *amount* at risk increased from zero, because the ALJ could not assess damages, to over $56,000, the damages originally calculated. Additionally, the *risk* of loss increased, from zero (the amount was not at risk in the agency proceeding) to some figure greater than zero (because through collateral estoppel a loss became possible).

caused Karlen to challenge its application both at the trial court level and on appeal. Once again, the entire civil liability was at issue, and the defendant acted rationally in expending resources proportional to the amount at risk. The level of expenditure was artificially high because the uncertainty of collateral estoppel application increased Karlen's probability of success on appeal. Litigation expenditure is a function of the amount at risk and the probability of success; because the probability of recovery increased, expenditures also increased.

Third, the undefined requirements for application of collateral estoppel virtually guaranteed litigation at the district court level and appeal to the circuit court by reducing incentives to settle the case.[140] If the parties had known that relitigation of liability was precluded, the only dispute would have been the level of damages. Such a situation fosters negotiation and settlement.[141] Neither party, however, could be sure whether collateral estoppel applied, and in this case the benefits of litigation outweighed the benefits of settlement to Karlen.

Conversely, if it had been clear that no preclusive effect would attach to the agency determination, Karlen would have had less incentive to continue his agency appeal. The certainty of nonapplication would have shifted the burden of determination of the trespass issue from the administrative agency system to the judicial system.[142] This shift would absorb additional judicial resources, but the entire dispute resolution system would gain from the reduced

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140 Collateral estoppel in general increases the incentive to litigate in the original action. *See* Polasky, *supra* note 3, at 220 ("[A]ny tendency to extend the conclusive effects of matters previously adjudicated might easily tend to intensify the effort expended in the initial litigation and might increase the probability of resort to appeal . . . ."); Thau, *supra* note 138, at 1116-19.

141 *See* Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel In Asbestos Litigation*, 70 IOWA L. REV. 141, 180-83 (1984) (An important but unexpressed consideration supporting collateral estoppel is that it fosters settlement. The judicial system benefits from settlement, because settlement of disputes removes them from the judicial process. The greater the uncertainty of application of collateral estoppel, however, the less likely settlement will occur.). Increased certainty in application of collateral estoppel promotes negotiation and settlement between parties in cases where it is reasonably certain to apply. *See generally* Gould, *supra* note 138, at 287; Comment, *The Impact of Collateral Estoppel Effect on Postjudgment Settlements*, 15 SW. U.L. REV. 343, 353 (1985) (authored by A. Ghazarians) (noting that "[a] party may be motivated to settle, however, after obtaining an adverse judgment at trial solely for the purpose of attempting to escape the effect of collateral estoppel"). Settlement is desirable and saves time and expense for both court and parties. *Id.* at 366; *see, e.g.*, Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976).

142 For discussion of the forum-shifting effect of collateral estoppel, see Comment, *supra* note 141, at 366-67 (by not limiting application of collateral estoppel to post-judgment settlements, courts may encourage increased use of appellate process; limitation of collateral estoppel effect may increase litigation at trial court level).

incentive to litigate at the agency level. In total, there would be less burden placed on the entire agency/court dispute resolution system.

Similarly, the costs of appeal, both to the parties and to the tribunals involved, would be reduced. The focus would be on facts rather than on interpretation and application of the law of collateral estoppel. Because the jury is generally upheld on its analysis of facts, the tribunal could easily dispose of the issues.[143] Consequently, the probability of recovery, and hence the level of resources that a rational appellant would spend on appeal, would decrease.

In this example, uncertainty about potential application of collateral estoppel reduced efficiency in the dispute resolution process, and application may have resulted in an absolute loss of judicial resources because the uncertainty increased both the amount at risk and the probability of loss at the agency level, and increased the probability of recovery at the appellate level. Additionally, the *Karlen* case illustrates the larger inefficiencies that can result from the uncertainty and flexibility of the *Utah Construction* test.

2. *Unfairness*

Application of collateral estoppel to agency determinations may also result in increased risks of unfairness to precluded litigants. Fairness in this sense is defined as a meaningful opportunity to participate in governmental action affecting individual, private rights.[144] Risks of unfairness result when courts applying the *Utah Construction* test grant collateral estoppel effect to determinations of agencies that provide relatively few procedural formalities.

In a systemic sense, agency adjudication presents risks of unfairness not present in court adjudication. The difficulty of characterizing agency action,[145] the agency decisionmaking process,[146] and the potential lack of neutrality of the agency tribunal creates these risks.[147] These unique characteristics of agency adjudication

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143 Courts will also uphold judicial determination of facts in a nonjury trial unless clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. *See* Comment, *An Analysis of the Application of the Clearly Erroneous Standard of Rule 52(a) to Findings of Fact in Federal Nonjury Cases*, 53 MISS. L.J. 473 (1983) (authored by John Bronson).

144 *See, e.g.*, Cramton, *supra* note 59, at 591 (in a democracy, "private persons should have a meaningful opportunity to participate in government decisions which directly affect them, especially when governmental action is based on individual rather than on general considerations"); Mashaw, *supra* note 15, at 775 (analysis of fairness focuses on "the extent to which accurate decisionmaking should be supported by providing a directly affected party with a trial-type hearing").

145 *See supra* notes 115-18 and accompanying text.

146 *See supra* notes 120-23 and accompanying text.

147 *See supra* notes 124-28 and accompanying text.

decrease the party's meaningful opportunity to participate in the decisionmaking process because factors extrinsic to the adjudicatory process may influence the result.

The agency may have legitimate reasons for creating those risks.[148] Similarly, the litigants may fully anticipate and accept those risks as an element of agency adjudication. However, these risks of unfairness in the decisionmaking process should not carry over into the federal court system through application of collateral estoppel to the agency determinations.

One way to avoid these systemic risks of unfairness is for courts to require a high level of procedural formality designed to ensure fairness at the agency adjudicatory proceeding before granting the agency determinations collateral estoppel effect.[149] The procedures can protect litigants from agency non-neutrality and similar risks created by the agency adjudicating process.

Uncertainty of application and the extension of collateral estoppel effect to determinations made by agencies employing low levels of procedural formality can create unfairness in individual cases as well. *Zanghi v. Incorporated Village of Old Brookville*[150] illustrates some of the risks of unfairness associated with the current application of the *Utah Construction* test.

In *Zanghi* the defendant town's police officer arrested the plaintiff, Zanghi, on a charge of driving while intoxicated.[151] While in custody, Zanghi suffered a broken cheekbone in an "incident" that occurred between Zanghi and several police officers. The police then charged Zanghi with resisting arrest and obstructing governmental administration as a result of this incident.[152]

After his arrest, Zanghi refused to take a chemical test for intoxication. Pursuant to New York law, that refusal automatically resulted in a temporary suspension of Zanghi's license to drive and a hearing before an ALJ to determine whether to impose a six-month license revocation.[153] The issue in that hearing was whether the police had probable cause to arrest Zanghi. The ALJ found for the police, and revoked Zanghi's license for six months.[154] Zanghi appealed to the Commissioner of the Department of Motor Vehicles, who affirmed.[155]

Zanghi was acquitted of all charges in the criminal prosecu-

148 *See supra* note 125.
149 For one example, see discussion *infra* p. 32.
150 752 F.2d 42 (2d Cir. 1985).
151 *Id.* at 44.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*

tion.[156] He subsequently brought claims of false arrest, false imprisonment, and malicious prosecution for damages under 42 U.S.C. section 1983 and under parallel state tort laws.[157] The district court held that under New York law, the finding of probable cause by the ALJ precluded relitigation of the issue in the subsequent civil action.[158] The court determined that the potential six-month license revocation provided sufficient incentive for Zanghi to litigate fully the issue of probable cause at the agency level.[159] Additionally, the court stated that "plaintiff was represented by counsel who we assume was competent to advise plaintiff of the effect of the administrative findings."[160] Through the full faith and credit clause as codified at 28 U.S.C. section 1738, Zanghi was precluded from relitigating the probable cause issue in his section 1983 claims.[161] Consequently, the court dismissed all of Zanghi's civil actions based on the findings of probable cause for arrest made by the ALJ in the license revocation hearing.[162]

This example illustrates the fairness problems current application of collateral estoppel can create. Contrary to the *Zanghi* court's statement,[163] the potential collateral estoppel effect of the ALJ's decision was uncertain due to the uncertain nature of the *Utah Construction* test itself. It was unlikely that the potential collateral estoppel effects of determinations made at that hearing were reasonably foreseeable.[164] Indeed, Zanghi's counsel probably could not have advised him of the potential preclusion, because the test does not define clearly when collateral estoppel applies. Additionally, the uncertainty reduced Zanghi's incentive to litigate[165] at the

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156 *Id.* at 45.

157 *Id.* New York law provided that a finding of probable cause defeats the state tort claims.

158 *Id.*

159 *But cf.* Hercules Carriers, Inc. v. Claimant State of Florida, 768 F.2d 1558, 1581 n.16 (11th Cir. 1985) (ship pilot's license revocation hearing not determinative on issue of negligence in subsequent civil action although negligence was basis for revocation hearing).

160 752 F.2d at 46.

161 *See supra* note 2.

162 A lengthier example of unfair preclusion is set forth in 4 K. DAVIS, *supra* note 4, § 21:4, at 55-59, discussing McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981) (informal Social Security Administration hearing denying claim for surviving child's insurance benefits given preclusive effect).

163 *See supra* note 160 and accompanying text.

164 *See generally* Note, *Collateral Estoppel*, 16 U. RICH. L. REV. 341, 356-69 (1982) (tracing collateral estoppel in light of Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), especially in relation to right to jury trial) (authored by R. Alexander, D. Rubin, A. Vaughn & C. Wings). For the importance of foreseeability, see The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

165 *See, e.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 540-41 (2d Cir. 1965) (no offensive collateral estoppel allowed because defendant lacked

license revocation hearing—if it had been clear that collateral estoppel would have applied, Zanghi naturally would have had additional incentive to litigate.[166]

Second, although nominally identical, the burdens of proof actually employed in the two actions may have differed. Court scrutiny in a license revocation hearing of probable cause in the arrest of an individual who refused to take a test for intoxication may differ from probable cause in a section 1983 action arising from police misconduct.[167] Particularly in license revocation hearings arising from allegations of drunk driving, police testimony receives added credence and claims of police misconduct discounted.[168] There is almost a necessity for these hearings to proceed on a consistent basis without consuming excessive resources. In a civil action for police misconduct, on the other hand, once the plaintiff satisfies his burden of production, courts scrutinize police conduct closely.[169]

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incentive to litigate in first action due to relatively small amount of risk), *cert. denied*, 382 U.S. 983 (1966).

166 *See supra* note 138.

167 Federal section 1983 actions arose out of the inability of state and local government to protect significant constitutional rights. Consequently, there is a strong preference for federal court review of state or local action when a party alleges violation of constitutional rights. This suggests federal courts will subject state and local actions to closer scrutiny than would state or local tribunals. *See generally* Note, *supra* note 113, at 1137 (discussing whether federal courts should invoke res judicata in section 1983 actions after state administrative decision on issue); Comment, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 U.C.L.A. L. REV. 177 (1979) (authored by Laurie Levenson) (discussing conflict between res judicata principles and section 1983 principles of allowing federal courts to redress injustice caused by state courts).

168 Courts defer to police judgment in motor vehicle cases in general, allowing the police to stop a motor vehicle on the basis of a reasonable suspicion. This objective test is a lower standard than probable cause. *See* Preiser, *Confrontations Initiated by the Police on Less Than Probable Cause*, 45 ALB. L. REV. 57, 61, 65-66 (1980). For an example from a New York court, see People v. Singleton, 41 N.Y.2d 402, 361 N.E.2d 1003, 393 N.Y.S.2d 353 (1977). Additionally, courts currently are reacting to the serious safety problems drunk drivers cause by facilitating drunk driver apprehension and prosecution. *See* Note, *Warrantless Misdemeanor Arrest for Drunk Driving Found Invalid in* Schram v. District of Columbia, 34 CATH. U. L. REV. 1241, 1252-53 (1985) (authored by J. Ortins). To that end, courts have willingly given broader meaning to probable cause than the traditional common law meaning. *Id.* at 1244. *Compare* State v. Allen, 2 Ohio App. 3d 441, 442 N.E.2d 784 (1981) (modern approach to probable cause) *with* Commonwealth v. Jacoby, 226 Pa. Super. 19, 311 A.2d 666 (1973) (traditional common law approach). The combination of court deference to police judgment in motor vehicle cases and heightened deference in drunk driving cases means that court scrutiny of police action was at its lowest point in *Zanghi*.

169 Courts are most sympathetic to claims of due process violations. *See* Comment, *supra* note 167, at 211. Additionally, liberty interests are more favored than property interests in allegations of due process violations. *Id.* at 212. Zanghi alleged a due process violation of a significant liberty interest. In this situation, courts scrutinize police conduct closer than in any other type of section 1983 action.

III
THE ALTERNATIVE

As the preceding discussion indicates, court application of collateral estoppel may result in inefficiency or unfairness in its effect while still adhering to the *Utah Construction* requirements. The result is contrary to the goals of collateral estoppel and the dispute resolution system in general.[170] To reduce these problems, courts should tailor the requirements of any test for application of collateral estoppel to meet the goals of collateral estoppel and to protect the legitimate interests of precluded parties.

To minimize inefficiency and the risks of unfairness, courts should require a specific list of agency procedures before applying collateral estoppel effect to the agency's decisions. The certainty of application itself enhances efficiency and helps to ensure fairness. Certainty would eliminate the inefficiency illustrated by *Karlen* and reduce the risks of unfairness illustrated by *Zanghi*.

Courts should require a high degree of procedural formality in all agency determinations to minimize the risks of unfairness and to avoid compromising the speed and efficiency with which agencies can resolve disputes using informal adjudicative procedures. The high level of formality would reduce the systemic risks of unfairness created by agency dispute resolution procedures themselves. Additionally, it would insulate the informal agency adjudications from overlitigation in anticipation of subsequent civil actions.

The suggested approach consists of a checklist of procedures that an agency must make available at their proceedings before collateral estoppel effect can attach to the agency determinations. If any of the procedures are lacking, courts should deny collateral estoppel. This may result in relitigation of some perfectly acceptable determinations, but the net gains to the system from application of a firm standard outweigh these costs in the long run.[171]

The proposed checklist approach provides several efficiency benefits. First, the ease of application itself conserves judicial resources. Rather than interpreting subjective standards such as judicial capacity and full and fair opportunity, courts can simply examine agency procedures in light of the procedural requirements.

Second, the degree of certainty of collateral estoppel application will eliminate the incentive to overlitigate at the agency level when collateral estoppel does not apply. Litigants will base expendi-

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170 *See generally supra* notes 22-34 and accompanying text.

171 Much criticism has been levelled at an analogous situation, the application of offensive collateral estoppel. *See generally* Flanagan, *Offensive Collateral Estoppel*, *supra* note 20, at 52-53; Thau, *supra* note 138, at 1084; Vestal, *supra* note 29, at 192.

tures on the risk of loss in the agency proceeding itself, rather than on the agency risk plus the risk of future liability.[172] Of course, litigants will contest issues fully at the agency level when collateral estoppel effect clearly attaches. This does not represent an additional expense borne by the dispute resolution system, however, but merely a shift between the systems bearing that expense (or a net saving, because in many cases the uncertainty of application encourages full litigation at the agency level anyway).[173]

Third, a clear standard provides a degree of certainty in subsequent actions about whether collateral estoppel applies. Litigants will challenge fewer collateral estoppel issues before courts on appeal. Where the procedural requirements are not met, collateral estoppel will not apply, and litigation will focus on facts and substantive law rather than on the potential application of collateral estoppel. If the procedural requirements are met and collateral estoppel clearly applies, litigants will negotiate, settle, or litigate only damages.[174] In short, the range of contested issues will narrow.[175]

Fourth, litigants can conserve private resources. Each issue not litigated or not relitigated at the judicial level saves both parties the resources that determination of those issues would require. Certainty of application avoids the waste of resources caused by overlitigation and contested application of collateral estoppel.[176]

The general strncture of the model itself increases efficiency. Consequently, the procedures should ensure fairness to the precluded party. The relatively high level of procedural formality addresses the systemic risks of unfairness; the particular procedures should protect the individual litigants. Courts should have the discretion to deny collateral estoppel in cases of particularized unfairness. This discretion entails costs, but the overriding concern of the system should be that it refuses to sacrifice fairness for efficiency. Courts should not expand the scope of collateral estoppel in the absence of unfairness, however.[177] The model procedures should operate then as a floor of procedural formality, subject to expansion in cases of particularized unfairness.

To determine which procedural elements ensure fairness, the

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172 *See supra* notes 138-41 and accompanying text.

173 *See supra* notes 138-43 and accompanying text.

174 *See supra* note 141 and accompanying text.

175 *See* Polasky, *supra* note 3, at 220 ("collateral estoppel does not prevent subsequent litigation but only tends to narrow the area of conflict in the second action by preventing the relitigation of issues already decided").

176 *See supra* notes 132-43 and accompanying text.

177 That is the problem with the *Utah Construction* test. To use simple economic terms, the marginal cost of discretionary expansion of the scope of application outweighs the marginal benefit due to the uncertainty such discretion creates. *See supra* notes 138-41 and accompanying text.

characteristics of a fair dispute resolution system should be defined. In no particular order, fairness includes: (i) minimization of the risks of binding parties by an erroneous or inaccurate determination;[178] (ii) participation in the dispute resolution system sufficient to promote reasonable party satisfaction with the results;[179] and (iii) an unbiased tribunal.[180] A fair proceeding may include additional elements, and some of the above elements blend into each other when considering procedural formality. Nevertheless, procedural requirements should be tailored to promote these characteristics.

The following list suggests desirable procedures and the policies each advances:

a. right to present evidence [i, ii]
b. right to cross-examine witnesses [i, ii]
c. representation by counsel [i, ii]
d. substantial discovery [i, ii]
e. an impartial tribunal [i, ii, iii]
f. decision made on the record [i, ii, iii]
g. judicial review for errors of fact or law [i, ii, iii]

Courts should require that agencies make all of these procedures available in their proceedings before allowing collateral estoppel effect to the agency's determinations. Procedures such as the right to present evidence, the right to cross-examine witnesses, representation by counsel, substantial discovery, an impartial tribunal, a decision made on the record, and judicial review for errors of fact or law promote the accuracy of agency determination. Even where the agency uses an inquisitorial dispute resolution process rather than an adversarial process, elements such as the right to present witnesses and substantial discovery facilitate development of a complete factual record on which the agency can base its determination.

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178 *See* Cramton, *supra* note 59, at 592 ("The ascertainment of truth, or more realistically, as close an approximation of reality as human frailty permits, is a major goal of most decision-making."); Mashaw, *supra* note 15, at 775 (due process in social welfare context requires "processes which will tend to assure the accuracy of claims adjudications").

179 *See* Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1402 (1979) (results of sociological study showed that adversary, party-controlled dispute resolution mechanisms were likely perceived as more fair than inquisitorial, judge-controlled dispute resolution mechanisms); Pielemeier, *supra* note 26, at 416 ("the principal due process requirement in ordinary civil actions is the opportunity for meaningful participation in an adversary hearing on the merits of one's claim").

180 *See* Friendly, *supra* note 13, at 1279. One commentator stated, "The primary quality of an adjudicator must be impartiality, for bias or prejudgment by the decision maker would seriously undercut, if not obliterate, both the rational and the participatory aspects of adjudication." Boyer, *supra* note 120, at 122. Additionally, "[s]afeguards for the independence of some regulatory agencies, prohibitions on ex parte communications and conflicts of interest, and the requirement of findings of fact and substantial evidence are all methods of bolstering administrative impartiality." *Id.* at 123.

These same procedures also promote litigant satisfaction. All elements increase party participation and bolster the quality of that participation. For example, the requirements of an unbiased tribunal basing its decision on the record subject to judicial review protects party participation in all aspects of the decisionmaking process. A party cannot be precluded in subsequent federal civil actions if excluded from the factual development by ex parte communications or agency bias.

Requirements of an impartial tribunal, decisionmaking on the record, and judicial review foster an unbiased tribunal. However, no one specific adjudicatory authority such as an ALJ is required. This increases the flexibility of acceptable agency decisionmaking. Of course, the risk of a combination of functions still exists, but judicial discretion can neutralize that risk.

IV
REBUTTAL

A. Why Not the APA?

Some readers will react to these procedures by concluding that they represent nothing more than a reformation of the APA's formal adjudication requirements, and, if so, why not simply require compliance with the APA? First, this formula differs from the APA. Fundamentally, the requirement for an impartial tribunal neither requires an ALJ nor mandates rigid separation of functions among agency personnel.[181] Courts can presume neutrality, subject to rebuttal by the precluded party. The requirements of a decision on the record and judicial review for errors of fact or law bolster impartiality. Additionally, this model does not necessarily require an adversarial proceeding.[182] For example, an agency can adopt an inquisitorial model of decisionmaking and still fit within the prescribed model, assuming the agency otherwise meets all of the procedural requirements.[183]

Second, reliance on the APA requirements for formal adjudication would exclude too many agency determinations from collateral estoppel effect. The vast majority of agency adjudications do not comply with APA formal procedures.[184] Yet, many of those agency adjudications are appropriate for collateral estoppel.

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181 *Cf.* Administrative Procedure Act, 5 U.S.C. § 554(d) (1982).

182 *Cf. id.* §§ 556-557.

183 *See supra* notes 77-80 and accompanying text.

184 *See generally* B. SCHWARTZ, *supra* note 63, § 10, at 27 (great bulk of administrative decisions made informally and by mutual consent; most transactions between citizen and agency do not reach stage of formal procedure); P. WOLL, ADMINISTRATIVE LAW 168 (1963) (administrative adjudication is *primarily* informal).

Finally, the APA has come under increasing criticism, and its continued vitality is in question.[185] By tying collateral estoppel effect to the APA, the solution proposed here would appear to advocate the APA or nothing. To the contrary, this theory grants collateral estoppel effect to those agency determinations whose procedures may not comply with the APA but which still provide sufficient guarantees of accuracy, neutrality, and party participation to permit collateral estoppel.

B. Finality

One might argue that the proposed model will compromise the finality of agency adjudication. Currently, courts and other subsequent tribunals give issues determined by administrative agencies final and conclusive effect. As a natural consequence, the proposed model will lessen finality because more issues litigated before agencies will come before courts for relitigation. However, the agency decisions will still be final between the parties, and the issues determined will be final within those decisions. Due to the differences between the agency and the judicial dispute resolution systems,[186] inter-system finality of issue determination is not a universal goal. Certain administrative determinations, such as those made pursuant to rulemaking or executive authority, are inappropriate for judicial preclusion. So too, in light of the goals behind collateral estoppel, are agency determinations made in the absence of sufficient procedural formality.[187]

C. Efficiency

One might also claim that court discretion to deny collateral estoppel in cases of particularized unfairness will diminish the efficiency of this model. Any uncertainty entails costs by encouraging litigation and appeal.[188] However, the avoidance of an irrationally inflexible application of the standard necessarily requires discretion. Cases will arise where precluding a party will be unfair even though the agency provided all of the required procedures. In such a case,

185 *See* LaTour, Houlden, Walker & Thibaut, *supra* note 117, at 258 (analyzes twelve different models of procedures based on research done in United States and Germany); Verkuil, *supra* note 117, at 321 ("With increasing regularity, Congress is enacting substantive mandates that use the APA only as a reference point for charting a new procedural course. This tendency does allow agency-by-agency experimentation with new procedural formulas that may not yet be ready for testing throughout the administrative process."); Robinson, *supra* note 122, at 535-39 (criticizing current APA approach and offering alternative methods for agencies to achieve their goals and formulate their policies).

186 *See supra* notes 115-23 and accompanying text.

187 *Id.*

188 *See supra* notes 174-75 and accompanying text.

fairness concerns should preempt efficiency concerns, and the court should refuse to apply collateral estoppel. Not allowing courts the discretion to expand the scope of collateral estoppel in cases where it would not be unfair to a precluded party maximizes certainty and minimizes inefficiency.[189] The checklist provides a floor of procedural requirements for application of collateral estoppel, subject to expansion in the discretion of a court but not subject to contraction.

CONCLUSION

The extension of collateral estoppel to administrative agency determinations essentially involves a linedrawing exercise across a spectrum of agency procedural formality. Courts currently draw the line in accordance with the *Utah Construction* standards. However, application of that test merely answers whether courts can apply collateral estoppel; it does not answer whether, in light of the policies behind the doctrine, courts should.

The uncertain test for application of collateral estoppel can grant collateral estoppel effect to issues determined with few procedural safeguards; such uncertainty reduces the efficiency of collateral estoppel and the informality increases the risks of unfairness to precluded litigants. Additionally, uncertainty compromises the speed and efficiency with which agencies can resolve disputes.

The solution is to require a rigid formula of agency procedures before allowing collateral estoppel effect to an agency determination. This advances efficiency and, depending on the procedures required, advances fairness to the precluded party. Additionally, by removing the threat of collateral estoppel to informal agency determinations, courts can protect the speed and efficiency with which the agencies can resolve disputes.

To avoid the illogic and unfairness of wooden application of the doctrine, courts must have the discretion to deny collateral estoppel in particular cases even when the agency procedures satisfy the requirements. But courts should not exercise their discretion in the other direction, reducing the procedural requirements in order to preclude a party who would not suffer unfairness.

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189 *See supra* note 177.