Res Judicata Effects of State Agency Decisions in Title VII Actions

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RES JUDICATA EFFECTS OF STATE AGENCY DECISIONS IN TITLE VII ACTIONS

INTRODUCTION

In title VII of the Civil Rights Act of 1964, Congress outlawed discriminatory employment practices, and created a federal cause of action for persons who believe they have been discriminated against in employment. The statute provides that an injured party may seek vindication of the right in federal court. Title VII is not, however, the only remedy available to victims of employment discrimination. Several different forums, including arbitration proceedings, administrative agencies, and state courts, may have jurisdiction over the same discrimination claim. Principles of res judicata, therefore, may operate to preclude one forum from hearing a claim already settled by an earlier proceeding in another forum. The Supreme Court has addressed this problem, although incompletely. In *Alexander v. Gardner-Denver Co.* the Court held that an arbitration proceeding will not bar a title VII claim in federal court. In *Kremer v. Chemical Construction Corp.*, the Court invoked section 1738 of title 28, which requires a federal court to give the same effect to a state court judgment that the state's courts would, to hold that a state court affirmance of an agency determination will bar the title VII claim.

The question that the Supreme Court has left open and that this Note addresses, is whether a state agency's decision in an employment discrimination claim that has not been reviewed by the state's courts will preclude a federal action. This Note first examines the Supreme Court's requirements of fairness in determining whether a particular forum's decision on an employment discrimination claim should be final. It then discusses two recent district court decisions which conflict in their application of these requirements.

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one holding that an unreviewed agency determination precludes the federal claim, the other holding that it does not. This Note views res judicata in a title VII case as primarily a "line drawing" exercise to determine what types of state action on employment discrimination claims will have preclusive effect. It argues that the line should be drawn between those actions that reach the state courts and those that do not. In other words, a state agency determination that is not reviewed by a state court should not preclude a title VII claim, but a state court affirmance of the agency determination should.

I
BACKGROUND

A. Concurrent Remedies Under Title VII and the Possibility of Preclusive Effect

Title VII provides for concurrent remedies, encouraging plaintiffs to pursue their claims on the local or state level before bringing them to federal court. Specifically, title VII requires the referral of an employment discrimination claim to any state or local agency having jurisdiction over it. After sixty days the plaintiff may receive a right to sue notice from the Equal Employment Opportunity Commission (EEOC) and bring the action to federal court." Under...
this scheme a state level forum may already have heard and decided the issues which would arise in a title VII lawsuit in federal court. Questions of fairness and efficiency arise if plaintiffs dissatisfied with the result in one forum may relitigate their claims in another.\textsuperscript{12}

Two possible responses would be to (1) allow a federal court to hear only those claims which have not been resolved by any forum within the sixty days of exclusive state level jurisdiction or (2) allow a federal court to hear all employment discrimination claims de novo regardless of any prior decision. The Supreme Court has precluded both of these extremes. In \textit{Alexander v. Gardner-Denver Co.}\textsuperscript{13} the Court narrowed the possibility for claim preclusion by holding that an adverse decision in an arbitration proceeding conducted pursuant to a collective bargaining agreement would not bar a title VII suit on the same discrimination claim. The Court's subsequent decision in \textit{Kremer v. Chemical Construction Corp.}\textsuperscript{14} indicates, however, that \textit{Alexander} does not mean that all discrimination claims can be brought to federal court regardless of prior proceedings. In \textit{Kremer} the Court held that a state court decision upholding an adverse agency determination barred the plaintiff's federal claim.

Together these two decisions prevent federal courts from applying either extreme approach in responding to title VII suits based on claims previously heard by state-level forums. The decisions narrow the range of possibilities for drawing the line at which a federal court may or must give preclusive effect to a judgment rendered by a state level forum. The Court narrowed that range to some point between the most informal, an arbitration proceeding, and the most formal, a state court judgment. If a court draws the line after arbitration proceedings, then it should give preclusive effect in the judgment of any more formal state proceeding. Under that solution, an unreviewed agency determination would bar a subsequent title VII suit. If, however, a court draws the line just before a state court judgment, then any proceeding before that point, including unreviewed agency determinations, should be denied preclusive effect by the federal courts.

\textsuperscript{12} See B. SCHLEI & P. GROSSMAN, \textit{supra} note 9, at 1074. To illustrate the potential fairness and efficiency concerns that could arise, the authors suggest the following scenario:

If the facts of a certain case are such that the claimant has only a 20-percent chance of prevailing in a given forum . . . the availability of, for example, four forums in which to independently assert the claim will change the odds dramatically. If each forum approaches the claim independently and \textit{de novo}, the chance of the respondent's prevailing will be reduced from 80 percent to approximately 40 percent.

\textit{Id.} (footnote omitted).

\textsuperscript{13} 415 U.S. 36.

\textsuperscript{14} 456 U.S. 461.
In deciding on which side of the line to place unreviewed agency decisions, the federal courts must look to the factors that the Supreme Court considered important in determining the non-preclusiveness of arbitration proceedings and the preclusiveness of a state court judgment. The factors include access to a federal forum provided by title VII, adequacy of the prior proceedings in vindicating the rights protected by title VII, and concern over repetitious litigation of the same claim. These factors will be applied to an unreviewed agency decision to determine whether it should be accorded preclusive effect.

B. Denying Preclusive Effect: Inadequacy of Prior Procedures and Access to a Federal Forum

The Supreme Court first discussed the preclusive effect of prior proceedings in title VII cases in Alexander v. Gardner-Denver Co. In Alexander, the Court considered the preclusive effect of an arbitrator's adverse ruling when the plaintiff subsequently brought the claim in federal court. The Court held that the arbitration proceeding would not bar the title VII claim on two principal grounds. First, the Court found that Congress intended for employees to be able to bring their discrimination claims to federal court despite prior attempts at resolution. Second, the Court found that an arbitration proceeding is procedurally inadequate for

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15 See infra text accompanying notes 21-25.
16 See infra notes 28-30, 59-68 and accompanying text.
18 Plaintiff Alexander, after being fired, submitted his claim for "unjust discharge" to grievance procedures pursuant to a collective bargaining agreement. Id. at 39. Just before the final arbitration hearing, Alexander filed a claim with the Colorado Civil Rights Commission which referred the complaint to the EEOC. Id. at 42. The arbitrator ruled against Alexander, finding he had been discharged for just cause under the terms of the bargaining agreement. Id. More than six months later, the EEOC determined that there was no "reasonable cause to believe" a violation of title VII had occurred and issued Alexander a right to sue notice. Id. at 43; see also 42 U.S.C. § 2000e-5(b).
20 The Court rejected the contention that the doctrine of election of remedies barred Alexander's suit on the ground that the remedies were not legally or factually inconsistent and did not force him to choose one or the other. 415 U.S. at 49-51. The Court also rejected the argument that Alexander waived his right to a title VII claim by submitting to arbitration. Id. at 51. The Court determined that the statutory scheme does not allow individuals to have their title VII rights prospectively waived in collective bargaining agreements. Id. at 51-52.
21 Id. at 44; see infra text accompanying notes 22-26.
final resolution of disputes over federally guaranteed rights.\textsuperscript{21} When applied to the question of whether unreviewed agency determinations should preclude title VII claims in federal court, the two grounds of decision seem to suggest conflicting results. An examination of the reasoning underlying each finding, however, shows that by basing the decision on two grounds, the \textit{Alexander} Court did not answer the question whether proceedings in forums other than arbitration should bar title VII claims.

In title VII's statutory scheme, the \textit{Alexander} Court found congressional intent to provide employees with a federal forum in which to litigate discrimination claims. The Court noted that the EEOC cannot directly adjudicate title VII claims. Although the EEOC may prepare and prosecute claims, the Court reasoned that the final responsibility for their resolution lies with the federal courts.\textsuperscript{22} The courts retain their broad statutory powers to issue injunctive relief and order affirmative action despite EEOC findings of no reasonable cause to believe that discrimination occurred.\textsuperscript{23} The Court viewed the purpose of the deferral provisions as providing preliminary proceedings in which the EEOC and state agencies have an initial opportunity to settle disputes through conciliation and persuasion and not as requiring preclusion of the federal suit on the basis of the prior state action.\textsuperscript{24}

The Court then examined the statute to determine whether the prior arbitral decision foreclosed the plaintiff's federal action or divested the federal court of jurisdiction over it. The Court rejected both possibilities, finding that title VII purposefully provides for consideration of employment discrimination claims in several forums with submission to one forum not precluding subsequent submission to another.\textsuperscript{25} The Court concluded that by combining an original federal action with a scheme for deferral to state agencies, Congress intended title VII to supplement, but not supplant, existing laws or institutions relating to fair employment.\textsuperscript{26} The Court reasoned, therefore, that title VII proceedings remain available after plaintiffs have unsuccessfully pursued other antidiscrimination remedies.\textsuperscript{27}

Considered alone, the Court's finding that Congress intended victims of employment discrimination to have access to a federal forum suggests that no prior proceedings have a preclusive effect on

\textsuperscript{21} \textit{Alexander}, 415 U.S. at 53; see infra text accompanying notes 29-30.
\textsuperscript{22} 415 U.S. at 44; see supra note 9.
\textsuperscript{23} See 42 U.S.C. § 2000e-5(g); see also supra note 9.
\textsuperscript{24} \textit{Alexander}, 415 U.S. at 44.
\textsuperscript{25} Id. at 47-48.
\textsuperscript{26} Id. at 47-49.
\textsuperscript{27} Id. at 48-49.
title VII claims brought in federal court. The Court did not, however, indicate whether the result was based on an absolute right to enter federal court or on the more limited finding that arbitration proceedings in particular are inadequate to vindicate title VII rights. Specifically, the Court pointed to two aspects of arbitration proceedings that render them inadequate to protect title VII rights. First, the Court noted that because the arbitrator only interprets and applies the terms of a collective bargaining agreement, the arbitrator lacks authority to go beyond the scope of the agreement and uphold a federal statute. Second, the Court found that the informal procedures used in arbitration proceedings do not adequately protect federal statutory rights. The Court emphasized the absence of a complete record and of the usual rules of evidence, testimony under oath, and cross examination in arbitration proceedings. Because the procedural inadequacies of arbitration proceedings may not be present in other fair employment proceedings, the Alexander Court's careful consideration of the procedural inadequacies may limit access to federal court to those plaintiffs who did not have a fair opportunity to litigate their discrimination claims by way of adequate procedures.

Alexander thus recognizes two factors, access to a federal forum and adequacy of procedure in the prior forum, that the federal courts should consider in determining whether to give preclusive

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28 Id. at 56-57. The Court noted that the arbitrator's special competence pertains to the "law of the shop, not the law of the land..., [o]n the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts." Id. at 57 (citation omitted). See also McDonald v. City of West Branch, 104 S. Ct. 1799 (1984) (allowing plaintiff to bring § 1983 action, 42 U.S.C. § 1983 (1982), after adverse arbitration decision, on ground that arbitrator has no authority to enforce federal civil rights).

29 Alexander, 451 U.S. at 53. If an arbitrator bases his decision solely on an interpretation of the federal statute rather than on an interpretation of the collective bargaining agreement, he has exceeded the scope of arbitral authority and the decision is invalid. Id. The Court emphasized that arbitral authority is confined to interpreting the collective bargaining agreement even though the "contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII." Id. at 54.

30 Id. at 57-58. The arbitration decision is not wholly irrelevant, however, to the federal claim. The Court provides that the "arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." Id. at 60 (footnote omitted). Schlei and Grossman argue that affording "considerable" or "great" weight to the arbitrator's findings best supports the policies put forth in Alexander. B. SCHLEI & P. GROSSMAN, supra note 9, at 1084-85. Summary judgment will not be granted based solely on an arbitrator's award; therefore, the employee may use procedures lacking in arbitration, and have a judge experienced in interpreting statutory law hear the claim. At the same time, however, the employee is not encouraged to relitigate a claim rejected on the merits because the federal court will give great weight to the arbitrator's findings. See Green v. U.S. Steel Corp., 481 F. Supp. 295 (E.D. Pa. 1979) (to extent that rights afforded by statute and collective bargaining agreement are similar, arbitrator's decision is given commensurately greater weight); see also Burroughs v. Marathon Oil Co., 446 F. Supp. 633 (E.D. Mich. 1978) (arbitrator's decision given some weight).
effect to a prior proceeding in a title VII suit. The combination of these factors presents the question whether the adequacy of procedures in a prior proceeding affects access to a federal forum. In other words, *Alexander* leaves open the question whether a plaintiff whose discrimination claim has been heard in a prior proceeding may bring the same claim in federal court, even if the procedures of the earlier forum adequately protected the statutory fair employment right.

The Supreme Court also has not directly addressed the question whether a procedurally adequate state agency proceeding precludes a federal action on the same claim. In *Chandler v. Roudebush,* however, in holding that a federal employee may bring an action in federal court after an adverse decision by the Civil Service Commission, the Court indirectly indicated that private employees were entitled to trial de novo after an adverse state agency determination. Underlying the holding was the Court's assumption that title VII "accords private-sector employees the right to de novo consideration of their . . . claims." The Court believed that federal and private employees should be treated alike, and therefore held that federal employees were entitled to a trial de novo. This reasoning indicates the Court's view that private sector employees are entitled to trial de novo.

The respondents in *Chandler* attempted to distinguish *Alexander* on the ground that, unlike arbitration, the administration of the federal employee's claim furnished an adequate basis for substantial review by the courts. The Court responded that although Congress was aware of the agency procedures available to federal employees for impartial adjudication, it "chose to give employees who had been through those procedures the right to file a de novo [civil action] equivalent to that enjoyed by private-sector employees." By implication, private sector employees would also not be precluded from bringing actions in federal court even though they enjoyed procedurally adequate proceedings in their respective state agencies.

By noting that even an "adequate basis for 'substantial evidence' review" would not overcome the statutory requirement of a trial de novo in federal court, *Chandler* seems to read *Alexander* as holding that the trial de novo requirement rather than the inade-

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32 Id. at 844.
33 Id.
34 Id. at 864.
35 Id. at 863.
36 Id.
37 Id.
quacy of arbitration proceedings led to the denial of preclusive effect. Yet, the procedural adequacy of the prior proceeding became a major ground for the third important Supreme Court decision concerning res judicata in title VII claims.

C. According Preclusive Effect: State Court Review and Concern Over Section 1738

In *Kremer v. Chemical Construction Corp.*, the Supreme Court addressed the procedural adequacy of state employment discrimination hearings. In *Kremer* the Court held that a state court’s affirmance of an adverse state agency determination would bar the plaintiff from bringing a title VII claim. The holding followed directly from the requirement of section 1738 that federal courts give the same respect to any state judicial proceedings that the courts of the state would.

The Court in *Kremer* barred the federal claim on two grounds. First, it found that title VII did not effect a repeal of section 1738 for discrimination claims. Second, it found that the procedures available to Kremer at the state level were adequate to protect his title VII rights. *Kremer* offered the Court an opportunity to resolve a split which arose in the circuit courts after *Chandler* concerning the preclusive effect of state court judgments, and to delineate clearly the applicability of section 1738 to prior proceedings in discrimina-

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39 *Id.* at 485. Kremer filed a discrimination charge with the EEOC after the Chemical Construction Corp. failed to rehire him after a layoff. The EEOC referred the charge to the New York State Division of Human Rights (NYHRD), the agency responsible for the enforcement of antidiscrimination laws in New York. NYHRD found no probable cause to believe the company had discriminated. The NYHRD’s Appeal Board upheld the determination as “not arbitrary, capricious, or an abuse of discretion.” *Id.* at 464. Kremer then petitioned the Appellate Division of the New York Supreme Court to set aside the adverse agency determination, but the court unanimously affirmed it. Kremer could have sought review by the New York Court of Appeals but did not. Subsequently, the EEOC found no reasonable cause to believe the charge was true and issued a right-to-sue notice with which Kremer brought this title VII action to federal court. The district court dismissed the complaint on the ground of res judicata, 477 F. Supp. 587, 590 (S.D.N.Y. 1984), relying on the Second Circuit’s holding in *Sinicropi v. Nassau Cty.*, 601 F.2d 60, 62 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979) that state court determinations are res judicata in title VII cases.

40 *Kremer*, 456 U.S. at 466. Section 1738 reads in pertinent part, “The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken.” 28 U.S.C. § 1738 (1982).

41 456 U.S. at 476. See infra notes 44-58 and accompanying text.

42 456 U.S. at 484-85. See infra notes 59-68 and accompanying text.

43 In *Mitchell v. NBC*, 553 F.2d 265 (2d Cir. 1977), the Second Circuit barred a § 1981 claim in federal court following an appellate division affirmation of an adverse state agency decision. The prior state proceeding operated as res judicata as to the federal action. *Id.* at 276. The Second Circuit extended *Mitchell* to title VII actions in
tion cases. The reasoning of Kremer has played a major role in subsequent cases involving the question of whether unreviewed agency determinations should also bar federal claims.

In affording preclusive effect to the state court judgment, the Court rejected Kremer's argument that Congress intended title VII to relieve federal courts of their usual obligation to afford full faith and credit to state court judgments. Kremer's contention could reasonably follow from title VII's deferral scheme which requires submission of the claim to a state level forum, but also provides for an original federal action. In addition, the argument seems consistent with the Court's language in Alexander and Chandler that Congress intended the federal courts to be the final arbiters of title VII claims. Addressing both the implications of the deferral scheme and the language in the earlier opinions, the Court rejected Kremer's argument.

Sinicropi v. Nassau County, 601 F.2d at 62. The Court in Sinicropi emphasized that the plaintiff had chosen to submit her claim to the state court. Id. at 62.

The Eighth Circuit, in Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980), denied preclusive effect in a title VII case to an adverse finding by the Iowa Supreme Court when the plaintiff had prevailed below. The court distinguished Mitchell and Sinicropi on the ground that the claimant had not sought the appeal in the state court. Id. at 1084. Applying res judicata "in these circumstances . . . creates the risk that by appealing any agency determination favorable to claimant, the respondent can force the claimant into the state courts and foreclose a federal action." Id. at 1084 (quoting Mitchell, 553 F.2d at 275 n.13). This result is "unacceptable and contrary to the policies of title VII." Gunther, 612 F.2d at 1084.

In Smouse v. General Elec. Co., 626 F.2d 333 (3d Cir. 1980) (per curiam), the Third Circuit denied preclusive effect to a Pennsylvania Supreme Court decision affirming an agency finding in the plaintiff's favor. In dicta the court stated that it would also reject the Mitchell-Sinicropi cases on the ground that Congress did not intend for the federal courts to defer to state findings. Id. at 335. The court also noted that the procedures available in state court were not the same as those available in federal court. Id. In Unger v. Consolidated Foods Corp., 657 F.2d 909 (7th Cir. 1981), vacated and remanded, 456 U.S. 1002 (1981) (Court directed circuit court to reconsider its decision in light of Kremer), the plaintiff appealed an adverse decision in the Illinois Supreme Court. The circuit court denied preclusive effect to the state court proceeding, finding no election of remedies even though the plaintiff, not the defendant, had sought state court review. Id. at 914.

44 456 U.S. at 476. The Court agreed that the district court's usual obligation in this case would be to bar the claim under § 1738. Kremer could not initiate a new action on the same claim in the courts of New York, so by its very terms, § 1738 would seem to preclude such an action in federal court. The Court also agreed with Kremer that to allow the federal action, the Court would have to find a partial repeal of § 1738 in title VII.

45 See 42 U.S.C. § 2000e-5(c), (d), discussed supra notes 9-10.

46 See 415 U.S. at 56 ("The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII.").

47 See 425 U.S. at 861 (Congress "faced a choice between record review or agency action . . . and trial de novo of Title VII claims . . . [and] selected trial de novo as the proper means for resolving the claims of federal employees.").
The Court held that Congress did not implicitly repeal section 1738 by enacting the deferral scheme of title VII.\textsuperscript{48} According to the Court, Congress intended the deferral provisions to supplement existing state antidiscrimination schemes with a uniform federal scheme so that possible deficiencies at the state level would not hinder employees in vindicating their rights.\textsuperscript{49} Congress did not intend to displace state laws with federal law, nor to deprive state courts of the respect traditionally accorded them by federal courts. Instead, the Court concluded, section 1738 applies to state court judgments in title VII claims as it does to other valid state court judgments.\textsuperscript{50}

The Court indicated that its statement in \textit{Alexander} that Congress intended federal courts to have the final responsibility for enforcement of title VII did not contradict its conclusion in \textit{Kremer} that title VII did not override section 1738.\textsuperscript{51} The Court noted that by "final responsibility" in a federal forum it did not mean that the federal forum should deny finality to decisions in another forum. Instead, the Court stressed the context in which the language in \textit{Alexander} was spoken. According to the Court, \textit{Alexander} was merely describing the role of the EEOC in title VII cases. The EEOC cannot adjudicate claims or impose sanctions; this responsibility, i.e. final responsibility, is vested in the federal courts.\textsuperscript{52}

By ruling that title VII did not effect a repeal of section 1738 and by limiting the federal forum discussion in \textit{Alexander}, \textit{Kremer} could be read as implying that any state proceeding that would bind the courts of that state would bind the federal courts as well. Under such a reading of \textit{Kremer}, a state administrative decision that would be given preclusive effect by that state's courts would also preclude federal courts from hearing the claim. \textit{Kremer} may not go that far, however. Citing \textit{Chandler},\textsuperscript{53} the Court stated that it had "interpreted the 'civil action' authorized to follow consideration by federal and

\textsuperscript{48} \textit{Kremer}, 456 U.S. at 468-69.

\textsuperscript{49} The Court noted that Congress intended the states to play a role in enforcing title VII, but wanted to ensure that the federal system would "defer only to adequate state laws." \textit{Id.} at 472. Congress considered limiting title VII jurisdiction to states without fair employment laws, but decided instead to have the EEOC assess the adequacy of state laws and procedures. \textit{Id.} at 472-73.

\textsuperscript{50} \textit{Id.} at 478.

\textsuperscript{51} \textit{See} \textit{Alexander}, 415 U.S. at 444.

\textsuperscript{52} \textit{Kremer}, 456 U.S. at 477. Because the plaintiff in \textit{Kremer} had chosen to pursue the appeal in state court, whether the defendant’s appeal would preclude a claim is uncertain. \textit{See Gunther}, 612 F.2d at 1083-84 (denying res judicata effect where plaintiff forced to defend appeal in state court). Section 1738 itself does not distinguish between state court actions based on which party initiated them. If \textit{Kremer} does not completely discard title VII's guarantee that employees have access to a federal forum, however, the Court may hesitate to bar a federal claim where the plaintiff did not seek state court review.

\textsuperscript{53} 425 U.S. 840. \textit{See supra} notes 31-37 and accompanying text.
state administrative agencies to be a trial *de novo*. Thus, the Court in *Kremer* limited its holding of preclusion to those agency proceedings reviewed by a state court. Hence, an unreviewed state agency determination will not bar a title VII claim, but a state court affirmance of the determination will.

The Court noted that EEOC review of a discrimination claim after the appropriate state agency has rejected it would be "pointless" if federal courts, in reviewing the EEOC's findings, were bound by the state agency's adverse decision. Because Congress authorizes EEOC review after a state agency rejection, Congress did not intend to preclude the federal courts from hearing the rejected claim. Furthermore, the Court rejected the notion that Congress intended to bind federal courts further by state administrative agencies than by the federal commission created specifically to enforce title VII. EEOC decisions cannot preclude a federal trial. Therefore, "it is clear that unreviewed administrative determinations by state agencies also should not preclude [federal] review even if such a decision were to be afforded preclusive effect in a State's own courts."

The Court also responded to Kremer's argument that the procedures provided through the state mechanism were inadequate to protect his title VII rights. Essentially, Kremer argued that even

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54 456 U.S. at 469. In supporting its decision to accord the state court judgment preclusive effect, the Court noted that Kremer was not required by title VII to appeal to the state court. *Id.* Later in the opinion, however, the Court pointed to the provision in the state scheme for appeal to the state court as one of the procedures making the state law adequate to bar a federal claim. *Id.* The Court seems to envision plaintiffs choosing to pursue their claims in either state or federal court after an adverse agency determination, but not in both.

55 The Court noted that although neither title VII nor Supreme Court decisions indicate that the final judgment of a state court may be subject to de novo review in federal court, no such decision or statute prohibits such de novo review after an administrative decision. *Id.* at 469-70.

56 456 U.S. at 470 n.7 (citing Batiste v. Furnco Constr. Co., 503 F.2d 447, 450 n.1 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975)). This footnote has played an important role in lower court interpretations of *Kremer*.

EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.

*Id.* (citations omitted).

57 *Id.*

58 *Id.* (citations omitted).

59 *Id.* at 484. The Court also disposed of Kremer's argument that the New York courts did not resolve the question of whether Kremer had received discriminatory
though the administrative proceedings were legally sufficient to bind the courts of New York, the Court should find these procedures insufficient to bind federal courts under section 1738.60

The Court responded to this contention by examining the requirements for preclusive effect under section 1738. Collateral estoppel would not bar a federal suit if the unsuccessful litigant on the state level did not have a full and fair opportunity to litigate the claim.61 The Court stated that it had never defined the specific content of the full and fair opportunity requirement, but asserted that for purposes of section 1738 the state proceedings need only "satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause."62 The Court then examined the procedures available to Kremer to determine whether they afforded him due process.

The procedures provided by New York law were exactly those found lacking in the arbitration proceedings at issue in Alexander.63 An employee who brings a charge to the designated New York agency64 is entitled to a "'full opportunity to present [the charge] on the record.'"65 That opportunity includes submission of exhibits, testimony of witnesses, representation by an attorney, and use of compulsory process. If the agency finds probable cause, it must conduct a public hearing to determine the merits of the complaint.66 State court review assures that the procedures were followed and that the agency's findings were not arbitrary or capricious.67

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60 Id. at 479-80.
61 Id. at 480-81. See also Allen v. McCurry, 449 U.S. 90, 95 (1980) (affording preclusive effect in § 1983 action to state court rejection of constitutional claims where losing party had full and fair opportunity to litigate the claim).
62 456 U.S. at 481.
63 See supra notes 28-30 and accompanying text.
64 The New York agency with jurisdiction over such claims is the Division of Human Rights (NYHRD).
65 456 U.S. at 483.
66 Id. at 483-84; see N.Y. Exec. Law § 297 (McKinney 1982 & Supp. 1984).
67 Kremer, 456 U.S. at 483-84. In dissent, Justice Blackmun objected to the emphasis placed on the arbitrary or capricious standard. He complained that giving preclusive effect to a state court affirmance of an adverse decision where the standard of review is so deferential that an opposite decision might also have been upheld contravened Congress's intent in title VII by giving preclusive effect to the administrative determination. Id. at 491-93 (Blackmun, J., dissenting). In a separate dissent, Justice Stevens assumed arguendo that a state court judgment on the merits would bar a federal claim, but considered the arbitrary or capricious standard of review too lenient. Stevens proposed that a federal court accept a state court's finding that an agency determination was not arbitrary or capricious, but then proceed to a de novo consideration of the merits. Id. at 509 (Stevens, J., dissenting).
thermore, the procedures are not rendered inadequate by an employee's failure to avail himself fully of them.\textsuperscript{68}

The Court's analysis of procedural adequacy in \textit{Kremer} undermines its prior conclusion that unreviewed agency determinations should not be given preclusive effect. The Court looked to the procedure provided by the agency and determined that due process was met. Although it listed judicial review as part of the adequate procedures, the Court viewed the state court judgment as an assurance that the procedures were followed. Further, the complainant's failure to use the full procedures available, apparently including failure to appeal to state court, did not render those procedures inadequate. If the procedures provided were adequate to meet minimal due process standards, and a provision for state court review existed, it follows from the second part of the \textit{Kremer} opinion that the district court should be bound by an unreviewed agency determination. A district court facing a title VII claim following an unreviewed agency decision must reconcile \textit{Kremer}'s exemption of agency determinations from section 1738 with its examination of agency procedure in finding a state antidiscrimination scheme adequate to invoke section 1738.\textsuperscript{69}

\textit{Alexander} and \textit{Kremer} limit the range of possibilities for district courts deciding where to draw the line between according preclusive effect to prior proceedings and allowing a trial de novo. Both cases stress the necessity of adequate procedures in the prior forum. Together, the cases deny finality to arbitration proceedings and accept the finality of valid state court judgments. The task left to district courts is to decide precisely what state procedures will suffice to justify barring a subsequent federal claim. In particular, district courts must assess the significance of the availability of state court review when a plaintiff chooses not to appeal and brings an action in federal court instead. \textit{Kremer}'s assertion that agency determinations should be subject to judicial review must be reconciled with its conclusion that failure to pursue available procedures does not indicate inadequacy of those procedures.\textsuperscript{70}

\textsuperscript{68} "The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." \textit{Id.} at 485.

\textsuperscript{69} \textit{See supra} notes 52-58 and accompanying text.

\textsuperscript{70} As Justice Blackmun pointed out in his \textit{Kremer} dissent, the majority's reasoning might discourage unsuccessful state discrimination complainants from seeking state judicial review. By going directly to the EEOC, such litigants could assure themselves of de novo federal court review. 456 U.S. at 504 (Blackmun, J., dissenting); \textit{see also infra} note 79.
II
RECENT DISTRICT COURT DECISIONS

Two district courts have recently considered the res judicata effects of unreviewed state agency determinations and reached opposite conclusions. In Buckhalter v. Pepsi-Cola General Bottlers, the District Court for the Northern District of Illinois held that a state proceeding which binds the state's courts and satisfies due process will preclude a title VII claim. In Jones v. Progress Lighting Corp., the District Court for the Eastern District of Pennsylvania held that an agency determination, which binds the state's courts, does not preclude a title VII claim.

A. Buckhalter v. Pepsi-Cola General Bottlers

In Buckhalter the plaintiff had filed a complaint with the Illinois State Fair Employment Practices Commission (FEPC) charging that the defendant-employer had illegally discharged him because of his race. The FEPC issued a complaint of racial discrimination which was heard by an administrative law judge of the Illinois Human Rights Commission. Procedures available to the parties included testimony under oath, cross examination, and access to compulsory process. After a four day hearing, the administrative law judge dismissed Buckhalter's claim. On appeal the full Human Rights Commission upheld the dismissal. Buckhalter could then have appealed the dismissal to the Illinois state courts, but chose instead to bring a title VII action in federal district court.

To determine whether the federal action should be barred by the prior agency proceeding, the court looked to the requirements of section 1738. First, the court found that Buckhalter could not initiate an original action based on the same claim in the courts of Illinois. Because the state courts would give preclusive effect to

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73 After observing a group of men drinking beer in the plant parking lot, a plant security agent took Buckhalter and three others into custody. All four were discharged. 590 F. Supp. at 1147.
74 Between the time the complaint was filed and the time it was heard, the Illinois legislature abolished the Fair Employment Practices Commission and replaced it with the Illinois Human Rights Commission. See ILL. ANN. STAT. ch. 68, § 8-101 (Smith-Hurd Supp. 1984).
75 Buckhalter, 590 F. Supp. at 1150.
76 Id. at 1159-50. Buckhalter's counsel feared that under Kremer, Buckhalter would lose his right to de novo district court review if he sought state court review. Id. at 1150 n.4; see supra note 70.
77 590 F. Supp. at 1149-50. The district court noted that it is "well settled that the findings and judgments of an administrative tribunal are entitled to full faith and credit in all courts if such administrative tribunal was acting in a judicial capacity in rendering its decision." Id. at 1148 (citations omitted). The court found that the Illinois agency
the agency decision, the Buckhalter court felt that section 1738 required it to do the same.\textsuperscript{78} Second, the court determined that the procedures available to Buckhalter satisfied due process requirements.\textsuperscript{79} Any errors in following the approved procedure could have been corrected by the state courts. Buckhalter's failure to appeal to state court did not detract from the adequacy of the available procedures.\textsuperscript{80} The court therefore concluded that the procedurally adequate agency determination which would bind the Illinois courts must similarly bind the district court.

The Buckhalter decision flows directly from the Supreme Court's statement in Kremer that title VII did not effect a repeal of section 1738, and from its careful analysis of the adequacy of state agency procedures. Nevertheless, the Buckhalter court had to reconcile its decision with Kremer's suggestion that administrative decisions should not be given the same preclusive effect as state court judgments.\textsuperscript{81} The court resolved this issue by focusing on the judicial capacity of the Illinois Human Rights Commission, which allowed the Commission to function more like a court than like the EEOC or the administrative agencies discussed in conjunction with the EEOC in Kremer.

In Buckhalter, the court interpreted Kremer as denying preclusive effect to the determinations of those agencies having only the limited powers granted to the EEOC.\textsuperscript{82} The court did not read Kremer to deny preclusive effect to determinations made by agencies having adjudicative power to resolve claims and grant relief. According to the court, Kremer's denial of preclusive effect would extend "only to those administrative decisions which are investigatory or otherwise purely administrative in nature."\textsuperscript{83} If, however, the state agency has the power to adjudicate claims and bind the state courts, section 1738 operates to bind the federal courts as well.\textsuperscript{84} It follows from

\textsuperscript{78} 590 F. Supp. at 1148-49. Nevertheless, in the context of the preclusive effect of a state agency decision in federal court, the court's use of precedent is questionable. See infra note 84.
\textsuperscript{79} Id. at 1150. The Seventh Circuit had previously upheld the Illinois antidiscrimination scheme against a due process challenge. See Unger v. Consolidated Foods Corp., 693 F.2d 703, 705 (7th Cir. 1982), cert. denied, 104 S. Ct. 549 (1983).
\textsuperscript{80} The court characterized Buckhalter's choice to abandon the state court proceedings in favor of a federal action as "a strategic tactic which . . . backfired." 590 F. Supp. at 1150 n.4.
\textsuperscript{81} See Kremer, 456 U.S. at 470 n.7.
\textsuperscript{82} Buckhalter, 590 F. Supp. at 1149. According to the court, the EEOC "has the power to investigate, attempt conciliation and prosecute charges of discrimination." Id. It does not have the power to adjudicate or exercise other judicial functions as the Illinois Department of Human Rights does. See supra note 9.
\textsuperscript{83} 590 F. Supp. at 1149.
\textsuperscript{84} The Buckhalter court cited United States v. Utah Constr., 384 U.S. 394 (1966), for
Buckhalter's interpretation of Kremer that the decision of the Illinois Human Rights Commission, an agency with full judicial capacity, should bind the federal court.

The Buckhalter court focused primarily on Kremer's consideration of administrative procedure, not on Kremer's treatment of the preclusive effects of state court judgments. The district court did not consider state court action on the claim to be determinative. Rather, the court considered the availability of appeal to state court as simply one of the procedural safeguards which made the antidiscrimination scheme adequate for purposes of section 1738. The plaintiff could not avoid the requirement of section 1738 by failing to use the available procedures. Buckhalter had full and fair opportunity to litigate his claim; for preclusive purposes, the claim was fully litigated and therefore barred federal suit.

B. Jones v. Progress Lighting Corp.

In Jones the plaintiff filed charges of race discrimination with the Philadelphia Commission on Human Relations. After an investigation, the Commission dismissed the charges because the plaintiff failed to comply with the Commission's request that the case be submitted to a review hearing. Jones did not appeal the dismissal by the Commission. Instead, after receiving a right to sue notice from

the proposition that § 1738 applies to agency determinations. See Buckhalter, 590 F. Supp. at 1149. In Utah Construction, a government contractor was denied relief on a claim submitted to an Advisory Board of Contract Appeals. Subsequently, the contractor filed a breach of contract claim in the Court of Claims which gave the matter de novo consideration. 384 U.S. 400-03. The Supreme Court held that the Court of Claims erred by denying finality to the Board's determination. Id. at 423. The applicability of Utah Construction to title VII, however, is doubtful. The Court devoted much attention to whether the dispute arose under the contract, which contained a disputes clause stating that any findings under the agreed upon dispute resolution procedure would be binding upon the parties. Id. at 404-07. In Alexander, however, the Court asserted title VII did not permit employees to bargain away their right to bring a federal action. 415 U.S. at 51-52. Furthermore, in support of its decision, the Court in Utah Construction cited with approval decisions affording preclusive effect to arbitration decisions. 384 U.S. at 393. In Alexander, the Court held that prior arbitration proceedings did not preclude subsequent title VII actions. 415 U.S. at 59-60.

Buckhalter also cited Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982), as requiring it to give preclusive effect to administrative proceedings. 590 F. Supp. at 1146. In Lee, however, the plaintiff had brought a federal action only after a state court had affirmed an administrative determination. 685 F.2d at 197-98. Thus, Lee did not face the same problem, the preclusive effect to be given an unreviewed agency decision, that Buckhalter did.

590 F. Supp. at 1150.

595 F. Supp. at 1031-32. The court noted that the EEOC would have referred the charges to the Philadelphia Commission had the plaintiff not voluntarily initiated the action there. Id. at 1032.

This dismissal would bind the Pennsylvania courts on the same claim. Id.
the EEOC, he initiated a title VII action in federal court.\(^8\)

The district court, in rejecting defendant's contention that plaintiff's claim was precluded, relied heavily on *Kremer*’s observation that “‘unreviewed administrative determinations by state agencies . . . should not preclude [federal court] review even if such a decision [would] be afforded preclusive effect in a state's own courts.’”\(^9\) The *Jones* court rejected the assertion in *Buckhalter* that *Kremer*’s observation applied only to those agencies with powers comparable to those of the EEOC.\(^9\) Rather, the court viewed *Kremer* as drawing the line at which section 1738 precludes federal actions at state court review of administrative decisions, leaving unreviewed agency determinations subject to trial de novo in federal court.\(^9\)

In reaching this conclusion, the *Jones* court failed to address *Kremer*’s discussion of the procedural guarantees necessary on the state level to invoke section 1738 and bar a subsequent federal action.\(^9\) Because the district court interpreted *Kremer* to mean that only a state court judgment could bar a title VII claim,\(^9\) the adequacy of procedure provided by the state administrative agency was irrelevant if the plaintiff did not secure state court review of its determination. The court did acknowledge that the agency determination would preclude a separate action in Pennsylvania state court,\(^9\) implying that the agency procedures met the minimum requirements of due process.

Under the *Jones* approach, a procedurally adequate state administrative decision, unreviewed by the state courts, would not preclude an action in federal court. Thus, *Jones* implicitly views the two parts of the *Kremer* opinion as representing two separate requirements for preclusive effect in federal court: a state court judgment and a procedurally adequate administrative process.\(^9\) Neither factor will suffice to preclude a subsequent claim without the other; therefore, without a state court judgment, even a procedurally ade-

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\(^8\) *Id.*

\(^9\) *Id.* at 1033 (quoting *Kremer*, 456 U.S. at 470 n.7); *see supra* notes 56-58 and accompanying text.

\(^9\) *See Jones*, 595 F. Supp. at 1033; *see also supra* notes 81-84 and accompanying text.

\(^9\) *See Jones*, 595 F. Supp. at 1032-33 (“The *Kremer* Court clearly limited the applicability of res judicata in Title VII cases to agency determinations which had been reviewed by a state court . . . .”).

\(^9\) *Kremer*, 456 U.S. at 479-85.

\(^9\) *Jones*, 595 F. Supp. at 1032-33.

\(^9\) *Id.* at 1032.

\(^9\) *Cf.* *Davis v. United States Steel*, 688 F.2d 166, 172 (3d Cir. 1983) (“[A] court judgment reviewing an administrative proceeding might in some circumstances be denied res judicata effect if there were procedural deficiencies in the administrative proceeding, and the court's standard of review were limited . . . .”) (dicta), *cert. denied*, 103 S. Ct. 1256 (1983).
quate administrative proceeding will not bind the federal courts under the *Jones* approach.

### III

**Analysis**

The conflict between *Jones* and *Buckhalter* regarding the preclusive effect of an unreviewed agency determination that rests on adequate procedures is best resolved by comparing the positions with the Supreme Court precedent and measuring the possible alternatives against the policy aims of title VII. The *Jones* approach of denying preclusive effect to unreviewed agency decisions, despite the availability of state court review, is more consistent with both precedent and congressional policy than the *Buckhalter* approach.

In *Kremer* the Supreme Court ruled, with respect to the preclusive effect of judicial decisions, that title VII did not effect a repeal of section 1738. Thus, the Court held that a state court decision on an employment discrimination claim bars a subsequent title VII action in federal court. 96 Adopting a functional approach, the *Buckhalter* court found that the administrative agency acted in a judicial capacity and that its decision would bind the courts of the state. It held, therefore, that section 1738 required the district court to afford preclusive effect to the agency decision. 97 Only the decisions of state agencies with powers as restricted as those of the EEOC would be denied preclusive effect. 98 In *Jones* the court followed literally *Kremer*'s direction that unreviewed state administrative determinations do not preclude de novo federal court review, even if such a decision would bind the state's courts. 99 Although *Buckhalter* may be consistent with some of the policies underlying *Kremer*, the Supreme Court's decision in *Chandler v. Roudebush* 100 indicates that the *Jones* court adopted the correct approach.

**A. Supreme Court Precedent: *Chandler v. Roudebush***

In *Chandler* the Supreme Court held that an adjudication before the appropriate federal agency did not preclude a subsequent title VII action in federal court. 101 The Court noted that Congress withheld adjudicatory power from the EEOC because it intended that federal courts finally adjudicate employment discrimination

96 *Kremer*, 456 U.S. at 477-78.
97 *Buckhalter*, 590 F. Supp. at 1148-49.
98 Id. at 1149.
99 *Jones*, 595 F. Supp. at 1033.
101 Id. at 863-84.
In light of Chandler, the district court's conclusion in Buckhalter that the decisions of agencies with full adjudicatory powers be given preclusive effect in federal court is incorrect. In Chandler, the Court denied preclusive effect to a decision made after a full adjudicatory process. Chandler suggests that "judicial capacity" is an inappropriate consideration for determining whether a federal court should give preclusive effect to unreviewed agency determinations; therefore, reading into Kremer a distinction between the EEOC and adjudicatory agencies, as Buckhalter did, is not justified. Jones more accurately followed Supreme Court precedent by denying preclusive effect to all state agency determinations even if the agency has full adjudicatory power.

B. Congressional Policy

Even though the Supreme Court failed to explain its statement in Kremer that state administrative proceedings should not bar title VII claims, the conclusion reached in Jones, best serves the policies of title VII. An examination of possible alternatives indicates that Jones adopted the correct approach.

One alternative would be to read title VII as guaranteeing employment discrimination plaintiffs a trial de novo in federal court. Under this approach, a plaintiff could bring a federal action despite any prior proceedings, including proceedings in state court. Although title VII does not expressly preclude such a scheme, its operation would result in the relitigation in federal court of claims already decided in state court, even if the state court judgment resulted from a trial de novo. In other words, federal courts would not give preclusive effect to state court judgments; this action would violate the longstanding requirement of section 1738 that federal courts give "full faith and credit" to state court judgments. The federal policy embodied in section 1738 of affording state court judgments finality in federal court mandates rejection of this alternative.

A second alternative, the one adopted by Buckhalter, would

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102 Id. at 853-54.
103 425 U.S. at 841-42. In Chandler, the complainant filed a discrimination complaint with her employer, the Veteran's Administration. After an administrative hearing, the complaints examiner found she had been discriminated against on the basis of sex. The agency rejected those findings as "not substantiated by the evidence" and denied relief. The Civil Service Commission's Board of Appeals and Review upheld the agency's decision. Id.
104 Kremer, 456 U.S. at 470 n.7.
105 Jones, 595 F. Supp. at 1033-34.
107 See supra notes 73-85 and accompanying text.
be to afford preclusive effect to any proceeding which binds state
courts and provides procedures adequate to satisfy due process re-
quirements. Under this approach, a plaintiff could not bring a title
VII action in federal court if a state administrative agency with ade-
quate procedure had made a final determination on the claim. Title
VII requires that a claim be referred to any appropriate state
agency, and that the agency be given sixty days to act on the claim
before a federal action can be initiated. 108 To prevent an agency
determination which could bind a federal court, the plaintiff would
have to intentionally cause delay until the sixty day deferral period
expired and then bring an action in federal court. This would result
in federal actions effectively supplanting state antidiscrimination
schemes, contrary to Congress's intention that title VII only supple-
ment them.109 By creating a federal action, and simultaneously pro-
viding for deferral to state action, Congress created a tension
between the two, but did not intend the friction to be alleviated by
plaintiffs completely avoiding the state schemes. Affording agency
decisions preclusive effect would encourage plaintiffs to avoid
agency determinations; therefore, such preclusive effect is inconsis-
tent with title VII.

The final alternative is to give preclusive effect to state court
judgments on discrimination claims, but not to proceedings in fo-
rums other than state courts, the approach adopted by the court in
Jones.110 This approach strikes the proper balance between title
VII's conflicting aims of providing prominent roles for both federal
courts and state administrative schemes in remedying the effects of
employment discrimination. It neither violates the rights of state
courts, as represented by section 1738, nor completely undermines
state antidiscrimination schemes.

Pursuant to this alternative, federal courts will uphold the man-
date of section 1738 while encouraging employees to first seek reso-
lution of their grievances on the state or local level. A plaintiff
would first proceed through the state mechanism especially
designed to handle discrimination claims. Absent the threat of
forfeiting a potential federal claim, the employee should proceed
through the administrative scheme in good faith, making the best
attempt to have the dispute resolved. Following an adverse agency
decision, a plaintiff may either appeal the agency action in state
court or bring an action in federal court. Denying a plaintiff who
chose to appeal to state court access to a federal forum upholds the
congressional policy of according due respect to the courts of the

109 Kremer, 456 U.S. at 468-69.
110 See supra notes 86-95 and accompanying text.
sovereign states. Allowing a plaintiff to choose federal court in lieu of a state court appeal preserves the intended role of federal courts in title VII enforcement. Drawing the line for preclusive effect at state court judgments best strikes the balance between the competing policies of title VII of providing multiple forums to hear title VII claims and of section 1738 of avoiding repetitious litigation and affording due deference to state court judgments.\textsuperscript{111}

\textbf{Conclusion}

In order to determine the preclusive effect of unappealed state administrative determinations in title VII actions, federal courts must choose a point between the boundaries set up by the Supreme Court at which the proceedings enjoyed by the plaintiff on the state level are adequate to foreclose a federal claim. In \textit{Alexander v. Gardner-Denver}\textsuperscript{112} the Court denied preclusive effect to an arbitration proceeding. In \textit{Kremer v. Chemical Construction Corp.},\textsuperscript{113} the Court held that a state agency determination which had been affirmed by a state court precluded relitigation of the claim in federal court.

In determining the preclusive effect of prior state proceedings in title VII cases, the Court considered the importance of guaranteeing access to a federal forum, the adequacy of procedures in the prior state proceedings, and the importance of according due deference to the judgments of state courts. The strong policy of title VII to provide victims of employment discrimination with several opportunities for relief, including a federal action, overrides the policy of section 1738 until a state court acts on the claim. At that point, the strong federal policy of affording state court judgments finality in federal court overcomes the policies of title VII. Thus, state agency determinations not passed on by a state court should not preclude a title VII action in federal court. Drawing the line for the invocation of section 1738 at state court judgments does not completely encourage full use of state procedures or avoid repetitious litigation. It does, however, strike the best balance between provid-

\textsuperscript{111} The wisdom of allowing plaintiffs such a choice seems questionable. A plaintiff who lost at the agency level would almost certainly bring an action in federal court rather than seek state court review if the state court substantially defers to agency determinations. Furthermore, in such cases, federal courts would be hearing claims that have already been rejected by administrative tribunals with expertise in the area of discrimination. Nevertheless, this scenario is contemplated by the congressional scheme.

To minimize such a result, Congress could require federal courts to accord substantial weight to the findings of state administrative agencies, which would lessen the desirability of choosing federal court over state court appeal. At present, nothing in title VII dictates what weight federal courts must accord state administrative findings.

\textsuperscript{112} 415 U.S. 36 (1974).

\textsuperscript{113} 456 U.S. 461 (1982).
ing both state and federal remedies and not allowing either to completely supplant the other.

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