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THE PROPER ROLE OF RES JUDICATA AND COLLATERAL ESTOPPEL IN TITLE VII SUITS

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Title VII of the Civil Rights Act of 1964[1] embraces an intricate and overlapping array of state and federal enforcement procedures,[2] all designed to eradicate discriminatory employment practices based on race, color, religion, sex, or national origin.[3] In states that have not adopted fair employment practices laws, the federal system operates alone. The complainant must first file with a federal agency, the Equal Employment Opportunity Commission (EEOC), which will investigate the charge.[4] If the EEOC finds reasonable cause to believe the allegation, it may, after unsuccessfully using informal conciliation to resolve the dispute, institute enforcement proceedings in federal court.[5] If the EEOC chooses not to litigate, the complainant may sue the defendant in federal court.[6] In states that have enacted

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

2. *See, e.g.*, Mohasco Corp. v. Silver, 447 U.S. 807 (1980); Love v. Pullman, 404 U.S. 522 (1972); Davis v. Valley Distrib. Co., 522 F.2d 827 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977).

3. *See* 42 U.S.C. § 2000e-2(1) (1976). *See generally Equal Employment Opportunity: Hearings on H.R. 405 and Similar Bills Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. (1963); H.R. REP. No. 914, 88th Cong., 1st Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401; H.R. REP. No. 570, 88th Cong., 1st Sess. 1-3 (1963); S. REP. No. 867, 88th Cong., 2d Sess. 1 (1964).

4. *See* 42 U.S.C. § 2000e-5(b) (1976).

5. *See* 42 U.S.C. § 2000e-5(f)(1), (3) (1976).

6. Where the EEOC determines that there is no reasonable cause to believe that a charge is true, it must dismiss the charge and issue the complainant a statutory right-to-sue letter.

a "law prohibiting the unlawful practice alleged," section 706(c) of the Act,[7] the so-called "deferral" provision, guarantees state authorities first opportunity to resolve the charge. Most states afford both investigatory review similar to that provided by the EEOC and full-scale evidentiary hearings before an administrative tribunal.[8] Complainants can then obtain review of the agency's findings in state courts.[9]

Although the Act's "deferral" provision establishes an important role for state enforcement proceedings, state jurisdiction is not exclusive. Sixty days after filing with a state, complainants may enter the federal system.[10] It is thus possible that each employment discrimination charge will be heard in four separate forums: a state administrative agency, a state court, the EEOC, and, finally, a federal court. The obvious and critical question raised by these overlapping juris-

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Where the Commission has not filed a civil action against the employer, the EEOC must, if requested, issue a right-to-sue letter 180 days after the charge was filed. Within 90 days after receipt of the right-to-sue letter, the complainant may institute a civil action in federal district court against the party named in the charge. *See* 42 U.S.C § 2000-5(f)(1), (3) (1976).

7. 42 U.S.C. § 2000e-5(c) (1976) provides:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

When an employment discrimination charge is filed directly with the EEOC,

> the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

42 U.S.C. § 2000e-5(d) (1976). A complete listing of title VII deferral agencies is contained at 29 C.F.R. § 1601.74 (1980).

8. *E.g.*, CAL. GOVT. CODE §§ 12963, 12967-69 (Deering Supp. 1981); FLA. STAT. ANN. § 23, 166 (West 1981); ILL. REV. STAT. ch. 68, ¶¶ 7-102(c), 8-106 (1980); MICH. STAT. ANN. § 3.548(602) (1977); N.Y. EXEC. LAW §§ 294, 297 (McKinney 1972 & Supp. 1980); OHIO REV. CODE ANN. § 4112.05 (Page 1980).

9. *E.g.*, ILL. REV. STAT. ch. 68, ¶ 8-111 (1980); MICH. STAT. ANN. § 3.548(606); N.Y. EXEC. LAW § 297(4)(g) (McKinney Supp. 1972-1980); OHIO REV. CODE ANN. § 4112.06(E) (Page 1980); WASH. REV. CODE § 49.60.260 (1979).

10. *See* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980); Love v. Pullman Co., 404 U.S. 522 (1972).

dictional provisions concerns the weight, if any, that one forum must attach to a prior determination rendered in another.

In most contexts, the answer has already been given. Within the state systems, most courts are required by statute to accept findings of state agencies that are supported by substantial evidence.[11] Within the federal system, the Supreme Court has declared that the EEOC's investigatory findings are admissible, but not conclusive, evidence in federal courts.[12] And the 1972 amendment to section 706(c) requires the EEOC to assign "substantial weight to final findings and orders made by state or local authorities."[13] Yet one issue — the deference that federal courts must give to state findings — has generated an important controversy that the Supreme Court has recently agreed to resolve.[14]

Following the Sixth Circuit's opinion in *Cooper v. Philip Morris, Inc.*,[15] the Third,[16] Fifth,[17] Seventh,[18] and Eighth Circuit[19] Courts of Appeals have held that a federal court may attribute partial, but not preclusive, deference to the prior decisions of state tribunals.[20] *Cooper* and its progeny have misconstrued both the congressional intent underlying title VII and the Supreme Court's decision in *Alex-*

11. *E.g.*, ILL. REV. STAT. ch. 68, ¶ 8-111 (1980); N.Y. EXEC. LAW § 297 (McKinney 1972) and § 298 (McKinney Supp. 1977-80); N.Y. CIV. PRAC. LAW § 7803(3)(4) (McKinney 1963); OHIO REV. CODE ANN. § 4112.06(E) (Page 1980); WASH. REV. CODE § 49.60.260 (1979). *See* Rosen, *The Law and Racial Discrimination in Employment*, 53 CAL. L. REV. 729, 779 (1965). *But see* MICH. STAT. ANN. § 3.548(606) (Supp. 1981) (court review *de novo*).

12. *See* Chandler v. Roudebush, 425 U.S. 840, 844-46, 863 n.39 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); Jones v. WFYR Radio/RKO Gen., 626 F.2d 576, 577 (7th Cir. 1980) ("[I]f the court finds that the EEOC's determination is supported by substantial evidence and that the plaintiff's objections to the determination are insubstantial, it may accord the Commission's findings weight.").

13. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 4a, 86 Stat. 104 (codified at 42 U.S.C. § 2000e-5(b) (1976)).

14. Kremer v. Chemical Constr. Corp., 623 F.2d 786 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3107 (1981) (No. 80-6045).

15. 464 F.2d 9 (6th Cir. 1972). *See* Lyght v. Ford Motor Co., 643 F.2d 435 (6th Cir. 1981).

16. Smouse v. General Elec. Co., 626 F.2d 333 (3d Cir. 1980) (per curiam).

17. *See* Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978).

18. Unger v. Consolidated Foods Corp., Nos. 80-2792 & 80-2844, slip op. (7th Cir. Aug. 14, 1981) (citing Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975)).

19. Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

20. Rather than using the term "substantial," some courts have held that state decisions deserve "appropriate" weight. Unger v. Consolidated Foods Corp., Nos. 80-2792 & 80-2844, slip op. at 8; Smouse v. General Elec. Co., 626 F.2d at 335. *See* Gunther v. Iowa State Men's Reformatory, 612 F.2d at 1084 ("prior state proceedings are entitled to weight"). One court held that state decisions do not bind a federal court but did not discuss what weight, if any, state decisions should receive. Garner v. Giarrusso, 571 F.2d at 1336-37.

ander v. Gardner-Denver Co.[21] They have established a blanket rule that permits a "second, independent federal action even though [the identical claims have been litigated in a state forum]."[22]

In *Sinicropi v. Nassau County*,[23] the Second Circuit reached a quite different conclusion, holding that res judicata applies automatically in cases where, at the complainant's behest, a state court has reviewed a state administrative decision.[24] This unqualified preclusion rule is equally unsatisfying. Although the Supreme Court's recent decision in *Allen v. McCurry*[25] holds that federal courts are presumptively bound by prior state decisions, courts must determine whether Congress intended that a particular statute override this presumption.[26] The Second Circuit did not explore this possibility. Rather, it ignored title VII's legislative history, and rested its decision on an unexplained, single-sentence analogy between title VII and section 1981: "[W]e see no reason to distinguish between section 1981 and title VII for res judicata purposes."[27] Perhaps due to its faulty methodology, the Second Circuit's use of preclusion principles is paradoxically too broad and too restrictive. Its rule is too broad because it gives preclusive effect to informal state investigatory findings. This standard is simultaneously too restrictive because it refuses to give preclusive effect to a state administrative adjudication unless the complainant initiates judicial review in state court.

This Article suggests that the correct answer lies between the positions adopted by the courts of appeals. The full faith and credit clause,[28] made applicable to the federal courts by Congress in section 1738 of title 28 of the United States Code,[29] title VII's legislative history,[30] and the policies of efficiency and consistency upon which preclusion doctrines are based[31] all play important roles in defining

21. 415 U.S. 36 (1974).

22. Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1083 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

23. 601 F.2d 60 (2d Cir.) (per curiam), *cert. denied*, 444 U.S. 983 (1979). The *Sinicropi* court relied on Mitchell v. NBC, 553 F.2d 265 (2d Cir. 1977) (holding that a state administrative agency's dismissal of a race discrimination claim brought under New York's fair employment law barred a subsequent claim under 42 U.S.C. § 1981 in federal court).

24. 601 F.2d at 61-62. For a full discussion and criticism of the Second Circuit's title VII preclusion doctrine *see* notes 202-14 *infra* and accompanying text.

25. 101 S. Ct. 411 (1980).

26. *See* Part I *infra*.

27. 601 F.2d at 62.

28. U.S. Const. art. IV, § 1.

29. 28 U.S.C. § 1738 (1976).

30. *See* Part II.A *infra*.

31. *See* Federated Dept. Stores, Inc. v. Moitie, 101 S. Ct. 2424, 2427-28 (1981); Allen v. McCurry, 101 S. Ct. 411, 415 (1980) ("Res judicata and collateral estoppel not only reduce

the correct solution. Provided that the state's fair employment practices laws parallel title VII, the doctrines of res judicata and collateral estoppel should preclude relitigation of claims and issues that were or could have been fully and fairly litigated in a state proceeding.

The Article proceeds from the premise, established in Part I, that federal courts must apply preclusion principles unless Congress clearly indicates otherwise. Part II considers a number of indicators of Congress's intent, and finds no evidence to rebut the presumption that federal courts must give preclusive weight to certain state decisions. Part III then proposes general guidelines for the application of preclusion doctrines in title VII litigation.

I. THE PRESUMPTIVE APPLICABILITY OF RES JUDICATA AND COLLATERAL ESTOPPEL

The deference that federal courts owe prior state determinations derives from the full faith and credit clause.[32] To promote comity and efficiency, the clause's implementing legislation, section 1738, expressly applies its command to both federal and state courts: "Such . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."[33] Section 1738 thus requires "federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."[34]

Despite section 1738's straightforward language, courts have not

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unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."); Montana v. United States, 440 U.S. 147, 153-54 (1979); Angel v. Bullington, 330 U.S. 183, 192-93 (1947). *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 (1981); RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment a, at 36 (Tent. Draft No. 1, 1973); RESTATEMENT OF JUDGMENTS § 1, Comment a (1942).

32. Full Faith and Credit shall be given in each State to public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

33. 28 U.S.C. § 1738 (1976). The statute was originally enacted just after the ratification of the Constitution. *See* Act of May 26, 1790, ch. 11, 1 Stat. 122, and was reenacted a few years later, Act of Mar. 27, 1804, ch. 56, 2 Stat. 298-99. As adopted in 1790, the act required that a state judgment be accorded "such faith and credit" as it would have "by law or usage in the courts of the state" in which it was rendered. *See* Allen v. McCurry, 101 S. Ct. 411, 416 n.8 (1980); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 31, at § 4467.

34. Allen v. McCurry, 101 S. Ct. at 415. *Accord*, Angel v. Bullington, 330 U.S. 183 (1947); Roller v. Murray, 234 U.S. 738 (1914).

always heeded its mandate.[35] In title VII cases, for instance, some federal courts have neglected to mention section 1738, and instead have invoked general principles to resolve the preclusion issue.[36] The Supreme Court's recent decision in *Allen v. McCurry*,[37] however, should dispel any lingering doubts concerning the applicability of section 1738.

Relying heavily on section 1738, the *Allen* Court held that preclusion rules apply in section 1983 litigation,[38] and may bar federal courts from freshly deciding constitutional claims previously litigated in state courts. The petitioner in *Allen* had been convicted in a Missouri state court of illegal possession of heroin and assault with intent to kill. At a pretrial hearing, the trial court rejected the petitioner's contention that the police had seized evidence in violation of the fourth amendment. After his conviction, the petitioner filed a section 1983 action in federal court, alleging, *inter alia*, that the search and seizure had violated his constitutional rights. Reversing the Eighth Circuit,[39] the Court held that section 1983 did not automatically entitle the petitioner to a de novo hearing of his constitutional claim in federal court.[40] The *Allen* Court considered the issue against the "background"[41] of section 1738's specific requirements, and concluded that federal courts cannot re-decide claims raised in

35. Federal courts have often decided what weight to give prior state decisions without referring to § 1738. *See, e.g.*, Montana v. United States, 440 U.S. 147 (1979); Turco v. Monroe County Bar Assn., 554 F.2d 515 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); Newman v. Board of Educ., 508 F.2d 277 (2d Cir.), *cert. denied*, 420 U.S. 1004 (1975); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Parker v. McKeithen, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974). *See generally* Winters v. Lavine, 574 F.2d 46, 54 (2d Cir. 1978) (citing cases); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1334 nn.14 & 15 (1977) [hereinafter cited as *Developments*].

36. *See, e.g.*, Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972).

37. 101 S. Ct. 488 (1980).

38. 42 U.S.C. § 1983 (1976) provides:

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

39. McCurry v. Allen, 606 F.2d 795 (8th Cir. 1979), *revd.*, 101 S. Ct. 411 (1980).

40. The Eighth Circuit, noting that the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976), barred the plaintiff from federal habeas corpus relief and that federal courts have a special role in protecting civil rights, held that a de novo § 1983 federal trial was necessary to ensure the plaintiff a federal forum for his constitutional claims. 606 F.2d at 799. The *Allen* court rejected the two premises of the Eighth Circuit's argument. The Court first stated that *Stone v. Powell* did not provide "a logical doctrinal source" for the Eighth Circuit's ruling because the availability of habeas corpus relief "has no bearing on § 1983 suits or on the question of the preclusive effect of state court judgments." 101 S. Ct. at 419. The Court next rejected the "generally framed principle" that a plaintiff must have a federal forum in which to litigate civil rights claims. 101 S. Ct. at 419.

41. 101 S. Ct. at 416.

section 1983 actions that have been fully and fairly litigated in a state court.

Although *Allen* emphasized the vitality of section 1738, that section alone is not conclusive. *Allen* reminds the federal courts that they must not overlook section 1738's clear command; it does not counsel blind adherence to that statute. Because Congress has the power to override section 1738 and common-law preclusion rules, courts must diligently analyze legislative purposes and history to determine whether Congress has done so in particular instances. Here the message of the *Allen* Court is unmistakable: Only the clearest expression of a contrary legislative intent displaces the requirements of section 1738.

The *Allen* Court was confronted with some legislative history from which it might reasonably have inferred a congressional desire to allow plaintiffs a de novo federal hearing. "One strong motive" behind the enactment of section 1983, the Court noted, was "the grave congressional concern that the state courts had been deficient in protecting federal rights."[42] A pervasive distrust of the state courts' capacity to render substantively fair decisions would seem to imply that final authority to promulgate substantive law should rest with federal courts,[43] but the *Allen* Court declared: "[M]uch clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits."[44] In fact, the Court's opinion indicates that evidence of an intent to override section 1738 must rise to the level of an implied repeal,[45] a doctrine generally applied only upon "some affirmative showing"[46]

42. 101 S. Ct. at 417. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (Congress enacting § 1983 was concerned "that state instrumentalities could not protect those [federally created] rights").

43. *See* Preiser v. Rodriguez, 411 U.S. 475, 509 n.14 (1973) (Brennan, J., dissenting); Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191, 208-11 (1972); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U. L. REV. 859, 868 (1976); *Developments*, *supra* note 35, at 1335-43. *But see* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 328-29 (1978) (footnotes omitted):

> All grants of federal jurisdiction are based upon some perceived inadequacy of state courts. Diversity jurisdiction rests upon fear of state court prejudice against "foreigners," federal question jurisdiction upon fear of state court hostility to or misunderstanding of federal rights. Yet Congress did not carry these policies so far as to oust state courts of concurrent jurisdiction over federal question or diversity cases, nor of cases within section 1983.

44. 101 S. Ct. at 417.

45. 101 S. Ct. at 417.

46. Morton v. Mancari, 417 U.S. 535, 550 (1974). The *Morton* Court also stated that courts may employ the implied repeal technique where the earlier and later statutes are irreconcilable. 417 U.S. at 550. The language of § 1738 and title VII, however, is not facially inconsistent.

of a "clear and manifest"[47] legislative purpose.

Allen v. McCurry thus neatly frames the question at hand: Unless an affirmative congressional desire to displace preclusion principles can be clearly discerned, section 1738 requires that federal courts apply those principles to decisions rendered by state tribunals under title VII's deferral provision. Part II of this Article searches for such a congressional desire.

II. LEGISLATIVE INTENT

Because the language of title VII and its subsequent amendments does not expressly address the preclusion issue, Congress's intent must be gleaned from less explicit sources.[48] Courts have accordingly sought guidance from a 1972 amendment to the Act,[49] the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*,[50] and the general structure of title VII's enforcement scheme.[51] The most obvious starting point, however, is the legislative history underlying the 1964 Act itself, a source that the courts regrettably have slighted.

A. *The History of the 1964 Act*

The unusual circumstances surrounding title VII's enactment make analysis especially difficult.[52] Unfortunately, courts interpreting title VII do not have the benefit of legislative reports, which are traditionally considered among the most illuminating and reliable indicators of Congress's intent. A report accompanied the House version of title VII,[53] but a substitute measure introduced in the Senate[54] substantially modified that bill. The Senate bill, a compromise measure hammered out in informal bipartisan conferences dominated by Senators Mansfield, Dirksen, Humphrey, and Kuchel, was

47. Radzanower v. Touche Ross & Co., 426 U.S. 148, 158 (1976) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939) (quoting Red Rock v. Henry, 106 U.S. 596, 602 (1882)).

48. As Chief Justice Marshall stated: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." United States v. Fisher, 6 U.S. (2 Cranch) 202, 205 (1805), *cited in* Consumer Prod. Safety Commn. v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980).

49. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4a, 86 Stat. 104 (codified at 42 U.S.C. § 2000e-5(b) (1976)).

50. 415 U.S. 36 (1974).

51. *See* Batiste v. Furnco Constr. Corp., 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

52. For a discussion of the events mentioned in the text, see UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 at 7-11, 3001 (1968).

53. H.R. REP. No. 914, 88th Cong., 1st Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391.

54. Amend. No. 656 to H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 11,926 (1964).

passed without an explanatory report.[55] And, because the House accepted the Senate's revisions without exception, there was no Senate-House Conference Report.[56] Even without the usual interpretative guideposts, however, several important conclusions can be drawn from the House bill, the Senate's revisions, and the legislators' explanatory statements.

By 1964, over half of the states had enacted some form of equal employment legislaton.[57] Troubling questions concerning the extent to which title VII should defer to state standards and procedures inevitably arose. Yet despite the plethora of proposed amendments[58] and sometimes impassioned debates, most legislators shared a common ground. They agreed that states should play an important role in enforcing title VII, but they also felt that the federal system should only defer to "adequate" state decisions.[59] Disagreements did exist, however, about the best way to accomplish these two goals. As Senator Dirksen, one of the principal architects of title VII's deferral provision, recognized, Congress faced the "knotty"[60] problem of drafting a bill that would "assure individual complainants that they will have fair and expeditious consideration of their grievances and still retain sufficient authority in the Federal Commission to carry forward the purposes and objectives of [title VII]."[61]

Congress considered a number of possible ways to achieve these goals. One approach would have been to presume the adequacy of state laws, limiting title VII's jurisdiction to states without fair employment laws. Most legislators, however, recognized that this presumption was unrealistic because "[i]n many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget."[62] A second alternative would have been to allow Congress to assess the adequacy of state laws, but, as Senators Clark and Chase observed: "Such a proposal is unworkable. Congress cannot determine nor can we devise a formula

55. H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 14,511 (1964). *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 52, at 3001.

56. H.R. Res. 789, 88th Cong., 2d Sess., 110 CONG. REC. 15,897. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified at 42 U.S.C. § 2000 (1976 & Supp. III 1979)). *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 52, at 3001.

57. Senator Clark (D., Pa.) pointed out that 28 states and some 48 cities had fair employment practices laws or ordinances. 110 CONG. REC. 7205 (1964) (remarks of Sen. Clark).

58. *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 52, apps. 1-11 (listing amendments adopted and rejected).

59. *See* notes 62-81 *infra* and accompanying text.

60. 110 CONG. REC. 13,087 (1964) (remarks of Sen. Dirksen).

61. 110 CONG. REC. 8193 (1964) (remarks of Sen. Dirksen).

62. 110 CONG. REC. 7205 (1964) (remarks of Sen. Case).

for determining which State laws and procedures are adequate."[63] Representative McClory advanced a third solution: title VII would apply only where the President had determined that state laws were inadequate or that the state was not adequately enforcing those laws.[64] The House rejected McClory's proposal.[65] Although it did not state its reasons, two factors probably contributed to the decision. First, because of the remoteness of the President from the daily administration of state civil rights laws, McClory's amendment made it difficult to review the adequacy of state laws.[66] Second, the amendment placed the authority to evaluate state laws in the hands of the President, a person less familiar with the vagaries of state law than the EEOC or the courts.

As title VII emerged from the House, it empowered the EEOC to assess the adequacy of state laws and procedures.[67] In "cases or classes of cases" for which the EEOC deemed state laws and procedures adequate, it could enter work-sharing agreements giving the state *exclusive* jurisdiction. Under such a work-sharing agreement,

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63. 110 CONG. REC. 7214 (1964) (interpretive memorandum on the house bill, H.R. 7152). Senators Clark and Chase were floor managers for the House-passed bill. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 52, at 3039.

64. Representative McClory's amendment provided:

> Where there is a State or local agency which has power to eliminate and prohibit discrimination in employment in cases covered by this title, the Commission shall not exercise jurisdiction under this title unless and until the President of the United States determines that such state or local agency no longer has such power or is no longer adequately exercising such power.

110 CONG. REC. 2728 (1964).

65. 110 CONG. REC. 2728 (1964).

66. The difficulty of challenging the adequacy of state laws may also have played a central role in the House's rejection of an amendment offered by Representative Cramer. Cramer's amendment would have given states with fair employment laws exclusive jurisdiction unless the EEOC, after formal hearing, expressly determined "that existing State law will not reasonably accomplish the objective of [title VII]." 110 CONG. REC. 2727 (1964). The EEOC's determination was to be subject to judicial review. The House, without comment, defeated Cramer's amendment. 110 CONG. REC. 2727 (1964). The bill first adopted by the House made it much easier to oust exclusive state jurisdiction. The bill empowered the EEOC to decide whether to give the states exclusive jurisdiction over a complaint or class of complaints but the EEOC was not required to make an express finding of the inadequacy of state law subject to judicial review. *See* notes 67-70 *infra* and accompanying text.

67. H.R. 7152, 88th Cong., 2d Sess. § 708(b) (1964). The bill states:

> Where there is a State or local agency which has effective power to eliminate and prohibit discrimination in employment in cases covered by this title, and the Commission determines the agency is effectively exercising such power, the Commission shall seek written agreements with the State or local agency under which the Commission shall refrain from bringing a civil action in any cases or class of cases referred to in such agreement. No person may bring a civil action under section 707(c) in any cases or class of cases referred to in such agreement. The Commission shall rescind any such agreement when it determines such agency no longer has such power or is no longer effectively exercising such power.

See 110 CONG. REC. 7214 (1964) (interpretative memorandum of Senators Clark and Case on H.R. 7152) (stating that EEOC must determine whether to exercise its jurisdiction based on its evaluation of the "effectiveness" of state "standards and procedures").

the EEOC would decline to hear the charge, *and* the complainant could not file a private action in federal court.[68] Representative McClory's proposed amendment and the House-approved bill thus shared a common foundation[69] — complete federal deference to "adequate" state laws[70] — but the bills contained different methods for determining the adequacy of state laws.

The Senate bill that was finally signed into law created yet another method for evaluating the adequacy of state laws and procedures. Like the House version, the Senate bill authorized the EEOC to enter into work-sharing agreements with state agencies.[71] In contrast to the House bill, however, the Senate bill guaranteed all states with fair employment practices laws an initial opportunity to resolve charges.[72] But this state jurisdiction does not necessarily foreclose access to the federal system. Nothing in the Act prevents a complainant from suing in federal court after a state has adjudicated his claim.[73]

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68. H.R. 7152, 88th Cong., 2d Sess. § 708(b) (1964) ("No person may bring a civil action under section 707(c) in any case or class of cases" referred to the state under an EEOC work-sharing agreement).

69. Representative Cramer's proposed amendment, discussed in note 66 *supra*, was also based on the premise that federal officials should defer completely to adequate and effective state laws.

70. Senator Carlson, for instance, stated his expectation that the House bill would have "but little effect within Kansas," his home state. 110 CONG. REC. 10,520 (1964). Because the bill directed the EEOC to seek written agreements giving states with adequate and effectively enforced nondiscrimination laws exclusive jurisdiction, Senator Carlson stated, "[I]t is to be expected that discrimination in employment would be handled by State officials under State law . . . ." *Id.*

71. 42 U.S.C. § 2000e-8(b) (1976) states in pertinent part:

> In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

72. 42 U.S.C. § 2000e-5(c) (1976).

73. Even though the EEOC declines to process a charge under a work-sharing agreement, the statute does not prevent the complainant from filing with the EEOC after expiration of the 60-day deferral period. *See* 42 U.S.C. § 2000e-5(c) (1976). Assuming that the EEOC, bound by the work-sharing agreement, takes no action on the charge, the complainant can sue in federal court 180 days after filing with the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1) (1976):

> [I]f within one hundred and eighty days from filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

This language contrasts with the House bill's express prohibition against private civil actions where a work-sharing agreement allows the state to process the charge. *See* note 68 *supra*. Even though title VII, unlike the House bill, does not state that a work-sharing agreement necessarily precludes a private civil action in federal court, a work-sharing agreement

The provision that allows access to federal courts is crucial. Whether a federal court may give preclusive weight to state decisions depends on the purpose of this provision. The position espoused by *Cooper* and its progeny would maintain that the provision evinces Congress's intent to afford complainants a relatively unfettered opportunity to reargue their cases. However, nothing in the legislative history of the 1964 Act suggests that Congress considered an unqualified right to relitigate in federal court necessary or desirable. In fact, Senator Dirksen, the principal drafter of the Senate bill,[74] objected to full litigation of a single claim in both state and federal forums:

> What a layering upon layer of enforcement. What if the court orders differed in their terms or requirements? There would be no assurance that they would be identical. Should we have the Federal forces of justice pull on the one arm, and the State forces of justice tug on the other? Should we draw and quarter the victim?[75]

Senator Dirksen recognized that under the House bill a work-sharing agreement would prevent relitigation but asked: "[I]f that agreement did not come to pass, where would we be under the provisions of overlapping Federal and State statutes?"[76] These remarks were made before the drafting of the Senate bill but one may reasonably suppose that the Dirksen-Mansfield-Humphrey-Kuchel substitute bill reflects Senator Dirksen's desire to avoid "multiple suits against the same defendant arising out of the same discrimination."[77] The available evidence thus suggests that the Senate accepted the premise of the McClory and House-approved bills that the federal system should defer completely to "adequate" state decisions.

The Senate apparently objected to the anticipatory nature of the method adopted by the House. The House bill required the EEOC to assess the adequacy of state law before the state had actually heard the charge. The Senate bill gave federal courts the delicate

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may include such a restriction. *See* 110 CONG. REC. 12,820 (1964) (remarks of Sen. Dirksen) ("Such agreements may also provide that civil actions may not be brought under this title in the Federal courts . . . ."). The typical work-sharing agreement, however, contains no such restriction. *See* Work Sharing Agreement Between the Equal Employment Opportunity Commission and the Illinois Fair Employment Practices Commission (as amended July 29, 1980) (on file with the *Michigan Law Review*).

74. *See* 110 CONG. REC. 12,593 (1964) (remarks of Sen. Clark):

> I think either the credit or the blame [for the changes in title VII] . . . should go primarily to the Senator from Illinois [Mr. Dirksen], for it was he who took the initiative, summoned the meetings, and presided over the arduous sessions at which a number of suggested changes — initiated by him and by members of his staff — eventually were hammered out on the anvil of long discussions, and were incorporated into the substitute.

75. 110 CONG. REC. 6449 (1964) (remarks of Sen. Dirksen).

76. 110 CONG. REC. 6450 (1964) (remarks of Sen. Dirksen).

77. *Id.*

task of determining the adequacy of state laws, remedies, and procedures on a case-by-case basis after the state proceedings have ended. The Senate evidently reasoned, and the House subsequently agreed, that the adequacy issue is often not ripe for decision before the state has actually acted on a charge. Because facts will vary, laws are complex, and a case's procedural context is difficult to predict, evaluation in advance of decision is a rather risky endeavor. Postdecision review in federal court is necessary to correct deficiencies in state procedures, remedies, and rights that become apparent only after a decision has been rendered. At the same time, consistent with the Senate's intention to increase the states' role in enforcement efforts,[78] the availability of postdecision review allows state jurisdiction to be expanded. The Senate bill eliminated the need to oust state jurisdiction on the basis of the EEOC's anticipatory judgment that state law is inadequate because federal courts can assess the adequacy of state laws and procedures after the decision. Senator Dirksen, for instance, disapproved of the House bill's provision that "a Federal commission or administrator would say whether the State law is effective and effectively administered."[79] Foreshadowing the Senate bill, Senator Dirksen declared: "I desire a court to say whether the people in my State are effectively administering our FEPC Act or not."[80] The bill thus authorized postdecision judicial review not to lower the threshold of deference due state decisions, but to ensure the adequacy of those decisions.[81]

The principles of res judicata and collateral estoppel are consistent with the federal courts' assigned task. First, preclusion doctrines allow federal courts to ensure that state proceedings are fair and that complainants have an opportunity to argue their cases in a formal, adversarial setting. In accord with the *Allen* Court's formulation,

78. *See* notes 82-94 *infra* and accompanying text.

79. 110 CONG. REC. 6451 (1964) (remarks of Sen. Dirksen).

80. *Id.*

81. The comments of Senator Clark, the Senate co-floor manager of the House-approved bill, concerning the Mansfield-Dirksen-Humphrey-Kuchel substitute are illustrative. Senator Clark recognized that the substitute both gave "greater deference to the States" and permitted the adequacy of state decisions to be subsequently tested in the federal system. Citing the inefficacy of some state laws, Senator Clark criticized the substitute's blanket provision for initial State jurisdiction. Although he realized that the federal system could "eventually" correct any deficiencies, he objected to delaying federal access: "In many a case I fear that the end result will be that justice delayed is justice denied." 110 CONG. REC. 12,595 (1964) (remarks of Sen. Clark).

Despite his criticisms, Senator Clark voted for the substitute: "After a good deal of careful thought, I have concluded that the weakening changes are not so great as to make it impossible to achieve the objectives of the title, although they certainly make it more difficult." 110 CONG. REC. 12,595 (1964) (remarks of Sen. Clark); 110 CONG. REC. 14,239, 14,511 (1964) (votes of the Senate).

federal courts can withhold preclusive effect from state decisions not "fully and fairly litigated." Second, preclusion doctrines permit federal courts to ensure the sufficiency of the substantive and remedial standards employed by state tribunals. A state decision can have res judicata effect only if the state provides the same "cause of action" — a requirement that this Article reads to mean that state law must entirely conform to title VII's substantive standards. And where state remedies are inferior, collateral estoppel will not prevent complainants from seeking additional relief under title VII. Preclusion principles thus fully accommodate Congress's predominant concern for the adequacy of state laws and procedures.

A defender of the *Cooper* court's approach might concede that preclusion doctrines are consistent with the goals that Congress sought to accomplish, but argue that a partial deference standard is equally consistent with those goals. A partial deference standard guarantees the procedural fairness of state decisions because complainants have the benefit of the formal, adversarial procedures available in federal courts. Furthermore, decisions will always be consistent with title VII's substantive and remedial standards. Indeed, state decisions are given some weight, but federal law is ultimately applied. This argument, however, cannot succeed. Although the *Cooper* partial deference standard satisfies Congress's desire for adequate state decisions, it frustrates Congress's equally important concern that state procedures be utilized to "the maximum extent possible."[82]

As we have seen, the drafters of the Senate bill evidently accepted the premise implicit in the McClory and House bills that the federal system should completely defer to adequate state decisions.[83] The great weight attributed to state proceedings in the Senate debates bolsters this conclusion. Senator Humphrey, one of the drafters of title VII's deferral provision, stressed the importance of state agencies in the total enforcement scheme: "The most important

82. 110 CONG. REC. 1521 (1964) (remarks of Rep. Celler) ("To the maximum extent possible, title VII provides for the utilization of existing State fair employment laws and procedures."); 110 CONG. REC. 7243 (1964) (remarks of Sen. Case) ("Ample provision has been made in title VII for the utilization of existing State fair employment laws and procedures to the maximum extent possible."). These two congressmen were speaking of the bill first approved by the House. The Senate substitute, as we have seen, altered the initial House-approved bill's provisions regarding federal/state enforcement efforts. Nevertheless, immediately preceding the House's approval of the Senate substitute, Representative Celler stated that these changes were "consistent with the intent of the House bill." 110 CONG. REC. 15,896 (1964). Indeed, the Senate intended that its bill increase the deference owing to state enforcement efforts. *See* notes 85-86 *infra*.

83. *See* notes 71-81 *supra* and accompanying text.

changes give greater recognition to the role of State and local action against discrimination."[84] Rather than limiting the deference that the House bill would have given to state decisions, the Senate designed its bill to upgrade the states' role.[85] Consistent with Senator Humphrey's sentiments, Senator Clark spoke of the states as equal partners in title VII enforcement efforts: "[Title VII] is so drafted that States and the Federal Government can work together. . . . [T]itle VII meshes nicely, logically, and coherently with the State and city legislation already in existence . . . ."[86]

The Supreme Court's recent decision in *New York Gaslight Club, Inc. v. Carey*[87] further highlights the importance of state proceedings. The issue in *Gaslight Club* was whether title VII authorized federal courts to award attorneys' fees to a prevailing party for work performed in state deferral proceedings. The Court relied on the intended cooperative relationship between state and federal enforcement efforts to hold that the federal court must award attorneys' fees. After rejecting the argument that the "action or proceeding"[88] language of section 706(k) referred only to federal proceedings,[89] the Court emphasized the need to preserve the significance of state participation in title VII's enforcement structure. The Court feared that complainants unable to recover fees incurred in state proceedings would flee to the federal system, and declared: "Only authorization

84. 110 CONG. REC. 12,707 (1964) (remarks of Sen. Humphrey).

85. *See* 110 CONG. REC. 11,936 (1964) (remarks of Sen. Humphrey); 110 CONG. REC. 11,935, 11,936 (1964) (remarks of Sen. Dirksen); 110 CONG. REC. 12,595 (1964) (remarks of Sen. Clark); 110 CONG. REC. 13,081 (1964) (remarks of Sen. Clark) ("Clearly, under the mechanics of the bill in the form with which the leadership is concerned, more concern or more deference could not be given to the rights of the States."); 110 CONG. REC. 13,089, 14,258 (1964) (remarks of Sen. Saltonstall); 110 CONG. REC. 14,313 (1964) (remarks of Sen. Miller) ("Action by the Federal Government should, to the maximum extent practicable, be taken in consonance with the preservation of States rights."); 110 CONG. REC. 14,331 (1964) (remarks of Sen. Williams) ("One of the principal changes made by the Senate was to preserve State sovereignty.").

86. 110 CONG. REC. 7205 (1964) (remarks of Sen. Clark). Senator Clark was speaking of the House bill. *See* 110 CONG. REC. 1521 (1964) (remarks of Rep. Celler) ("Through cooperative efforts with State and local agencies, title VII envisions an effective and harmonious mobilization of Federal, State, and local authorities in attacking this national problem."). The Senate intended its bill to further enhance the cooperative and equal partnership between federal and state enforcement authorities. *See* 110 CONG. REC. 14,335 (1964) (remarks of Sen. Williams) ("We believe that the Federal-State partnership evolving from this bill will enhance our progress even more."); note 85 *supra*. *See also* Tooles v. Kellogg Co., 336 F. Supp. 14, 17 (D. Neb. 1972) (early title VII decision holding that preclusion principles apply to title VII cases because the act requires deference to state decisions).

87. 447 U.S. 54 (1980).

88. The Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5 (1976), provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fees as part of the costs . . . ."

89. 447 U.S. at 62.

of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme."[90]

As the congressional debates and the Supreme Court's decision in *Gaslight Club* make clear, the appropriate standard of deference must facilitate respect for and cooperation with state tribunals.[91] The *Cooper* partial deference standard, however, fails to give states their due. It permits federal courts to go far beyond merely ensuring the adequacy of state laws and procedures. Despite the general consistency of state law with title VII, the fairness of state procedures, and the partial deference attributed to state decisions, a federal court may overturn those decisions simply because it interprets the relevant facts or applicable law differently. The partial deference standard requires the federal court to rehear the evidence presented to the state tribunal.[92] Permitting federal courts to duplicate full evidentiary hearings, overturn findings of fact, or discard reasonable interpretations of adequate laws flies in the face of the congressional policies of cooperation and respect.[93] Congress clearly did not doubt the competence of state tribunals to find facts and construe state laws. Rather, as Senator Clark stated, Congress intended that "[f]ederal authorities . . . stay out of any State or locality which has an adequate law and is effectively enforcing it" so that states "will have the field to themselves . . . ."[94]

In addition to demonstrating that preclusion principles and title VII are consistent, this analysis of the legislative history of the 1964 Act thus points to the stronger conclusion that title VII demands the application of those principles. The preclusion doctrine outlined in

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90. 447 U.S. at 65. *See* 447 U.S. at 66 n.6.

91. *See* Love v. Pullman Co., 404 U.S. 522, 526 (1972); Dubois v. Packard Bell Corp., 470 F.2d 973, 975 (10th Cir. 1972) (recognizing the legislative policy behind deferral, through the words of Senator Humphrey, as a "guarantee that the states '. . . will be given every opportunity to employ their expertise and experience . . .' ").

92. *See* Batiste v. Furnco Constr. Corp., 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975). The *Batiste* court stated that the court need not retake the evidence if the parties stipulate the prior state record as containing all of the relevant facts. Nonetheless, the federal court must draw its own inferences from the stipulated evidence. *See* Unger v. Consolidated Foods Corp., Nos. 80-2792 & 80-2844, slip op. at 8 (7th Cir. Aug. 14, 1981) (arguing that *Gardner-Denver* "recognized Title VII's requirement of a trial de novo . . .").

93. Commentators have observed that the states' role in title VII's enforcement scheme lacks meaning unless complete deference is given to adequate and effective state decisions:

> The advantages of local enforcement cannot be secured unless the deferral is complete —*i.e.*, unless the EEOC refuses jurisdiction over the claim and treats the state resolution of it as dispositive. Any arrangement which provides for less than this will inevitably detract from the state agency's effectiveness. The parties will always feel free to ignore the state agency so long as they know that there is parallel federal machinery to which they can turn if they dislike the state result.

Developments, *supra* note 35, at 1215-16.

94. 110 CONG. REC. 7216 (1964) (remarks of Sen. Clark).

Part III of this Article strikes the intended balance between deference to state decisional authority, on the one hand, and insistence that title VII decisions be rendered according to adequate laws and procedures, on the other. Under this Article's formulation, the federal courts retain final authority to evaluate the consistency between state and federal law and the fairness of state procedures. Yet, in deference to the vital role that the 1964 Congress envisaged for the states, this Article's preclusion doctrine intrudes no further on the jurisdiction of the states.

B. Alexander v. Gardner-Denver Co.

In *Alexander v. Gardner-Denver Co.*,[95] the Supreme Court declared: "[F]inal responsibility for enforcement of Title VII is vested with federal courts." The legislative materials discussed above strongly suggest that granting preclusive effect to adequate state decisions is not inconsistent with the federal courts' role as final arbiters of title VII claims. Nevertheless, most courts of appeals have cited *Gardner-Denver* and the federal courts' "final responsibility" in support of the rule that title VII complainants are entitled to a de novo opportunity to present their cases in federal courts irrespective of the nature of the prior state proceedings.[96] The Supreme Court, however, appears to have rejected that reading of *Gardner-Denver* in its recent decision in *New York Gaslight Club, Inc., v. Carey*.[97] Citing *Gardner-Denver*, the Court concluded: "Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief."[98]

Gardner-Denver held that a private arbitral decision based on contractual language that tracks the language of title VII will not bar a subsequent suit in federal court.[99] Despite this narrow holding, courts of appeals deciding whether state decisions may bind federal courts have quoted language from the *Gardner-Denver* opinion that appears to sweep rather broadly:

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95. 415 U.S. 36, 44 (1974).

96. *See, e.g.*, Smouse v. General Elec. Co., 626 F.2d 333, 334-35 (3rd Cir. 1980); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1082-83 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

97. 447 U.S. 54 (1980).

98. 447 U.S. at 65.

99. 415 U.S. 36, 59-60 (1974). Although the Court, following the district court, analyzed the issue as an election of remedies problem, it stated: "Whatever doctrinal label is used, the essence of [the issue] remains the same. The policy reasons for rejecting the doctrines of election of remedies and waiver [in arbitration cases] in the context of title VII are equally applicable to the doctrines of res judicata and collateral estoppel." 415 U.S at 49 n.10.

> [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.[100]

The appellate courts have reasoned that state fair employment practices laws, like arbitration, operate independently of title VII. Consequently, they have argued, litigating in one forum, be it an arbitration hearing or a state evidentiary hearing, does not prevent a second forum from hearing the claim.[101]

This reading of *Gardner-Denver* fails for two reasons. First, unlike arbitration hearings under collective bargaining agreements negotiated under the National Labor Relations Act, state fair employment practices laws are explicitly incorporated into title VII's enforcement scheme. It may be fair to extend *Gardner-Denver's* holding to causes of action such as those created by section 1981 or Executive Order 11,246, which are outside title VII's purview, but the conclusion that the *Gardner-Denver* Court's reasoning applies to state fair employment proceedings is considerably weaker. Title VII's language suggests,[102] and its legislative history confirms,[103] that Congress foresaw a unique interdependent relationship between federal and state enforcement proceedings.

Second, *Gardner-Denver's* rationale applies only weakly, if at all, to state administrative or judicial decisions reached after a full evidentiary hearing. The *Gardner-Denver* Court was troubled because the "choice of forums inevitably affects the scope of the substantive right to be vindicated."[104] The hallmark of arbitration is the informality that "enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution."[105] Arbitral fact-finding processes, the Court observed, are not commensurate with judicial processes: the record is not as complete, the usual rules of evidence do not apply, and civil trial procedures such as discovery, compulsory process, cross-examination, and testimony under oath are often

100. 415 U.S. at 48-49 (footnote omitted).

101. *See* note 96 *supra*.

102. *See* 42 U.S.C. § 2000e-5(b) (1976) ("In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by state or local authorities . . . ."); 42 U.S.C. § 2000e-5(c) (1976) (deferral requirement); 42 U.S.C. § 2000e-8(b) (1976) (authority for work-sharing agreement between the EEOC and state agencies).

103. *See* notes 57-94 *supra* and accompanying text.

104. 415 U.S. at 56 (quoting United States Bulk Carriers v. Arguelles, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring)).

105. 415 U.S. at 58.

severely limited or unavailable.[106] The distinction between contractual and statutory interpretation also figured prominently in the Court's analysis. In stark contrast to a judge, an arbitrator "is confined to interpretation and application of the collective bargaining agreement"[107] and "has no general authority to invoke public laws."[108] As the Court succinctly summarized the basis for its decision: "It is uncertain whether minimal savings in judicial time and expense would justify the risk to the vindication of title VII rights."[109]

The "risk" of applying res judicata and collateral estoppel principles to claims adjudicated in full-fledged state evidentiary hearings is considerably reduced. Like federal courts, the state tribunals interpret an employee's statutory rights rather than his contractual rights. Additionally, full state evidentiary hearings afford greater procedural protections than arbitration hearings.[110] The *Gardner-Denver* Court indicated that where a competent arbitrator considered contractual provisions that substantially conform with title VII in a procedurally fair manner and developed an adequate record concerning discrimination, "a court may properly accord [the arbitrator's] decision great weight."[111] It requires no great leap of logic to conclude that decisions rendered by a state tribunal may, in some cases, deserve preclusive effect. The *Gardner-Denver* opinion, taken as a whole, is consistent with the application of preclusion principles to claims that have been fully and fairly litigated in state deferral proceedings.[112]

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106. 415 U.S. at 56-58.

107. 415 U.S. at 53 (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

108. 415 U.S. at 53. *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 101 S. Ct. 1437 (1981) (claims arbitrated under a collective bargaining agreement may be reasserted in a federal court action under the Fair Labor Standards Act, 29 U.S.C. § 201 (1976)).

109. 415 U.S. at 59.

110. *See, e.g.*, CAL. GOVT. CODE §§ 12930, 12963 (Deering Supp. 1981); 2 CAL. AD. CODE § 7285.6 (1980) (subpoena power, full discovery powers); ILL. REV. STAT. ch. 68, ¶¶ 8-102 (Supp. 1980) and ILL. HUMAN RIGHTS COMMN. R. PRAC. & PROC. §§ 2, 7, 3 EMPL. PRAC. GUIDE (CCH) ¶¶ 22,475.02 & .07 (1981) (subpoena power, full discovery with modified right to depositions); MICH. STAT. ANN. § 3.548 (602) (1977) (subpoena power, interrogatories, right to request documents); OHIO REV. CODE ANN. §§ 4112.04 (Page 1980) and OHIO CIVIL RIGHTS COMMN. R. AND REG. §§ 4112-3-12 & 13, 3 EMPL. PRAC. GUIDE (CCH) ¶¶ 26,677.12 & .13 (1979) (full civil powers of subpoena and discovery). *Cf.* R. OF FLA. COMMN. ON HUMAN RELATIONS, § 9D-8.19, 3 EMPL. PRAC. GUIDE (CCH) ¶ 21,829.19 (1980) (discovery availability may be limited by hearing officer).

111. 415 U.S. at 60 n.21.

112. *Cf.* Becton v. Detroit Terminal of Consol. Freightways, 490 F. Supp. 464, 468 (E.D. Mich. 1980), where the court found that the arbitration process fully protected the employee's interests under the collective bargaining agreement. "To rule that the court must consider the issue of just cause for termination on a de novo basis in this case would be to needlessly

C. *The 1972 Amendments*

In 1972, Congress passed an amendment that requires the EEOC to give "substantial weight" to the findings of state tribunals.[113] The substantial weight directive is not addressed to federal courts, but it has been read as implicitly limiting the weight that federal courts may give to state decisions. The weight that a federal court assigns to state findings admittedly has implications for the standard of deference used by the EEOC. Indeed, the language of the "substantial weight" amendment is the linchpin of the *Cooper* partial deference standard.[114] If federal courts give state decisions preclusive effect, the EEOC, as a practical matter, must do so as well. It would be futile for the EEOC to overturn a state decision that is binding on the federal courts.[115] Some courts have concluded that this result — effectively requiring the EEOC to attribute preclusive weight to some state decisions — violates the intent of the substantial weight directive and, hence, have refused to apply preclusion principles.[116]

This argument possesses an attractive logic, but rests on the faulty assumption that the substantial weight provision prescribes the maximum weight that the EEOC may accord state findings. This assumption might be justified if Congress had enacted the amendment to prevent the EEOC from assigning too much weight to state findings. Congress's concerns, however, ran in the opposite direction. Prior to 1972, the EEOC was free to ignore the determinations handed down by state tribunals.[117] The legislative materials concerning the 1972 amendment are rather sparse,[118] but, in light of the

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emasculate the arbitral process and to pass up an opportunity to conserve judicial resources." 490 F. Supp. at 468. *But see* Chandler v. Roudebush, 425 U.S. 840 (1975), where the court held that federal employees may obtain de novo review of title VII claim in federal courts after exhausting federal administrative procedures. The court had no occasion, however, to express an opinion on preclusion principles and did not discuss the Act's legislative history on the issue as it presumably would have done had it intended to express a view on the question.

113. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (codified at 42 U.S.C. § 2000e-5(b) (1976)). The relevant portion of the amendment states: "In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by state or local authorities in proceedings commenced under State or local law pursuant to [the deferral provision]."

114. 464 F.2d at 12.

115. As the Seventh Circuit astutely noted: "The E.E.O.C. . . . would be attempting to mediate with defendants who were already protected from any further legal action." Batiste v. Furnco Constr. Corp., 503 F.2d 447, 450 n.1 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

116. *See* Batiste v. Furnco Constr. Corp., 503 F.2d at 450; Cooper v. Philip Morris, Inc., 464 F.2d 9, 12 (6th Cir. 1972).

117. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(b), 78 Stat. 259-60.

118. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 866-67 n.279 (1972) (Congress's failure to indicate precisely its meaning leaves the substantial weight directive "an unknown factor in the law").

policies of respect and cooperation evident in the 1964 Act,[119] it is reasonable to infer that Congress thought that the EEOC's freedom denigrated the proper role of state enforcement proceedings. During the Senate debates on the 1972 amendments, for instance, Senator Montoya questioned the purpose of the substantial weight provision.[120] In response, Senator Ervin explained that the provision's purpose was to require the EEOC to give "due respect" to the findings of state and local authorities and to guard against peremptory reversal by the EEOC.[121] Although Senator Ervin was not a supporter of the amendments, his explanation was unquestioned, and apparently accepted,[122] by Senator Williams, one of the bill's primary sponsors.[123] Interpreted in light of its purpose, the substantial weight directive would seem to state only the *minimum* weight that the EEOC must give to state findings, not an implicit maximum.

This conclusion becomes quite compelling when one considers the varied character of state decisions. The 1972 amendments clearly command the EEOC to accord at least substantial weight to *all* state decisions. Yet the thoroughness and quality of state proceedings vary substantially — ranging from purely administrative investigations performed by understaffed state agencies to full-scale adversarial litigations conducted before highly qualified administrative tribunals and courts.[124] Reading the substantial weight directive as implicitly limiting the weight that the EEOC may give to state decisions appears unreasonable because that interpretation prevents the EEOC from distinguishing among the various types of state determinations. The more natural reading of the provision is that the EEOC *must* attribute substantial weight to mere investigative find-

119. *See* notes 82-94 *supra* and accompanying text.

120. 118 CONG. REC. 309-10 (1972).

121. 118 CONG. REC. 310 (1972).

122. Although silence usually might not imply acquiescence, Senator Montoya directed his question to both Senators Williams and Ervin. 118 CONG. REC. 309-10 (1972) (remarks of Sen. Montoya). Moreover, Senator Williams freely commented on and corrected Senator Ervin's understanding of the bill both before and after Senator Ervin's explanation of the substantial weight directive. *See* 118 CONG. REC. 308-12 (1972).

123. Senator Williams was floor manager of the Senate version of the 1972 amendments, 118 CONG. REC. 583 (1972) (remarks of Sen. Williams), and served on the House-Senate conference committee, 118 CONG. REC. 6646 (1972) (conference report).

124. *See* Rosen, *supra* note 11, at 775-81; Witherspoon, *Civil Rights in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1184-205 (1965); *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J.L. & SOC. PROB. 1, 12-13 (1969) [hereinafter cited as *Present Operation*]; Note, *The Right of Equal Treatment: Adminstrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961); notes 8, 11 *supra* and accompanying text; notes 187-92 *infra* and accompanying text.

ings of state agencies, but it *may* accord greater weight to decisions rendered after a full and fair litigation.

Other statements made during the Senate debates further corroborate this interpretation. Expressing concern over "the possibility of a multiplicity of actions"[125] for each alleged violation, Senator Hruska submitted an amendment that, with certain exceptions, would have made title VII the only federal remedy in employment discrimination cases.[126] Although the proposed amendment would not have barred proceedings in state agencies,[127] the concerns that Senator Hruska sought to address included the confusion, expense, and delay involved in litigating the same discrimination claim in both state and federal proceedings.[128] In response, Senator Javits, one of the principal proponents of the 1972 amendments, stated his belief that preclusion principles rendered Senator Hruska's concerns inapplicable:

> Furthermore, there is the real capability in this situation of dealing with the question on the basis of res judicata. In other words, once there is a litigation — a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual — the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted.[129]

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125. 118 CONG. REC. 3368 (1972) (remarks of Sen. Hruska).

126. Senator Hruska's amendment proposed as follows:

AMENDMENT NO. 877

After subsection 4(e), of page 38, line 6, the following new subsection (f) is added; subsection (f) of S. 2515 and all succeeding subsections are redesignated as appropriate:

(f) Except as provided in subsection (b) through (e), (n) and (q) of this section, section 707 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e-6), as amended, and the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)), a charge filed hereunder shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization.

118 CONG. REC. 3173 (1972) (remarks of Sen. Hruska).

127. Senator Hruska's amendment excepted state deferral proceedings from its general rule that filings with the EEOC exclude legal remedies under other statutes. *See* 118 CONG. REC. 3369 (1972) (remarks of Sen. Hruska). The amendment also excepted proceedings under the Equal Pay Act and § 707 pattern and practice suits instituted by the Attorney General. *Id.*

128. *See* 118 CONG. REC. 3172-73 (1972) (remarks of Sen. Hruska). Senator Hruska observed that an aggrieved employee may file with the state fair employment practice agency, which typically has authority to obtain the employer's records, correspondence, and papers. After 60 days, he noted, "the EEOC can move in with a similar demand for records and documents." Senator Hruska continued: "Even after the State agency dismisses the complaint, the EEOC can move in and file a complaint . . . . If the EEOC dismisses the complaint, or it takes no action within 6 months, then the respondent may file suit under title VII." *Id.* at 3368.

129. 118 CONG. REC. 3370 (1972). Arguably, Senator Javits's comments could be interpreted to apply, like Senator Hruska's amendment, only to extra-title VII suits such as § 1981 or National Labor Relations Act "fair representation" suits. While plausible, this interpretation seems unlikely because Senator Javits was answering concerns that encompassed state deferral proceedings. *See* note 128 *supra*. Even if Javits was addressing only the relationship between title VII proceedings and NLRB, § 1981, or Executive Order 11,246 proceedings, his

Echoing Senator Javits's remarks, Senator Williams, a sponsor of the amendments, endorsed application of preclusion principles to complaints previously decided in another forum: "[I] do not believe that the individual claimant should be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again . . . ."[130] After Senators Javits and Williams spoke, an evenly divided Senate refused to approve the proposed amendment.[131] The statements of these two Senators, both advocates of the 1972 amendments, support two important conclusions. First, they impliedly suggest that the substantial weight directive does not limit the weight that the EEOC can accord state findings. Second, and more important, they indicate that Congress perceived no inconsistency between the substantial weight provision and the availability of preclusion doctrines.

The purposes and history of the 1972 amendments reveal that the substantial weight directive does not implicitly restrict a federal court's authority to apply res judicata or collateral estoppel principles to the decisions of state tribunals. In fact, the remarks of Senators Javits and Williams add credence to this Article's conclusion that the 1964 Act is consistent with and, in fact, contemplates the application of preclusion doctrines.[132]

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endorsement of preclusion rules would apply a fortiori to state and federal title VII proceedings. As *Alexander v. Gardner-Denver Co.* illustrates, the issue of whether preclusion principles may be applied to civil rights claims outside the ambit of title VII is difficult because of "a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." 415 U.S. at 48. It is much easier to apply preclusion principles to the findings of title VII state deferral agencies or courts. Rather than arguably compromising the independence of civil rights claims, application of preclusion rules enhances the interdependent, cooperative and respectful relationship between state and federal title VII enforcement efforts. *See* notes 82-94 *supra* & 160-201 *infra* and accompanying text.

130. 118 CONG. REC. 3372 (1972). For a discussion of how these remarks should be interpreted, see note 129 *supra*.

131. 118 CONG. REC. 3372-73 (1972). Because Senator Hruska's amendment was defeated on a tie vote, the comments of Senators Javits and Williams are not as authoritative as they might otherwise be. Even if all Senators who voted against the amendment did so because, agreeing with Senators Javits and Williams, they believed that preclusion principles rendered the amendment unnecessary, courts still lack complete assurance that a *majority* of the Senate held this view. This inference, however, is more plausible than it might first appear. Many Senators might have agreed with Senators Javits's and Williams's remarks but voted for Senator Hruska's amendment anyway. These Senators might have reasoned that the amendment was more certain to prevent needless relitigation because courts, lacking clear guidance, might mistakenly hold preclusion principles unavailable in title VII suits.

Even though this legislative history is not ideal, it is the best available. It is especially illuminating that Senator Williams, a sponsor of the 1972 amendments and a member of the Senate-House conference committee, endorsed application of preclusion rules. *See, e.g.*, National Woodwork Mfrs. Assn. v. NLRB, 386 U.S 612, 640 (1967) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.")).

132. In construing a statute, courts have questioned the weight that they should attribute to statements made by legislators well after the statute's enactment. *See* Note, *Implying a Cause*

D. *Title VII's Enforcement Scheme*

Title VII's federal enforcement proceedings are designed to mesh "nicely, logically, and coherently with state and city legislation already in existence . . . ."[133] To remain faithful to this intent, federal courts should fashion standards of deference to state decisions that promote a harmonious, efficient, and balanced relationship between state and federal enforcement efforts.

In *Batiste v. Furnco Construction Corp.*,[134] the Seventh Circuit argued that application of preclusion principles would impair the efficacy of state proceedings, and distort title VII's federal/state enforcement scheme.[135] According to the *Batiste* court, the knowledge that federal courts would give res judicata and collateral estoppel effect to state decisions would induce complainants who desire a federal forum to "first commence state proceedings but abandon them quickly before an adjudication is made."[136] This argument is vulnerable to several criticisms.

A complainant's incentive to abandon state proceedings will depend on the content of the preclusion rules that federal courts apply. If, like the Second Circuit in *Sinicropi v. Nassau County*,[137] courts adopt a rule that accords preclusive weight to almost all final state decisions, the incentive might be substantial. Under the standard proposed in this Article, however, whether the complainant's claim is barred hinges on the sufficiency of the rights, remedies, and procedures provided by the state.[138] This rule would significantly reduce

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of Action Under Section 503 of the Rehabilitation Act of 1973, 79 MICH. L. REV. 1093, 1105 n.60, 1109-10 & nn.79-82 (1981). Above all, courts want some assurance that a majority of the earlier Congress shared the legislators' subsequently expressed views. Where evidence that a majority of the subsequent Congress endorsed the views is lacking, it is less likely that those views commanded majority support in the earlier Congress. *See id.* at 110 n.81 and cases cited therein. Thus, doubts that Senator Javits's and Williams's statements reflected the understanding of the 1972 Congress, *see* note 131 *supra*, bear on whether courts may rely upon those remarks in interpreting title VII as originally enacted. But, as those statements deserve some weight in inferring the 1972 Congress's intent, *see* note 131 *supra*, they also illuminate the 1964 Congress's intent. Courts have attributed significance to subsequent statements made by legislators involved in the development of the original legislation. *See, e.g.*, Pierce & Stevens Chem. Corp. v. United States Consumer Prod. Safety Commn., 585 F.2d 1382, 1387 n.23 (2d Cir. 1978). Both Senator Javits and Senator Williams participated in the 1964 debates on title VII. *See* 110 CONG. REC. 362-63 (1964) (index) (page citations to Sen. Javits's remarks on title VII); *id.* at 739 (index) (page citations to Sen. Williams's remarks on title VII).

133. 110 CONG. REC. 7205 (1964) (remarks of Sen. Clark). *See* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63-64 (1980); note 86 *supra*.

134. 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

135. 503 F.2d at 450.

136. 503 F.2d at 450.

137. 601 F.2d 60 (2d Cir.) (per curiam), *cert. denied*, 444 U.S. 983 (1979).

138. *See* Part III *infra*.

the incentive to flee to federal court.

This Article's preclusion rule would induce complainants to abandon state proceedings only if they fear that state tribunals will misread facts or misinterpret substantive law.[139] Yet, as we have seen, Congress expressed no doubts concerning the competence of state authorities.[140] Such doubts, therefore, cannot justify restricting the deference that federal courts owe to state decisions that have been fully and fairly litigated. Although the *Batiste* court's rule is ostensibly designed to enhance federal/state cooperation, it reveals a fundamental mistrust of the state systems that is at odds with title VII's policies of respect and deference.

Even assuming that federal courts may properly consider fears that state tribunals are incompetent or hostile to civil rights, one wonders what a no-preclusion rule will achieve. Although such a rule may not cause complainants to abandon state proceedings, it might, ironically, deter them in some circumstances from seeking federal court review of state decisions. The Supreme Court's *Gaslight Club* opinion emphasized that where state remedies fall short of those provided by title VII, Congress made the federal courts available to grant additional relief.[141] Without the benefit of collateral estoppel rules, however, a complainant might hesitate to avail him-

139. Depending on one's jurisprudence, the text's assertion may misstate the argument. If one believes that generally there is one "correct" result in each case, then the assertion in the text is accurate. One might believe, however, that there is a range of equally reasonable results in each case. If so, it might be more accurate to say that complainants will abandon the state system because they fear more conservative results. Even if phrased in this way, the argument advanced in the text still stands. As against the Second Circuit's rule, this Article's preclusion rule significantly reduces the complainant's incentive to abandon state proceedings. Furthermore, Congress did not design access to federal courts to correct "conservative" state results. Courts should not ignore congressional policies of state/federal cooperation and respect by legitimizing fears that states will reach conservative results.

140. Congress wished to ensure the consistency of state and federal law and the procedural fairness of state decisions. The predominant attitude toward state laws and tribunals was one of respect and deference. *See* notes 82-94 *supra* and accompanying text.

It is interesting to note that the Supreme Court has recently given the states an increased role in protecting individual liberties guaranteed by federal law. *See* Allen v. McCurry, 101 S. Ct. 411 (1980); Stone v. Powell, 428 U.S. 465 (1976); Younger v. Harris, 401 U.S. 37 (1971). *Cf.* Sumner v. Mata, 101 S. Ct. 764, 770 (1981):

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinion as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.

Various commentators have applauded this trend. See Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821, 845 (1981); O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814-15 (1981) ("It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court".) (emphasis in original).

141. *See* notes 87-91 *supra* and accompanying text.

self of this opportunity because he fears that the federal court will retry his entire claim and reach a different result. A no-preclusion rule thus possesses no real advantage over this Article's rule.

In fact, a no-preclusion rule creates an additional distortion. Exercising authority granted by section 709(b) of the Act,[142] the EEOC routinely enters into work-sharing agreements with state agencies to divide responsibility for acting on charges.[143] Despite title VII's deferral clause, some charges are thus channeled directly into the federal system. Because the EEOC lacks formal enforcement powers, these complainants have only one opportunity to argue their case in a formal adversarial setting. Complainants whose claims are initially considered by a state agency, however, might have two opportunities to argue their case formally — one before a state tribunal and another in federal court. This windfall opportunity for a full relitigation detracts from the rationality of title VII's enforcement scheme.

Besides enhancing the fairness and symmetry of title VII's enforcement procedures, this Article's preclusion rule also promotes efficiency. Whether or not the state decision is ultimately vindicated, relitigation of a claim that has already been fully and fairly tried involves substantial costs: The parties, lawyers, and courts must all expend considerable time, money, and energy. Unfortunately, this costly duplication is largely without purpose. By establishing the dual enforcement structure, Congress merely sought to ensure that each complainant has an opportunity formally to present his case,[144]

142. 42 U.S.C. § 2000e-8(b) (1976):

> The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

The confidence that the EEOC has in the ability of state agencies to resolve charges is demonstrated by its proposed regulations that would dispense with its substantial weight review in many cases. *See* 46 Fed. Reg. 37,523-24 (1981) (to be codified at 29 C.F.R. pt. 1601) (proposed July 21, 1981).

143. *See Present Operations*, note 124 *supra*, at 17.

144. *See* 110 CONG. REC. 7205 (1964) (remarks of Sen. Clark) (expressing the concern that "inadequate procedures" hampered the efficacy of state enforcement efforts). Congress's judgment that the informal procedures employed by the EEOC must be supplemented with a right

and that state decisions conform to title VII's substantive and remedial standards.[145] An appropriately formulated preclusion rule can address Congress's overriding concern at considerably less expense. In contrast to the *Cooper* substantial weight standard, which permits relitigation of all claims, a rational preclusion doctrine would preserve judicial resources by barring relitigation of "adequate" state decisions. This concern for efficiency may be rationally imputed to Congress. Courts should not hesitate to choose the most efficient paths where, as here, other congressional policies are not sacrificed.

E. *Summary*

Neither title VII's legislative history nor its purpose provides an "affirmative showing" that Congress intended to override section 1738. Rather, the available indicators of Congress's intent suggest that applying preclusion principles to decisions rendered by state tribunals under the deferral provision is consistent with, and required by, title VII's state/federal enforcement scheme. This conclusion necessitates the development of general guidelines for the application of preclusion principles in title VII litigation, a task that this Article undertakes in Part III.

III. TITLE VII PRECLUSION PRINCIPLES

The broad contours of preclusion doctrines are easily described. Res judicata[146] or, more recently, "claim preclusion"[147] bars relitigation of an entire cause of action that was or should have been previously litigated.[148] Collateral estoppel[149] or "issue preclusion,"[150] in

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to a de novo trial in federal court, *see* note 8 *supra*, also reveals a concern for procedural formality and fairness.

145. 110 CONG. REC. 12,725, 13,091 (1964) (remarks of Sen. Humphrey); 110 CONG. REC. 13,091 (1964) (remarks of Sen. Dirksen). Section 1104 of the Civil Rights Act of 1964, which applies to title VII, states:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Civil Rights Act of 1964, Pub. L. 88-352, Title XI, § 1104, 78 Stat. 268.

146. *See, e.g.*, 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[3], at 631-35 (2d ed. 1980). *But see* Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615, 615 n.2 (1980) (arguing that Professor Moore does not appropriately use the term "res judicata").

147. See RESTATEMENT (SECOND) OF JUDGMENTS § 74 (Tent. Draft No. 3, 1976). The same doctrine has also been termed "merger and bar." *See* Vestal, *Res Judicata/Preclusion*, in PERSONAL INJURY ANNUAL V-43 to V-48 (L. Fromer & M. Friedman eds. 1969).

148. In the words of the Court, claim preclusion requires that a judgment,

> if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat

contrast, attributes preclusive weight to factual or legal conclusions concerning issues that were actually and necessarily litigated in prior proceedings. [151] These simple formulations, however, understate the complexity of the two doctrines. Modern courts have transformed the once fixed and easily ascertainable rules of preclusion into a fluid and richly textured equitable doctrine designed to attain "substantial justice" in particular cases.[152] Title VII's dual enforcement scheme and the wide variations among state fair employment practices laws further complicate the application of these already sophisticated principles. Although this Article obviously cannot attempt to apply preclusion principles to all possible variations, it does attempt to outline the central features of a title VII preclusion doctrine.

It is first necessary to consider whether state or federal law determines the content of the applicable preclusion rules. The language of section 1738 directs attention to the law of the state that rendered the first decision, stating that federal courts must give state decisions the "same full faith and credit" as they would be given "by law or usage in the courts of such State, Territory or Possession from which they are taken."[153] But section 1738's command does not rigidly confine federal courts to state law. Although the statute uses the term "same," the weight of authority suggests that federal courts may assign greater weight to a state decision than would the rendering state.[154] Because state decisions receive at least the deference that they would be accorded by the state's own courts, this greater defer-

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the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). *See* Allen v. McCurry, 101 S. Ct. 411, 414-15 (1980). For an excellent discussion and analysis of the res judicata doctrine, see Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Hazard, *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036 (1971).

149. *See* 1B MOORE'S FEDERAL PRACTICE § 0.441[2], at 3375-80 (2d ed. 1980).

150. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 74 (Tent. Draft No. 3, 1976).

151. As the Court stated the doctrine in Cromwell v. County of Sac: "[T]he judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." 94 U.S. 351, 353 (1876). *See* Montana v. United States, 440 U.S. 147 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1978); Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Fernandez v. Trias Monge, 586 F.2d 848, 856 & n.11 (1st Cir. 1978); RESTATEMENT (SECOND) OF JUDGMENTS, §§ 68, 68.1 (Tent. Draft No. 4, 1977).

152. *See generally* George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980); Holland, *supra* note 146, *passim*; Vestal, *Res Judicata Preclusion: Expansion*, 47 S. CAL. L. REV. 357 (1974).

153. 28 U.S.C. § 1738 (1976).

154. *See, e.g.*, Durfee v. Duke, 375 U.S. 106, 109 (1963) ("at least the *res judicata* effect which the judgment would be accorded in the State which rendered it"); Williams v. Ocean Transp. Lines, Inc., 425 F.2d 1183, 1389 (3d Cir. 1970) ("Section 1738 does not prohibit the second federal court from affording to the first judgment a greater precluding effect than would be afforded by the laws of the first forum state."); Vestal, *Res Judicata/Preclusion by Judgment:*

ence does not undermine section 1738's dual policies of comity and efficiency.[155]

Federal courts may also override state rules of repose where necessary to further competing federal policies.[156] As one court has succinctly stated: "The application of state law we approve today is state law wrapped in a cocoon of federal law governing the degree of adherence to state law — not unequivocal application of naked state law."[157] In *Allen v. McCurry*, the Supreme Court recognized the need to develop preclusion rules that accommodate specific federal policies, but required that any exception to these rules be based on a clear expression of legislative intent to override section 1738.[158] A perceived policy exception is the basis for all court holdings that employment discrimination cases may properly be litigated twice. But as demonstrated above, this *Cooper* premise is unsupportable under the *Allen* Court's guidelines. Absent an explicit policy exception to section 1738, the only limits on the federal courts' deference to prior state determinations in title VII cases are "essentially the same as

The Law Applied in Federal Courts, 66 MICH. L. REV. 1723, 1736-39 (1968) (It "seems to be the case" that "the [full faith and credit] clause establishes only a minimum").

155. Federal courts thus should not consider themselves bound by the sometimes archaic limitations that pervade state formulation of preclusion doctrines. *See, e.g.*, Parker v. McKeithen, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974) (res judicata applied despite absence of Louisiana recognition of this principle); Williams v. Ocean Transp. Lines, Inc., 425 F.2d at 1190 (federal interest overrides state's mutuality requirement); Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970) (claim barred as to party not named in prior suit). *But see* McCune v. Frank, 521 F.2d 1152 (2d Cir. 1975) (strict application of state preclusion law required). *See generally* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, Inc., 402 U.S. 313, 320-27 (1971) (discussion of state divergence regarding mutuality requirement in collateral estoppel). The Supreme Court in recent years has taken significant steps to liberalize the principles of preclusion in federal courts, *see, e.g.*, Montana v. United States, 440 U.S. 147, 154 (1979) (nonparty who assumed control over prior litigation estopped); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979) (on facts before the Court, offensive use of collateral estoppel by nonparty approved); Blonder-Tongue Laboratories v. University of Ill. Foundation, Inc., 402 U.S. at 350 (defensive use of collateral estoppel by nonparty approved), and this liberalization should be effective in all federal question cases, *cf.* Heiser v. Woodruff, 327 U.S. 726, 733 (1946) ("It has been held in non-diversity cases, since *Erie R.R. v. Tompkins*, that the federal courts will apply their own rule of *res judicata*.").

156. *See, e.g.*, Mitchell v. NBC, 553 F.2d 265, 274 (2d Cir. 1977) (quoting American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972)). Cases decided without reference to § 1738 have also held that strong federal policies may override traditional common-law rules of preclusion. *See, e.g.*, Commissioner v. Sunnen, 333 U.S. 591 (1948) (federal tax policy may dictate limited application of collateral estoppel to state decision on federal tax liability); Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977) (unique historical relationship between the American Indian and federal government may require variation in application of res judicata). *See generally* Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations*, 53 VA. L. REV. 1360 (1967).

157. American Mannex Corp. v. Rozands, 462 F.2d 688, 691 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972). *See* Winters v. Lavine, 574 F.2d 46, 55 (2d Cir. 1978); Ohland v. City of Montpelier, 467 F. Supp. 324, 336-37 (D. Vt. 1979).

158. 101 S. Ct. at 416-18.

important general limits on rules of preclusion that already [exist]."[159]

A. *Identity of Claims: Ensuring the Consistency of Federal and State Law*

The debates on title VII reveal that Congress recognized the need for consistency between federal and state law.[160] Federal courts can achieve the consistency that Congress desired by using preclusion doctrines judiciously. Res judicata effect may be given to a decision only if there is an "identity of claims" between prior and subsequent proceedings.[161] Courts have defined "identical claim" in a number of ways,[162] but the ultimate inquiry remains whether the claim asserted in the second forum was or should have been litigated in the first forum.[163] Where state law falls short of federal law on substantive issues, res judicata does not apply; not all issues could, much less should, have been litigated in the state proceeding.[164]

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159. 101 S. Ct. at 418.

160. *See* note 145 *supra*.

161. *See, e.g.*, Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 508-09 (1941); Bankers Life & Cas. Co. v. Kirtley, 338 F.2d 1006, 1011 (8th Cir. 1964); Sims v. Mack Trucks, Inc., 463 F. Supp. 1068, 1069 (E.D. Pa. 1979).

162. *See, e.g.*, Hanson v. Hunt Oil Co., 505 F.2d 1237, 1240 (8th Cir. 1974) ("whether the wrong for which redress is sought is the same in both actions"); Rhodes v. Meyer, 334 F.2d 709 (5th Cir.), *cert. denied*, 379 U.S. 915 (1964) (whether same right is infringed by same wrong). *See also* Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975) ("There is no one test for deciding whether the substances of two actions are the same for purposes of *res judicata*."). *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.410[1], at 98-107 (2d ed. 1980-1981); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 31, § 4407.

163. J. LANDERS & J. MARTIN, CIVIL PROCEDURE 885 (1981).

164. *See, e.g.*, Hayes v. Solomon, 597 F.2d 958, 982-85 (5th Cir. 1979) (state court action did not preclude subsequent federal action because state court did not have jurisdiction to consider the alleged federal violations arising out of the incident in question), *cert. denied*, 444 U.S. 1078 (1980). *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 31, § 4412, at 97. The assertion that the complainant cannot raise federal title VII-based claims in state proceedings assumes that federal courts have exclusive jurisdiction to interpret title VII's substantive law. Some courts, however, have held that state courts have concurrent jurisdiction over title VII-based claims. *See* Peterson v. Eastern Airlines, 20 Fair Empl. Prac. Cas. 1322, 1323 (W.D. Tex. 1979); Bennun v. Board of Governors, 413 F. Supp. 1274 (D.N.J. 1976); Vason v. Carrano, 31 Conn. Supp. 338, 330 A.2d 98 (Super. Ct. 1974). *But see* Lucas v. Tanner Bros. Contracting Co., 10 Fair Empl. Prac. Cas. 1104 (Ariz. Sup. Ct. 1974); Fox v. Eaton Corp., 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976). If states may legitimately decide title VII-based claims, then one can argue that state decisions should preclude subsequent title VII actions in federal court — the complainant should have raised his title VII claim in the state proceeding.

This mechanical argument and its premise of concurrent state/federal jurisdiction must be rejected as inconsistent with Congress's intent. The statute is designed to allow the complainant access to the federal system after a state decision. The legislative history conclusively demonstrates that this access was meant to ensure that where state law was inconsistent with or not as complete as federal law, federal law should prevail. *See* Part II.A *supra*. Both the statute's structure and legislative history reflect Congress's assumption that this task should be entrusted to federal courts.

At the most general level, title VII's deferral provision limits the possible differences between federal and state law. The EEOC may only defer to states that have "a law prohibiting the unlawful practice alleged."[165] One might argue that the overlap between state and federal law that the deferral provision requires should conclusively establish an identity of claims. Closer scrutiny of the required similarity, however, discloses several circumstances in which separate claims may exist despite the fact of deferral.

The sometimes broader scope of state law raises the possibility that state proceedings may not address the title VII issue. For instance, some states prohibit marital discrimination in addition to sex discrimination.[166] The prior state proceeding thus may have only applied the state's law on marital discrimination, even though the matters alleged might also support a charge of sex discrimination. The complainant should be able to litigate a sex discrimination claim not presented in the state forum.[167]

Res judicata effect should also be denied where claims based on title VII could not have been raised in the state proceeding. First, deferral to a state that defines "unlawful" discrimination more restrictively than does title VII should not preclude a complainant from taking advantage of the greater protection that title VII affords. It is possible, for example, that a state may use a restrictive intent standard to define unlawful discrimination.[168] But this situation is uncommon. Some states have expressly embraced title VII's disparate impact standard,[169] others look to title VII for guid-

165. 42 U.S.C. § 2000e-5(c) (1976).

166. *E.g.*, ILL. REV. STAT. ch. 68, ¶ 1-103(Q) (1980); MICH. STAT. ANN. § 3.548(202) (Supp. 1981); CAL. GOVT. CODE § 12940 (Deering Supp. 1981). Several variations of the same theme are possible. In addition to the traditional bases, some states prohibit discrimination based on mental illness, *see* CONN. GEN. STAT. § 17-206 (1981); nepotism, *see* OR. REV. STAT. § 659.340 (1979); or sexual preference, *see* D.C. CODE § 1-320e (Supp. V 1978).

167. *See* note 161 *supra* and accompanying text. Because res judicata bars not only claims that were raised, but also those that might have been, litigation of claims not raised in the first forum should be permitted only when the complainant did not have the opportunity or was affirmatively barred from raising the claims in the first instance.

A related problem arises when a federal administrative determination under a separate federal statute is used to preclude a subsequent title VII claim or where a state administrative determination regarding employment discrimination is set forth as a bar to a federal claim other than under title VII. In both cases preclusion may be appropriate if the bases of the subsequent suit could have been or were litigated as part of the prior proceeding. *Compare* Mitchell v. NBC, 553 F.2d 265 (2d Cir. 1977) (state employment discrimination proceeding bars suit under 42 U.S.C. § 1981), *with* Tipler v. E. I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971) (NLRB finding did not bar title VII claim because issues asserted in each proceeding were different).

168. *See* Duffy v. Physicians Ins. Co., 191 Neb. 223, 214 N.W.2d 471 (1974). *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (adopting an intent standard under the fourteenth amendment of the Federal Constitution).

169. *See, e.g.*, Iowa Dept. of Social Servs. v. Iowa Merit Employment Dept., 13 Fair Empl.

ance,[170] and several employ evidentiary standards that are more lenient than title VII's.[171] Except for the rare circumstance where state law is more restrictive, federal courts are barred from conducting a de novo hearing.

There is a second, more common situation in which important title VII rights cannot be fully litigated in state deferral proceedings: federal and state remedial standards often differ. Some of the state agencies to which complaints are deferred under section 706(c) are not authorized to file suit,[172] obtain full monetary relief,[173] or provide attorneys' fees.[174] The unavailability of certain forms of relief,[175] however, does not justify the adoption of a no-preclusion rule. Although a court adopting traditional preclusion rules would not permit relitigation of the merits of claims,[176] it would allow complainants to seek forms of relief authorized by title VII but unavailable in state proceedings. Not only would these rules enhance the coordination of the federal/state enforcement scheme,[177] but they would do so in a manner that is consistent with the *Gaslight Club* Court's understanding that federal courts should be made available

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Prac. Cas. 1332 (Iowa Dist. Ct. 1976); Giles v. Family Court of Delaware, 411 A.2d 599 (Del. 1980); Maine Human Rights Commn. v. City of Auburn, 408 A.2d 1253 (Me. L. Ct. 1979), *aff'd.*, 425 A.2d 990 (Me. 1980).

170. *See, e.g.*, Narragansett Co. v. Rhode Island Commn. for Human Rights, 118 R.I. 457, 374 A.2d 1022 (1977); Civil Rights Commn. v. Chrysler Corp., 80 Mich. App. 368, 263 N.W.2d 376 (1977); City of Cairo v. Fair Employment Practices Commn., 21 Ill. App. 3d 358, 315 N.E.2d 344 (1974).

171. *See, e.g.*, Goodyear Tire & Rubber Co. v. Department of Indus., Labor & Human Relations, 87 Wis. 2d 56, 273 N.W.2d 786 (1978).

172. *See, e.g.*, EEOC v. United States Fidelity & Guar. Co., 420 F. Supp. 244, 254 (D. Md. 1976) (applying Florida law).

173. *See, e.g.*, White v. Dallas Independent School Dist., 581 F.2d 556, 560 (5th Cir. 1978) (applying Texas law); Crosslin v. Mountain States Tel. & Tel. Co., 422 F.2d 1028, 1030-31 (9th Cir. 1970), *vacated*, 400 U.S. 1004 (1971) (applying Arizona law); EEOC v. Union Bank, 408 F.2d 867, 869-70 (9th Cir. 1968) (applying California law).

174. *See, e.g.*, New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67-68 (1980) (applying New York law).

175. State discrimination remedies may be inadequate in another way. Where the state has not established a civil enforcement scheme, charges may be referred to the state for criminal proceedings. *See* 42 U.S.C. § 2000e-5(c) (1976) (where state law prohibits the employment practice alleged, EEOC must defer to state entity authorized to institute criminal proceedings). Acquittal of the respondent should not preclude a putative complainant from bringing a civil action because the discriminatee is not a party to the state criminal proceeding, the penal remedy does not provide the monetary compensation or reinstatement sought by the complainant, and the burden of proof is more demanding in criminal proceedings. A respondent, on the other hand, may be bound on issues actually litigated in such prior proceedings. *Cf.* Allen v. McCurry, 101 S. Ct. 411, 419-20 (1980) (holding that federal courts addressing § 1983 constitutional claims must give collateral estoppel effect to same claim fully and fairly litigated in a state criminal proceeding.

176. *See* notes 148-51 *supra* and accompanying text.

177. *See* Part II.D *supra*.

only to supplement inadequate state remedies.[178]

Federal courts should not give res judicata effect to state decisions unless the overlap between federal and state law with respect to the relevant claims and relief is fairly complete. The inappropriateness of res judicata in a particular case, however, usually will not justify a de novo relitigation of every issue in that case. Congressional deference to state authority and collateral estoppel[179] compel federal courts to accept the state's findings on legal or factual issues actually and necessarily litigated in the state proceeding.

B. *Full and Fair Litigation: Procedural Fairness*

The preclusive effect of a state's resolution of a particular issue or an entire claim does not depend solely on consistency between state and federal law. The quality, extensiveness, and objectivity of the procedures followed in the prior litigation also play important roles. The Supreme Court in *Allen v. McCurry* stated the proper view: "Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court."[180] The *Allen* Court, interpreting section 1983, recognized that the full and fair opportunity requirement is especially compelling where, as is true of title VII, the proponents of the statute that created the cause of action sought to ensure procedural adequacy.[181]

Although no talismanic formula exists to determine whether a complainant had a full and fair opportunity to litigate his claim, the safeguards generally required in adversarial proceedings are useful indicators. In deciding whether to give preclusive weight to prior proceedings, courts have been influenced by the presence of the right to counsel,[182] the right to present evidence,[183] the right to cross-ex-

178. *See* notes 87-90 *supra* and accompanying text.

179. *See* notes 149-51 *supra* and accompanying text.

180. 101 S. Ct. at 418. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88(2) (Tent. Draft No. 2, 1975) (preclusion does not apply where "[t]he forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined").

181. 101 S. Ct. at 418.

182. *See* H.L. Robertson & Assocs. v. Plumbers Local 519, 429 F.2d 520, 521 (5th Cir. 1970) (per curiam); Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081, 1084 (5th Cir. 1969).

183. *See* Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d at 1084; Groom v. Kawasaki Motors Corp., 344 F. Supp. at 1002. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. at 57-58 (absence of rules of evidence reason to deny preclusive effect to arbitral decisions).

amination,[184] evidentiary guidelines,[185] and discovery procedures.[186] By considering these factors, one can reasonably distinguish between investigatory findings and decisions made after full evidentiary hearings.

State agencies, like the EEOC, typically investigate charges to determine their strength.[187] If the state agency finds the charge unsupported by reasonable cause or sufficient evidence, it will not pursue the matter,[188] but if the agency finds the complaint reasonable, it will usually conduct a quasi-judicial evidentiary hearing.[189]

Federal courts should not give preclusive weight to findings rendered after simple investigatory hearings. These findings typically result from a combination of investigation and conciliation in several informal meetings between an agency employee and the parties. These informal meetings ordinarily lack sworn testimony and cross-examination, make no provision for subpoenaing witnesses, and do not require attendance of counsel.[190] Respondents, usually private business concerns, may send counsel to submit exculpatory evidence and advance their interests.[191] An inexperienced complainant, however, normally is not prepared to make an equivalent presentation. Informal investigatory proceedings serve a valuable function by weeding out patently frivolous claims and furnishing satisfactory re-

184. Alexander v. Gardner-Denver Co., 415 U.S. at 49, 57-58 (1974).

185. *See, e.g.*, North Carolina v. Chas. Pfizer & Co., 537 F.2d at 73-74; United States v. School Dist., 400 F. Supp. 1141, 1150 n.6 (E.D. Mich. 1975). *But see* Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 184 & n.9 (E.D. Pa. 1976).

186. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. at 57-58 (1974) (absence of discovery one factor in not giving res judicata effect to arbitration proceeding); Smouse v. General Elec. Co., 626 F.2d 333, 335 (3d Cir. 1980) (per curiam); Groom v. Kawasaki Motors Corp., 344 F. Supp. at 1002 (W.D. Okla. 1972). It is doubtful whether the denial or limitation of discovery procedures alone is sufficient to negate application of preclusion principles. Where the amount involved does not warrant extensive pretrial proceedings, for example, cases are often tried with little or no discovery without creating a perception of unfairness. Most state employment discrimination statutes provide at least some forms of discovery, even at the administrative determination stage. Illinois, for example, allows for interrogatories and document requests, but limits access to depositions. ILL. HUMAN RIGHTS COMMN. R. PRAC. & PROC. § 7, 3 EMPL. PRAC. GUIDE (CCH) ¶ 22,475.07. For examples of the kinds of discovery procedures available in state proceedings, see note 110 *supra*.

187. *See* note 8 *supra*.

188. *E.g.*, CAL. GOVT. CODE § 12971 (Deering Supp. 1981); ILL. REV. STAT. ch. 68, ¶ 7-102(D) (Supp. 1980); N.Y. EXEC. LAW § 297(2) (McKinney Supp. 1980); OHIO REV. CODE ANN. § 4112.05 (Page 1980). *See* note 8 *supra*.

189. CAL. GOVT. CODE §§ 12967-69 (Deering Supp. 1981); ILL. REV. STAT. ch. 68, ¶ 8-106 (Supp. 1980); MICH. STAT. ANN. § 3.548(602) (1977); N.Y. EXEC. LAW §§ 294 & 295 (McKinney 1972 & Supp. 1980); OHIO REV. CODE ANN. § 4112.05 (Page 1980).

190. *See, e.g.*, N.Y. EXEC. LAW § 297 (McKinney 1972). For a description of New York's procedures, see Mitchell v. NBC, 553 F.2d 265, 270 (2d Cir. 1977). *See also* Witherspoon, *supra* note 124, at 1197.

191. *See, e.g.*, Mitchell v. NBC, 553 F.2d at 267.

lief without expensive litigation. But these proceedings do not afford complainants a full and fair opportunity to litigate, and, therefore, cannot support application of res judicata or collateral estoppel.[192]

This conception of the full and fair opportunity requirement conflicts with the Second Circuit's view. In *Sinicropi v. Nassau County*[193] and *Kremer v. Chemical Construction Corp.*,[194] the Second Circuit granted res judicata effect to an investigatory determination of no probable cause that had been reviewed by a state court. Both opinions relied on *Mitchell v. NBC*,[195] a section 1981 case. The *Mitchell* court equated an administrative finding of no probable cause with a judicial ruling on a motion for summary judgment,[196] and concluded that the lack of "a formal evidentiary hearing is no bar to the application of res judicata principles."[197] The *Mitchell* court's equation is generally suspect,[198] and it is especially dubious in title VII cases. Federal courts routinely hold that the EEOC's in-

192. *See, e.g.*, Pearson v. Williams, 202 U.S. 281, 284-85 (1906) (immigration board determination with no power to call witnesses or gather evidence). *Cf.* Truvillion v. King's Daughters Hosp., 614 F.2d 520, 523-25 (5th Cir. 1980) (dismissal of EEOC suit for failure to meet procedural prerequisites no bar to private action). *See generally* Parker, *Administrative Res Judicata*, 40 ILL. L. REV. 56 (1945); Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 5; *Developments*, *supra* note 35, at 865-74.

193. 601 F.2d 60 (2d Cir. 1979) (per curiam).

194. 623 F.2d 786 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3107 (1981) (No. 80-6045).

195. 553 F.2d 265 (2d Cir. 1977).

196. 553 F.2d at 270-71.

197. 553 F.2d at 271.

198. The New York nondiscrimination statute in *Mitchell*, for example, allows the fair employment agency to dismiss a complaint on grounds of "administrative convenience" as well as lack of probable cause. N.Y. EXEC. LAW § 297(3)(c) (McKinney 1972). It seems likely that the agency's decisions regarding probable cause are affected by the resources the agency has at its disposal. With fixed resources, the agency can conduct a fixed number of evidentiary hearings and conciliation sessions. *See* Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practice Laws (Part II)*, 42 N.Y.U. L. REV. 1035, 1049 (1967) ("Most commentators agree that budgetary limitations are currently one of the greatest single factors responsible for deficiencies in the civil rights commission administration of fair employment laws"). Rather than expressly dismissing complaints due to considerations of administrative convenience, the agency might subtly impose a higher standard of probable cause. *See* Girard & Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFFALO L. REV. 114, 118 (1964) ("From commission dismissal of about one-half of the complaints filed with them for lack of probable cause and from other evidence, one gets the strong impression that commissions have required too rigorous a showing of discrimination"); *cf.* Harvard Note, note 124 *supra* at 538 (1961) ("What 'probable cause' means is not at all clear, even among [state] commissioners and staff"). Because of the informality of the state determination and the deferential standard of review, state courts are not likely to detect and remedy use of a more demanding standard. In contrast, courts cannot vary summary judgment standards according to budgetary needs. The court must respond in a formal written opinion to the written contentions of the parties, basing its decision strictly on the merits.

Relatedly, an administrative agency, unlike a court, usually makes its probable cause determination without the benefit of a factual record or formal legal argument generated by the complainant's counsel. It seems unrealistic to believe that this difference has no effect on the

vestigatory "reasonable cause" determinations are admissable, but not controlling.[199] It is difficult to comprehend why a similar state determination deserves preclusive weight; no evidence that Congress endorsed such an arbitrary rule exists. Rather, Congress's decision not to bind complainants to the EEOC's investigatory findings suggests that complainants were meant to receive a more formal opportunity to present their cases. Even state court review of investigatory findings does not furnish such an opportunity. Although federal courts accord the EEOC's investigatory decisions appropriate weight, they nevertheless render de novo decisions. But state courts typically may decide only whether substantial evidence supports the administrative determination.[200] Consequently, even if reviewed by a state court, purely investigatory determinations by state agencies should not be entitled to preclusive effect.

State decisions rendered after full-blown evidentiary hearings, however, should ordinarily receive preclusive weight in federal courts. After a state agency determines that reasonable cause exists, state proceedings usually progress to an administrative evidentiary hearing. These hearings provide the adversarial procedural protections that are characteristically absent during the investigatory stage.[201] Except where such safeguards are lacking, federal courts should give preclusive effect to these more formal administrative determinations.

C. *Unreviewed Administrative Determinations*

Although a superficial reading of section 1738 might suggest

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fairness and accuracy of the agency's determination. *See also* note 191 *supra* and accompanying text.

The differences between an agency's probable cause and a court's summary judgment determination raise serious doubts about whether the agency is acting in a truly "judicial capacity." *See generally*, Davis, *Case Commentary: Withrow v. Larkin and the "Separation of Functions" Concept in State Administratrive Proceedings*, 27 AD. L. REV. 407 (1975); Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389; Gladstone, *The Adjudicative Process in Administrative Law*, 31 AD. L. REV. 237 (1979); Parker, *Administrative Res Judicata*, 40 ILL. L. REV. 56 (1945); Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 WIS. L. REV. 5; *Developments*, *supra* note 35, at 865-74.

199. *See* note 12 *supra*.

200. *See* note 11 *supra*. In both Kremer v. Chemical Constr. Corp., 623 F.2d 786 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3107 (1981) (No. 80-6045), and in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 983 (1979), no evidentiary hearing was conducted, nor was cross-examination permitted. In both, the New York Human Rights Division's informal investigatory determination was reviewed under a "substantial evidence" standard when the complainant subsequently appealed to the New York courts. N.Y. EXEC. LAW §§ 297 & 298 (McKinney 1972 & Supp. 1980).

201. *See* note 8 *supra*.

otherwise, the more reasonable view is that the section applies to final unreviewed administrative decisions rendered in a judicial capacity. Both the full faith and credit clause and section 1738, by their terms, apply only to "judicial proceedings."[202] Although a reading of this language that excludes administrative decisions is tenable, the purposes of section 1738, accepted rules of res judicata, and the case law all point to a broader construction. To decide whether certain types of hearings are "judicial proceedings," courts should ignore the label affixed to the deciding tribunal, and evaluate the actual nature of the proceedings.

In *United States v. Utah Construction & Mining Co.*,[203] the Supreme Court held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity."[204] The narrow issue in *Utah Construction* concerned the effect that a federal court must give to federal administrative adjudications. This reasoning applies with equal force to state administrative adjudications.[205] The full faith and credit clause and section 1738 require application of preclusion principles to unreviewed State administrative adjudications.[206]

The Second Circuit refuses to grant preclusive effect to purely administrative decisions, even if the administrative agency employed formal, adversarial procedures.[207] It will, however, apply preclusion doctrines to state administrative decisions if the complainant has initiated state court review of those decisions.[208] This formalistic dis-

202. U.S. CONST. art. 4, § 1; 28 U.S.C. § 1738 (1976).

203. 384 U.S. 394 (1966).

204. 384 U.S. at 422.

205. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 443 (1943).

206. In *Magnolia Petroleum Co. v. Hunt*, the Supreme Court so held in reviewing the effect of an unreviewed administrative proceeding of one state in another:

> Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a "judicial proceeding," or its award is a "record" within the meaning of the full faith and credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have "such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.

320 U.S. at 443.

207. The Second Circuit has not directly held that an unreviewed state administrative decision is not entitled to res judicata effect. Language in its opinions, however, strongly suggests that it will not grant administrative determinations preclusive effect. In *Sinicropi*, the court stated: "The crucial factor is that the appellant chose to submit her case to the state *courts* for review and she cannot now relitigate the same issues in federal court." 602 F.2d at 62 (emphasis in original) (citing Mitchell v. NBC, 553 F.2d at 275-76). *But see* Mitchell v. NBC, 553 F.2d at 273 & n.10 (discussing whether the New York legislature intended that unreviewed decisions of the Civil Rights Commission stand as "final").

208. *See* Kremer v. Chemical Constr. Corp., 623 F.2d 786 (2d Cir. 1980), *cert. granted*, 101

tinction between reviewed and unreviewed administrative decisions misconstrues title VII's intent, section 1738, and traditional preclusion principles.

Judicial review of an administrative adjudication, a process that adds little to the procedural fairness or substantive adequacy of the original decision, does not magically trigger application of section 1738's policies of comity and efficiency: These policies apply equally well to an unreviewed decision of an administrative agency acting in a judicial capacity. After *Utah Construction*, there is no dispute in state courts[209] or federal courts[210] that preclusion doctrines apply to unreviewed administrative adjudications, and that they must be given full faith and credit.[211]

The Second Circuit's position not to accord preclusive effect must, therefore, be supported by a clearly expressed legislative intent.[212] The evidence that the circuit has mustered in support of its position cannot withstand careful analysis. In *Mitchell* and *Sinicropi*, the Second Circuit intimated that restricting res judicata to administrative decisions that were judicially approved at the complainant's request might be necessary to preserve his right to choose a federal forum.[213] If unreviewed state administrative decisions can have res judicata effect, title VII's deferral provision, which requires complainants to submit their claims first to state administrative agencies, will prevent them from choosing to litigate in a federal forum. Although *Sinicropi* suggests that complainants were meant to have such a choice, nothing in title VII's legislative history supports that assertion. As we have seen, Congress provided access to the federal courts not to guarantee complainants their choice of forums, but to ensure the adequacy of state decisions.[214]

S. Ct. 3107 (1981) (No. 80-6045); Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir. 1979), *cert. denied*, 444 U.S. 983 (1979). The Second Circuit has hinted that preclusive effect should not attach where the *defendant* has sought judicial review. *See* note 213 *infra* and accompanying text.

209. *See, e.g.*, Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St. 2d 133, 403 N.E.2d 996 (1980); Schmidt v. Zellmer, 298 N.W.2d 178 (S.D. 1980).

210. *See, e.g.*, McCullough Interstate Gas Corp. v. FPC, 536 F.2d 910 (10th Cir. 1976); Roberts v. American Airlines, 526 F.2d 757 (7th Cir. 1975); Safir v. Gibson, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970).

211. *See, e.g.*, Thomas v. Washington Gas Light Co., 100 S. Ct 2647 (1980); Industrial Commn. v. McCartin, 330 U.S. 622 (1947); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 441 (1943); Nagle v. Ringling Bros. & Barnum & Bailey Combined Shows, Inc., 386 F. Supp. 349 (S.D. Tex. 1974); Trautman v. Standard Oil Co., 263 N.W.2d 809 (Minn. 1978). *But see* Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. ILL. L.F. 1049, 1100.

212. *See* Part I *supra*.

213. 601 F.2d at 62; 553 F.2d at 275 n.13. *See* Case Comment, 12 SUFFOLK L. REV. 139, 147-48 (1978).

214. *See* Part II. A *supra*.

Instead of implementing title VII's intent, the Second Circuit's preclusion doctrine frustrates important congressional goals. Because the Second Circuit's position rests the preclusion issue on state court review rather than on substantive adequacy and procedural fairness, it is both under-inclusive and over-inclusive. The approach is over-inclusive because it allows investigatory determinations of state agencies, unlike the EEOC's findings, to bind federal courts. It is under-inclusive because a complainant's decision not to seek state judicial review allows a federal court to overturn a procedurally fair and substantively sufficient state administrative decision. In contrast, this Article's preclusion doctrine directly addresses Congress's concerns. Far from overriding section 1738's presumptive applicability, an examination of title VII's intent strengthens the conclusion that federal courts should give preclusive effect to procedurally fair unreviewed state administrative decisions.

CONCLUSION

In *Allen v. McCurry*, the Supreme Court rejected the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . . ."[215] Courts can no longer rely on vaguely supported general principles, but must look instead to Congress's intent to determine whether a complainant is entitled to a de novo trial in federal court after a state tribunal has adjudicated the claim. *Allen's* message is that only a clearly expressed legislative intent to permit relitigation can justify the "implied repeal" of section 1738, a federal statute that requires federal courts to give res judicata and collateral estoppel effect to state decisions.

The available evidence does not demonstrate an affirmative intent to supplant preclusion rules. Instead, it gives courts strong reasons to believe that title VII is fully compatible with, and even compels, the use of preclusion doctrines. In holding that state decisions deserve only substantial weight, most circuit courts have drawn unconvincing inferences from title VII's structure, the 1972 "substantial weight" amendment, and the Supreme Court's decision in *Alexander v. Gardner-Denver Co.* Surprisingly, they have virtually ignored the most direct and illuminating evidence of Congress's intent — the 1964 Act's legislative history. These legislative materials reveal that Congress wished to defer to state authorities whenever such deference would not undermine the substantive adequacy and

215. 101 S. Ct. at 419.

procedural fairness of employment discrimination decisions. Congress concluded that one method — granting the states primary jurisdiction, but permitting access to federal courts for supplemental relief — would best reconcile title VII's conflicting objectives.

Unfortunately, the circuit courts have misconstrued the guarantee of access to the federal courts. By interpreting access to imply a right to a de novo relitigation, most circuit courts have undercut the policies of respect for and deference to adequate state decisions. The Second Circuit's application of preclusion principles has also distorted title VII's intended operation. Because the Second Circuit's rule turns on whether a state court reviewed an agency's decision, the court may uphold procedurally unfair decisions while discarding fully and fairly litigated decisions. This Article's preclusion doctrine, which is based explicitly on title VII's federal/state policies of comity and efficiency, strikes the proper balance between deference to state jurisdiction and fidelity to the rights guaranteed by title VII.