COMMENTS

ADMINISTRATIVE *RES JUDICATA* AND SECTION 1983: SHOULD THE RULE OF PRECLUSION APPLY TO UNREVIEWED STATE ADMINISTRATIVE AGENCY DECISIONS?

I. INTRODUCTION

In 1871 the Forty-second Congress passed what was then known as the Ku Klux Klan Act.[1] It is now known simply as Section 1983.[2] The Act was intended, *inter alia*, to prevent racist state and local officials from denying Blacks fundamental rights by providing Blacks with a federal remedy.[3] However, in recent opinions, the Supreme Court has curtailed access to the federal courts for section 1983 plaintiffs.[4]

Also, a conflict has arisen between circuits regarding the extension of *res judicata* to unreviewed state administrative agency decisions of Section 1983 claims.[5]

The source of the conflict can be found in two footnotes contained in *Kremer v. Chemical Construction Co.*, a Supreme Court case which held that preclusive effect could be given to state court determination of Title VII claims.[6] On July 9, 1985, the Sixth Circuit, in *Elliott v. University of Tennes-*

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1. 42 U.S.C. § 1983 (1983); *see generally* Monroe v. Pape, 365 U.S. 167 (1961).

2. 42 U.S.C § 1983 (1983). The section reads in relevant part:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

3. *See* Mitchum v. Foster, 407 U.S. 225, 238-39 (1972).

4. *See* Migra v. Warren City School Dist. Bd. of Educ., 104 S.Ct. 892 (1984), Allen v. McCurry, 449 U.S. 90 (1980).

5. *See* Elliott v. Univ. of Tennessee, 766 F.2d 982 (6th Cir. 1985) (federal discrimination claims not barred by *res judicata* after state administrative agency review); Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985) (federal discrimination claims barred by *res judicata* after state administrative decisions).

6. 456 U.S. 461 (1982). Footnote seven states:

> EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions.[citation omitted] 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, [citation omitted].

Footnote twenty-six reads:

> Certainly, the administrative nature of the fact-finding process is not dispositive. In United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966), we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, *res judicata* is properly applied to decisions of an administrative agency acting in a "judicial capacity." *Id.*, at 422.

see, adopted the language from footnote seven in the *Kremer* decision. It held that the doctrine of *res judicata* did not apply to unreviewed state agency decisions.[7] Nine days later the Seventh Circuit, in *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, followed the language found in footnote twenty-six of the *Kremer* opinion. It stated that *res judicata* could be applied to findings of fact made by an administrative agency acting in a judicial capacity.[8]

This comment will argue that the conflict should be resolved in favor of the Sixth Circuit position. The primary reason being that section 1983 contemplates federal judicial review and thus its legislative scheme is incompatible with the doctrine of *res judicata*. The secondary reason being that the two footnotes in *Kremer* are reconcilable and that *res judicata* should not be applied to unreviewed state agency decisions. And finally, because public policy demonstrates that the application of *res judicata* would frustrate the intent and purpose of Section 1983.

II. *RES JUDICATA*

A. *Definition*

The doctrine of *res judicata* prevents the relitigation of issues which were or could have been determined in a case that has already been decided on the merits.[9] The doctrine is also known as the rule of preclusion, and is comprised of two separate types of preclusions: concept-claim preclusion and issue preclusion.[10]

Claim preclusion is sometimes known as "true" *res judicata*.[11] It incorporates the ideas of merger and bar.[12] A judgment handed down under claim preclusion is all the relief that the parties involved are entitled to with respect to the same claim.[13] If the plaintiff has prevailed, his claim is extinguished and merged into the grant of relief.[14] A judgment in favor of the defendant eliminates plaintiff's claim and bars any subsequent action on that claim.[15] Claim preclusion bars the relitigation of issues that could have been litigated but were not.[16] In addition, the Supreme Court has stated that any *issues* actually litigated may not be relitigated if the determination of the issue was essential to the judgment.[17]

Issue preclusion is more commonly known as collateral estoppel.[18] Collateral estoppel prevents the parties from relitigating an issue actually ajudi-

7. *Elliott*, 766 F.2d 982, 983.

8. *Buckhalter*, 768 F.2d 842, 853. Although the case dealt only with section 1981 the decision clearly implies that section 1983 claims would be treated the same. In Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982), the same court said, "we see no reason to distinguish civil rights actions brought under §§ 1981, 1983 & 1985 from suits brought under Title VII for purposes of applying *res judicata*."

9. *See Kremer*, 456 U.S. at 467 n.6.

10. *See* Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978).

11. *See id.* at 535.

12. *See* Cooper v. Fed. Reserve Bank, 104 S.Ct. 2794, 2799 (1984).

13. *See Kaspar*, 575 F.2d at 535.

14. *See Cooper*, 104 S.Ct. at 2799.

15. *See id.*

16. *See Kaspar*, 575 F.2d at 535; *Lee*, 685 F.2d at 198.

17. *See Cooper*, 104 S.Ct. at 2799.

18. *See Kaspar*, 575 F.2d at 535.

cated and necessary to the resolution of prior claims.[19] The relevancy of the issue is not determinative since it must have actually been litigated and essential to the judgment in order to be barred from any subsequent litigation.[20]

Since the rights granted by Section 1983 are so important and the need for review of those rights beyond state agency decisions so great, this comment will not distinguish between the different rules of preclusion. Instead it will argue that any preclusive effect given to unreviewed state agency decisions denies the full vindication of rights under Section 1983.

B. *Rationale*

The objective of *res judicata* is to make final a judgment of an action in which each party has had a full and fair opportunity to argue its respective position.[21] The rationale behind finality is that it promotes judicial economy and that it protects the parties involved.[22] Judicial economy is promoted in a number of ways. First, by preventing another hearing to decide resolved issues, the court avoids becoming needlessly burdened.[23] Second, because litigants are encouraged to join all parties involved and to raise each pertinent issue and claim, duplication is prevented.[24]

Res judicata also serves the interests of the individual party. She is spared the "expense and vexation" of having to go to court repeatedly to resolve the same issues.[25] Moreover, avoiding inconsistent resolutions of these issues promotes confidence in the judicial system.[26] When this confidence is maintained, potential parties are more apt to rely upon, and to be satisfied by, the judicial resolution of disputes.[27]

Although the objectives and rationale of *res judicata* are meritorious, *res judicata* must yield on occasion to competing public policies.[28] Section 1983 is one of those policies.

C. *Section 1983*

Section 1983 had three aims: (1) to override certain types of state law; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.[29] The Civil Rights Act of 1871 was passed to afford a federal right in federal courts to Blacks who, "by reason of prejudice, passion, neglect, intolerance or otherwise," were not able to enjoy the protection of state laws or to enjoy the rights and privileges supposedly guaranteed by the fourteenth amendment.[30]

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19. *See id.*
20. *See id.*
21. J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE 10.405 1 (2d ed. 1984).
22. *See* Montana v. United States, 440 U.S. 147, 153-54 (1979).
23. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4403 (1981); [hereinafter WRIGHT, MILLER & COOPER].
24. *See id.*
25. *See Montana*, 440 U.S. at 153-54.
26. *See Allen*, 449 U.S. at 94.
27. *See id.*
28. *See* Int'l Harvestor Co. v. Occupational Safety and Health Review Comm'n, 628 F.2d 982, 986 (7th Cir. 1980).
29. *See* Monroe v. Pape, 365 U.S. 167, 173-74 (1961).
30. *See id.* at 180.

The need for the protection provided by Section 1983 has not diminished with the passage of time. A Third Circuit Court of Appeals judge put it succinctly when he said, "[n]ot all localities are enthusiastic supporters of anti-discrimination legislation."[31] Nor is the application of Section 1983 limited to Jim Crow states. While the Act was indeed prompted by the miserable state of affairs which existed for Blacks in the reconstruction-era South, it is drafted in language that is general, not narrow, and is therefore equally applicable to northern states.[32]

What the Congress intended to do, and did, was to provide a unique federal remedy.[33] Section 1983 allows a claimant to seek relief without having to seek out a state remedy before the federal remedy becomes available.[34] Congress did not intend that an individual, seeking vindication of his federal rights, end his quest before a professional bureaucrat instead of a federal judge.[35]

III. ADMINISTRATIVE *RES JUDICATA* AND SECTION 1983 — STATUTES AND POLICY

When preclusive effect is given to the decisions made by state administratvie agencies, the doctrine is called *administrative res judicata*. It would prevent a federal court from reviewing Section 1983 issues which were, or could have been, litigated in a state administrative proceeding. This result could not have been the intent of the Forty-second Congress.

The Supreme Court has not directly addressed the issue of whether administrative *res judicata* applies to Section 1983 claims. The Court has stated that nothing in the language of Section 1983 indicates congressional desire to exempt Section 1983 from the provisions of 28 U.S.C. § 1738 (exemption from 28 U.S.C. § 1738 would deprive state court judgments of preclusive effect).[36] Yet, for two reasons, 28 U.S.C. § 1738 does not appear to apply when a Section 1983 claim is made before a state administrative tribunal.[37] First, the chief rationale for section 1738 is absent. No countervailing public policy of according full faith and credit to state court decisions exists. Second, the statute itself is inapplicable. Section 1738 applies to judicial proceedings, not to administrative agencies.[38]

In other words, when Section 1983 claims are decided by state courts there is an overriding policy couched in statutory language that the Supreme Court has said precludes federal review. When those claims are decided by administrative tribunal there is no such contravening public policy. Addition-

31. *See* Davis v. United States Steel Supply, 688 F.2d 166, 189, (3d Cir. 1982) (Gibbons, J., dissenting), *cert. denied*, 460 U.S. 1014 (1983).

32. *See Monroe*, 365 U.S. at 180.

33. *See Mitchum*, 407 U.S. at 240.

34. *See Monroe*, 365 U.S. at 183.

35. *See id.* at 180.

36. *See Allen*, 449 U.S. at 97-98. Section 1738 reads in relevant part:

> Such acts, records and judicial proceedings or copies thereof, so authenticated, should have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken. (West 1966).

37. *See Elliott*, 766 F.2d at 990.

38. 449 U.S. at 97-98.

ally, no statute requires a rule of preclusion for decisions made by administrative tribunals.

One remaining rationale may justify the use of administrative *res judicata*—the value of a final judgment. The value of final judgments is an important rationale for applying *res judicata* to state court decisions. The Restatement (Second) of Judgments states that the value of a final judgment is just as important, and should apply, to state agencies which exercise a judicial function.[39] However, the Restatement acknowledges that a court is not bound by *res judicata* in reviewing agency decisions if there is a legislative determination that the issue involved should be given an independent judicial review.[40] In that case, giving preclusive effect to such decisions would be incompatible with legislative policy.[41]

The Supreme Court has already recognized that one such legislative policy that would be harmed by administrative *res judicata* is found in Title VII of the 1964 Civil Rights Act.[42] Under Title VII, federal courts are not bound by the administrative decisions of the Equal Employment Opportunity Commission (EEOC).[43] The Court, in *Kremer*, expanded this notion by stating that it is not plausible that the federal courts could be bound by state administrative decisions in this area when they are not bound by rulings handed down by the EEOC.[44]

The legislative policy embodied within Section 1983 is incompatible with the rule of preclusion.[45] Indeed, the lesiglative history of what is now Section 1983 strongly suggests that issues raised under the section should be accorded independent federal review.[46] Moreover, application of the preclusion rule would be particularly odious when the officials charged with the misconduct are the state administrative decision makers.[47]

IV. ADMINISTRATIVE *RES JUDICATA* SHOULD NOT APPLY TO SECTION 1983—THE CASE LAW

In 1966, the Supreme Court, in *U.S. v. Utah Construction and Mining Co.*,[48] declared that the resolution of disputed facts by a state administrative agency acting in a judicial capacity could be accorded preclusive effect.[49] Some circuits have followed that language,[50] as dicta; other circuits have qualified it,[51] while one court has dismissed the language regarding collateral

39. RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment 6 (1982), [hereinafter RESTATEMENT].

40. *See* RESTATEMENT at § 83(4).

41. *See id.*; WRIGHT, MILLER & COOPER at § 4475.

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

43. *Id.* at 487 (Blackmun, J., dissenting).

44. *Id.* at 470 n.7.

45. *See Elliott*, 766 F.2d at 993.

46. *See id.*; *see also supra* text accompanying notes 29-35.

47. *See* WRIGHT, MILLER, & COOPER at § 4471 (supp.1985).

48. 384 U.S. 394 (1966).

49. *Id.* at 422.

50. *See* Zanghi v. Inc. Village of Old Brookville, 752 F.2d 42, 46 (2d Cir. 1985); *Buckhalter* 768 F.2d at 850; Bd. of Trustees v. Univeral Enterprises, 751 F.2d 1177, 1183 (11th Cir. 1985); F.T.C. v. Texaco, 517 F.2d 137, 146 (D.C. Cir. 1975).

51. *See Elliott*, 766 F.2d at 988; Griffin v. Big Spring Indep. School Dist., 706 F.2d 645, 654 (5th Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983); United States v. Lasky, 600 F.2d 765, 768 (9th Cir.

estoppel.[52]

Sixteen years later, the Court, in *Kremer*, alluded to this issue in two separate footnotes.[53] In footnote seven, the Court stated that the rule of preclusion did not apply to state agency determinations.[54] However, in footnote twenty-six, the Court appeared to state the opposite.[55] The result has been that the Sixth Circuit has held that footnote seven correctly indicated the Supreme Court's intent,[56] while the Seventh Circuit has held that footnote twenty-six best interpreted the Court's intent.[57] A review of each of these cases reveals that the Court has not intended to preclude federal judicial review of a state administrative determination of a Section 1983 claim.

A. Utah Construction

The *Utah Construction* case involved the applicability of a disputes clause contained in a construction contract between the United States Government and a private contractor,[58] and the applicability of *United States v. Carlo Bianchi & Co.*,[59] which held that in a suit on a government contract a court may not make a *de novo* determination of the facts when the evidentiary basis for the administrative decision is challenged.[60] The Utah Construction and Mining Company had a contract to build a facility for the Atomic Energy Commission.[61] Drilling and excavation at the site were delayed by the presence of flat rock, and the company asked for a time extension and delay damages under the "changed conditions clause" of the contract.[62] The Advisory Board of Contract Appeals denied the request,[63] and found that the company was responsible for the delays.[64]

Utah Construction then went to the Court of Claims and asked for delay damages under a breach of contract theory.[65] The court overruled the administrative board's factual determination as to who had caused the delay,[66] because it found that the government had caused the delay by furnishing Utah Construction with inadequate specifications.[67] The court awarded delay damages to the company because the government had breached the contract.[68] The government appealed.

One issue to be decided by the Supreme Court was "whether factual issues that have once been properly determined administratively may be retried

1979), *cert. denied*, 444 U.S. 979 (1979); *but cf.* United Farm Workers of America v. Arizona Agricultural Employment Relations Bd, 669 F.2d 1249, 1255 (9th Cir. 1982).

52. *See* Compton v. United States Dep't of Energy, 706 F.2d 260, 262 (8th Cir. 1983).
53. *Kremer*, 456 U.S. at 470 n.7, 484-85 n.26.
54. *Id.* at 470 n.7.
55. *Id.* at 484-85 n.26.
56. *See* Elliott v. Univ. of Tennessee, 766 F.2d 982 (6th Cir. 1985).
57. *See* Buckhalter v. Pepsi-Cola, 768 F.2d 842 (7th Cir. 1985).
58. United States v. Utah Construction Co., 384 U.S. 394, 400 (1966).
59. 373 U.S. 709 (1963).
60. *Id.*
61. *Utah Construction*, 384 U.S. at 400.
62. *Id.*
63. *Id.*
64. *Utah Construction*, 384 U.S. at 401.
65. *Id.*
66. *Id.*
67. *Id.* at 400.
68. *Id.* at 401.

de novo in subsequent breach of contract actions for relief that is unavailable under the [terms of the contract]."[69] The Court said no.[70] The Court explained that the board had the authority to make an administrative determination of the facts, and such a determination was conclusive in the court suit for breach of contract and delay damages.[71] The Court also noted that finality was required by the language of the disputes clause, by the Wunderlich Act,[72] (which directs that administrative fact finding be final and conclusive unless the process was fraudulent, capricious, arbitrary or not supported by substantial evidence), and by the general principles of collateral estoppel.[73] In so holding, the Court did not preclude a review of the case by the Court of Claims.[74] Rather, it merely held that there was no need for a second evidentiary hearing once the Court of Claims undertook the review.[75]

B. Kremer

In 1975, the Chemical Construction Co. (Chemico) rehired some of the engineers it had laid off two years previous.[76] Chemico did not rehire Rubin Kremer, a Jewish immigrant from Poland.[77] Kremer claimed that Chemico had discriminated against him based on his religion and national origin, and thus sought relief under Title VII.[78] The EEOC, by law, had to give the appropriate administrative agency sixty days to resolve the issue.[79] Kremer then filed a claim with the New York State Division of Human Rights (NYHRD) which investigated that charge and disallowed it.[80] That agency's appeal board affirmed.[81] Undaunted, Kremer filed his charge with the EEOC, and petitioned for review by the New York Supreme Court.[82]

The state supreme court unanimously upheld the NYHRD's finding.[83] The EEOC also found no probable cause to believe that Chemico had discriminated against Kremer, yet, the EEOC did issue a right-to-sue letter.[84] Kremer filed an action in district court, which initially decided to hear the case;[85] however, after the Second Circuit Court of Appeals later ruled that state agency decisions in Title VII cases were to be given preclusive effect,[86]

69. *Id.* at 402.
70. *Id.* at 418-19.
71. *Id.*
72. 41 U.S.C.A. §§ 321-22 (West 1965).
73. *Utah Construction*, 384 U.S. at 419. It noted that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."
74. *Id.* at 420.
75. *Id.* at 422.
76. *Kremer*, 456 U.S. at 463.
77. *Id.*
78. *Id.* at 465.
79. 42 U.S.C. 2000e-5(c) (West 1981), *cited in Kremer*, 456 U.S. at 463.
80. *Kremer*, 456 U.S. at 464.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 465.
85. *Id.* at 465.
86. *See* Sinicropi v. Nassau County, 601 F.2d 60 (2nd Cir. 1979), *cert. denied*, 444 U.S. 983 (1979), *cited in Kremer*, 456 U.S. at 463-466.

the district court dismissed Kremer's claim on grounds of *res judicata*.[87] The Court of Appeals upheld the decision.[88]

The issue before the Supreme Court was whether a federal court in a Title VII case was precluded from reviewing a state court's decision which upheld a state administrative agency's determination when the state court's decision would be *res judicata* in the state's own courts.[89] The Court affirmed the Second Circuit's decision, and ruled that federal courts were bound by the rule of preclusion found in Section 1738.[90] Thus, any state judicial proceeding that satisfied the minimum procedural requirements of the fourteenth amendment's due process clause qualified for the full faith and credit guaranteed by federal law.[91] A departure from the statute's provisions could only be justified "if plainly stated by Congress."[92]

Although the main holding of *Kremer* dealt with the preclusive effect to be given state court decisions, the Court did make comments regarding the preclusive effect to be given state administrative agency decisions.[93] Unfortunately, those comments were contradictory on the surface and received varying interpretations by the circuits.[94]

In footnote seven, the Court seemed to clearly state that unreviewed state administrative decisions were not to be given preclusive effect.[95] Yet, later in the decision, in footnote twenty-six, the Court quoted language from *Utah Construction* which appeared to say that administrative findings of fact made by state agencies acting in a judicial capacity could be afforded preclusive effect.[96] The predictable result was that two circuit courts of appeal have read the same language and have reached exact opposite conclusions.

C. *Post*-Kremer

1. *Buckhalter*

In June of 1978, Robert Buckhalter, a Black employee of Pepsi-Cola was dismissed from his job for violating a company rule which prohibited the possession of alcoholic beverages or drugs on company property.[97] Two days later, two white employees, David Lynch and James Ault, were discharged for violating the same rule.[98] All three men filed grievances through their union representative, and after a grievance hearing, the Industrial Relations Manager reinstated only Ault.[99] On appeal, the labor management committee upheld the discharges of Buckhalter and Lynch.[100]

87. *Kremer*, 456 U.S. at 466.
88. *Id.*
89. *Id.* at 463.
90. *Id.* at 481; "Section 1738 requires 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." *Id.* at 466.
91. *Kremer*, 456 U.S. at 481.
92. *Id.* at 485.
93. *See id.* at 470 n.7, 484-85 n.26.
94. *See infra* text accompanying notes 109-66.
95. *See* Kremer v. Chemical Construction Co., 456 U.S. 461, 470 n.7 (1982).
96. *Id.*
97. *Buckhalter*, 768 F.2d at 843.
98. *Id.*
99. *Id.*
100. *Id.*

Buckhalter then filed charges with the Illinois Fair Employment Practices Commission (FEPC) alleging racial discrimination as the cause of his discharge.[101] Although it initially found a lack of evidence to support Buckhalter's claim, the FEPC later reversed itself and assigned the case to an Administrative Law Judge (ALJ).[102] The ALJ issued both findings of fact and conclusions of law which denied the claim.[103]

In the meantime, the FEPC had been replaced by the Illinois Human Rights Commission (HRC),[104] and a three-member panel of that Commission affirmed the ALJ's decision.[105] Rather than seek review in the Circuit Court of Cook County, which he was entitled to do under state law, Buckhalter sought and obtained a right-to-sue letter from the EEOC.[106] He also filed a separate lawsuit in the district court alleging racial discrimination under Title VII and Section 1981.[107] After the district court gave the HRC decision preclusive effect, the Seventh Circuit agreed to hear Buckhalter's appeal.[108]

The issue presented was whether the doctrine of administrative *res judicata* precluded Buckhalter from relitigating his racial discrimination claim in federal court.[109] The Seventh Circuit Court of Appeals said yes.[110] It held that when the administrative agency is acting in a judicial capacity and the parties have had a full and fair opportunity to litigate their case, then *res judicata* will apply to the agency's determination.[111]

The court distinguished the administrative hearing that Buckhalter received from the hearing that Kremer had been provided by the NYHRD.[112] The court found that the NYHRD had merely investigated Kremer's claim and rejected it because it found no probable cause.[113] However, the HRC conducted an ajudicatory hearing in Buckhalter's case, and thus the question of administrative *res judicata*, not raised in *Kremer*, was present in this case.[114]

After reviewing the doctrine of administrative *res judicata*,[115] the court found it to be applicable to the case before it and set about to answer three questions: (1) was the HRC acting in a judicial capacity when it ruled on Buckhalter's claim; (2) did the parties have a full and fair opportunity to litigate their claims; and (3) did the principles of *res judicata* apply to this case?[116] The court answered all three questions in the affirmative.[117]

The Seventh Circuit was unpersuaded by Buckhalter's reliance on foot-

101. *Id.*
102. *Id.* at 843-44.
103. *Id.* at 845.
104. *Id.* at 844.
105. *Id.* at 845.
106. *Id.* at 846.
107. *Id.* [Title VII, 42 U.S.C. § 2000(e)-2(a); 42 U.S.C. § 1981].
108. *Id.* at 846-47.
109. *Id.* at 852.
110. *Id.* at 853.
111. *Id.* at 855.
112. *Id.* at 852.
113. *Id.* at 849.
114. *Id.* at 846-49.
115. *Id.* at 849-52.
116. *Id.* at 849-50.
117. The court first reviewed applicable law. *Id.* at 850-854. (*Utah Construction*; 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 21:3 (2d ed. 1983); the various RESTATEMENT provisions; and past Seventh Circuit opinions).

note seven.[118] It said that the Supreme Court, in writing the footnote, meant only that such review would be provided solely for decisions made by agencies which had acted in their investigatory capacity.[119] As support for its argument, the court cited the High Court's explicit mention in the footnote of the EEOC, which functions only as an investigatory body.[120]

The Seventh Circuit also dismissed as misguided three district court opinions Buckhalter cited in support of his interpretation that footnote seven allowed federal review of state agency decisions.[121] These decisions were dismissed because they failed to acknowledge the language from *Utah Construction* contained in footnote twenty-six.[122]

2. *Elliott*

Robert B. Elliott, a Black employee of the University of Tennessee's Agricultural Extension Service, was informed in December of 1981 that his employment was being terminated.[123] In response, he filed an administrative appeal pursuant to state law, and he filed a federal complaint.[124]

In his federal complaint, Elliot alleged that his immediate supervisor and other school officials conspired to have him fired because he had made complaints to university officials that Blacks were discriminated against in the 4-H Club. Elliot asserted claims under Title VII and Sections 1981, 1983, 1985, 1986 and 1988, as well as the first, thirteenth and fourteenth amendments; although the court chose to focus on his Title VII and Section 1983 claims, its reasoning and conclusions could have applied to the other statutory claims.[125]

At the state level, the parties went through an ajudicatory administrative hearing presided over by an administrative law judge.[126] The ALJ upheld four of the eight university charges of poor job performance, but denied the school's request for dismissal and instead ordered Elliott transferred.[127] The ALJ admitted he had no jurisdiction to hear Elliott's civil rights claims, but he ruled on them nonetheless holding that Elliott had failed to sustain his burden of proof, resulting in a denial of his claims.[128]

After Elliott's appeal to the University's Vice President for Agriculture was rejected,[129] he renewed his pending federal complaint,[130] which the district court had delayed so that the parties could go through the administrative process.[131] The university moved for summary judgment asserting that *res judicata* prevented a federal court from granting Elliott relief on his racial discrimination claims.[132] The district court agreed and Elliott appealed.[133]

118. *See Buckhalter*, 768 F.2d at 851-53.
119. *See id.* at 853.
120. *See id.* at 854.
121. *See id.* at 853.
122. *See id.* at 853.
123. *See Elliott*, 766 F.2d at 982.
124. *See id.*
125. *See id.* at 989 n.4 and accompanying text.
126. *See id.* at 985.
127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.* at 986.
131. *See id.* at 983.
132. *See id.* at 986.

At the apellate level, the university argued before the Sixth Circuit Court, and cited *Kremer*, interpreting that case in a manner closely parallel to the Seventh Circuit's interpretation.[134] Footnote seven's rule of nonpreclusion was limited to state administrative agencies acting in an investigatory fashion, the school asserted, while footnote twenty-six was the true measure of the Supreme Court's intent.[135]

The Sixth Circuit rejected these arguments.[136] Footnote seven was plain, it said, in its application of the rule of nonpreclusion to agency decisions which resulted from adjudicatory procedures.[137] It pointed out that three of the four cases the Supreme Court used to support its language in the footnote involved independent judicial review of ajudications.[138] Thus, the Supreme Court's specific mention of the EEOC could not have meant that it was limiting the rule of nonpreclusion to agency decisions which resulted from investigatory procedures.[139]

Footnote twenty-six, the court said, had been interpreted out of context by the university.[140] The Supreme Court had cited *Utah Construction* in the context of a reviewed agency decision.[141] The discussion in footnote seven took place in the context of an unreviewed agency decision.[142] In addition, the court noted that the legal issues involved in the discussion of the footnotes were different.[143] The accompanying text of footnote twenty-six discussed whether or not the procedures afforded Kremer met due process requirements.[144] The text surrounding footnote seven involved the applicability of *res judicata*.[145] Thus, the two footnotes did not conflict but rather addressed different issues.[146]

Footnote twenty-six, then, did not stand for the proposition that unreviewed agency decisions were to be given preclusive effect, the court said.[147] Rather, taken in its proper context, the footnote only applied to prior determinations made by federal agencies.[148] In fact, it stated, that was how *Utah Construction* had primarily been applied.[149]

Finally, the Sixth Circuit said that the legislative history of Section 1983, as well as its purpose, was incompatible with a rule of preclusion.[150] The difference between the state administrative and the federal judicial forums compelled it to conclude that barring federal review of an agency decision would frustrate the application of the full protection of federal rights envisioned by

133. *See id.*
134. *See id.* at 988.
135. *See id.*
136. *See id.*
137. *See id.*
138. *See id. See also infra* text accompanying notes 165-69.
139. *See Elliott*, 766 F.2d at 988.
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.* at 988-89.
144. *See id.*
145. *See id.*
146. *See infra* text accompanying notes 162-76.
147. *See Elliott*, 766 F.2d at 988.
148. *See id.* at 989.
149. *See id.* at 991.
150. *See id.* at 991-92.

Section 1983.[151]

D. *The* Kremer *Footnotes Reconciled*

A superficial reading of the *Kremer* footnotes reveals an obvious inconsistency. Simply put, footnote seven states that preclusive effect is not to be given to agency decisions.[152] Footnote twenty-six states that so long as the parties involved had an opportunity to litigate disputed issues of fact, preclusive effect is properly applied to agency decisions when the agency is acting in a judicial capacity.[153] As the Sixth Circuit suggests, reading the footnotes in the context in which they were written reveals that they are not inconsistent but merely referring to two different issues.[154]

The Seventh Circuit has tried to reconcile the footnotes by asserting that the language in footnote seven calling for a rule of nonpreclusion is applicable only to agencies, like the EEOC, which act in an investigatory capacity.[155] As the Sixth Circuit correctly points out, three of the four cases cited by the Supreme Court to support its footnote involved agencies which were acting in a judicial capacity.[156] In *Garner v. Giarrusso* a discharged police officer was given "a postdetermination hearing" before the New Orleans Civil Service Commission;[157] in *Batiste v. Furnco Construction Co.*, "extensive hearings were held before a hearing examiner of the FEPC" concerning bricklayers who claimed that they were discriminated against because of their race;[158] and Black employees in *Cooper v. Phillip Morris, Inc.*, were granted a "full six-day hearing" before the Kentucky Commission on Human Rights in order to present their grievances.[159] Clearly, the Supreme Court would not support an assertion that judicial review should be limited to decisions made by agencies acting in an investigatory capacity by citing cases in which such review was given to agency decisions reached after adjudicatory proceedings.

Taken in the context in which it was written, footnote seven illuminated the majority's discussion of the amount of weight that should be given to a state court determination of a Title VII claim.[160] It contrasts the trial *de novo* given to civil actions brought after determinations by federal and state agencies with the preclusive effect of Section 1738 when a determination of the claim is made by a state court.[161] In highlighting this distinction in footnote seven, the court points out that it is implausible that Congress intended federal courts to be bound further by state agency decisions than by EEOC decisions which may be reviewed by federal judges.[162]

The language in footnote twenty-six is found in the midst of the Court's discussion of whether or not the procedures provided Kremer were ade-

151. *See id.* at 993.
152. *See* Kremer v. Chemical Construction Co., 456 U.S. 461, 470 n.7 (1982).
153. *See id.*
154. *See Elliott*, 766 F.2d at 988-89.
155. *See Buckhalter*, 768 F.2d at 854.
156. *See Elliott*, 766 F.2d at 988.
157. 571 F.2d 1330, 1335 (5th Cir. 1978).
158. 503 F.2d 447, 449 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).
159. 464 F.2d 9 (6th Cir. 1972).
160. *See Kremer*, 456 U.S. at 479-480.
161. *See id.*
162. *See id.* at 470 n.7; *see also* text accompanying *supra* note 6.

quate.[163] Towards the end of this discussion the opinion states: "We have no hesitation in concluding that this panoply of procedures, complemented by administrative as well as judicial review, is sufficent under the Due Process Clause."[164] Then, in footnote twenty-six, the Court held: "Certainly, the administrative nature of the fact finding process is not dispositive. . .so long as [the] opposing parties had an adequate opportunity to litigate disputed issues of fact" *res judicata* may be applied to administrative agencies acting in a "judicial capacity. . . ."[165] What the Court seemed to be saying is that Kremer was not denied due process simply because the fact finding process took place on the administrative rather than judicial level. The key element here is that the determination took place in the context of an agency decision that had been reviewed by a state court.[166] When such review is accorded, the Court appears to say, that the parties are not entitled to another evidentiary hearing since judicial review, under such circumstances, need not be de novo.

To summarize, footnote seven stands for the proposition that a rule of nonpreclusion exists for unreviewed agency decisions. Footnote twenty-six, meanwhile, indicates that when state judicial review is accorded an agency decision, due process is not denied by giving preclusive effect to the agency's factual findings. Thus, despite the surface contradictions, the two footnotes are reconcilable.

V. ADMINISTRATIVE *RES JUDICATA* SHOULD NOT APPLY TO SECTION 1983—THE POLICY ARGUMENTS

A. *The Importance of the Federal Right*

The language and purpose of Section 1983 leaves no doubt that the right involved is best protected by the federal judiciary. If anything about the section is plain, it is that the forty-second Congress did not entrust local authorities with the responsibility of protecting individuals from the onerous treatment meted out by officials acting under state sponsorship.[167] In other words, Congress did not intend that federal rights violated by the state be dependent upon state authorities for their vindication.

Section 1983 assures that an individual victimized by the state has the right to a federal forum in which to air her grievance. Since the vindication of her federal rights need not be first sought and refused in the state arena[168] the application of *res judicata* would undermine the essence of *Monroe v. Pape*.[169] After all, a claimant should not be penalized because she chose to seek an administrative determination before pressing her claim in federal court.

The Supreme Court has said that a state court which gives the parties a full and fair opportunity to litigate federal claims has shown that it is willing and able to protect federal rights.[170] Thus, it has held that preclusive effect

163. *See Kremer*, 456 U.S. at 479-85.
164. *See id.* at 484.
165. *Id.* at 484-85 n.26, *see also supra* note 6.
166. *See Kremer*, 456 U.S. at 479-85.
167. *See generally* Monroe v. Pape, 365 U.S. 167 (1961).
168. *See* New Jersey Educ. Ass'n v. Burke, 579 F.2d 764, 774 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978).
169. 365 U.S. 167, 183 (1961).
170. *See* Allen v. McCurry, 449 U.S. 90, 104 (1980).

may be given to state court determination of Section 1983 issues and claims.[171] However, the Court has not shown itself willing to apply such deference to state agency determinations.[172]

B. *State Administrative Tribunals are Inadequate Forums for the Vindication of Section 1983 Rights*

Since state administrative tribunals provide less protection to the Section 1983 claimant than state court judges, preclusive effect should not be given to unreviewed agency decisions especially since Congress fully intended that Section 1983 be judicially enforceable.[173]

The argument that findings of state agencies acting in a judicial capacity should be given preclusive effect erroneously assumes that such agency action is equivalent to federal judicial proceedings. This is not the case. The purpose of the agency forum, the selection of its decisionmakers and the role they play, the inadequacy of its procedures, and the limited nature in which its decisions are reviewed afford much less protection for this important federal right than that afforded by the federal courts. Simply put, an administrative determination of a Section 1983 claim is an inadequate substitute for full access to the federal courts.[174]

Inherent in the idea of giving preclusive effect to agency decisions is that state administrators rather than members of the federal judiciary will be determining the validity of Section 1983 claims. Indeed, it is the differences in the decisionmakers involved which is one of the most important distinctions between a state administrative forum and a federal judicial forum.

The decisionmaker who sits on the administrative tribunal is more likely to be chosen for his abilities in the specific, often technical field, involved.[175] He is prized for his administrative and bureaucratic skills.[176] On the other hand, a federal judge is a practitioner of the law with a knowledge of just how complex the issues are in trying to resolve a Section 1983 claim. A high value is placed on her problem-solving and conflict-resolving capabilities.[177] It is she, not the veteran technocrat, who is better equipped to handle the pressures involved in resolving disputes replete with accusations of racial discrimination, charges of recriminations and latent and blatant animosity between parties.

In addition, the first concern of an administrator is usually the rules and regulations of his particular agency.[178] Often the administrator's focus will be on vindicating agency rules and procedures rather than the civil rights involved.[179] Thus, Section 1983 claims are not always fully addressed.

Another key feature which distinguishes a state administrator from a federal judge is the amount of insulation respectively afforded from the majoritarian pressure that often accompanies civil rights claims: without the

171. *See supra* note 4 and accompanying text.
172. *See supra* text accompanying notes 43-45.
173. *See* McDonald v. City of W. Branch, 104 S.Ct. 1799 (1984).
174. *See Elliott*, 766 F.2d at 992.
175. *See id.*
176. *See id.*
177. *See id.*
178. *See* Harborlite Corp. v. I.C.C., 613 F.2d 1088, 1092 (D.C. Cir. 1979).
179. *See infra* text accompanying notes 182-83.

life tenure enjoyed by federal judges, state administrators are less likely to enforce unpopular rights or the rights of an unpopular minority.[180]

It has been argued that decisions made by an agency should be given preclusive effect if it acts in a judicial capacity and gives a full and fair opportunity for the parties to litigate their claims.[181] Although administrative procedures may be judicial in nature, they still do not constitute judicial proceedings. The distinction is not merely one of semantics. It is very real. The procedural safeguards present in a judicial setting are often sacrificed in administrative procedures in order to facilitate one of its main goals—efficiency in processing the huge amount of conflicts brought before it.[182]

For example, evidence otherwise admissible in a federal court may be excluded by an administrative tribunal.[183] The use of discovery is narrowed.[184] Some circuits do not require the presence of attorneys nor a legally-trained hearing officer in order for a proceeding to be "fair and adequate."[185] Another circuit states that the proposition that an agency is not to be restricted by the formalities of judicial procedure in the absence of clear congressional intent to the contrary.[186]

The fact that full judicial proceedings are not required by agency tribunals takes on added signficance in light of the view that the degree of precision required in an agency's findings (and the rationale behind them) is directly related to the level of judicial scrutiny to which the agency is subject.[187] If, because of the rule of preclusion, there is no independent judicial review of agency decisions, or if such review is quite limited, it is readily apparent that the procedural protections afforded by an agency will deteriorate accordingly. This would not be an unimportant development. As Justice Douglas once said, "it is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law."[188]

Some administrative adjudicatory proceedings, however, may be substantially like those of judicial proceedings, but such adjudication by state agencies is not appropriate nor does it offer enough protection to vindicate the important statutory and constitutional issues raised by Section 1983 claims. Congress, when it passed this important piece of legislation, did not contemplate adjudication in such proceedings nor would it think that such proceedings are adequate.[189]

Moreover, there is a large number of state agencies which attempt to re-

180. *See* England v. La. State Bd. of Medical Examiners, 375 U.S. 411, 427 (Douglas, J., concurring).

181. *See Buckhalter*, 768 F.2d at 852.

182. *See* WRIGHT, MILLER & COOPER at § 4471 (Supp. 1985); *see also Harborlite*, 613 F.2d at 1092.

183. *See* Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

184. *See* Boykins v. Ambridge Area School Dist., 621 F.2d 75, 79 (3d Cir. 1980).

185. *See* Grossmuller v. Int'l Union, United Automobile Aerospace and Agricultural Implement Workers of America, Local 813, 715 F.2d 853, 858 n.5 (3rd Cir. 1983); Torey v. Reagan, 467 F.2d 953, 958 (9th Cir. 1972), *cert. denied* 409 U.S. 1130 (1973).

186. *See* Trans-Pacific Freight Conference of Japan/Korea v. Fed. Maritime Comm'n, 650 F.2d 1235, 1245 (D.C. Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

187. *See Harborlite*, 613 F.2d at 1092.

188. Joint Anti-Fascit Refugee Comm. v. McGrath, 341 U.S. 123, 179 (Douglas, J., concurring).

189. *See McDonald*, 104 S.Ct. at 1803.

solve Section 1983 claims and an equally large number of different procedures employed. An attempt to develop a standard measurement of what constitutes a full and fair opportunity to litigate would create costly, remedy-delaying and court-burdening litigation.[190] The standard would have to be developed incrementally by the judiciary in the context of diverse claims relating to thousands of different agencies.[191] In sum, an attempt to formulate appropriate safeguards in administrative hearings would be costly and time consuming, as well as incompatible with the purpose and history of Section 1983.

C. *A Rule of Nonpreclusion Would Maximize Claimant Choice*

For a § 1983 claimant who has the choice of seeking a remedy through state procedures or through the federal courts, giving preclusive effect to agency decisions would make the administrative process a trap for the unwary.[192] A claimant may want to take advantage of the particular specialized knowledge of a particular industry or custom which an administrative tribunal may possess in pressing his claim. He may also hope that his conflict can be resolved informally and without the antagonistic and bitter feelings which are often by-products of litigation. However, a decision by this body which has not decided the Section 1983 issues or which may have been influenced by political considerations or personal prejudice, may induce the claimant to seek vindication in the federal courts. If the decision is given preclusive effect, such vindication will not be available.

Under a rule of preclusion, the claimant must either give up the option to go before a state administrative tribunal or forego a determination by a federal court.[193] The inevitable result is that claimants will decide to skip the administrative remedies and proceed in the federal courts. Since the administrative process is bypassed, the federal courts are forced to hear more Section 1983 cases than they otherwise would. Thus, one of the rationales behind *res judicata*, reducing the workload of the judiciary, is frustrated by its application in these kinds of cases.

By not applying a rule of preclusion to agency decisions forum choice is maximized.[194] The claimant now has the choice of going before an administrative tribunal or immediately proceeding to the federal court. For individual claimants, who would like to reap the perceived advantages of one or the other forum, the choice is an important one.

D. *The Limited Scope of State Judicial Review of Agency Decisions*

If a rule of preclusion is applied to agency decisions then the only judicial review available to a Section 1983 claimant is that which is given by a state court. Such review is hardly thorough and does not come close to providing the protection of federal rights envisioned by the 42nd Congress.

Once a determination of a Section 1983 claim has been made, it is subject only to limited judicial review. Sometimes that review consists of determining

190. *See* Patsy v. Regents of Florida, 457 U.S. 496, 514 (1982).
191. *See id.*
192. *See Burke*, 579 F.2d at 774.
193. *See* Moore v. Bonner, 695 F.2d 799, 801 (4th Cir. 1982).
194. *See Elliott*, 766 F.2d at 993.

whether or not the agency decision was arbitrary or capricious.[195] Other times the standard is whether the agency decision is supported by substantial evidence.[196] Rarely is there a review on the merits.[197]

Such limited review has the effect of precluding any determination of some Section 1983 claims since the claims may not have even been touched upon during the agency hearing. In some cases the agency may not have considered the issues involved in a Section 1983 claim;[198] or the agency may not have had jurisdiction to hear the issues;[199] or the agency may not have been competent to determine the issues.[200]

When a claimant knows that the only judicial review of an agency decision is going to be very limited, then the incentive to go directly to the federal courts is greater. More importantly, a limited scope of review means that the application of a rule of preclusion works a particular hardship on a claimant. Not only does the rule deprive her of choosing between state or federal judicial review, it deprives her of any meaningful judicial review whatsoever.

E. *A Rule of Preclusion is Inconsistent with the Preclusive Effect Given to Title VII Claims*

Title VII was passed by Congress in 1964 for basically the same reasons that Congress in 1871 passed the forerunner of Section 1983—to provide federal protection for a federal right. It was enacted in order to prevent any discrimination on the basis of race, color, religion, sex or national origin[201] and to establish a comprehensive scheme to enforce those rights.[202] In order to enforce them, federal courts have been granted plenary power to insure compliance with the statute's provisions.[203]

Title VII and Section 1983 claims are often asserted together where there are charges of employment discrimination.[204] The two statutes are meant to augment each other and claimants should not be forced to choose between them. However, the rule of preclusion is not applicable to agency determinations of Title VII claims.[205] If the rule is applied to section 1983 claims, a claimant who wants to assert both claims is put in an awkward position.

If a Section 1983 claim is simultaneously pursued with a Title VII claim, the two claims will be treated differently. If the decision at the administrative

195. *See, e.g.* MASS. ANNO. LAWS ch.30A § 14(7)(f) (Michie/Lawyer Co-op 1980).

196. *See, e.g.* DEL. CODE ANN TIT. 29, § 10,142 (1983).

197. The approach taken by the Minnesota Supreme Court is indicative of state court review of agency determinations. "Deference is to be shown to agency expertise, restricting judicial functions to a narrow area of responsibility lest the court substitute its judgment for that of the agency." Manufactured Housing Inst. v. Pettersen. 347 N.W. 2d 238, 244 (1984) (quoting, Reserved Mining Co. v. Herbs, 256 N.W.2d 808, 805 (Minn. 1977)).

198. *See Lee*, 685 F.2d 196 at 197 (racial discrimination issues not considered in the agency's determination of the truth of a police officer's testimony); *see also* Moore v. Bonner, 695 F.2d 799 (4th Cir. 1982) (in deciding whether a teacher was guilty of unprofessional conduct and insubordination, racial discrimination not discussed).

199. *See Elliott*, 766 F.2d at 985.

200. *See Garner*, 571 F.2d at 1336 (New Orleans Civil Service Commission not a competent body to determine Section 1983 claims).

201. *See* 42 U.S.C.A. 2000(e)-2(a)(1) (West 1981) (GPO 1983).

202. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 458 (1975).

203. *See Elliott*, 766 F.2d at 993.

204. *See* Tucker v. Harley-Davidson Motor Co., 454 F.Supp. 738, 743 (E.D. Wis. 1978).

205. *See supra* text accompanying notes 42-44.

level is not satisfactory to the claimant, he may pursue his Title VII claim in federal court. At the same time his Section 1983 claim has been barred by the rule of preclusion and there is no remedy available in the federal court. Yet, if the claimant does not assert his Section 1983 claim initially he is collaterally estopped from asserting it later.[206]

This disjointed and inconsistent approach to two similarly-based statutory schemes only impedes the vindication of federal rights. A rule of non-preclusion in Section 1983 claims provides a more compatible approach and ensures that the full measure of remedies available to a claimant may be applied.

VI. CONCLUSION

The doctrine of *res judicata* is not meant to apply to legislative schemes which contemplate independent judicial review. The legislative history of Section 1983, which indicates that the section was promulgated to provide a federal claim reviewable by federal courts rather than by the state agencies charged with the misconduct, demonstrates that the section contains such a scheme. Moreover, the Supreme Court has stated that applying *res judicata* to unreviewed state administrative agency decisions is inappropriate. Finally, the application of a rule of preclusion at the administrative level frustrates the protection of individual federal rights. It denies federal judicial review and relegates the determination of these important rights to decisionmakers ill-equipped to decide issues of such magnitude under procedures which are inadequate to insure their fair and just determination.

VII. ADDENDUM

On July 7, 1986, after this article was written for publication, the United States Supreme Court ruled 5-3, in *University of Tennessee v. Elliot*,[207] that its previous decisions giving preclusive effect to state court judgments in Section 1983 actions supported the view "that Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to general rules of preclusion."[208] Thus, the Court held "that when a state agency, 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it, which the parties have had a adequate opportunity to litigate' . . . federal courts must give the agency's factfinding the same preclusive effect entitled in the State's courts."[209]

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206. *See* Snow v. Nevada Dept. of Prisons, 543 F. Supp. 752, 755 (D.C. Nev. 1982); WRIGHT, MILLER & COOPER, § 4471 (Supp. 1985).

207. Univ. of Tennessee v. Elliot 41 FEP Cases 177 (1986).

208. *Id.* at 180.

209. *Id.* at 181.