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# Probing the Process: Should Agency Investigations Preclude Plaintiffs from Access to a Judicial Remedy?

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# PROBING THE PROCESS: SHOULD AGENCY INVESTIGATIONS PRECLUDE PLAINTIFFS FROM ACCESS TO A JUDICIAL REMEDY?

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## INTRODUCTION

Kevin Murray was a quality assurance auditor with Alaska Airlines (Alaska).[1] During the course of his employment he brought safety concerns to the Federal Aviation Administration (FAA).[2] Subsequently, Murray's position with Alaska was outsourced and he was not rehired.[3] Murray voluntarily filed an administrative complaint pursuant to the Whistleblower Protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[4] The Secretary of Labor conducted an ex parte investigation, considering Murray's written complaint, as well as Alaska's written response and Alaska's witness testimony.[5] Murray was never contacted by the Secretary's investigator, was never given the chance to see the documents provided by Alaska, was never permitted to submit additional information, and was never given the opportunity to respond to Alaska's arguments.[6] After the conclusion of the investigation, Murray was notified that his complaint had been dismissed, and that he had thirty days to seek an appeal.[7] Instead, Murray filed a new action in California state court, and his complaint was subsequently dismissed by the California Supreme Court under the doctrine of issue preclusion.[8]

Murray's decision to seek an administrative remedy ultimately kept him out of court, despite the fact that he never had the opportunity to come face to face with his former employer, or even to respond to the arguments and evidence Alaska submitted in its de-

1. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 567 (Cal. 2010).
2. *Id.*
3. *Id.*
4. *Id.*; 49 U.S.C. § 42121 (2006).
5. *Murray*, 237 P.3d at 567.
6. *Id.*
7. *Id.* at 567–68.
8. *Id.* at 568.

fense.[9] The decision by the California Supreme Court seems undeniably harsh in a legal environment that values the adversarial system[10] and the notion that every person deserves his day in court.[11]

Murray is one of three individuals discussed in this Note who was denied access to the judicial system due to an investigative finding by an administrative agency. The validity of those denials is questionable in light of the Supreme Court's decision in *United States v. Utah Construction & Mining Co.*[12] *Utah Construction* is the seminal case legitimizing the application of administrative preclusion.[13] In *Utah Construction*, the Court noted three requirements essential to the validity of administrative preclusion:

(1) the administrative agency must be acting in a judicial capacity;
(2) the agency must resolve issues properly before it; and
(3) the parties must have had an adequate opportunity to litigate.[14]

The dissent in *Murray* expressly noted that the proceedings Murray was afforded were not nearly sufficient to support a finding of preclusion and pointed to missing elements that would have created an adequate opportunity to litigate: "[N]o California case has allowed what the majority countenances here—issue preclusion for

9. *Id.* at 567.

10. *See, e.g.*, Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 KAN. J.L. & PUB. POL'Y 5, 12–15 (Spring 1993) (describing various justifications for the adversarial system); John Thibaut, Laurens Walker, Stephen LaTour & Pauline Houlden, *Procedural Justice as Fairness*, 26 STAN L. REV. 1271, 1287–88 (1974) (finding subjects in an experiment viewed adversarial procedures as "the most preferable and the fairest mode of dispute resolution.").

11. *See, e.g.*, Martin v. Wilks, 490 U.S. 755, 762 (1989) (noting "our deep-rooted historic tradition that everyone should have his own day in court") (internal quotation marks omitted); Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-In-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1877 (2009) (offering a theoretical explanation for the day-in-court ideal).

12. 384 U.S. 394 (1966).

13. The Court in *Utah Construction* specifically referred to the application of res judicata to administrative decisions, using the term "administrative preclusion" to indicate both res judicata and collateral estoppel (claim and issue preclusion, respectively). *Id.* at 422. For the sake of simplicity, this Note will refer to both claim and issue preclusion as they apply to administrative decisions as "administrative preclusion." Any distinctions as to which doctrine is the subject of the opinions analyzed will be noted in the summaries of the cases. Where the doctrines are specifically indicated, they will be referred to as "claim preclusion" and "issue preclusion," rather than the more traditional "res judicata" and "collateral estoppel."

14. *Utah Constr.*, 384 U.S. at 422.

findings rendered without any prior opportunity for a hearing, the submission of evidence, the confrontation of witnesses, or the presentation of argument."[15]

The aim of this Note is to determine exactly how courts[16] analyze and determine issues of administrative preclusion. Specifically, this Note examines the narrow question of how courts scrutinize administrative preclusion when faced with only an ex parte investigative finding.[17] This particular question was selected because, in theory, the inherently nonjudicial character of an agency investigation offers the best assessment of how faithfully courts adhere to the *Utah Construction* framework.[18] From the small number of cases analyzed (seven) it appears that courts are split on the interpretation of the *Utah Construction* framework. One approach requires the agency to have acted in a judicial capacity and the parties to have had an adequate opportunity to litigate *at the time the administrative decision was rendered*. Another approach simply requires those elements to have been available to the claimant *somewhere within the statutory scheme*. That is, the second approach would grant preclusive effect to a decision rendered after a mere investigation, provided that available procedures would have assured adequate opportunity to litigate the decision of an agency acting in a judicial capacity if the claimant had followed through with the statutory review provisions.

This Note argues that courts are right to preclude additional litigation where the statutory remedy comports with notions of due process and where the statute provides clear notice as to the finality

15. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 580 (Cal. 2010) (Werdegar, J., dissenting).

16. Due to the small number of opinions that discuss the application of administrative preclusion to agency investigative proceedings, this Note considers the opinions of both federal and state courts.

17. For the purposes of this Note, "investigative findings" and "investigations" will refer to ex parte proceedings in which no hearing took place. The basic procedures used in each investigation are discussed in the case summaries.

18. It is a potential concern that an analysis of seven cases discussing six different statutes may seem inadequate to address a tenet of administrative preclusion. This is worrying in the sense that administrative law centers on statutory interpretation and application, and the interpretation of any given statute can depend on the particular provision implicated by the case, the overall statutory scheme, or even other statutes that speak to the particular topic at issue. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000). On the one hand, this makes the idea of drawing broad generalizations about administrative preclusion from six different statutes quite concerning. On the other hand, this Note attempts to examine a doctrine that is *universally* applicable to administrative preclusion, regardless of organic statute. Thus, the fact that different statutes play a role in the analysis is irrelevant, because the concepts of *Utah Construction* and its attendant due process requirements must apply to all of them.

of the agency decision. Administrative preclusion should be considered proper even where the litigant has failed to follow through with available procedures, and thus has not experienced a proceeding that resembles litigation in court. What is needed is a clear articulation of the judicial policy of adhering to clear statutory mandates of repose. That is, litigants have the right to know that the judicial character of the agency decision is not the determinative factor when considering administrative preclusion. Rather, it is the presence of adequate remedial procedures within the statutory scheme, combined with sufficient notice to any claimant that initiation of some avenues, or failure to follow through with others, will result in a firmly closed door as far as judicial relief is concerned.

Part I offers a brief doctrinal background of claim and issue preclusion and their applications to administrative determinations. Part II outlines distinctive factors applied in court opinions that discuss whether administrative preclusion should be applied to a judgment or finding rendered by an agency after conducting an investigation. Part III offers an analysis of the more noteworthy factors from Part II, and considers whether the courts' determinations are in keeping with *Utah Construction*, the Due Process Clause, and the deference paid by courts to the legislative branch. Part IV suggests an approach to administrative preclusion that can be viewed as predictable and fair, yet still in line with the goals of efficiency and judicial economy that are so central to doctrines of preclusion.

## I.
## DOCTRINAL BACKGROUND

### *A. Claim and Issue Preclusion After Judicial and Administrative Determinations*

The doctrines of claim and issue preclusion, traditionally referred to respectively as res judicata and collateral estoppel, have long been applied in courts in the United States.[19] Res judicata may be used broadly to refer to both claim preclusion and issue preclusion—two distinct doctrines that confer finality on decisions previously made by a court of law.[20] Claim preclusion refers to the preclusive effect of a prior *judgment*, and reflects the principle that

19. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398–99 (1981); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 322 (1979); Hart Steel Co. v. R.R. Supply Co., 244 U.S. 294, 297–99 (1917); S. Pac. R.R. Co. v. United States, 168 U.S. 1, 65 (1897).

20. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 2012).

a party cannot relitigate all or part of a previously litigated claim, nor raise in a second action any claims that could have been raised in the first action.[21] Issue preclusion refers to the preclusive effect of factual and legal *issues* previously decided, and binds the parties who litigated that issue to the findings made.[22]

The Supreme Court established the validity of applying preclusive doctrines to decisions made by administrative agencies in *United States v. Utah Construction & Mining Co.*[23] The Court 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."[24] This passage has been quoted often in both federal and state court opinions discussing administrative preclusion.[25] In *University of Tennessee v. Elliot*, the Supreme Court clarified that administrative preclusion applies to determinations by both federal and state agencies.[26] The *Elliot* Court reiterated the *Utah Construction* factors when it applied administrative preclusion to the state agency's finding.[27]

Although *Utah Construction* establishes conditions that attach to the application of administrative preclusion, there is no one-size-fits-all formula for determining when preclusion is appropriate. Commentators note that "[i]t is difficult to state a general formula to capture the essential elements of adjudicatory procedure that may entitle administrative decisions to preclusion effects in subsequent judicial proceedings."[28] The Restatement (Second) of Judg-

21. *See Migra*, 465 U.S. at 77 n.1; RESTATEMENT (SECOND) OF JUDGMENTS: EFFECTS OF FORMER ADJUDICATION—GENERAL RULES § 17 (1982).

22. *See Migra*, 465 U.S. at 77 n.1; RESTATEMENT (SECOND) OF JUDGMENTS: ISSUE PRECLUSION—GENERAL RULE § 27 (1982).

23. 384 U.S. 394 (1966). The Court held that the findings of the agency's adjustment board were final and conclusive within the meaning of the Wunderlich Act, Pub. L. No. 83-356, 68 Stat. 81 (1954) (repealed 2011), and were binding on the Court of Claims. *Id.* at 399.

24. *Id.* at 422.

25. *See, e.g.*, Miller v. Cnty. of Santa Cruz, 39 F.3d 1030, 1033 (9th Cir. 1994); Compton v. U.S. Dep't of Energy, 706 F.2d 260, 262 (8th Cir. 1983); Gear v. City of Des Moines, 514 F. Supp. 1218, 1220 (S.D. Iowa 1981); Indus. Comm'n v. Moffat Cnty. Sch. Dist. RE No. 1, 732 P.2d 616, 620 (Colo. 1987) (en banc); Lindas v. Cady, 515 N.W.2d 458, 466 n.6 (Wis. 1994).

26. 478 U.S. 788, 798 (1986) (noting that "both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources is equally implicated whether factfinding is done by a federal or state agency.") (internal citation omitted).

27. *Id.* at 797–98.

28. 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4475, at 483 (2d ed. 2002). *See generally* Lon L.

ments explains that an adjudicative finding by an administrative tribunal is conclusive under res judicata when five factors are present, indicating that the administrative proceeding "entailed the essential elements of an adjudication."[29] However, even the Restatement's summation of adjudicative elements is rounded off by a catchall factor: "[S]uch other procedural elements as may be necessary."[30] Thus, as with other common law doctrines of repose, the concept of administrative preclusion is decidedly (and necessarily) amorphous.[31]

Administrative preclusion should not be confused with administrative exhaustion, which is a doctrine requiring that a claimant fully complete available administrative remedies before a judicial claim becomes available.[32] The statute providing the remedy requires that a claimant first exhaust administrative remedies and delineates the procedures for doing so.[33]

Unlike administrative exhaustion, which derives purely from statutory authority, administrative preclusion has its origins in the common law and so has a potentially more flexible use as a bar to a judicial forum. Despite the common law foundation of preclusive

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Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353 (1978) (discussing "adjudication in the very broadest sense.").

29. RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83(2) (1982).

30. *Id.* § 83(2)(e).

31. *See, e.g.*, Robert P. Morris, *How Many Bites Are Enough? The Supreme Court's Decision in* University of Tennessee v. Elliot, 55 TENN. L. REV. 205, 256 (1988) (noting that it was the practice of some courts to apply the administrative preclusion doctrine flexibly); Robert Ziff, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 953 (1992) (discussing the unforeseeable and flexible nature of preclusion and stating that "it is impossible to design a system of res judicata in which preclusion is both fully inclusive and foreseeable").

32. *See generally* 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES § 26:1, at 434 (1989) ("Exhaustion of administrative remedies before going to court is sometimes required and sometimes not."); Ralph F. Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817, 859–911 (1976) (describing how the administrative exhaustion is one prerequisite to the availability of judicial review); Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1 (1984) (examining the doctrine of administrative exhaustion in the context of environmental litigation).

33. *See, e.g.*, Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(1)(A) (2002) (describing the procedure for filing a Sarbanes-Oxley Civil Enforcement Action); Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1326 (S.D. Fla. 2004) ("[B]efore an employee can assert a cause of action in federal court under the Sarbanes-Oxley Act, the employee must file a complaint with the Occupational Safety and Health Administration ('OSHA') and afford OSHA the opportunity to resolve the allegations administratively.") (internal quotation marks omitted).

doctrines, courts routinely consult and interpret the source of the claimant's remedy—the statute—when determining whether administrative preclusion is applicable. For example, in *Utah Construction*, the Supreme Court specifically referred to the statutory language in discussing the limits of issue preclusion as they applied them to the case:

> [T]he finality accorded administrative fact finding by the disputes clause is limited by the provisions of the Wunderlich Act of 1954 which directs that such a decision 'shall be final and conclusive unless the same is fra(u)dulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.'[34]

The importance of statutory interpretation and the adherence to statutory provisions by courts assessing administrative preclusion is considered more fully in Parts III and IV.

### *B. Due Process Protections for Those Facing Preclusion*

Any decision that impacts or terminates a liberty or property right implicates the Due Process Clauses of the Fifth and Fourteenth Amendments.[35] One such property interest is the right to pursue a remedy in court, which is affected by a decision to enforce a preclusive doctrine.[36] Thus courts addressing the issue of administrative preclusion must ensure that the claimant was afforded due process.[37]

Determining whether due process has been afforded in a given proceeding is not a purely binary inquiry. As the Supreme Court

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34. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 399 (1966).

35. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 260 (1970) ("The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits.").

36. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 312–13 (1950) (holding that a cause of action is a form of intangible property protected by the Due Process Clause); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (finding that plaintiff's FEPA claim was a constitutionally protected property right); Jay Carlisle, *Getting a Full Bite at the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84–85 (1986) ("Concepts of fair play and due process have consistently been important policy considerations for courts when considering issue preclusion.").

37. *See* Kremer v. Chemical Const. Corp., 456 U.S. 461, 482 (1982) (noting that a state's administrative remedy must comply with the minimum requirements of due process); Joel deJesus, *Interagency Privity and Claim Preclusion*, 57 U. CHI. L. REV. 195, 204 (1990) ("Due process considerations are also important to analyzing claim preclusion in the administrative context.").

stated in *Mathews v. Eldridge*, determining the standards of due process requires a consideration of:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[38]

Thus, the due process requirement in any administrative preclusion analysis will be very case specific. Given the amorphous nature of administrative preclusion, it would seem to be nearly impossible to predict what process a claimant is due when she decides to pursue an administrative remedy. On the one hand, Judge Friendly has said that "some kind of hearing" is necessary before properly depriving an individual of his property interests.[39] On the other hand, one court has noted, "we have never held that such a hearing is a precondition to administrative preclusion."[40]

Regardless of the inherent difficulty of articulating a predictable and inclusive due process standard for administrative remedies, the Due Process Clause provides the minimum requirements for administrative preclusion. A significant aspect of due process is the notice requirement: "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[41] In the context of administrative preclusion, the notice requirement could be considered applicable to the determination of whether preclusion is proper—that is, courts could look to whether claimants were on notice of the administrative proceeding's potential for finality

38. 424 U.S. 319, 335 (1976); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[W]e are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due."); Pamela A. Mann, *Federalism Issues and Title VII:* Kremer v. Chemical Construction Corp., 13 N.Y.U. REV. L. & SOC. CHANGE 411, 436 (1984–1985) ("In resolving due process claims, the courts pursue a two part inquiry: (1) whether the interest asserted is a protected one, and (2) if so, what process was due prior to infringement of the interest.").

39. Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974). *See generally* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267 (1975) (discussing the development and elements of the hearing requirement).

40. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012).

41. Jones v. Flowers, 547 U.S. 220, 226 (2006) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

and subsequent preclusion when deciding whether to enforce repose.[42] The significance of this "notice floor" is considered further in Part IV.

## II.
## FACTORS CONSIDERED BY COURTS WHEN REVIEWING THE PRECLUSIVE EFFECT OF AN INVESTIGATIVE PROCEEDING

In order to determine whether courts look to the *Utah Construction* requirements—specifically, agency action in a judicial capacity and parties having an adequate opportunity to litigate—this Note analyzes opinions that discuss preclusive doctrines as they apply to an agency investigation. The rationale for this methodology is that an investigative proceeding (as opposed to an administrative hearing) bears little resemblance to pursuing litigation in court, and so, facially, an investigation would not satisfy the *Utah Construction* requirements.[43] "Investigation" refers generally to an ex parte proceeding, in which the parties submit a complaint and response to an agency official or employee (an investigator), and the investigator reviews the material and issues a finding.[44] The investigator is not an administrative law judge (ALJ), but rather an employee or official of the executive branch of the state or federal government.[45]

With this investigative requirement in mind, seven court opinions have addressed the narrow question of whether administrative preclusion should apply to an agency investigation.[46] Court opinions in which the claimant was granted or pursued an administra-

42. Mann, *supra* note 38, at 452 ("The due process cases, the administrative preclusion cases, and the full and fair opportunity cases all focus on whether the basic elements of notice and meaningful opportunity to be heard have been met.").

43. *See supra* note 13 and accompanying text.

44. *See, e.g.*, 49 U.S.C. § 42121(b)(2)(A) (2006) ("Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit . . . ."); Alaska Stat. § 18.80.110 (2006) ("The executive director or a member of the commission's staff designated by the executive director shall informally investigate the matters set out in a filed complaint."); Iowa Code § 88.9(3)(b)(2) (2008) ("Upon receipt of the complaint, the commissioner shall conduct an investigation as the commissioner deems appropriate.").

45. *See supra* note 44 and accompanying text.

46. Herrera v. Churchill McGee, LLC, 680 F.3d 539 (6th Cir. 2012); Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322 (S.D. Fla. 2004); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210 (W.D. Wash. 2003); Parson v. State, 189 P.3d 1032 (Alaska 2008); Murray v. Alaska Airlines, Inc., 237 P.3d 565 (Cal. 2010); George v. D.W. Zinser Co., 762 N.W.2d 865 (Iowa 2009); Mac Home Improvement Co., Inc.

tive hearing were not used. The searches were conducted entirely on WestlawNext between September and November of 2012.[47] Three of the seven courts—*Murray*, *Herrera*, and *Fadaie*—applied administrative preclusion and prevented the claimants from pursuing all or part of their claims in court.[48]

After a careful reading of the seven court opinions, a pattern of factors discussed by the courts emerged, as shown in Appendix A.[49] The factors highlighted for discussion are: (1) whether the selection of an administrative remedy was voluntary or required by statute; (2) whether additional review procedures for the agency finding were available but not taken; (3) whether the factors from *Utah Construction* (or an analogous state opinion) were cited and how they were treated; (4) whether the claimant had an attorney; and (5) whether the agency finding became final under the statute. Factor five was found to correlate directly with a court's decision to apply administrative preclusion—if the statute mandated finality, the court would give the agency finding preclusive effect, regardless of the fact that the finding was rendered after a mere investigation. Factor four appeared in only three out of the seven opinions, but it is considered noteworthy because it was emphasized by two of the three courts that decided administrative preclusion was appropriate. The remainder of this Part summarizes the courts' treatment of each factor and notes any correlations with the existence of a particular factor and the application of administrative preclusion.

### *A. Voluntary Election of Administrative Remedy*

The claimants in four of the seven cases voluntarily elected to pursue an administrative remedy before filing a claim in federal or state court.[50] Voluntary pursuit of administrative remedy did not correlate directly with the court's ultimate decision on whether or not to apply administrative preclusion: although all three applica-

v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498 (Ohio Ct. App. Mar. 30, 2000).

47. Examples of search criteria include: (1) "administrative /s preclusion issue claim", search "investigat!" within results, in all state and federal jurisdictions; (2) "administrat! and investigat! and preclu!", search "utah cons!" within results, in all state and federal jurisdictions; and (3) "administrative agency judicial capacity", search "investigat! and preclu!" within results, in all state and federal jurisdictions. The above list of searches performed is not exhaustive.

48. *See Herrera*, 680 F.3d 539; *Fadaie*, 293 F. Supp. 2d 1210; *Murray*, 237 P.3d 565.

49. *See infra* Tables 1–2.

50. *See Herrera*, 680 F.3d 539; *Fadaie*, 293 F. Supp. 2d 1210; *Parson*, 189 P.3d 1032; *Murray*, 237 P.3d 565.

tions of administrative preclusion occurred in cases in which the claimant had pursued an administrative remedy by choice,[51] one of the cases that did not apply administrative preclusion also involved a voluntary administrative filing.[52]

The claimants in *Fadaie*, *Murray*, *Parson*, and *Herrera* all chose to file a complaint in pursuit of an administrative remedy despite having the option of pursuing a claim directly in court. Fadaie and Murray both filed administrative claims with the Department of Labor pursuant to the Whistleblower Protection Provision (WPP) of AIR 21,[53] and both made the decision voluntarily.[54] Herrera also decided to bring his complaint to a local agency, the Lexington-Fayette Urban County Human Rights Commission (FUCHRC), rather than file a claim in state court.[55] In Kentucky, victims of state civil rights violations can choose to file a claim either in state court[56] or with the FUCHRC.[57] Finally, Parson chose to file a claim with the Alaska State Commission for Human Rights, although he could have filed a claim in superior court.[58]

The claimant's pursuit of administrative rather than judicial relief in the *George* case is more difficult to categorize as either clearly voluntary or clearly involuntary. In *George*, the Supreme Court of Iowa was faced with an issue of first impression: whether Iowa's Occupational Safety and Health Act (IOSHA) provided an exclusive administrative remedy for a claim of retaliatory discharge.[59] Thus it is unclear whether George in fact chose to pursue an administrative remedy or whether he felt he was required to do so. After reading the statute, the court determined that the administrative remedy was not exclusive, and George was permitted to file a claim of retali-

51. *See Herrera*, 680 F.3d 539; *Fadaie*, 293 F. Supp. 2d 1210; *Murray*, 237 P.3d 565.

52. *See Parson*, 189 P.3d 1032.

53. 49 U.S.C. § 42121(b)(1) (2006).

54. *Fadaie*, 293 F. Supp. 2d at 1217; *Murray*, 237 P.3d at 567.

55. *Herrera*, 680 F.3d at 542.

56. KY REV. STAT. ANN. § 344.450 (1996) ("Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations.").

57. *Id.* at § 344.200 ("Any individual claiming to be aggrieved by an unlawful practice . . . may file with the commission a written sworn complaint . . . .").

58. Parson v. State, 189 P.3d 1032, 1036 (Alaska 2008) ("The Alaska Human Rights Act creates concurrent jurisdiction over discrimination claims; both the Commission and the superior court can hear a discrimination claim under the Act.").

59. George v. D.W. Zinser Co., 762 N.W.2d 865, 871 (Iowa 2009) ("Our court has yet to determine whether an individual can bring a private cause of action for wrongful discharge in violation of the public policy behind IOSHA.").

atory discharge in a court of law.[60] The court pointed out, "The language in section 88.9(3) is permissive. 'An employee who believes that the employee has been discharged . . . in violation of this subsection *may* . . . file a complaint with the commissioner alleging discrimination.'"[61]

The claimants in *Mac Home* and *Hanna* were required to first pursue an administrative remedy before filing a complaint in a court of law. The *Mac Home* dispute stemmed from a general contractor's (Mac Home Improvement Company) obligation to pay prevailing wage rates to its employees.[62] Disputes of this type must be resolved administratively through the Department of Labor.[63] Hanna was also required to seek an administrative remedy for the complaint that he filed seeking damages under the Sarbanes-Oxley Act for retaliatory discharge.[64] Neither Hanna nor the Cuyahoga Metropolitan Housing Authority (the claimant in *Mac Home*) was precluded from seeking a judicial remedy after receiving an adverse ruling from the administrative agency.[65]

Given the divergent results of *Herrera*, *Murray*, and *Fadaie*, where the court applied administrative preclusion, as opposed to *Parson* (and possibly *George*), where the court did not apply administrative preclusion, the voluntary election of an administrative remedy does not necessarily inform a court's decision regarding the application of administrative preclusion. The relevance of this factor lies in the emphasis the courts applying administrative preclusion placed on the claimant's choice. Although the *Herrera* court did not specifically discuss the implications of Herrera's choice to pursue an administrative remedy, both the *Fadaie* and *Murray* courts indicated that a claimant who chooses to file an administrative claim must deal with the consequences of not following through with available procedures. The *Fadaie* court pointed to Fadaie's decision to seek an administrative remedy when it ruled that he was precluded from further relief:

> The WPP procedures are not mandatory, however, and merely afford "an additional remedy for plaintiffs seeking to advance a

60. *Id.* at 871–72.

61. *Id.* at 872 (quoting IOWA CODE § 88.9(3)(b)(1) (1988)).

62. Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Housing Auth., No. 75314, 2000 WL 336498, at *1–2 (Ohio Ct. App. Mar. 30, 2000).

63. *Id.*, at *3–4 (citing Disputes Concerning Payment of Wages, 29 C.F.R. § 5.11 (2011)).

64. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1324 (S.D. Fla. 2004) (citing Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(1)(A) (2002)).

65. *Id.* at 1330–31; *Mac Home Improvement Co., Inc.*, 2000 WL 336498, at *5–6.

> retaliatory discharge claim." . . . Mr. Fadaie could have elected to forego his administrative options and file his whistleblower claims directly in a court of law. However, this choice of remedies ended once plaintiff initiated the administrative complaint process and obtained a final decision from the Secretary of Labor.[66]

The *Murray* court made an even more pointed remark about Murray's voluntary selection of an administrative remedy when it pointed out that a failure to apply administrative preclusion would allow him an extra chance to get the result he wanted:

> By choosing to proceed under the AIR 21's federal administrative whistleblower protection scheme, Murray availed himself of these distinct advantages. To allow him to relitigate the factual issue of causation decided against him in the Secretary's final nonappealable order in this subsequent court action between the same parties would reduce the AIR 21 statutory scheme to a mere rehearsal for litigation . . . .[67]

It is of course worth pointing out that the opinions of only two courts (of different jurisdiction) are insufficient to conclusively point to a trend in judicial determinations. The inclusion of this observation is meant largely to serve as a caution to potential claimants and attorneys: courts may not be sympathetic to claims regarding the arguable insufficiency of procedures when the claimant chooses to pursue an administrative remedy and subsequently fails to follow through with it.

### *B. Availability of Additional Review Procedures*

The claimants in all of the cases except *Mac Home* had the opportunity to pursue further review of the agencies' investigative findings but chose not to do so. For example, Herrera was notified of "his right to apply for reconsideration," and was told that a failure to seek reconsideration within twenty days would result in the issuance of "an Order of Dismissal."[68] Similarly, Murray was notified of his right to file objections with the Department of Labor and to seek a hearing before an administrative law judge.[69] The same is true of George and Fadaie.[70] In the case of Hanna, additional re-

66. Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1220 (W.D. Wash. 2003) (citations omitted).

67. *Murray*, 237 P.3d at 577 (internal quotation marks omitted).

68. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 543 (6th Cir. 2012).

69. *Murray*, 237 P.3d at 567–68.

70. *See Fadaie*, 293 F. Supp. 2d at 1219 ("Mr. Fadaie opted not to request a hearing before an Administrative Law Judge."); George v. D.W. Zinser, 762 N.W.2d

view procedures were available by statute, but the agency did not issue its finding within the required timeframe.[71] Thus Hanna did not have an agency finding to review at the time he decided to initiate a lawsuit.[72]

Parson's options for additional review were less clear. Under Alaska law, where the Commission for Human Rights (CHR) finds substantial evidence of discrimination, it is required to attempt to work towards conciliation.[73] The *Parson* court stated, "By implication, if the investigator determines that the allegations of the complaint are not supported by substantial evidence, the complaint is dismissed."[74] Thus it is not clear from the statute whether there is a specific statutory review process if the CHR determines that the complaint should be dismissed. Presumably the default provisions of the Alaska Administrative Procedures Act (AAPA) provided Parson with an avenue for judicial review.[75] After the CHR dismissed his complaint, Parson filed a complaint in state court.[76] The trial court granted summary judgment against Parson but converted his state claim into an administrative appeal so that he would have further opportunity for judicial review.[77] Parson voluntarily dismissed the administrative appeal in order to obtain a final judgment and then appealed that judgment to the Alaska Supreme Court.[78] Unless one argues that Parson should have pursued an administrative appeal under the AAPA, it seems that Parson pursued the avenues for review that were available to him without voluntarily forfeiting any additional review.

The claimant in *Mac Home*, the Cuyahoga Metropolitan Housing Authority (CMHA), did not have any additional review procedures available to it under the statute. In stating that "CMHA did not have an ample opportunity to litigate its position with the Department of Labor," the *Mac Home* court pointed to the Labor De-

865, 867 (Iowa 2009) ("George did not seek judicial review of the commissioner's decision under Iowa Code section 17A.19.").

71. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1326 (S.D. Fla. 2004) ("Contrary to the guidelines set forth in 29 C.F.R. § 1980.105(a), Mr. Hanna did not receive OSHA's preliminary findings 'within 60 days of the filing of [his administrative] complaint.'").

72. *Id.*

73. ALASKA STAT. 18.80.110 (2006).

74. Parson v. State, 189 P.3d 1032, 1034–35 n.1 (Alaska 2008).

75. *See* ALASKA STAT. 44.62.570 (1959).

76. *Parson*, 189 P.3d at 1034–35.

77. *Id.* at 1035.

78. *Id.* at 1036.

partment regulations.[79] The court explained that the Labor Department regulations did not afford CMHA a proper opportunity to litigate because the regulations only offered the "contractor and/or subcontractor" the option of requesting a hearing on the basis of the investigator's findings.[80] Therefore the CMHA had no additional administrative review options available.[81]

The availability of additional review procedures does not correlate perfectly with the decision of whether or not to apply administrative preclusion. Of the six claimants discussed above who had additional review procedures available, three had administrative preclusion enforced against them[82] and three did not.[83] Again, however, the courts applying administrative preclusion pointed out that the claimants had been notified of the additional procedures available,[84] and so this may have been a factor that those courts considered when conducting their analyses.

### *C. Interpretation of* Utah Construction *or an Analogous Administrative Preclusion Requirement: "Past Procedures" Versus "Future Procedures"*

Courts addressing a question of administrative preclusion routinely cite and/or discuss the three *Utah Construction* factors (held applicable to state agencies in *University of Tennessee v. Elliot*).[85] The cases discussed in this Note are no exception. *Utah Construction* was cited directly in the following court opinions: *Murray*,[86] *Herrera*,[87] *George*,[88] and *Hanna*.[89]

The *Fadaie* court did not cite to *Utah Construction* or to *Elliot*, but did cite to a Washington Supreme Court case[90] noting that the state of Washington had adopted the Restatement (Second) of

79. Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Housing Auth., No. 75314, 2000 WL 336498, at *5 (Ohio Ct. App. Mar. 30, 2000).

80. *Id.* (citing 29 C.F.R. § 5.11(b)(2) (2011)).

81. *Id.*

82. Fadaie, Herrera, and Murray.

83. George, Hanna, and Parson.

84. *See* Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1219–20 & n.2 (W.D. Wash. 2003); Murray v. Alaska Airlines, Inc., 237 P.3d 565, 576 (Cal. 2010)

85. *See supra* note 26 and accompanying text.

86. *Murray*, 237 P.3d at 568.

87. *Herrera*, 680 F.3d at 547.

88. George v. D.W. Zinser, 762 N.W.2d 865, 868 (Iowa 2009).

89. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1330 (S.D. Fla. 2004).

90. Shoemaker v. City of Bremerton, 745 P.2d 858, 861 (Wash. 1987) (en banc).

Judgments § 83 to determine when an administrative adjudication is entitled to preclusive effect.[91] The section of the Restatement quoted in the opinion is analogous to *Utah Construction* for the purpose of comparing how courts interpret the requirements for administrative preclusion. The language resembles the *Utah Construction* requirements of "judicial capacity" and "opportunity to litigate"—the Restatement requires "the essential elements of adjudication," which include "[t]he right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties."[92] Similarly the *Parson* and *Mac Home* courts did not cite to *Utah Construction*, but did cite to or use analogous language.[93]

Where these cases differ is how the courts interpreted the requirements of *Utah Construction*. In *Herrera*, the Sixth Circuit noted the inherent ambiguity of the two factors relevant to this discussion: (1) that the agency acted in a judicial capacity; and (2) that the parties had an adequate opportunity to litigate.[94] The *Hererra* court noted:

> At the outset, we note that "[i]t is difficult to state a general formula to capture the essential elements of adjudicatory procedure that may entitle administrative decisions to preclusion effects in subsequent judicial proceedings." Likewise, a full and fair opportunity to litigate does not require any "single model of procedural fairness, let alone a particular form of procedure."[95]

The *Parson*, *Hanna*, *Mac Home*, and *George* courts interpreted the *Utah Construction* framework (or its doctrinal equivalent) to re-

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91. Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1219 n.3 (W.D. Wash. 2003). The law in Washington was relevant to the *Fadaie* court's opinion because the action was brought in diversity.

92. *Id.* at 1219 (quoting RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83 (1982)).

93. *See* Parson v. State, 189 P.3d 1032, 1037 (Alaska 2008) ("[T]he preclusive use of prior administrative findings must always be fair and that fairness at a minimum requires that the administrative process follow the essential elements of adjudication, including notice and an opportunity to present and rebut evidence, a formulation of issues of fact and law, and other procedural elements necessary for a conclusive determination of the issue.") (internal quotation marks omitted); Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498, at *5 (Ohio Ct. App. Mar. 30, 2000) ("Res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that: (1) are judicial in nature; and (2) where the parties have had an ample opportunity to litigate the issues involved in the proceeding.").

94. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 547 (6th Cir. 2012).

95. *Id* (citation omitted).

quire that the agency had actually acted in a judicial capacity and the parties had an adequate opportunity to litigate *at the time the decision was rendered*. This Note refers to this reading of *Utah Construction* as the "past procedures" interpretation. The *Parson* court stated, "[A]n informal investigation by Commission staff does not contain the essential elements of adjudication."[96] Similarly, the *Hanna* court observed:

> In this case, OSHA's "preliminary order" was not based on the resolution of disputed facts in a forum where both parties had a fair and adequate opportunity to litigate their theories of the case. According to OSHA's own regulations, preliminary orders are issued solely on the basis of an investigation of facts that OSHA deems relevant . . . . The only point in which a Sarbanes–Oxley Act plaintiff receives a "trial-court like hearing" is when that plaintiff appeals his "preliminary order" to an administrative law judge.[97]

The *Mac Home* court additionally found that "the administrative investigation by the Department of Labor was not judicial in nature" and that "CMHA did not have an ample opportunity to litigate its position with the Department of Labor."[98] Finally the *George* court stated:

> The Division, in investigating George's complaint and subsequently dismissing it, was not acting in a judicial capacity. Neither the procedure nor the investigation meets the requirements to be granted preclusive effect in a judicial proceeding. . . . George did not have a full and fair opportunity to present evidence or respond to D.W. Zinser's position.[99]

In contrast, the *Herrera*, *Murray*, and *Fadaie* courts interpreted *Utah Construction* as follows: the agency must render a decision in a judicial capacity and the parties must have an adequate opportunity to litigate in the course of the procedures that are *available*, as opposed to the procedures that the parties actually utilize. This Note refers to this gloss on *Utah Construction* as the "future procedures" interpretation. Courts using the "future procedures" interpretation emphasized the procedures made available by statute or regulation, as well as the claimants' voluntary choice to abandon their administrative remedy. In *Herrera* the court observed:

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96. *Parson*, 189 P.3d at 1038.

97. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1331 (S.D. Fla. 2004) (citation omitted).

98. *Mac Home*, 2000 WL 336498, at *5.

99. George v. D.W. Zinser, 762 N.W.2d 865, 869–70 (Iowa 2009).

> Herrera could submit evidence in support of his claim and, because the Fayette HRC rules do not contain a deadline for the submission of evidence, seemingly could have responded to any evidence submitted by or obtained from Churchill McGee with additional evidence of his own. The Fayette HRC can obtain subpoenas, though it is not clear whether Herrera could have asked the investigator to do so. Herrera could seek assistance from an attorney. Administrative reconsideration and judicial review are available.[100]

While all of these procedures arguably would have ensured that Herrera did in fact have an adequate opportunity to litigate before an agency acting in a judicial capacity, these were not procedures afforded to Herrera, but rather procedures he would have been afforded had he sought reconsideration of the agency's determination. The court emphasized its point that the *Utah Construction* requirements were satisfied when it stated, "The fact that the HRC's Order of Dismissal . . . received neither administrative reconsideration nor judicial review does not change this conclusion, because both options were available. Herrera's 'fail[ure] to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy.'"[101] The *Fadaie* court made an identical point when it noted that "the WPP provides complainants with an opportunity to fully and fairly litigate their claims: plaintiffs cannot now argue that the procedures utilized by the agency were insufficient when it was Fadaie's choice to forego the admittedly sufficient procedures to which he was entitled."[102]

The *Murray* court also emphasized the statutorily prescribed procedures that were available to Murray, as well as his voluntary decision to forgo them. Said the court, "The AIR 21 statutory scheme afforded Murray an absolute right to a full de novo trial-like hearing before an ALJ, a hearing we find would fully comport with the requirements . . . for establishing that the administrative proceedings were undertaken in a judicial capacity."[103] Emphasizing that the court interpreted *Utah Construction* to require "future procedures," the court explained that "it is the *opportunity to litigate* that is important in these cases, not whether the litigant availed himself

100. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012).

101. *Id.* at 550.

102. Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1220 (W.D. Wash. 2003).

103. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 569 (2010) (internal quotation marks omitted).

or herself of the opportunity."[104] The court hammered its point home when it stated:

> Focusing the inquiry on the *opportunity to litigate* issues in the prior administrative proceeding is particularly appropriate where the party who initiates an administrative complaint apparently abandons his action upon receiving an adverse ruling, thereby forfeiting his statutory rights to a formal de novo hearing of record before an ALJ, and then seeks to relitigate the same issues decided in the agency's final order against the same party in a subsequently filed court action.[105]

From the above, it is clear that the cases discussed in this Note are split on the question of whether the application of administrative preclusion requires adequate past procedures or adequate future procedures. In observing this disagreement, it is important to emphasize the point made in Part II.B, that additional review procedures were available to all except one[106] of the parties involved in these seven cases.[107] The implication is that the courts interpreting *Utah Construction* to require past procedures to comport with due process—*Parson*, *George*, *Hanna*, and *Mac Home*—did not do so because there was no additional review available for the claimants, but rather because they construed administrative preclusion to require adequate procedures to be in place at the time the administrative decision was rendered. The appropriateness of the past procedures and future procedures constructions is discussed in Part III.

### *D. Presence or Absence of an Attorney*

As previously stated, three of the seven court opinions discussed in this Note applied administrative preclusion to a decision rendered by an agency after an investigation.[108] The presence or absence of an attorney on behalf of the claimant was only noted in three of the opinions—*Herrera*, *Murray*, and *Parson*[109]—but the factor nevertheless bears consideration. *Herrera* and *Murray* were two

104. *Id.* at 570.

105. *Id.*

106. The contracting authority in *Mac Home*, the Cuyahoga Metropolitan Housing Authority (CMHA), could not request a hearing under the applicable regulations. *See* Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498, *5 (Ohio Ct. App. Mar. 30, 2000); 29 C.F.R. § 5.11(b)(2) (2011).

107. *See supra* Part II.B.

108. *See supra* Part II.C.

109. *See* Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012); Parson v. State, 189 P.3d 1032, 1035 (Alaska 2008); Murray v. Alaska Airlines, Inc., 237 P.3d 565, 567, 568, 569, 576 (Cal. 2010).

of the three cases that found administrative preclusion appropriate, and in both instances the court emphasized attorney availability when denying the claimants further opportunity for relief.[110] The *Murray* court in particular made much of the fact that Murray was represented by counsel, referring to that fact no fewer than five times in the course of its opinion.[111]

In *Herrera* the Sixth Circuit appeared to place weight on the fact that Herrera was advised to seek assistance from an attorney when it determined that he had an adequate opportunity to litigate his claim. At the start of its analysis the court stated that "a full and fair opportunity to litigate does not require any 'single model of procedural fairness, let alone a particular form of procedure.'"[112] The court proceeded to cite relevant precedent and to describe the procedures available to a claimant who files a Kentucky state discrimination claim with the local agency (the Lexington-Fayette Urban County Human Rights Commission).[113] The court found that "the [agency] rules appear to have provided Herrera with a[n] . . . ability to present his claims,"[114] and listed five factors in support of its conclusion.[115] The fourth factor listed was: "Herrera could seek assistance from an attorney."[116] In driving home its point that Herrera had an adequate opportunity to litigate his claim but simply failed to avail himself of the opportunity, the court stated, "Both the investigator and the Executive Director advised Herrera that he might wish to consult an attorney."[117] So it seems that the court found the availability of attorney advice—regardless of the fact that Herrera never actually sought out an attorney—directly applicable to the decision to deny him another avenue for relief.

The court in *Murray* made a similar, even more pointed statement when it precluded Murray from obtaining a judicial remedy. The court emphasized that Murray had been "represented by counsel at every stage of the prior administrative and present court proceedings" when it determined that the agency's findings were final

110. *See Herrera*, 680 F.3d at 549; *Murray*, 237 P.3d at 567, 568, 569, 576.

111. *See Murray*, 237 P.3d at 567, 568, 569, 576.

112. *Hererra*, 680 F.3d at 547.

113. *Id.* at 547–49.

114. *Id.* at 549.

115. *Id.*

116. *Id.* The other four factors noted were: (1) ability to submit evidence in support of his claim; (2) ability to respond to evidence submitted by his adversary; (3) ability of the agency to obtain subpoenas; and (5) availability of administrative reconsideration and judicial review. *Id.*

117. *Id.*

and subject to preclusive effect.[118] The court referenced "[b]oth Murray and his attorney" again when it explained that Murray could have avoided preclusion by following the procedures for complaint withdrawal listed in the agency regulations.[119] Like the *Herrera* court, the California Supreme Court in *Murray* placed weight on the availability of attorney advice when it determined that the opportunity to litigate was sufficiently *available to*, albeit not properly utilized by, the claimant.

As previously noted in Part II.A, the musings of only two courts are not sufficient to indicate any trend in judicial decisionmaking. The inclusion in this Note of the presence or absence of an attorney as a factor is intended to serve as a caution to potential claimants and attorneys: courts may not be sympathetic to arguably insufficient procedures if an attorney was present or available and the party could have sought out additional review.

### *E. Finality of the Agency's Finding Under the Relevant Statute*

The determination that an agency finding became final under the statute providing the remedy correlated directly with a court's decision to apply or not apply administrative preclusion in each of the seven opinions discussed in this Note. In the three cases finding administrative preclusion appropriate—*Murray*, *Fadaie*, and *Herrera*—the courts all determined that the statute had effectively provided an endpoint to the plaintiffs' claims.[120] In contrast, three of the courts refusing to apply administrative preclusion—*Hanna*, *Parson*, and *George*—did not find that the relevant statute had dictated finality given the circumstances of the case.[121] In *Mac Home*, the administrative procedures for the remedy were set by regulation, not by statute, so the court did not have occasion to determine whether a statute created finality.[122]

In the case of *Hanna*, the plain wording of the Sarbanes-Oxley Act provided that "a plaintiff may obtain *de novo* review of any Sarbanes-Oxley administrative complaint that has not been resolved by a Department of Labor final decision within 180 days of filing an

118. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 569 (Cal. 2010).

119. *Id.* at 576.

120. *See Hererra*, 680 F.3d at 549; Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1219–20 (W.D. Wash. 2003); *Murray*, 237 P.3d at 574–75.

121. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1327–30 (S.D. Fla. 2004); Parson v. State, 189 P.3d 1032, 1036–37 (Alaska 2008); George v. D.W. Zinser, 762 N.W.2d 865, 869–70 (Iowa 2009).

122. *See* Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498, at *4 (Ohio Ct. App. Mar. 30, 2000).

administrative complaint."[123] The court determined that the circumstances of Hanna's complaint did not satisfy the provision of the statute that would have made the Department of Labor's finding "final."[124] The court held that "on the date Hanna filed his complaint [in court], the Secretary had not issued a final decision within 180 days of the filing of Hanna's administrative complaint."[125] Thus under the plain wording of the statute Hanna was permitted to obtain review of his complaint *de novo* in a court of law.[126]

Similarly, the *Parson* court engaged in a statutory interpretation exercise when it addressed the question of whether Parson was barred from further opportunity for relief. The court noted that the Alaska Human Rights Act (AHRA) expressly provided circumstances under which a determination by the Alaska State Commission (ASC) would preclude further action in court.[127] Specifically, issue preclusion is appropriate under the AHRA if "the commission conducts a hearing and reaches a decision under [AHRA] 18.80.120 and 18.80.130," so long as only issues actually reached at the hearing are precluded in future litigation.[128] Claim preclusion is appropriate wherever there is an "acquittal of a person by the commission."[129] The *Parson* court interpreted the statute and determined that the ASC's decision to close Parson's case was not an "acquittal" within the meaning of the Act.[130] The court distinguished between the terms "dismissal" and "acquittal:"

> [A]n acquittal generally comes after a trial, while a dismissal generally comes before a trial. . . . The Commission never adjudicated the merits of Parson's discrimination claims and therefore did not acquit AHFC. Because the Commission did not acquit AHFC, Parson's superior court claims were not foreclosed by [AHRA] 18.80.280.[131]

The *George* court did not explicitly note the absence of statutory finality when it found in favor of George. It did, however, quote the relevant statutory provisions and comment on the proce-

123. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1324 (S.D. Fla. 2004) (citing Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(1)(B) (2002)).

124. *Id.* at 1327.

125. *Id.*

126. *Id.*

127. Parson v. State, 189 P.3d 1032, 1036 (Alaska 2008).

128. Johnson v. Alaska State Dep't of Fish & Game, 836 P.2d 896, 907 (Alaska 1991).

129. ALASKA STAT. § 18.80.280 (1965).

130. *Parson*, 189 P.3d 1032, 1036 (Alaska 2008).

131. *Id.* at 1037.

dural deficiency of the administrative proceedings.[132] For example, the court pointed out, "The statute instructs the commissioner to conduct an investigation and then to make a determination whether there has been a violation. Nowhere does the statute mention presenting evidence or weighing legal arguments."[133] The court's discussion of the procedures available to George indicated generally that it found the statutory scheme inadequate to create a final determination that would be properly preclusive.[134]

In contrast, the *Murray* court went to great lengths to explain that, due to Murray's own inaction, the Secretary of Labor's investigative findings had become a "final nonappealable order" subject to preclusive effect.[135] By the plain wording of the Whistleblower Protection Provision of the statute, the failure to request a hearing within thirty days of the Secretary's findings results in the preliminary investigative order becoming "final" and "not subject to judicial review."[136] The court observed that Murray had been represented by counsel, that both he and his counsel were on clear statutory notice of the implications of failing to appeal, and that the Secretary's letter of findings further explained that failure to appeal the preliminary order would result in it becoming final and unappealable.[137] Murray failed to appeal the Secretary's order within the time limit and instead filed a complaint in California state court one month later.[138] Given the clear meaning and intent of the statute, the court found that preclusion properly applied: "Where Congress evinces a clear intent to preclude judicial review of final administrative decisions, a failure to properly appeal a final order must be given preclusive effect."[139]

In the case of *Herrera*, the state statute under which Herrera sought an administrative remedy only explicitly indicated finality as to the state remedy. The relevant statutory provision reads:

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132. George v. D.W. Zinser, 762 N.W.2d 865, 869–70 (Iowa 2009).

133. *Id.*

134. *See id.*

135. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 577 (Cal. 2010). The *Murray* majority used the phrase "final nonappealable order" seven times in the course of its opinion, five times in the body, and twice in footnotes. *Id.* at 566 & n.2, 568, 569, 576 & n.8, 577. The *Fadaie* court applied preclusion in the context of the same statutory provision, but did not engage in a discussion of finality. *See* Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210 (W.D. Wash. 2003). Accordingly, the discussion by the *Murray* court is the focus, and is seemingly applicable to both cases given the identity of claims.

136. 49 U.S.C. § 42121(b)(2)(A) (2006).

137. *Murray*, 237 P.3d at 568.

138. *Id.*

139. *Id.* at 576.

> A final determination by a state court or a final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with KRS Chapter 13B by the same person based on the same grievance.[140]

The Sixth Circuit determined that both Herrera's state claim and his federal claim under § 1981 were precluded.[141] The court based its decision to preclude the federal action in part on the fact that a final determination from the state agency would have barred a remedy under the Kentucky Civil Rights Act.[142]

Based on the above discussions, it is clear that the statutory intent regarding the existence of a clear endpoint to the administrative remedy was an essential factor for the *Hanna*, *Parson*, *George*, *Murray*, and *Herrera* courts in deciding whether administrative preclusion was appropriate. As will be argued in Part IV, adherence to the explicit intent of the statute should be considered a valid (and preferred) approach to the resolution of these types of cases.

## III.
## ANALYSES OF JUDICIAL OPINIONS: WHAT IS THE PROPER APPROACH TO ADMINISTRATIVE PRECLUSION AFTER AN AGENCY INVESTIGATION?

As discussed more fully in Part II.C, "past procedures" and "future procedures" are terms this Note uses to refer to the two ways courts apply the "judicial capacity" and "opportunity to litigate" factors of *Utah Construction*. Courts that interpret *Utah Construction* to require "past procedures" look to whether the *Utah Construction* factors exist when the agency decision is rendered. Such courts effectively take the stance that an agency decision possesses enough baseline validity to warrant respect by courts only if the decision itself resulted from adequate procedures. Courts that interpret *Utah Construction* to require "future procedures" look to whether the *Utah Construction* factors would have been present if the complainant had chosen to follow through with the original action. Both this discrepancy of past versus future procedures[143] and the uniform ad-

140. KY REV. STAT. ANN. § 344.270 (1996).

141. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 550 (6th Cir. 2012) (finishing the analysis of preclusion application by noting that "a final determination from the Fayette HRC would bar a subsequent KCRA lawsuit on election-of-remedies grounds").

142. *Id.*

143. *See supra* Part II.D.

herence to statutory insistence on finality[144] are the focus of this Part.

### *A. Distinguishing* Murray, Herrera, *and* Fadaie *from* Kremer

It is first important to distinguish the seven cases discussed above from the Supreme Court opinion that is most relevant: *Kremer v. Chemical Construction Corporation*.[145] The Court determined that Kremer, who had obtained an adverse ruling from an administrative agency after an investigation, was properly precluded from obtaining a Title VII remedy in federal district court.[146]

Like Murray, Herrera, and Fadaie, Kremer filed a claim with an administrative agency (although Kremer did not pursue the state administrative remedy voluntarily).[147] Like the other claimants, Kremer received an adverse ruling after the agency conducted a mere investigation.[148] But unlike the other claimants, Kremer appealed the agency's decision in New York state court.[149] The investigative determination was deemed by the New York Human Rights Division Appeal Board to be "not arbitrary, capricious, or an abuse of discretion."[150] Kremer also filed a petition with the Appellate Division of the New York Supreme Court to set aside the agency determination.[151] Five Appellate Division justices unanimously upheld the agency's decision.[152] Kremer chose not to appeal the Appellate Division's decision to the New York Court of Appeals.[153]

*Kremer* is facially distinguishable from *Murray*, *Herrera*, and *Fadaie* in that the Supreme Court in *Kremer* relied on the decision rendered by the New York Appellate Division, a court of law, to preclude a subsequent federal claim.[154] In contrast, *Murray*, *Herrera*, and *Fadaie* involved courts that found preclusion appropriate based

144. *See supra* Part II.E.

145. 456 U.S. 461 (1982).

146. *Id.*

147. *Id.* at 463–64 ("Because the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter, the Commission referred Kremer's charge to the New York State Division of Human Rights (NYHRD).") (internal citation omitted). *See also* 42 U.S.C. § 2000e-5(c) (2006).

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

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

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

only on the investigation by the administrative agency.[155] Although the claimants in *Murray*, *Herrera* and *Fadaie* could have obtained judicial review of their investigations, they chose not to, and so the doctrine of administrative preclusion was applied on the basis of an administrative investigation alone.[156] As the Supreme Court stated in *Kremer*:

> Here the Appellate Division of the New York Supreme Court has issued a judgment affirming the decision of the NYHRD Appeals Board that the discharge and failure to rehire Kremer were not the product of the discrimination that he had alleged. There is no question that *this judicial determination* precludes Kremer from bringing any other action, civil or criminal, based upon the same grievance in the New York courts.[157]

It is clear that no such "judicial determination" was in play when Murray, Fadaie, and Herrera were precluded from bringing their claims in court.

It is also notable that Kremer raised an argument very similar to those advanced by the three other claimants. Kremer contended that the issue he raised—the question of his discriminatory treatment by his employer[158]—was not actually decided by the New York courts, and the procedures made available to him in his initial action were inadequate.[159] The Court pointed out that the concerning aspect of Kremer's argument was his suggestion that "even though administrative proceedings and judicial review are legally sufficient to be given preclusive effect in New York, they should be deemed so fundamentally flawed as to be denied recognition under" the statute.[160] This issue gets to the heart of exactly what "feels wrong" about the decisions in *Murray*, *Herrera*, and *Fadaie*. The fundamental concern with denying a judicial remedy to claimants who have experienced a mere administrative investigation is that the minimum due process requirement—the floor for any preclusion doctrine—has not been met.

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155. *See* Herrera v. Churchill McGee, LLC, 680 F.3d 539 (6th Cir. 2012); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210 (W.D. Wash. 2003); Murray v. Alaska Airlines, Inc., 237 P.3d 565 (Cal. 2010).

156. *See supra* note 155.

157. *Kremer*, 456 U.S. at 466 (internal quotation marks omitted) (emphasis added).

158. *Id.* at 463.

159. *Id.* at 479.

160. *Id.* at 480.

After noting the Due Process Clause requirement,[161] the Supreme Court determined that "Kremer received all the process that was constitutionally required in rejecting his claim."[162] The Court emphasized the procedures available to Kremer within the agency itself, as well as the opportunity for administrative and judicial review, both of which were obtained.[163] Finally, the Court stated, "The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy,"[164] suggesting that it found the due process requirement to be fulfilled by the availability of future procedures, rather than the actual utilization of past procedures. However, it is undeniable that Kremer did in fact obtain administrative *and* judicial review of the agency's investigative finding, so there is a question as to whether the Court's apparent endorsement of the "future procedures" approach would hold up with claimants like Murray, Herrera, and Fadaie.

### *B. "Past Procedures" Versus "Future Procedures": Which Is More Faithful to* Utah Construction *and Due Process?*

The plain language of the oft-quoted section of *Utah Construction* seems to suggest that the Court was indicating a preference for past procedures: "When 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."[165] The wording suggests that, for preclusion to be properly applied, the agency must be acting in a judicial capacity when it resolves the disputed issues of fact. This would seem to cut against the idea that administrative preclusion is appropriate in circumstances involving an agency conducting an ex parte investigation. Additionally, the *Utah Construction* language indicates that the parties must "have

161. *Id.* at 482 ("The State must, however, satisfy the applicable requirements of the Due Process Clause.").

162. *Id.* at 483.

163. *Kremer*, 456 U.S. at 483–85. The agency procedures noted by the Court included the requirement of an investigation, the full opportunity to present charges against the respondent on the record, the right to present exhibits and witness testimony, the opportunity to rebut evidence presented by the respondent, the right to have the assistance of an attorney, and the right to request that the division issue subpoenas. *Id.*

164. *Id.* at 485.

165. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (emphasis added).

had" an opportunity to litigate, as opposed to merely "having,"[166] and this again points to the notion that the opportunity must occur before the agency renders its decision.

If there is any ambiguity regarding the plain meaning of the language, placing the Court's determination in the context of the original case makes it clear that the Court intended that the factors mentioned be present when the agency makes its determination:

> In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings.[167]

Thus it is reasonable to state that the form of administrative preclusion blessed by the Supreme Court in *Utah Construction* properly applies to agency determinations made while the agency was acting in a judicial capacity, after the parties had an adequate opportunity to litigate.

The Restatement (Second) of Judgments § 83 also provides support for the past procedures interpretation.[168] Section 83(2) states that the determinations of an administrative agency are afforded preclusive effect "only insofar as *the proceeding resulting in the determination* entailed the essential elements of adjudication."[169] This indicates that the procedures actually used, as opposed to the procedures that were available, are the pertinent consideration. The Restatement view aligns with those of the *Mac Home*, *Hanna*, *Parson*, and *George* courts, but does not match those of the courts in *Herrera*, *Murray*, and *Fadaie*.[170]

The past procedures approach also appears to comport with due process considerations to a greater degree than the future procedures approach. As discussed in Part I.B, courts considering the application of administrative preclusion must ensure that the plaintiff's rights under the Due Process Clauses have been satisfied. Although there is not a rigid due process standard, and the procedures required depend on the interests involved,[171] there is support from commentators and the Supreme Court for the idea

166. *Id.*

167. *Id.*

168. RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83(3) (1982).

169. *Id.* (emphasis added).

170. *See supra* Part II.C.

171. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

that due process requires a hearing, or something resembling a hearing.[172] Further, some commentators argued that courts should carefully review those agency determinations that are particularly discretionary because those agency decisions are especially deserving of due process analysis.[173] Given that the past procedures approach taken by some courts ensures that the agency had been acting in a judicial capacity when its decision was rendered, it seems that such an approach is in line with notions of procedural fairness. At the very least, the past procedures approach is more in line with due process requirements than the future procedures approach.

### *C. Adherence to Clear Indications of Statutory Finality: Deference by the Judiciary to Legislative Schemes*

As discussed previously, all of the courts addressing administrative preclusion after an agency investigation—except *Mac Home*—interpreted the relevant statutory provisions when conducting their analyses.[174] All of the courts that found indications of statutory finality decided to enforce administrative preclusion.[175] In contrast, those courts that determined the agency had not reached a conclusive determination under the statute rejected the application of preclusion.[176]

It is the practice of courts to defer to legislative findings and determinations.[177] This deference is generally considered appropriate because of the "structural separation of powers established by the Constitution and the appropriate functional division of tasks between the two branches."[178] In the area of administrative law, courts have long been in the practice of remaining faithful to the legislative intent of a statute, where it can be discerned, rather than

172. Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (holding that an agency must follow due process and hold an adequate hearing before stopping welfare payments); Friendly, *supra* note 39.

173. Tim Searchinger, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1018 (1986) ("Instead of viewing unlimited discretion as a reason to limit judicial review, courts should treat the breadth of discretion as a 'process' variable which they can influence and for which they can order compensating procedural checks.").

174. *See supra* Part II.E.

175. *See infra* Tables 2–3.

176. *Id.*

177. *See* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195 (1997); United States v. Lopez, 514 U.S. 549, 604 (1995) ("The practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint.") (Souter, J., dissenting) (internal quotation marks omitted).

178. Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2315 (1998).

deferring to an agency interpretation that seems to contradict the legislature's objectives.[179] In light of these considerations, it seems proper that courts would defer to legislative intent regarding remedial finality when it is expressed through the plain language of the statute.[180]

The Restatement (Second) of Judgments also provides support for the idea that courts should defer to legislative policy when deciding whether or not to enforce preclusion. The Restatement provides:

> (4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:
>
> > (a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings . . . .[181]

This language squarely indicates that courts should not enforce administrative preclusion where legislative policy dictates that the agency determination should not be conclusive in subsequent proceedings. From this, one can infer that it is proper for courts to enforce administrative preclusion in those cases involving a legislative policy that clearly expresses that the agency determination be considered final.

Viewed in this way, the courts' decisions in *Murray*, *Herrera*, and *Fadaie* to adhere to a statutory grant of finality, despite an arguable lack of proper proceedings prior to the enforcement of preclusion, seem less unreasonable. As the *Murray* court stated, "Where Congress evinces a clear intent to preclude judicial review of final ad-

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179. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

180. Of course, the mere fact that judicial deference to implied legislative intent is an accepted practice is not enough, since this practice does not fulfill or replace the minimum procedural rights guaranteed by the Due Process Clause. Any legislative remedial scheme that impacts an individual's property interests would need to meet the floor due process requirement. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

181. RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83(4) (1982).

ministrative decisions, a failure to properly appeal a final order must be given preclusive effect."[182]

## IV.
## A SUGGESTED APPROACH TO ADMINISTRATIVE PRECLUSION

As discussed above, it appears that courts faced with a question of administrative preclusion adhere more carefully to the boundaries of the remedy provided by Congress in the relevant statute than they do to the framework provided in *Utah Construction*. Put another way, courts are more likely to engage in freeform due process review of actually employed procedures only in the absence of a legislative command that agency findings be treated as preclusive. Although this statutory approach may seem at odds with the principles of an adversarial approach to factfinding and the desire for a day in court, especially when the effect of its application is to preclude judicial review of the decision based on investigative proceedings, such an approach is in fact desirable—if it can be clearly expressed. The main danger in the statutory approach lies in any ambiguity and uncertainty felt by potential claimants and their attorneys. [183] If those individuals are concerned about an unpredictable judicial system that leads to administrative preclusion in some instances but not others, they may be driven to forgo an administrative remedy altogether and immediately file a claim in court. This would create a massive burden on an already strained judicial system.

Many statutes already provide that claimants must file a complaint with the appropriate agency before they may file a claim in court. Some require mere filing and then a waiting period, while others require administrative exhaustion before a judicial remedy will be available. Given the broad application of these administrative requirements, it is clear that administrative remedies are endorsed and encouraged by Congress. If Congress can properly determine that an administrative remedy is an appropriate first step (in instances where it is required) or an appropriate alternative (in instances where it is not), it seems logical that Congress can prop-

182. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 576 (Cal. 2010).

183. Another danger of the statutory approach is, of course, that the statute itself will not provide avenues for relief that are procedurally sufficient to meet due process requirements. This is something that needs to be considered by courts on a statute-by-statute basis, and it is considered briefly in Part IV.C.

erly determine when the opportunity for an administrative remedy is at an end.[184]

Given these considerations, it is possible to outline a workable rule that will allow courts to both defer to the congressional will regarding agency remedies and to ensure that traditional administrative preclusion requirements are met.

When the statute providing remediation to the complainant establishes circumstances or procedures that create finality, courts should determine only whether those procedures were present in the administrative action when they conduct their preclusion analysis. If the circumstances dictate finality—as they did in *Murray*, *Fadaie*, and *Herrera*—courts should enforce repose. When the statute providing remediation to the complainant is silent as to finality, courts should engage the *Utah Construction* framework, adhering to a "past procedures" interpretation when addressing preclusion.

### *A. When to Use "Past Procedures": Where the Statute Does Not Clearly Create Finality*

The "past procedures" interpretation is preferable where the statute does not address procedures creating finality for three reasons. First, as discussed in Part III.B, when the holding of *Utah Construction* is read in the context of the facts of the original case, it seems clear that the "past procedures" interpretation is more faithful to the intent of the Court in evaluating the appropriateness of administrative preclusion. Addressing the three factors emphasized in the exercise of administrative preclusion, the Court stated that all three factors had existed *prior to* the decision to enforce repose.[185]

Second, applying preclusion to administrative determinations that resemble judicial proceedings is more faithful to common law preclusion requirements. Common law res judicata requires a "final judgment on the merits."[186] Similarly, the Supreme Court has observed that "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair

184. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 418–19 (1966) (noting that the agency's findings were "conclusive on the parties" because "finality is required by the language and policies underlying the disputes clause and the Wunderlich Act and by the general principles of collateral estoppel").

185. *See id.* at 422.

186. Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Comm'r v. Sunnen, 333 U.S. 591, 597 (1948).

opportunity to litigate that issue in the earlier case."[187] It follows from these tenets that, where there is no legislative authority detailing the circumstances that create finality, an administrative proceeding must bear some resemblance to a judicial proceeding before it can be given preclusive effect.

Finally, as discussed in Part III.C, the past procedures approach better satisfies due process requirements than the future procedures approach. Even if the Due Process Clause does not dictate a single model of procedural fairness, surely the past procedures approach is preferable given that it ensures an adequate opportunity to litigate and a judicial character to the proceedings that actually occurred. The past procedures approach should better reduce the "risk of an erroneous deprivation" of property interests[188] because it guarantees that the individual with the interests at stake had an opportunity to actually voice arguments to the decisionmaker.

### *B. When to Adhere to the Statute: Where the Language Clearly Indicates When Agency Decisions Become Final*

On the other hand, where the statute explicitly provides that the failure to appeal agency decisions will render them final and conclusive, and where the statute provides adequate procedures that, if pursued, create adequate opportunities for litigation and review, it should be the policy of courts and agencies to enforce administrative preclusion. This should be the standard approach even where the plaintiff has failed to avail herself of the full procedures available and has only received investigative review by the agency. This approach appropriately balances: (1) efficiency considerations; (2) proper deference to legislative intent; and (3) adequate satisfaction of due process requirements.

First, it is well established that administrative remedies ease the burden on the judicial system and promote efficient resolution of disputes.[189] Both courts and agencies are overwhelmed with plain-

187. Allen v. McCurry, 449 U.S. 90, 95 (1980) (internal quotation marks omitted). *See also* Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328–29 (1971).

188. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

189. *See, e.g.*, Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (stating that administrative remedies "aid[ ] judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding" and "promote[ ] judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency"); Almeida v. Plasters' & Cement Masons' Local 40 Pension Fund, 722 A.2d 257, 259 (R.I. 1998) (stating the same); Sonya Gidumal, McCarthy v. Madigan*:*

tiffs seeking restitution for actual or supposed injuries.[190] Given the undeniable strain already present in the legal system, it seems reasonable to limit and even wholly bar avenues to a remedy *where appropriate*. One place to start is with cases involving plaintiffs like Murray, Herrera, and Fadaie—plaintiffs who sought an administrative remedy, had clear statutory notice as to the repercussions of their failure to appeal the agency decision, and who, arguably, had relatively weak claims on the merits. The *Herrera* court pointed to the anomaly that would result if a hearing on the merits were a prerequisite to enforcing administrative preclusion:

> Moreover, Herrera's position would lead to the dubious result that a complainant with a weaker case (i.e., whose claim was dismissed without a hearing for lack of probable cause) would be in a more favorable position with respect to preclusion than a complainant with a stronger case (i.e., whose claim was supported by probable cause and thus merited a hearing).[191]

It may be argued that, although this approach would promote efficiency, it is inherently unfair to require unrepresented plaintiffs, who are not equipped to interpret statutes in order to determine exactly what circumstances create finality, to be aware of when they are facing preclusion and when they are not. This concerns the issue of whether adequate notice was provided and is considered below in the discussion of due process.

Second, as noted in Part III.C, judicial deference to legislative intent is the respected norm of the U.S. legal system, especially in the area of administrative law. The role of the court is to interpret and apply statutes as written, provided they are constitutional. As the Supreme Court has noted, "Once the meaning of an enactment

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*Exhaustion of Administrative Agency Remedies and* Bivens, 7 ADMIN. L.J. AM. U. 373, 381 (1993) (noting that exhaustion of administrative remedies promotes judicial efficiency).

190. A 2012 report issued by the Administrative Office of United States Courts provided statistics on the number of filings in federal courts for the fiscal year ending September 30, 2012. There were 57,501 filings in the regional courts of appeal and 278,442 civil filings in the U.S. district courts. HON. THOMAS F. HOGAN, ADMIN. OFFICE OF U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2012 ANNUAL REPORT OF THE DIRECTOR (2012), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx. Additionally, statistics from the Whistleblower Protection Program website, administered by the Department of Labor and OSHA, indicate that from 2005 to 2013, there have been 20,186 whistleblower cases received under various statutory schemes. *See* OSHA, *Whistleblower Investigation Data: FY2005–FY2013*, THE WHISTLEBLOWER PROTECTION PROGRAMS, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf (last visited Feb. 10, 2014).

191. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 559 (6th Cir. 2012).

is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto."[192] Providing that a statute creating an administrative remedy meets minimum constitutional requirements, courts are right to adhere to the letter of the statute when it clearly states that an agency determination is final and conclusive in particular situations. The *Kremer* Court did exactly that:

> But for present purposes, *where we are bound by the statutory directive of § 1738*, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.[193]

Thus explicit legislative statements about available procedures are controlling where constitutionally sufficient.

Third, the approach of adhering to the clear mandate of the statute would satisfy the due process requirement of notice and the right to be heard if courts and agencies *clearly establish* their policy of following the letter of the statute when applying preclusion, even in cases where the prior proceedings lack judicial character and an adequate opportunity to litigate. Clarifying the primacy of the statutory scheme will, in turn, put potential claimants and their attorneys on notice of their own obligations and opportunities for litigation, which further bolsters the satisfaction of the Due Process requirement. A problem with the current practice of courts, which is to respect statutory finality despite nominally acknowledging adherence to the "judicial character" requirement, is that litigants do not expect, as a matter of popular understanding of the U.S. legal system, to be precluded after a mere investigation. If the policy of respecting legislative finality were explicitly stated, claimants and attorneys would take more care to follow statutory procedures when seeking administrative remedies.

### *C. Some Concerns Raised by the Statutory Approach*

The suggested approach put forward by this Note finds support in the doctrinal and policy considerations outlined above. However, some underlying issues would need to be addressed if the approach were to be implemented. First, what is the correct result in the context of a statutory scheme that clearly indicates circumstances in which an agency determination will become final, but that also ar-

192. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194–195 (1978).

193. Kremer v. Chem. Const. Corp., 456 U.S. 461, 481 (1982) (emphasis added).

guably fails to provide adequate due process protections? Second, given the importance of notice to the claimant of finality to the satisfaction of the due process requirement, how can agencies better ensure that claimants are aware of the consequences of their actions in the administrative process?

Fully addressing these concerns is beyond the scope of this Note. The problem of statutory schemes providing finality with insufficient procedural protections is one that must be addressed by Congress each time it drafts new legislation creating private causes of action. Where Congress has failed to provide such protections, it is the role of the courts to enforce the Due Process Clause as necessary. As discussed in Part I.B, the Due Process Clause doctrine is amorphous in the context of administrative law and may require different protections in different circumstances. It seems clear that courts would and should uphold the constitutional right to due process, regardless of what a statutory scheme provides. The exact boundaries of that constitutional right are more difficult to quantify, and would require an in-depth analysis into the various causes of action provided by statutory law.

The statutory approach to administrative preclusion poses another problem: for the unrepresented plaintiff who will not read the applicable statute, how can it be ensured that notice of finality is properly provided? One solution that would put most, if not all, potential claimants on notice would be to implement semi-uniform agency procedures in the administrative offices handling claims subject to administrative preclusion. Such procedures and safeguards would include: verbal notice to the claimant given by an agency representative processing the administrative claim; written notices on claim forms and agency web pages that are written in plain language and presented in a large, bold font; and signs and posters inside agency offices alerting claimants to their rights and responsibilities. A concern with this approach is that, even with the warnings, claimants will not fully comprehend the meaning of preclusion or appreciate the procedures they must follow to avoid it. To address this, agencies could commission instructive film clips, ideally fifteen minutes or fewer in length, that are made readily available to individuals filing administrative claims. Claims filed online could easily require individuals to view the films by making their viewing a prerequisite to electronic claim submission. The procedure for claims filed in person in agency offices might, as part of the interview or waiting process, facilitate or strongly encourage the claimant to watch the explanatory film, which would be accessible online in the claimant's home or on screens at the agency.

These suggestions provide something of an answer to the drawbacks of the statutory approach, but if courts put this framework into practice, greater attention would be necessary—particularly to the problem of addressing statutes that create finality without satisfying due process requirements. At minimum, it would be important for claimants and attorneys to keep these concerns in mind while navigating the administrative process.

## CONCLUSION

Plaintiffs and administrative claimants who have filed claims for relief are entitled to due process—protected by judicial oversight along the lines of *Utah Construction* and other frameworks—at a minimum. Due process can properly be satisfied by the availability of substantively adequate future procedures, such as the right to a thorough investigation, the right to appeal that investigation, the right to a hearing, and the right to appeal the ALJ's decision in a court of law. Where a statute clearly indicates that agency determinations will become final and not subject to judicial review, under certain circumstances it is proper for courts to adhere to the intent of the legislature and preclude further action, even if the agency proceedings leading to the determination lacked resemblance to a judicial proceeding. Courts should express this policy of remaining faithful to statutory schemes, despite the requirements created by *Utah Construction* and carried forward in *University of Tennessee v. Elliot*. If courts explicitly express that their practice is to respect statutorily crafted finality, this will put claimants and attorneys on notice of the importance of following through with administrative procedures so that they can avoid meeting an outcome like that of Kevin Murray.

## APPENDIX

*Cases Considering Applying Preclusion to an Investigative Finding*

Table 1. Factors Discussed by Courts

(1) Whether the selection of an administrative remedy was voluntary or required by statute;
(2) Whether additional review procedures for the agency finding were available but not taken;
(3) Whether the factors from Utah Construction (or an analogous state opinion) were cited and how they were treated;
(4) Whether the claimant had an attorney; and
(5) Whether the agency finding became final under the statute.

Table 2. Factors Applied to Each Case Analyzed in This Note[194]

| FACTOR | (1) | (2) | (3) | (4) | (5) |
|---|---|---|---|---|---|
| *Murray* | YES | YES | YES | **YES** | **YES** |
| *Herrera* | YES | YES | YES | **YES** | **YES**[195] |
| *Parson* | YES[196] | YES[197] | YES (analogous) | **YES**[198] | **NO** |
| *Fadaie* | YES | YES | YES (analogous) | Not discussed | **YES** |
| *George* | UNCLEAR[199] | YES | YES | Not discussed | **NO** |
| *Hanna* | NO | YES | YES | Not discussed | **NO**[200] |
| *Mac Home* | NO | YES[201] | YES (analogous) | Not discussed | **NO**[202] |

194. Factors in bold are correlated with a court's determination as to preclusion.

195. The agency finding only became final as to the state claim, not the federal claim.

196. The statute provided for concurrent jurisdiction, on which the agency could intervene.

197. The court claim was converted into an administrative appeal.

198. Parson noted that he was unrepresented in the agency proceeding.

199. The availability of court action was decided as matter of first impression.

200. The agency finding only became final according to the court interpretation.

201. Additional review procedures were only available for the contractor, not for the contracting authority.

202. The procedure for finality was set by regulation; the regulation only made agency finding "final" if the contractor/subcontractor failed to timely appeal.

Table 3. Results in Each Case Analyzed in This Note

| FACTOR | "Future Procedures" Interpretation Used? | Preclusive Doctrine Applied? |
|---|---|---|
| *Murray* | YES | YES |
| *Herrera* | YES | YES |
| *Parson* | NO | NO |
| *Fadaie* | YES | YES |
| *George* | NO | NO |
| *Hanna* | NO | NO |
| *Mac Home* | NO | NO |