NOTES

STATE ADMINISTRATIVE PRECLUSION IN ADEA FEDERAL COURT SUITS—ANSWERING *ELLIOT*'S CALL

Responding to widespread concern for employment discrimination against older workers,[1] Congress passed the Age Discrimination in Employment Act of 1967 (ADEA).[2] Rather than amending Title VII of the 1964 Civil Rights Act[3] to include a bar against age discrimination in employment, Congress chose to enact ADEA as an independent statutory scheme.[4]

Under ADEA, an individual may initiate a discrimination suit on his own behalf.[5] The private claimant must file his charge with the Equal Employment Opportunity Commission (the EEOC).[6] A federal court will hear the claim upon the EEOC's decision to sue or issuance of a

1. *See* H.R. REP. NO. 805, 90th Cong., 1st Sess. 2 (1967) (message of President Johnson); *Legal Problems Affecting Older Americans: Hearings Before the Special Senate Comm. on Aging*, 91st Cong., 2d Sess. 19 (1970); U.S. DEP'T OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964: RESEARCH MATERIALS 67-69 (1965) [hereinafter DEP'T OF LABOR REP.]; *see also* Note, *Age Discrimination in Employment: The Problems of the Older Worker*, 41 N.Y.U. L. REV. 323, 384-88 (1966).

2. Age Discrimination in Employment Act, Pub. L. No. 90-202, §§ 2-16, 81 Stat. 602, 602-08 (1967), *codified at* 29 U.S.C. §§ 621-631 (1982). Congress designed pre-ADEA legislation primarily to reduce older workers' inability to cope with technological advancement, rather than to eradicate discrimination in the workplace. *See* 113 CONG. REC. 34,745 (1967) (remarks of Rep. Eilberg); *id.* at 34,752 (remarks of Rep. Dwyer); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. 355, 461 (1967) [hereinafter *ADEA Hearings*]. *See also* Manpower Development and Training Act of 1962, Pub. L. No. 87-415, 76 Stat. 23 (1962); Older Americans Act of 1965, 42 U.S.C. §§ 3001-3055 (1982). Prior to enactment of ADEA, President Johnson issued an executive order prohibiting age discrimination by government contractors. Exec. Order No. 11,141, 29 Fed. Reg. 2,477 (1964). *See also* S. REP. NO. 723, 90th Cong., 1st Sess. 13 (1967) (views of Senator Javits). For a general discussion of the history of ADEA, see Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976).

3. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964) [hereinafter Title VII] *codified* at 42 U.S.C. §§ 2000e to 2000e-17 (1982).

4. Some congressmen believed that Congress should have extended Title VII to include age as a protected classification. *See, e.g.*, *ADEA Hearings*, *supra* note 2, at 35 (statement by Sen. Murphy); *id.* at 29 (statement by Sen. Smather). In 1974, two bills, which later died in the House Education and Labor Committee, were introduced to supplement Title VII by adding age as a protected classification. *See* 120 CONG. REC. 33,390 (1974); *id.* at 35,661.

5. 29 U.S.C. § 626(c)(1) (1982).

6. 29 U.S.C. § 626(d). Congress created the Equal Employment Opportunity Commission to

right-to-sue letter to the claimant.[7] Additionally, in states that have enacted laws prohibiting the discriminatory conduct, ADEA requires a filing with the appropriate state employment agency.[8] There is no requirement that the EEOC filing occur before the state filing. Thus, a claimant may still initiate federal suit after a state agency has made factual findings and determined the merits of a claim.

Title VII similarly requires that individual claimants first file with state employment agencies. In *University of Tennessee v. Elliot*,[9] the Supreme Court concluded that Congress intended to afford Title VII

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assist civil rights claimants pursuing discrimination claims under Title VII. Title VII § 705(g), 42 U.S.C. § 2000e-4(g). Congress vested the EEOC with the power:

> (1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;
> (2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;
> (3) to furnish upon persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;
> (4) upon request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;
> (5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;
> (6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

Title VII § 705(g), 42 U.S.C § 2000e-4(g).

Under ADEA, the EEOC also has the power to investigate claims. 29 U.S.C. § 626(a). Like Title VII, ADEA instructs the EEOC to attempt to eliminate the alleged discrimination before instituting a civil action. 29 U.S.C. § 626(b). Both Title VII and ADEA dictate that the EEOC attempt to effectuate voluntary compliance with the requirements of the respective chapters through conciliation, conference and persuasion. *Compare* Title VII § 705(c)(2), 42 U.S.C. § 2000e-4(c)(2) *with* 29 U.S.C. § 626(e)(2). Only after the EEOC has failed in its attempt to mediate voluntary compliance may it institute a civil suit on the complainant's behalf.

7. 29 U.S.C. § 626(b), (c)(1). An individual may file a claim on his own behalf if the EEOC decides not to pursue the claim. If the EEOC commences an action, however, the claimant's action will then terminate. 29 U.S.C. § 626(c)(1).

8. 29 U.S.C. § 633(b). Section 633(b) provides that the EEOC may institute no action under § 626 until 60 days after the commencement of an action brought under state law. Thus, the EEOC may not act until 60 days after a claimant has filed with the state administrative agency empowered under state law to adjudicate age discrimination claims or the state administrative role is terminated, whichever occurs first. For two interesting treatments of ADEA and claim preclusion, see generally Note, *State Deferral of Complaints Under the Age Discrimination in Employment Act*, 51 NOTRE DAME L. REV. 492 (1976); Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457 (1977).

9. 478 U.S. 788 (1986).

claimants a trial de novo following state administrative proceedings.[10] The Court accordingly held that unreviewed state agency determinations do not preclude Title VII claims brought in federal court.[11] Whether ADEA claims should receive similar treatment, however, remains unsettled.

This Note analyzes an extension of the *Elliot* decision to ADEA claims. Part I investigates the preclusive effect of state administrative judgments under Title VII. Part II specifically examines the application of *Elliot* to ADEA cases. Part III proposes a solution based on the legislative history of ADEA and its connection with Title VII.

I. STATE ADMINISTRATIVE PRECLUSION UNDER TITLE VII

A. Title VII Background

Congress enacted Title VII of the 1964 Civil Rights Act to assure employees equal opportunity in employment by barring employment practices based on race, color, national origin, religion, and sex.[12] Congress granted state civil rights agencies a limited opportunity to resolve disputes under state law.[13] Primarily, Title VII created the Equal Employ-

10 *Id.* at 796; *see also infra* notes 36-43 and accompanying text.

11 478 U.S. at 796. This Note does not address the preclusive effect of state judicial review of state agency determinations in federal ADEA suits.

12 *See* Title VII §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

13. Section 706(c) of Title VII provides that:

> [i]n the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . .

Title VII § 706(c), 42 U.S.C. § 2000e-5(c) (1982). *See also* Love v. Pullman Co., 404 U.S. 522, 526 n.5 (1972) (Congress intended to give states the chance to act on claims before the EEOC); 29 C.F.R. § 1601.13 (1981).

Thus, under Title VII, timely filing with the appropriate state agency is a precondition to an effective federal filing. Mohasco Corp. v. Silver, 447 U.S. 807, 817 (1979) (federal filing not timely until state deferral period expires); Citicorp Person-to-Person Fin. Corp. v. Brazell, 658 F.2d 232, 234-35 (4th Cir. 1981) (failure to defer to state agency renders federal filing invalid). Section 706(c), however, only requires deferral by the EEOC when the particular state in which the alleged discriminatory practice occurred has both a law prohibiting the practice and a state agency authorized to hear the dispute. The EEOC may commence its investigation only upon the expiration of 60 days or upon termination of the state agency's proceedings. For a complete list of state deferral agencies under Title VII, see 29 C.F.R. § 1601.74 (1988).

Although generally a Title VII claimant must file with the EEOC within 180 days after the alleged discriminatory employment practice, § 706(e) extends this period to 300 days when the person ag-

ment Opportunity Commission[14] to settle disputes through conference, conciliation and persuasion before the aggrieved party may file a lawsuit in federal court. Title VII empowers the EEOC to bring suit on behalf of an alleged victim when conciliatory efforts fail.[15] Title VII, however, does not permit the EEOC to adjudicate claims.[16] Rather, Congress vested federal courts with the final responsibility for enforcement of Title VII claims.[17]

Under Title VII, the EEOC cannot pursue a claim until sixty days after the claimant has filed a state-law claim with a state administrative agency authorized to adjudicate such discrimination claims.[18] In states without a law applicable to the alleged discrimination, the EEOC may take action immediately.[19] State agencies that adjudicate claims may make both findings of fact and conclusions of law.[20] The federal courts traditionally have deferred to state administrative agencies acting in such a judicial capacity.[21] Moreover, section 706(b) of Title VII instructs the EEOC to give "substantial weight" to state agency determinations in Title VII complaints.[22]

Title VII entitles a private litigant to institute a lawsuit on his own behalf so long as he has: 1) timely filed a charge of employment discrimination with the EEOC, and 2) received and acted upon a statutory notice

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grieved has initially instituted proceedings with a state or local deferral agency. *See* Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (1982).

14. *Id.*

15. *Id.* Title VII provides that when the EEOC dismisses a charge as untrue, it must issue a statutory right-to-sue letter 180 days after the charge was filed. Title VII § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). The complainant may then institute a civil action in his own behalf within 90 days of receipt of the right-to-sue letter.

16. Title VII § 706, 42 U.S.C. § 2000e-5 (1982).

17. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

18. Title VII § 706, 42 U.S.C. § 2000e-5 (1982).

19. *Id.*

20. B. SCHWARTZ, ADMINISTRATIVE LAW 9-15 (1984).

21. *Id. See also* Report of the Attorney General's Committee on Administrative Procedure, 7 (1941) ("the distinguishing feature of an 'administrative agency' [is] the power to determine, either by rule or by decision, private rights and obligations").

22. Congress mandated this standard in its 1972 amendment of Title VII. Prior to the amendment, the EEOC was not required to give state agency factfinding any weight at all. Senator Ervin explained that Congress designed the "substantial weight" provision to prevent the EEOC from reversing administrative decisions "peremptorily." The Commission was thus required to "give due respect to findings of state or local authorities." 118 CONG. REC. 310 (1972) (remarks of Sen. Ervin).

of the right to sue.[23] Thus, a private litigant may bring a civil action against an employer pursuant to Title VII if the EEOC chooses not to do so. The Supreme Court has interpreted this "civil action" as a trial de novo following federal or state administrative agency determinations.[24]

In 1972, Congress amended Title VII to bring federal employees within the statute's scope.[25] It added section 717(c), permitting federal employees to file civil actions pursuant to section 706.[26] Because section 706 provides for a trial de novo, it follows that federal employees are entitled to a trial de novo in Title VII suits.[27]

The enforcement provision of Title VII[28] fails to define precisely the effect of state administrative findings on subsequent federal suits. Courts developed the common-law doctrine of res judicata[29] to avoid both repetitious litigation[30] and inconsistent decisions,[31] and to promote "the con-

23 Title VII § 706(b), (e), (f), 42 U.S.C. § 2000e-5(b), (e), (f). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

24. Chandler v. Roudebush, 425 U.S. 840, 845-46 (1976).

25. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111-12 (1972) (adding § 717 to Title VII).

26. Title VII § 717(c), 42 U.S.C. § 2000e-16(c) (1982).

27 *Chandler*, 425 U.S. at 845-46 *See supra* notes 9-11 and accompanying text.

28 Title VII § 706, 42 U.S C. § 2000e-5 (1982).

29 Courts have used the phrase "res judicata" to identify two types of preclusive effects. First, true res judicata, or claim preclusion, renders a court's judgment on a particular claim binding on all other courts. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 100A (1983). Many courts refer to this form of res judicata as "merger" because all related claims merge with a judgment for the plaintiff. Additionally, because true res judicata prevents relitigation of a claim after a judgment for the defendant, courts have characterized this preclusive effect as a "bar." *Id. See, e.g.*, Kaspar Wire Works v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978). Under true res judicata, a claim has preclusive effect if four requirements are satisfied: (1) the claim arises out of the same cause of action, (2) as a claim for which there was a trial on the merits, (3) resulting in a final judgment, and (4) upon which the identical parties, or their privies, litigated. *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS (1981); RESTATEMENT (SECOND) OF JUDGMENTS (1982). Res judicata is a mandatory doctrine Federated Dep't Stores v. Moitie, 452 U.S. 394, 401-02 (1981).

The second type of preclusive effect, collateral estoppel, or issue preclusion, prevents the relitigation of a particular issue. To invoke collateral estoppel a party must establish that: (1) the issue was actually litigated, (2) the issue was essential to a final decision, (3) the party sought to be barred, or his privy, was a party to the first suit, and (4) the party sought to be barred had a full and fair opportunity to litigate the issue. Southern Pac. R.R. v. United States, 168 U.S. 1, 48-49 (1897). Issue preclusion applies to both factfindings and conclusions of law. C. WRIGHT, A. MILLER & E. COOPER, *supra*, § 4425, at 245-46. Unlike true res judicata, collateral estoppel is a discretionary doctrine *Id.* § 4420. For purposes of clarity and consistency, this Note uses "res judicata" to encompass both claim and issue preclusion.

30 Allen v McCurry, 449 U.S 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

31 *Allen*, 449 U.S. at 94; *Montana*, 440 U.S. at 154.

clusive resolution of disputes within [the court's] jurisdiction."[32] The United States Constitution[33] and 28 U.S.C. section 1738[34] embody these policy concerns, and require that federal courts give full faith and credit to state court judgments. Based on the policy behind Title VII—assuring parties the right to sue in federal court—it was unclear whether the full faith and credit standard applied to Title VII claims.[35]

B. University of Tennessee v. Elliot

1. Title VII Claims

In *University of Tennessee v. Elliot*,[36] the Supreme Court held that unreviewed state agency determinations of race discrimination claims have no preclusive effect in federal court.[37] Because the full faith and credit

32. *Allen*, 449 U.S. at 94. As the Court in *Allen* summarized, the application of res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Id.* (citing *Montana*, 440 U.S. at 153-54).

33. The full faith and credit clause of the United States Constitution provides: "Full faith and credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

34. 28 U.S.C. § 1738 provides in pertinent part:

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

28 U.S.C. § 1738 (1982). Federal courts have thus applied res judicata to state court judgments. *See* Allen v. McCurry, 449 U.S. 90, 96 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Angel v. Bullington, 330 U.S. 183, 190-91 (1947).

35. *See* Monroe v. Pape, 365 U.S. 167, 173-83 (1961). The policy behind Title VII and the rest of the Civil Rights Act conflicted with the notion that a state court could, under 28 U.S.C. § 1738, preclude a party from later bringing its civil rights claim in federal court. *See also* Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 U. ILL. L.F. 95 (1975); Note, *Constitutional Law—Civil Rights—Section 1983—Res Judicata/Collateral Estoppel*, 1974 WIS. L. REV. 1180 (1975). For further discussion of Title VII and res judicata, see Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485 (1981); Note, *The Role of Preclusion Rules in Title VII: An Analysis of Congressional Intent*, 71 IOWA L. REV. 1472 (1986); Note, *Res Judicata, Collateral Estoppel, and Title VII: Tool or Trap for the Unwary*, 62 NEB. L. REV. (1983).

36. 478 U.S. 788 (1986).

37. *Id.* In *Elliot*, an individual claimant, alleging racial discrimination under Title VII, requested a state administrative hearing. Additionally, the plaintiff filed suit in federal court while awaiting completion of the administrative hearings. *Id.* The administrative law judge found no racial discrimination and the plaintiff then sought federal court review. The district court held that the administrative law judge's ruling had preclusive effect, and granted defendants motion for summary judgment. *Id.* The court of appeals reversed.

The court cited Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1981), for this proposition.

clause applies only to state court judgments, its application to unreviewed state agency findings is inappropriate.[38] In the past, however, the Court has applied federal common-law rules of preclusion to administrative findings.[39] In *Elliot*, the Court specifically addressed whether "a common law rule of preclusion would be consistent with Congress' intent in enacting Title VII."[40]

The *Elliot* Court explained that the provision requiring the EEOC to give substantial weight to state administrative decisions would be unnecessary if such decisions had preclusive effect.[41] The Court reasoned that, had Congress intended preclusion to obtain in Title VII cases, it would not have instructed the EEOC to accord "substantial weight" to state agency findings.[42] Rather, Congress would have required the EEOC to defer completely to state administrative determinations. Thus, in *Elliot* the Supreme Court chose not to fashion a federal common-law rule of preclusion with respect to Title VII claims.[43]

Elliot, 478 U.S. at 793. In *Kremer*, the Court held that Congress did not intend a trial de novo to follow state court decisions. *Kremer*, 456 U.S. at 485. The Court noted that, unless Title VII tacitly repealed § 1738, state court judgments regarding Title VII claims have preclusive effect in subsequent federal suits. *Id.* at 468. Lacking an affirmative showing of congressional intent to partially repeal § 1738 in Title VII suits, the Supreme Court in *Kremer* applied res judicata. *Id.* at 468-85. Dictum in *Kremer*, however, suggests that unreviewed state agency determinations should have no preclusive effect in Title VII actions, even if a state's own courts would afford such effect. *Id.* at 470 n.7. For a discussion of *Kremer* and its progeny, see Preer, *A Full and Fair Opportunity: A Perspective on the* Kremer *Decision and Its Progeny*, 12 EMPLOYEE REL. L.J. 98 (1986).

38. 478 U.S. at 794. As the Court explained, Title VII's legislative history indicates Congress' intent to allow a petitioner to seek redress under both Title VII and appropriate state and federal statutes. *Id. See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974) (Congress intended that a claimant pursue Title VII and state remedies independently). The Court noted that the respondent's failure to request judicial, rather than administrative, action had no bearing on the preclusion issue.

39. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979); Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313, 350 (1971); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378 (1940); Stoll v. Gottlieb, 305 U.S. 165, 176-77, *reh'g denied*, 305 U.S. 675 (1938); Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273, 291 (1906).

40. 478 U.S. at 796.

41. *Id. See supra* note 22 and accompanying text.

42. 478 U.S. at 796.

43. The Court relied on the rationale of Chandler v. Roudebush, 425 U.S. 840 (1976) in addition to Title VII's language. *See supra* note 24 and accompanying text. In *Chandler*, the Court opined that Congress intended to afford federal employees a right to a trial de novo following federal administrative proceedings. *Chandler*, 425 U.S. at 864. Although *Elliot* involved state administrative proceedings, the application of res judicata would represent a significant departure from the Court's rationale in *Chandler*. *Elliot*, 478 U.S. at 795. The Court rejected the plaintiff's argument that the presumption against an implied repeal of § 1738 dictates a finding of preclusion. According

2. *Section 1983 Claims and the* Utah *Criteria*

The Supreme Court in *Elliot* also addressed the question of whether state administrative determinations have preclusive effect in subsequent federal court suits under the Reconstruction Civil Rights Statute, 42 U.S.C. section 1983.[44] Citing a prior Supreme Court decision,[45] the Court explained that, unlike Title VII, nothing in the language of section 1983 suggests that Congress intended to bar traditional notions of res judicata.[46] According to the Court, both the full faith and credit standard and common-law rules of preclusion apply to section 1983 suits.[47] No legislative mandate partially repealing the statutory requirements of the full faith and credit clause exists for section 1983 suits.[48] Moreover, in enacting the Reconstruction Civil Rights Statutes, Congress did not intend to foreclose application of res judicata to future civil procedural developments—here, the modern use of administrative adjudication.[49]

Having found no congressional intent to bar preclusion, the Court next reaffirmed and applied its prior holding in *United States v. Utah Construction and Mining Co.*[50] In *Utah*, the Court held that state administrative adjudications resolving "disputed issues of fact properly before [the agency] which the parties have had an adequate opportunity to litigate" have preclusive effect in subsequent state court suits.[51] The *Elliot* Court extended *Utah* to allow federal courts to apply this standard to subsequently raised state agency determinations.[52] According to the

to the Court, "[t]his argument is based on the erroneous premise that § 1738 applies to state administrative proceedings." *Id.* at 796.

44. *Id.* at 793. In *Elliot*, the petitioner brought a civil rights action under both Title VII of the 1964 Civil Rights Act and the Reconstruction civil rights statute, 42 U.S.C. § 1983. The Supreme Court in *Elliot* held that, while state agency Title VII adjudication does not have preclusive effect in subsequent federal court suits, similar § 1983 actions do. *Id.* at 799.

45. Allen v. McCurry, 449 U.S. 90 (1980).

46. 478 U.S. at 794. Moreover, the Court suggested that the decision in *Allen* was valid "even in the absence of § 1738." *Id.* The Court thus asserted that *Allen* does not stand for the notion that Congress intended to create an exception to traditional notions of res judicata with respect to § 1738. *Id.* at 793.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 797 (citing *Utah*, 384 U.S. 394 (1966)).

51. 384 U.S. at 421-22. The *Utah* Court further specified that the "parties have had an adequate opportunity to litigate" dispute issues of fact "properly" brought before the agency. *Id.*

52. Accordingly, 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 an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Elliot*, 478 U.S. at 799 (citation, footnote omitted).

Court, the full faith and credit clause compels this conclusion[53] because the clause's purpose—to act as a nationally unifying force—applies equally to state and federal courts.[54]

3. *The* Elliot *Two-Pronged Test*

In effect, the *Elliot* decision established a two-pronged test for determining the common-law preclusive effect of state agency decisions in federal courts. If Congress, through the language and legislative history of a statute, intended to bar preclusive effect of state administrative findings in federal court, then preclusion will not obtain.[55] If Congress did not intend such a result, then findings of a state agency acting in a judicial capacity in a proceeding in which the litigants had a full and fair opportunity to argue their claims are entitled to preclusive effect. The resulting presumption favoring preclusive effect stems from the general res judicata principle of "enforcing repose."[56]

II. THE EFFECT OF *ELLIOT* ON ADEA ADMINISTRATIVE PRECLUSION IN FEDERAL COURT

A. *ADEA Background*

Title VII of the 1964 Civil Rights Act virtually compelled age discrimination legislation. Section 715 of the Civil Rights Act directed the Secretary of Labor to study and report on the status of older workers in employment.[57] The Secretary explored nonstatutory means of curbing

53. *Id.* at 794-95. Whereas *Elliot* involved a potential federal court review of state agency factfinding, *Utah* involved a potential state court review of state agency factfinding. The difference is significant in that federal courts, unlike state courts, are not bound by the full faith and credit clause. *See supra* note 34 and accompanying text.

54. *Elliot*, 478 U.S. at 795. The Court explained that, although § 1738 does not bind federal courts, the policy behind the clause provides a good reference point from which to begin the inquiry. *See supra* note 34 and accompanying text. Because § 1738's application to federal as well as state courts achieves the goal of federal-state comity, the Supreme Court broadened the holding in *Utah* to encompass federal courts. *Id.*

55. The Court impliedly established this congressional exception in the context of both Title VII ("[§ 1738] clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect." 478 U.S. 795) and § 1983 ("Congress of course may decide, as it did in enacting Title VII, that other values outweigh the policy of according finality to state administrative factfinding." *Id.* at 799 n.7).

56. *Id.* at 798.

57. Title VII § 715, 42 U.S.C. § 2000e-14 (1982); *see* DEP'T. OF LABOR REP., *supra* note 1. The Secretary's report discussed the pervasiveness of age discrimination in employment, but found "no evidence of prejudice based on dislike or intolerance for the older worker." *Id.* Rather, the report revealed that age discrimination stemmed from employers' mistaken beliefs that older workers are

age discrimination in the workplace, but described this possibility as "barren."[58] As a result, he recommended a federal statutory scheme to "promote hiring without discrimination on the basis of age."[59] Two years later, Congress enacted the Age Discrimination in Employment Act of 1967.[60]

In 1974, Congress amended ADEA to bring federal employees within the statute's scope.[61] Although the legislative history of the 1972 Title VII amendments clearly indicates Congress' intent to provide federal employees with a trial de novo following administrative factfindings,[62] ADEA legislative history is silent on the matter.[63] Both the Fourth and the Ninth Circuits have suggested that, in amending ADEA, Congress obviously found it unnecessary to reconsider issues previously resolved in the Title VII amendment debates.[64] Under this view, the absence of ADEA legislative history does not necessarily refute congressional intent that ADEA and Title VII have identical preclusive effect.

Although ADEA and Title VII share the common goal of abating employment discrimination,[65] the statutes operate independently. Congress, however, patterned many provisions in ADEA after Title VII.[66] Indeed, the Supreme Court explicitly sanctioned analogy to Title VII as a

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less competent than younger workers solely because of their age. 113 CONG. REC. 34,742 (1967) (remarks of Rep. Bulke); *id.* at 34,752 (remarks of Rep. Dwyer); *id.* at 31,254 (remarks of Sen. Javits); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 146 (1967).

58. DEP'T. OF LABOR REP., *supra* note 1. By 1967, 24 states had already enacted age discrimination statutes comparable to ADEA. H.R. REP. NO. 805, 91st Cong., 1st Sess. (1967). The Manpower Administration of the Department of Labor in May-June 1963 surveyed the effectiveness of these state laws. *Id.* State officials as well surveyed the perceived advantages of a federal policy condemning age discrimination in employment. *Id.*

59. DEP'T. OF LABOR REP., *supra* note 1.

60. *See supra* note 2.

61. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 55, 74-75 (1974) (adding § 633a to ADEA).

62. *See* Chandler v. Roudebush, 425 U.S. 840, 848 (1976).

63. 1974 U.S. CODE CONG. & ADMIN. NEWS 2811 (legislative history of the 1974 amendment to ADEA).

64. *See* Rosenfeld v. Department of the Army, 769 F.2d 237, 240 (4th Cir. 1985); Nabors v. United States, 568 F.2d 657, 659 (9th Cir. 1978); *infra* notes 69-79 and accompanying text.

65. *Compare* ADEA, 29 U.S.C. § 621 (1982) *with* Title VII § 701, 42 U.S.C. § 2000e (1982).

66. For example, the substantive and procedural provisions of Title VII and ADEA are similar. *Compare* Title VII §§ 701, 703, 704, 42 U.S.C. §§ 2000e, 2000e-2, 2000e-3 (1982) (Title VII substantive provisions) *with* 29 U.S.C. §§ 623, 630 (1982) (ADEA substantive provisions); *compare* Title VII § 706, 42 U.S.C. § 2000e-5 (1982) (Title VII enforcement provisions) *with* 29 U.S.C. §§ 211(b), 216(b), 216(c), 217, 626(b) (1982) (ADEA enforcement provisions).

The deferral provision in ADEA, entitled "Federal-State relationship," reads in pertinent part:

means of interpreting certain ADEA provisions, where the two statutes use comparable language. In *Oscar Mayer v. Evans*,[67] the Court held that "since the language of [an ADEA provision] is almost *in haec verba* with [an analogous Title VII provision] . . . it may be properly concluded that Congress intended that the construction of [the ADEA section] should follow that of [the Title VII section]."[68] *Oscar Mayer* indicates that interpreting ADEA by analogy to Title VII is a valid method of analysis.

B. Federal Administrative Preclusion Under ADEA

Prior to *Elliot*, the Ninth Circuit in *Nabors v. United States*,[69] relied on the Supreme Court's interpretation of Title VII's deferral provision, section 717(c),[70] to determine the extent of preclusion under the analogous ADEA provision, section 633a(c).[71] The *Nabors* court recognized the Supreme Court's finding that section 717(c) of Title VII allows federal employees to enjoy a trial de novo rather than judicial review of federal administrative factfinding.[72] Noting the judicial tendency to analogize ADEA and Title VII provisions,[73] the Ninth Circuit broadened the *Elliot*

(a) Federal action superseding State action:

Nothing in this Act shall affect the jurisdiction of any agency of any state performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of federal action upon commencement of state proceedings:

In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 U.S.C. § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless proceedings have been earlier terminated . . . .

29 U.S.C. § 633(a), (b) (1982). See *supra* note 13 for Title VII's analogous deferral provision.

67 441 U.S. 750 (1979).

68. *Id* at 756 *See also* Northcross v. Board of Educ., 412 U.S. 427, 428 (1973) (Comparing § 718 of the Emergency School Aid Act of 1972 with § 204(b) of the Civil Rights Act of 1964).

69 568 F.2d 657 (9th Cir. 1978). Prior to judicial construction of 29 U.S.C. § 633, the Ninth Circuit interpreted a similar provision, 29 U.S.C. § 633a. 29 U.S.C. § 633a(c) reads as follows: "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 633a(c) (1982).

70 Section 717(c) reads: "an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 [706] of this title." Title VII § 717(c), 42 U.S.C. § 2000e-16(c) (1982).

71 *Compare* Title VII § 717(c), § 2000e-16(c), *supra* note 70, *with* 29 U.S.C. § 633a(c) (1982) (ADEA), *supra* note 69.

72. 568 F.2d at 659-60. *See* Chandler v. Roudebush, 425 U.S. 840 (1976). *See supra* notes 24, 43 and accompanying text.

73 The court noted that analogy to Title VII in defining ADEA provisions is a common judi-

holding to embrace ADEA section 633a(c). The court reasoned that similarities between the two provisions dictate similar civil actions.[74] The court therefore concluded that ADEA, like Title VII, entitles federal employees to a trial de novo when a federal administrative body has made a "final" decision on the merits.[75]

The Fourth Circuit similarly extended the *Elliot* rationale to the context of ADEA. In *Rosenfeld v. Department of the Army*,[76] the Fourth Circuit recognized under ADEA a presumption against administrative preclusion in unreviewed discrimination cases in subsequent federal court suits.[77] Because Congress entrusted resolution of discrimination claims to the federal judiciary, the court reasoned that legislative policy favors review in federal courts.[78] Citing *Nabors*, the Fourth Circuit concluded that Title VII's bar of administrative preclusion applies "with equal force under ADEA."[79]

C. *State Administrative Preclusion Under ADEA*

Since *Elliot*, the circuit courts have split with respect to whether state administrative findings are entitled to preclusive effect in federal ADEA cases.[80] Although *Elliot* enunciated a test requiring initial deferral to

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cial practice. The court cited United Air Lines v. McMann, 434 U.S. 192, 200 (1977); Dartt v. Shell Oil Co., 539 F.2d 1256, 1259 (10th Cir. 1976), *aff'd by an equally divided Court*, 434 U.S. 99 (1977), *reh'g denied*, 434 U.S. 1042 (1978); Curry v. Continental Airlines, 513 F.2d 691, 693 (9th Cir. 1975). *See also* Moses v. Falstaff Brewing Corp., 525 F.2d 92, 94 (8th Cir. 1975) (noting the similarities of Title VII and ADEA); Goger v. H.K. Porter Co., 492 F.2d 13, 15 (3d Cir. 1974) (comparing Title VII and ADEA provisions).

74. *Nabors*, 568 F.2d at 659.

75. *Id.*

76. 769 F.2d 237 (4th Cir. 1985).

77. *Id.* at 239.

78. *Id.*

79. *Id.* at 240.

80. The following courts have discussed the issue specifically: the Fourth Circuit, in Rosenfeld v. Department of the Army, 769 F.2d 237 (4th Cir. 1985); the Ninth Circuit, in Mack v. South Bay Beer Distrib., 798 F.2d 1279 (9th Cir. 1986); the Seventh Circuit, in Duggan v. Board of Educ., 818 F.2d 1291 (7th Cir. 1987); and the Eighth Circuit, in Stillians v. State of Iowa, 843 F.2d 276 (8th Cir. 1988). For a discussion of these cases see *supra* notes 69-79 and accompanying text; *infra* notes 87-92, 98-132 and accompanying text.

Although only these four circuits have addressed this specific issue, at least three other circuits have recognized the problem. In Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 646 47 (11th Cir. 1987) the court indicated in dictum that, under proper circumstances, it would follow the analysis in *Duggan*. In Gjellum v. City of Birmingham, 829 F.2d 1056, 1070 (11th Cir. 1987), the Eleventh Circuit also held that the importance of federal rights requires that federal courts give no res judicata effect to unreviewed state agency decisions. The court, however, ruled that because the state agency did not afford the appellants an adequate opportunity to litigate their claims, *Elliot*'s effect was

congressional intent, the Court necessarily limited its holding to Title VII and section 1983 actions.[81] Three of the five courts addressing the administrative preclusion issue under ADEA chose not to consider Congress' intent in enacting ADEA.[82] Rather, these courts simply applied the second prong of the *Elliot* test.[83] Of the two courts that actually addressed congressional intent, only one interpreted the ADEA federal-state relationship provision by analogy to Title VII's federal-state relationship provision.[84]

1. Avoiding the Congressional Intent Step

In *Mack v. South Bay Beer Distributors*,[85] the Ninth Circuit, although citing *Elliot*, refused to decide whether Congress intended to bar preclusion under the ADEA. Avoiding the first prong of the *Elliot* test, the court considered only the *Utah* criteria of the second prong.[86] Because the petitioner had no adequate opportunity to litigate his age discrimination claim, the Ninth Circuit declined to apply the federal common-law rule of claim preclusion.[87]

In *Delgado v. Lockheed-Georgia Co.*,[88] the Eleventh Circuit also found it unnecessary to determine whether state administrative findings have preclusive effect in federal court with respect to ADEA claims.[89] While the court found the EEOC persuasive in arguing Congress' preclusive intent was similar for ADEA and Title VII suits,[90] it nevertheless refused to decide this point. Instead, the *Delgado* court resolved the case through the second prong of the *Elliot* test.[91] Because the state agency in

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irrelevant *See supra* notes 44-54 and accompanying text. In Nichols v. City of St. Louis, 837 F.2d 833, 835 (8th Cir. 1988), the court held that state court determinations can preclude Title VII claims brought in federal court.

81 *See supra* note 43 and accompanying text.

82 *See infra* notes 86, 89, 94 and accompanying text.

83 *See supra* notes 50-56 and accompanying text.

84 *See infra* notes 119-23. Courts, however, have frequently construed analogous Title VII and ADEA provisions similarly. *See, e.g.*, Oscar Mayer v. Evans, 441 U.S. 750, 755 (1979) (§ 14(b) of ADEA patterned after § 706(c) of Title VII). *See supra* notes 65-68 and accompanying text.

85 798 F.2d 1279 (9th Cir. 1986).

86. *Id.* at 1283. *See supra* notes 50-56 and accompanying text.

87 798 F.2d at 1283-84.

88 815 F.2d 641 (11th Cir. 1987).

89 *Id.* at 646.

90 *Id.* The court explained that the differences between the deferral mechanisms in ADEA and Title VII suggest that Congress intended to appropriate less deference to state agency adjudications in ADEA claims than in Title VII claims. *Id.*

91 *Id.*

question did not afford the plaintiffs an adequate opportunity to litigate their claims, the court refused to give the agency's finding preclusive effect.[92]

The District Court for the Southern District of New York in *Frank v. Capital Cities Communications, Inc.*[93] similarly saw no need to reach the ADEA administrative preclusion question. In *Frank*, the district court simply assumed, *arguendo*, that unreviewed state administrative determinations are entitled to preclusive effect in federal court, and proceeded to apply the *Utah* factors.[94]

The courts in *Mack*, *Delgado* and *Frank* avoided the first step of the *Elliot* test. These courts reasoned that because the petitioners had no real opportunity to litigate their claims before the appropriate administrative bodies, preclusion did not apply.[95] Although this conclusion is correct, the rationale should rest on *Elliot*'s first prong. Whether a petitioner has had an adequate opportunity to litigate a claim is irrelevant if ADEA claims are not entitled to preclusion in the first place. Thus, the more pressing question is not whether the *Utah* criteria are satisfied, but rather whether Congress intended to bar the preclusive effect of unreviewed state agency determinations in federal court.[96] *Elliot* teaches that only upon reaching a negative answer to the congressional intent question should a court apply the *Utah* standard.[97]

2. *The Congressional Intent Inquiry*

a. Stillians v. State of Iowa

The Eighth Circuit addressed the congressional intent issue in *Stillians*

92. *Id.* at 647. The Eleventh Circuit found it unnecessary to address the administrative adjudication issue because, unlike most states, Georgia had no state agency overseeing discrimination claims. *Id.* at 646-47 n.8. *See* 29 U.S.C § 633(b). The court thus concluded that the plaintiffs were provided no opportunity to litigate their claims. 815 F.2d at 647. Although *Elliot* involved a state (Tennessee) that did have a state agency overseeing discrimination claims, *Elliot*'s rationale is still applicable in *Delgado*. *Elliot*'s foundation rests not on the existence of a state agency, but rather on the congressional intent of the specific statute in question (i.e., whether Congress intended ADEA to supersede traditional notions of state administrative preclusion). *See supra* notes 40-43 accompanying texts.

93. 689 F. Supp. 334 (S.D.N.Y. 1988).

94. *Id.* at 337. In *Frank*, the court stated that it need not even decide the administrative preclusion issue if the facts of the case would not "sustain the bar." *Id.* The court merely assumed that state agency factfinding in ADEA claims has res judicata effect in subsequent federal court suits.

95. *See supra* notes 87, 92 and accompanying text.

96. *Elliot*, 478 U.S. at 791. *See also supra* notes 40-43 and accompanying text.

97. *See supra* notes 55-56 and accompanying text.

v. State of Iowa.[98] Purporting to apply the *Elliot* test, the court first correctly asked whether ADEA manifests congressional intent to bar preclusion of state administrative findings in subsequent federal court suits.[99] The court answered the question in the negative, reasoning that ADEA must clearly and independently exhibit congressional intent to bar administrative preclusion in federal court.[100]

The court noted that when a statute infringes on the common law, a presumption exists favoring common-law principles[101] unless Congress clearly intends otherwise.[102] Because the common-law doctrine of res judicata was firmly established when Congress enacted ADEA,[103] the *Stillians* court upheld the presumption favoring preclusion.[104]

Furthermore, the Eighth Circuit declined to interpret ADEA by analogy to Title VII.[105] The court reasoned that a reviewing court must analyze a statute independently for expressions of congressional intent.[106] If Congress intended ADEA decisions to have the same preclusive character as Title VII decisions, ADEA's language would specifically reflect such an intent.[107] In searching for congressional intent,[108] the Eighth

98 843 F.2d 276 (8th Cir. 1988).

99 *Id.* at 280-83. The Eighth Circuit, although affirming the district court's judgment, employed a different analysis. The district court held that res judicata precluded Stillians from raising her claims in federal court because she could have raised one of her claims before the appropriate state agency, and because another claim was actually litigated before the agency. *Id.* In rejecting this analysis, the Eighth Circuit tacitly followed the reasoning in *Elliot*. A court need not apply the *Utah* test if Congress intended a statute to partially repeal § 1738. Such a statute would prevent administrative preclusion from obtaining in federal court. *See infra* notes 46-48.

100 843 F.2d at 281-82.

101 *Id.* at 280. The court cited Isbrandsten v. Johnson, 343 U.S. 779, 783 (1952) (statute codifying common law to be read with a presumption of favoring long-established and familiar principles)

102 843 F.2d at 280-81.

103 *See supra* note 29 and accompanying text.

104 843 F.2d at 282. "Prior to the adoption of the ADEA, preclusion was alive and well in the federal common law and absent a clear showing of Congressional intent to the contrary it should continue on. Such a showing has not been made in this case." *Id.*

105 *Id.* The majority declared that a comparison of ADEA with Title VII "does not address the ultimate issue whether Congress intended to abrogate traditional rules of preclusion when it enacted the ADEA." *Id.*

106 *See infra* note 109 and accompanying text.

107 *See infra* note 112 and accompanying text.

108 The court noted that Stillians had failed to show evidence of congressional intent to depart from traditional rules of preclusion Instead, she understandably attempted to criticize the district court's analysis *See supra* note 99. The district court, following the *Duggan* analysis (*see infra* notes 116-33 and accompanying text) found too many differences between ADEA and Title VII to permit an inference that Congress intended to bar preclusive effect of state administrative proceedings in

Circuit found that, unlike Title VII, ADEA contains no language inconsistent with traditional rules of preclusion.[109] The court reasoned that, because an ADEA claimant may choose to forego state remedies and pursue a discrimination claim in federal court,[110] it would be anomalous to permit the claimant to file suit anew in federal court after losing at the state level.[111]

Having found no congressional intent to bar preclusion,[112] the Eighth Circuit applied the second prong of the *Elliot* test.[113] The court concluded that Stillians received a full and fair opportunity to litigate her claims before the appropriate state agency.[114] Because the state agency had served in a judicial capacity, the Eighth Circuit gave the agency's determination preclusive effect and refused to decide the case on the merits.[115]

b. Duggan v. Board of Education

In *Duggan v. Board of Education*,[116] the Seventh Circuit held that state administrative determinations have no preclusive effect in subsequent federal court suits with respect to ADEA claims.[117] To reach this conclusion, the court relied heavily on both the language of ADEA and the Supreme Court's analysis in *Elliot*.[118]

The court in *Duggan* first queried whether a federal common-law rule

federal court. The Eighth Circuit expressly repudiated this type of analysis, however, and searched for congressional intent independent of ADEA's legislative and historical ties to Title VII. 843 F.2d at 281-82. The court also noted that there exists no federal policy favoring federal court review of discrimination claims. *Id.* at 281. The court cited Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) and Nichols v. City of St. Louis, 837 F.2d 833 (8th Cir. 1988) in support of its position. *Id.* *See supra* notes 37, 80. Furthermore, the court contended that congressional intent, rather than federal policy, dictated the Supreme Court's ruling in *Elliot*. 843 F.2d at 281.

109. 29 U.S.C. § 633(a) (1982).

110. 843 F.2d at 281. A claimant may choose to initiate suit in either the state or federal system 60 days after filing a complaint with the appropriate state agency. 29 U.S.C. § 633.

111. 843 F.2d at 281. The court reasoned that it would be ludicrous to allow a petitioner to try and possibly fail within the state system, but allow him a second chance at the federal level. The court concluded that such a result would reduce the state administrative proceeding to a testing ground for a petitioner to check the validity of his claim. *Id.* at 281-82.

112. *Id.* at 282.

113. *See supra* notes 50-54 and accompanying text.

114. The court applied Iowa law to determine whether the requirements for administrative issue preclusion were satisfied. The court concluded that the requirements had been met. *Id.* at 283.

115. *Id.*

116. 818 F.2d 1291 (7th Cir. 1987).

117. *Id.*

118. *See supra* notes 36-54 and accompanying text.

of preclusion is consistent with Congress' intent in enacting ADEA.[119] The Seventh Circuit considered whether Title VII and ADEA are sufficiently alike to justify similar bars of administrative res judicata.[120] The court began by comparing the statutes' respective deferral provisions. Because of the parallels between ADEA's section 633[121] and section 706 of Title VII,[122] the court construed the two statutes similarly with respect to administrative preclusion.[123]

The deferral provisions of both statutes allow a claimant to bring suit in several forums, after initiating the claim with the appropriate state or federal agency.[124] The court reasoned that, although Congress initially favored administrative treatment of discrimination claims, it did not intend the judicial process to cease at the administrative level.[125] Given the strong federal policy condemning employment discrimination, Congress probably intended that federal courts review administrative discrimination determinations.[126] In support of this theory, the court pointed to the procedure of hearing Title VII claims in federal court.[127]

According to the *Duggan* court, the difference between the statutes' respective deferral provisions further supports the proposition that administrative preclusion should not obtain in ADEA suits.[128] Under Title VII, a claimant must wait sixty days after commencement of state agency proceedings before filing suit with the EEOC or in federal court.[129] The

119 818 F.2d at 1294. The Supreme Court handed down *Elliot* after the district court had rejected Duggan's ADEA claim (based on issue preclusion), but before the Seventh Circuit had heard the appeal. In *Duggan*, the Seventh Circuit addressed the question whether Congress intended to bar res judicata of ADEA claims brought in federal court after the appropriate state agency had heard the claim and rendered a decision on the merits. *Id.* at 1293 n.7.

120. *Id.* at 1294.

121 *See supra* notes 13, 66.

122. *See supra* notes 13, 66

123 818 F.2d at 1295. The court also explained that citizens of nondeferral states have an advantage over citizens of deferral states. Section 633 dictates that a plaintiff in a deferral state must first submit a claim to the appropriate state agency and wait 60 days before filing suit in federal court. *See supra* note 8. Because § 633 does not encompass claims initiated by citizens of nondeferral states, prior state agency findings do not impede these claims. 818 F.2d at 1295 n.10.

124. *See supra* notes 13, 66.

125 818 F.2d at 1295. The court cited Kremer v. Chemical Constr. Corp., 456 U.S. 461, 478 (1981) as holding that "a prior state court judgment can deny an individual the right to a federal trial de novo on his Title VII claim." 818 F.2d at 1295. *See supra* note 37.

126 818 F.2d at 1295. *See supra* notes 12-17 and accompanying text.

127 818 F.2d at 1295, *citing* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). *See supra* note 17

128. *Id.* at 1296.

129 *See supra* note 13 and accompanying text.

analogous ADEA deferral provision is less stringent. Under ADEA, a claimant may file charges with the EEOC without first filing with the appropriate state administrative body.[130] Furthermore, no Title VII provision is analogous to section 633(a) of ADEA,[131] which explicitly gives federal suits priority over state suits. These distinctions suggest that federal claims are more central to Congress' ADEA scheme than to Title VII's structure. This conclusion in turn weighs in favor of even less deference to state administrative proceedings under ADEA.

From its statutory analysis, the Seventh Circuit concluded that Congress intended to give less deference to ADEA state administrative findings than to similar Title VII state administrative findings.[132] The court thus reasoned that, because the Supreme Court has not given Title VII administrative findings preclusive effect in federal court, administrative findings in ADEA claims likewise have no preclusive effect in federal court.[133]

III. PROPOSAL

This Note proposes the adoption of the *Duggan* analysis[134] and the rejection of *Stillians*.[135] In light of *Elliot* and the obvious parallels between Title VII and ADEA, unreviewed state agency determinations of age discrimination claims should have no preclusive effect in subsequent

130. *See supra* note 8 and accompanying text.

131. 818 F.2d at 1296. Section 633(a) provides that "upon commencement of an action under this chapter, such action shall supersede state action." 29 U.S.C. § 633(a). *See supra* note 66.

132. 818 F.2d at 1297.

133. *Id.* In *Duggan*, the defendant school district argued that because the Supreme Court in *Elliot* relied in part on Title VII § 706(b), 42 U.S.C. § 2000e-5(b) (1982) (which provides that the EEOC must accord "substantial weight" to state agency factfinding in subsequent EEOC suits), and that because ADEA has no comparable provision, the court should not broaden *Elliot*'s rationale to encompass ADEA claims. *Id.* The court pointed out, however, that the Supreme Court's reliance on § 706(b) in support of its conclusion in *Elliot* is not surprising. Section 706(b)'s language indicates that administrative preclusion is inapplicable in Title VII claims. *See supra* notes 21-22 and accompanying text. The absence of a provision in ADEA comparable to § 706(b) strengthens the argument that state administrative factfinding has no preclusive effect in subsequent federal court suits with respect to ADEA claims. Congress added § 706(b) to increase the EEOC's deference to state administrative decisions in Title VII claims. Prior to 1972, the EEOC was under no statutory obligation to defer to state administrative determinations. *See supra* note 22. The absence of a similar provision in ADEA thus supports *Duggan*'s contention that Congress intended to bar administrative preclusion in ADEA claims. *See* 818 F.2d at 1297.

134. *See supra* notes 116-33 and accompanying text.

135. *See supra* notes 98-115 and accompanying text.

federal court suits. The Seventh Circuit's holding in *Duggan* thus represents an appropriate extension of *Elliot*.

In resolving the issue, a reviewing court must first ask whether Congress intended administrative preclusion to obtain in ADEA claims brought in federal court.[136] Although both the *Stillians* and *Duggan* courts raised this question, only the *Duggan* court answered it correctly.[137] The Seventh Circuit in *Duggan* properly compared ADEA to Title VII in its search for congressional intent.[138] The Eighth Circuit, however, refused to make such a comparison.[139]

The Eighth Circuit's inquiry into congressional intent behind ADEA is both incomplete and unsound. A reviewing court must construe ADEA in light of its historical and legislative background.[140] Not only have courts frequently looked to Title VII for assistance in interpreting analogous ADEA provisions,[141] but the Supreme Court expressly approved of this strategy.[142] The *Stillians* court, however, rejected this approach,[143] citing no authority for its position.[144] The Eighth Circuit

136 *See Elliot*, 478 U.S. at 791. *See also supra* notes 40, 55 and accompanying text.

137. *See supra* notes 98-100, 119, 132 and accompanying text.

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

139 The court in *Stillians* found the *Duggan* analysis of "dubious validity" because the Fourth Circuit defined its task as comparing Title VII and ADEA to find whether similar bars of state administrative preclusion exist. *Stillians*, 818 F.2d at 1297. The *Stillians* court, however, failed to cite authority supporting its proposition that statutory interpretation by analogy is intrinsically inappropriate.

140 *See infra* notes 57-68 and accompanying text.

141. *See supra* notes 67-68, 73 and accompanying text.

142. Oscar Mayer v. Evans, 441 U.S. 750, 756 (1979). See *supra* notes 67-68 and accompanying text.

143. 843 F.2d at 281-82. Although the court asserted that statutory analysis by way of analogy is improper, it proceeded to compare Title VII with ADEA to support its conclusion. *Id.* at 281-82. Chief Judge Lay, in dissent, stated that "[t]he majority concludes without any supporting authority that a comparison of the ADEA and Title VII is inappropriate. Yet the majority opinion proceeds to make just such a comparison immediately following that conclusion." *Id.* at 283-84 n.1 (Lay, C.J., dissenting). Specifically, the court first noted that ADEA must be examined independently for expressions of congressional intent. *Id.* at 281 The court next declared that the absence of a provision similar to Title VII § 706(b), 42 U.S.C. § 2000e-5(b) "in the ADEA goes far toward resolving the issue." *Id.* The court's conclusion contradicts its earlier refusal to interpret a statute by analogy.

144. *See supra* note 111. In fact, the Supreme Court case of Oscar Mayer v. Evans, 441 U.S. 750 (1979) directly undermines the analysis in *Stillians* and supports *Duggan*'s position. *See supra* notes 67-68 and accompanying text. In addition, by refusing to compare ADEA with Title VII, the Eighth Circuit unwittingly departed from *Elliot*'s precedent. In *Elliot*, the Supreme Court compared § 1983 and Title VII to determine whether similar preclusive characteristics existed. *See supra* notes 44-46 and accompanying text. Although the Supreme Court did not hold that statutes comparable to Title VII have comparable preclusive effect, it implicitly approved statutory analysis by way of analogy.

isolated ADEA and drew independent conclusions based solely on the statute's language. The court thus performed merely a perfunctory linguistic analysis, ignoring a historical examination.

The Eighth Circuit's construction of ADEA's language is also misplaced. Section 633(b) requires a petitioner to file a complaint with the appropriate state agency at least sixty days before filing suit in federal court.[145] The *Stillians* court reasoned that, because an ADEA claimant may bypass state remedies after sixty days, she has "the discretion to forego state remedies in favor of a federal lawsuit."[146] Initially, however, the claimant has no choice. Section 633(b) forces her to wait sixty days before filing a federal claim. A claimant thus has no real "choice" until the sixty-day time limit expires.[147] This restriction greatly undermines the court's assertion that giving claimants a "choice" reduces state agencies to mere testing grounds for future federal court suits.[148]

The court in *Stillians* further erred by refusing to look to Title VII for assistance in evaluating ADEA. Although ADEA legislative history is silent with regard to whether administrative adjudications of ADEA claims have preclusive effect in federal court,[149] this silence does not end the inquiry. Title VII and ADEA both represent congressional concern for discrimination in the workplace.[150] Title VII combats discrimination on the basis of race, color, national origin, religion, and sex,[151] while ADEA prohibits discrimination on the basis of age.[152] Intuitively, one can assume that Congress intended analogous provisions in the respective statutes to yield similar interpretations. This proposition is particularly true in light of the fact that Title VII engendered the enactment of the ADEA.[153] Having debated various controversies in the enactment of Title VII and its amendments, Congress found it unnecessary to reconsider these issues when enacting ADEA and its amendments. Congressional desire to avoid repetitious debates sufficiently explains the lack of ADEA legislative history on the administrative res judicata issue.[154]

145. *See supra* note 66 and accompanying text.

146. *Stillians*, 843 F.2d at 282. *See supra* notes 110-11 and accompanying text.

147. *See supra* notes 66, 124 and accompanying text.

148. *Stillians*, 843 F.2d at 282.

149. *See supra* note 63 and accompanying text.

150. *See supra* notes 1-4, 12-17, 57-60 and accompanying text.

151. *See supra* note 12 and accompanying text.

152. *See supra* note 59-60, 65.

153. *See* Title VII § 715, 42 U.S.C. § 2000e-14 (1982); DEP'T OF LABOR REP., *supra* note 1.

154. *See* Rosenfeld v. Department of the Army, 769 F.2d 237 (4th Cir. 1985); Nabors v. United States, 568 F.2d 657 (9th Cir. 1978); *supra* notes 69-79 and accompanying text.

Arguably, the enactment of a separate statute to deal with age discrimination is indicative of congressional intent to distinguish Title VII and ADEA. However, the differences between the respective federal-state relationship provisions reveal that federal courts actually must give less deference to state agency determinations in ADEA claims than in Title VII claims.[155] Congress apparently attached greater significance to federal judicial resolution of age discrimination claims than to the similar resolution of Title VII claims. Because *Elliot* held that Title VII administrative adjudication has no preclusive effect in federal court,[156] the adjudication of age discrimination claims merits the same treatment.

IV. CONCLUSION

The Seventh Circuit in *Duggan* performed an exhaustive study of the comparable deferral provisions in ADEA and Title VII. The court's analysis is sound and complete. Both the language of ADEA and its obvious parallels to Title VII indicate the need to broaden *Elliot*'s rationale to encompass ADEA claims. The *Duggan* court, recognizing these inherent similarities between the two statutes, appropriately held that unreviewed state administrative determinations of age discrimination claims have no preclusive effect in subsequent federal court suits.

Clifford R. Perry III

155 *Duggan*, 818 F.2d at 1296 *See supra* text following note 131; *supra* note 132 and accompanying text.

156. *See supra* note 37 and accompanying text.