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Civil Rights--Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action under Section 1981 of the Civil Rights Act of 1866

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Civil Rights—Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866

After she was discharged by the National Broadcasting Company (NBC), appellant filed a complaint with the New York State Division of Human Rights alleging that she had been denied " 'equal terms, conditions and privileges of employment' " because of her race in violation of state law.[1] After conducting an investigation that consisted of two "informal conferences"[2] attended by appellant, Division officials, and NBC attorneys,[3] the Division dismissed the complaint for lack of probable cause.[4] The Division's finding was affirmed, first

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1. Mitchell v. National Broadcasting Co., 553 F.2d 265, 267 n.2 (2d Cir. 1977)(quoting appellant's brief). Appellant brought her action under the New York Human Rights Law, N.Y. EXEC. LAW art. 15, § 296(1)(a) (McKinney 1972), *as amended*, N.Y. EXEC. LAW art. 15, § 296(1)(a) (McKinney Supp. 1977), which makes it

> an unlawful discriminatory practice . . . [f]or an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The New York Human Rights Law was one of the earliest modern attempts by a state to legislate against discrimination, and it has served as a model for similar legislation in many other states. *See generally* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 19-31 (1966).

2. 553 F.2d at 267. Such informal investigations are not uncommon under the New York law. *See, e.g.*, State Div. of Human Rights v. Buffalo Auto Glass Co., 42 App. Div. 2d 678, 344 N.Y.S.2d 374 (1973) (mem.).

3. Appellant was not represented by an attorney when she commenced this action and continued to be unrepresented until after affirmance of the Division's action by the New York Human Rights Appeal Board. *See* 553 F.2d at 267-68.

4. The Division was acting under N.Y. EXEC. LAW art. 15, § 297(2) (McKinney 1972), *as amended*, N.Y. EXEC. LAW art. 15, § 297(2) (McKinney Supp. 1977), which states,

> After the filing of any complaint, the division shall . . . make prompt investigation in connection therewith. Within fifteen days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint . . . has engaged or is engaging in an unlawful discriminatory practice.

A finding of no probable cause means "virtually that as a matter of law, the complaint lacks merit." Mayo v. Hopeman Lumber & Mfg. Co., 33 App. Div. 2d 310, 313, 307 N.Y.S.2d 691, 695, *appeal dismissed*, 26 N.Y.2d 962, 259 N.E.2d 477, 311 N.Y.S.2d 5 (1970). In making this determination, the Division is required to give "full credence . . . to the complainant's version of the events." State Div. of Human Rights

by the New York State Human Rights Appeal Board[5] and then by the Appellate Division of the New York Supreme Court.[6]

While her administrative appeal was pending, appellant filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging violations by NBC of title VII of the Civil Rights Act of 1964.[7] A year after the title VII complaint was filed, the EEOC

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v. Buffalo Auto Glass Co., 42 App. Div. 2d 678, 678, 344 N.Y.S.2d 374, 375 (1975) (mem.).

5. *See* N.Y. EXEC. LAW art. 15, § 297-a(6)(c) (McKinney 1972) (empowering the Appeal Board "[t]o hear appeals by any party to any proceeding before the division from all orders of the commissioner issued pursuant to this article, provided such appeals are commenced by filing with the board of a notice of appeal within fifteen days after service of such order"). The scope of review of the Appeal Board is generally limited:

> [T]he board shall limit its review to whether the order of the division is:
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> a. in conformity with the constitution and the laws of the state and the United States;
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> b. within the division's statutory jurisdiction or authority;
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> c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;
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> d. supported by substantial evidence on the whole record; or
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> e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 297-a(7). Review of dismissals for lack of probable cause, however, may be even more limited. For example, the Appeal Board is to review dismissals for lack of probable cause only to determine whether the action of the Division was "arbitrary and capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." Mayo v. Hopeman Lumber & Mfg. Co., 33 App. Div. 2d 310, 313, 307 N.Y.S.2d 691, 694, *appeal dismissed,* 26 N.Y.2d 962, 259 N.E.2d 477, 311 N.Y.S.2d 5 (1970). Moreover, the Appeal Board "may not reverse a decision of the [Division] 'in the interests of justice' . . . nor may it substitute its judgment for that of the Division." State Div. of Human Rights v. Mecca Kendall Corp., 53 App. Div. 2d 201, 202-03, 385 N.Y.S.2d 665, 666-67 (1976).

Even if the Appeal Board determines that there is a genuine factual dispute over a key issue, it may not reverse the Division's dismissal for lack of probable cause since to do so would constitute substitution of the judgment of the Board for that of the Division. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. State Div. of Human Rights, 48 App. Div. 2d 391, 370 N.Y.S.2d 96 (1975) (per curiam). Finally, "[t]he board is not empowered to find new facts." State Div. of Human Rights v. Columbia Univ., 39 N.Y.2d 612, 616, 350 N.E.2d 396, 398, 385 N.Y.S.2d 19, 21 (1976), *cert. denied,* 429 U.S. 1096 (1977).

6. *See* Mitchell v. State Div. of Human Rights, 46 App. Div. 2d 844, 362 N.Y.S.2d 391 (1974)(mem.). Appeal to the appellate division is available as a matter of right. *See* N.Y. EXEC. LAW art. 15, § 298 (McKinney 1972)("Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof . . . ."). Such appeals are given "lawful precedence over other matters," and provisions are made to reduce the expense of appeal. *Id.*

Limitations on the scope of review in the appellate division are comparable to those placed on the Appeal Board. *See* Mize v. State Div. of Human Rights, 33 N.Y.2d 53, 57, 304 N.E.2d 231, 233, 349 N.Y.S.2d 364, 367-68 (1973); State Div. of Human Rights v. Mecca Kendall Corp., 53 App. Div. 2d 201, 204, 385 N.Y.S.2d 665, 667 (1976).

7. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). Like the New York law,

issued an independent finding of "no probable cause."[8]

Nine months later,[9] appellant commenced an action in federal district court under section 1981 of the Civil Rights Act of 1866.[10] The district court granted NBC's motion to dismiss the section 1981 claim on the ground that appellant's pursuit of state administrative and judicial remedies had res judicata effect on the federal claim.[11] The

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title VII was enacted to eliminate invidious discrimination in employment, a goal that the United States Supreme Court has characterized as being of the highest priority. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976)(citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)). The detailed and complex procedures of title VII are structured around a three-tiered system of local, federal administrative, and federal judicial remedies. Generally a complainant must first file with available state agencies and allow them time to act before filing with the EEOC:

> 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 (a) 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
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> . . . .

42 U.S.C. § 2000e-5(c) (Supp. V 1975).

If complainant files with the EEOC before filing with the available state agency, or before expiration of the sixty-day deferral period, the EEOC must defer to the state until the exhaustion requirements are satisfied. *See, e.g.,* Mitchell v. Mid-Continent Spring Co., 466 F.2d 24, 25-26 (6th Cir. 1972), *cert. denied,* 410 U.S. 928 (1973); Jefferson v. Peerless Pumps Hydrodynamic, Div. of FMC Corp., 456 F.2d 1359 (9th Cir. 1972); Oubichon v. North Am. Rockwell Corp., 325 F. Supp. 1033, 1036-37 (C.D. Cal. 1970), *rev'd on other grounds,* 482 F.2d 569 (9th Cir. 1973).

8. 553 F.2d at 268. The EEOC must notify complainant promptly if its investigation reveals that there is no reasonable cause to believe complainant's charges are true and must issue to complainant a notice of his right to bring a civil action. *See* 42 U.S.C. § 2000e-5(b), (f)(1) (Supp. V 1975). The finding of no reasonable cause by the EEOC will not affect complainant's right to bring a title VII action in federal court, *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973), but the statutory notice has been held to be a jurisdictional prerequisite, *see* Stone v. E.D.S. Fed. Corp., 351 F. Supp. 340, 341 (N.D. Cal. 1972).

9. After receiving notice of no reasonable cause, *see* note 8 *supra,* complainant had ninety days to file suit in federal district court. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). Thus, by the time appellant commenced her federal action, the limitation period for the title VII action had run.

10. 42 U.S.C. § 1981 (1970), which states in its entirety,

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

11. *See* Mitchell v. National Broadcasting Co., 418 F. Supp. 462, 464 (S.D.N.Y. 1976), *aff'd,* 553 F.2d 265 (2d Cir. 1977).

Second Circuit Court of Appeals affirmed, *holding* that one who has pursued state employment discrimination remedies from administrative to final judicial determination is precluded from asserting in federal court a section 1981 claim based on the same acts. *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977).

In the decade since the United States Supreme Court first suggested that section 1981 could be used to remedy private acts of racial discrimination,[12] the courts have developed a procedural framework for this cause of action[13] and have recognized it as a remedy for employment discrimination independent from but complementary to title VII.[14] Nevertheless, the precise issue in *Mitchell*—the effect of

12. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-26 (1968). For nearly a century after its passage, the courts had held that section 1981 was derived from the fourteenth amendment and thus, like 42 U.S.C. § 1983 (1970), could not be invoked to remedy discriminatory acts in which there was no element of state action. *See, e.g., In re* Parrott, 1 F. 481, 508-09 (C.C.D. Cal. 1880); Martinez v. Fox Valley Bus Lines, Inc., 17 F. Supp. 576, 577 (N.D. Ill. 1936); *cf.* Hurd v. Hodge, 334 U.S. 24 (1948) (construing section 1982, a sister provision of section 1981, as derived from the fourteenth amendment). In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Supreme Court rejected this interpretation and declared that both sections 1981 and 1982 were derived from the thirteenth amendment and were designed to eliminate "badges and incidents of slavery." *Id.* at 441.

The circuit courts quickly extended the Supreme Court's dictum in *Jones* to discriminatory acts in private employment contracts. *See, e.g.*, Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.) (by implication), *cert. denied*, 409 U.S. 982 (1972); Caldwell v. International Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). Finally, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Supreme Court held expressly that section 1981 could be used to remedy private acts of discrimination in employment. *See id.* at 459-60.

On the history of section 1981, see Spiess v. C. Itoh & Co. (America), 408 F. Supp. 916, 918-31 (S.D. Tex. 1976); C. FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1207-58 (1971); Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615 (1969).

13. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976)(statute of limitations); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)(filing with EEOC does not toll running of statute of limitations against section 1981 action); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974)(measure of damages), *cert. denied*, 425 U.S. 997 (1976); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974)(complainant not required to exhaust administrative requirements under title VII; burden of proof); Cooper v. Allen, 493 F.2d 765 (5th Cir. 1974)(award of attorneys' fees); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970)(injunctive relief available), *cert. denied*, 401 U.S. 948 (1971).

14. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 468 (1975)(Marshall, J., concurring in part and dissenting in part); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974). There was some initial speculation about whether title VII

prior state administrative and appellate judicial proceedings on a section 1981 employment discrimination action in federal court—is one of first impression.

The effect of prior proceedings on an action is ordinarily determined by reference to the common law doctrine of res judicata. The general principle of res judicata is that "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit . . . are thereafter bound '. . . as to every matter which was offered and received to sustain or defeat the claim or demand.' "[15] For res judicata to apply, four elements must be established: identity of parties,[16] identity of claims,[17] a full and fair adjudication,[18] and a final judgment.[19] This common law doctrine

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repealed section 1981 by implication, but the courts have resolved this question against such repeal. *See, e.g.*, Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

15. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948)(quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)). Res judicata is used herein in a broad sense denoting the general doctrine by which parties are precluded from relitigating claims and issues. *See* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. 2), 60 VA. L. REV. 250, 251-52 & n.5 (1974). In this traditional sense, the term includes "claim preclusion" (also referred to as "merger and bar"), *see* RESTATEMENT OF JUDGMENTS §§ 45-48 (1942), and "issue preclusion" (also referred to as collateral estoppel), *see id.* § 68.

16. Without identity of parties, claim preclusion will not apply. *See* RESTATEMENT OF JUDGMENTS § 93 (1942). A different result may obtain in issue preclusion. *Compare* Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957), *with* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961).

17. Debate regarding the element of identity of claims centers on the scope of a claim or cause of action. *Compare* McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 638 (1925)(smaller cause of action, limited to "single right . . . and a single delict to that right"), *with* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 137 (2d ed. 1947)(larger cause of action, the extent of which is controlled by "trial convenience"), *quoted in* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 340 (1948). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 61-61.2 (Tent. Draft No. 1, 1973).

18. *See* Mitchell v. National Broadcasting Co., 553 F.2d 265, 270 (2d Cir. 1977). Despite the nominal requirement of a "full and fair adjudication on the merits," res judicata may in fact apply when the prior adjudication was neither full nor on the merits in the sense that a trial preceded dismissal. *Compare* RESTATEMENT OF JUDGMENTS § 49 (1942), *with* RESTATEMENT (SECOND) OF JUDGMENTS § 48 (Tent. Draft No. 1, 1973). *See generally* FED. R. CIV. P. 41(b)(dismissal except for jurisdiction, venue, or joinder is adjudication on merits unless court specifies otherwise in its order for dismissal); 1B MOORE'S FEDERAL PRACTICE ¶ 0.409[1] (2d ed. 1974); Note, *Federal Procedure—Rule 41(b)—A Dismissal with Prejudice Is Res Judicata of the Cause of Action and Operates As an Adjudication of the Merits Regardless of Whether the Merits Have Been Reached*, 49 TEX. L. REV. 372 (1971).

19. *See* Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961)(" 'Finality' . . . may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."), *cert. denied*, 368 U.S. 986 (1962); RESTATEMENT (SECOND) OF

is supplemented in the federal courts by 28 U.S.C. § 1738, which requires federal courts to accord the same full faith and credit to state court decisions as would the courts of the state.[20] The *Mitchell* court relied on both common law res judicata and the federal statute to bar appellant's claim.[21]

In its res judicata analysis, the court examined closely each element of the res judicata defense[22] except identity of parties, which was not in issue. The court began by establishing identity of claim, finding that the state law issue before the State Human Rights Division and the federal issue raised in the section 1981 suit were identical: whether appellant's discharge was the result of racial discrimination.[23]

The court next determined that the proceedings in the Human Rights Division were a full and fair adjudication on the merits, noting that less than a full evidentiary hearing could satisfy this element.[24] This determination was buttressed by the similarity between the standard used by the Division for judging the sufficiency of a complaint and that used by federal courts when considering motions to dismiss under Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure.[25] The court apparently reasoned that since dismissals under Rules 12(b)(6) and 56 may be deemed full and fair adjudica-

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JUDGMENTS § 41 (Tent. Draft No. 1, 1973); Brousseau, *A Reader's Guide to the Proposed Changes in the Preclusion Provisions of the Restatement of Judgments*, 11 TULSA L.J. 305, 306-09 (1976).

20. 28 U.S.C. § 1738 (1970). *See* Batiste v. Furnco Constr. Corp., 503 F.2d 447, 450 (7th Cir. 1974)("[F]ull faith and credit implemented by federal statute (28 U.S.C. § 1738) is the means by which state adjudications are made res judicata."), *cert. denied*, 420 U.S. 928 (1975).

21. *See* 553 F.2d at 274-77.

22. Although the court held that appellant incurred the bar of res judicata only when she "cross[ed] the line between state agency and state judicial proceedings," *id.* at 276, it analyzed each res judicata element, except finality, in the context of the Human Rights Division proceedings.

23. In an apparent attempt to forestall criticism that the federal law would have provided appellant with greater protection, the court suggested that the New York law was broader than either similar federal statutes or the equal protection clause of the Federal Constitution. *See id.* at 269-70. Indeed, illegal discriminatory classifications under New York law include age, disability, and marital status—classifications that have not been deemed suspect under the equal protection clause and that are not included in title VII. The New York law, however, does not appear to be substantively broader than federal law in any way relevant to the result in *Mitchell.*

24. *See id.* at 270-73.

25. *See id.* at 270-71. "The preliminary review for the purpose of determining probable cause, despite its investigatory and conciliatory aspects, is an adjudicatory process comparable to the treatment given under the Federal Rules of Civil Procedure to a motion for summary judgment or to dismiss for failure to state a claim . . . ." *Id.* at 270.

tions on the merits for res judicata purposes,[26] a state agency determination employing equivalent standards should be treated equally. The court also concluded that errors committed by the agency in finding no probable cause were in any event an insufficient ground on which to base a finding that there had not been a full and fair adjudication on the merits.[27] Emphasizing that the "[f]ederal courts do not sit to review the determinations of state courts,"[28] the court stated that

> [t]he doctrine of res judicata does not depend on whether the prior judgment was free from error. . . . Otherwise, judgments would have no finality and the core rationale of res judicata—repose—would cease to exist. . . . [T]here would no longer be a distinction between direct review of an erroneous judgment and collateral attack.[29]

Turning to the issue of whether there had been a final adjudication of appellant's claim in the state proceedings, the court was unable to find that the agency's determination of no probable cause would be accorded finality by the courts of the state[30] and relied instead on the determination of the appellate division, which clearly was final.[31] Apparently, both the finality and the judicial character

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26. *See id.* at 271; note 18 *supra. See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.409[1]-[2] (2d ed. 1974).

27. *See* 553 F.2d at 271-72.

28. *Id.* at 273.

29. *Id.* at 272 (citations omitted).

30. *See id.* at 273. The New York Law provides that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights." N.Y. EXEC. LAW art. 15, § 297(9) (McKinney Supp. 1977). Moreover,

> as to acts declared unlawful by section two hundred ninety-six of this article, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure in this article, he may not subsequently resort to the procedure herein.

Id. § 300.

Whether the combined effect of these provisions is to render Division dismissals for lack of probable cause "final" is unclear. It seems likely that such an administrative determination would bar further administrative consideration, as, for example, by a different state agency, *see* Bronx Eye & Ear Infirmary v. New York City Comm'r on Human Rights, 55 Misc. 2d 22, 284 N.Y.S.2d 218 (1967), but New York courts seem hesitant to allow Division determinations to preclude subsequent *judicial* consideration, *see* Gaynor v. Rockefeller, 21 App. Div. 2d 92, 248 N.Y.S.2d 792 (1964); Division of Human Rights v. County of Monroe, 88 Misc. 2d 16, 386 N.Y.S.2d 317 (Sup. Ct. 1976); Moran v. Simpson, 80 Misc. 2d 437, 362 N.Y.S.2d 666 (Sup. Ct. 1974). *But see* Taylor v. New York City Transit Auth., 309 F. Supp. 785 (E.D.N.Y. 1970)(under New York law, decisions of administrative agencies are res judicata).

31. *See* 553 F.2d at 273.

of the appellate division proceedings were necessary to the court's decision. Finality was significant not only as an element of res judicata, but also because the potential finality of the appellate proceedings put the appellant "on notice that the determination of the Appellate Division might foreclose any other action in the state courts."[32] The judicial character of the appellate division's proceedings also seems to have been necessary to the decision inasmuch as the court stressed that res judicata was applied only because appellant had crossed the line from administrative to judicial remedies.[33]

Finally, the court determined that the final judgment of the appellate division implicated 28 U.S.C. § 1738, which requires federal courts to accord the same full faith and credit to a state court judgment as would be accorded to the judgment by the state courts themselves.[34] Although the court recognized that application of res judicata and section 1738 might be limited by competing policies,[35] it concluded that in this case there was an "absence of countervailing policy considerations."[36]

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32. *Id.* The significance of this statement is uncertain. Notice or foreseeability of potential preclusion is a factor sometimes considered in the application of collateral estoppel, *see* 1B MOORE'S FEDERAL PRACTICE ¶ 0.442[2], at 3859-61 (2d ed. 1974), but seems to be irrelevant in considering preclusion by res judicata, *see id.* ¶ 0.405, at 631-34.

On an intuitive level one might argue that the harsh penalty of preclusion is fairer when the risk of preclusion was knowingly undertaken. It is questionable, however, whether a complainant before *Mitchell* would have been "on notice" that pursuit of state appellate review would foreclose subsequent federal relief. Considering the unsettled state of the law and the substantial case law to the contrary in the context of title VII, a reasonable complainant might easily have concluded that the appellate court judgment would be of "no consequence." *See* Benneci v. Department of Labor, N.Y. State Div. of Employment, 388 F. Supp. 1080, 1082 (S.D.N.Y. 1975), *discussed at* notes 67-75 *infra* and accompanying text.

33. *See* 553 F.2d at 275-77.

34. *See id.* at 273-74.

35. " 'Other well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738.' . . . Appellant has raised a number of policy objections to giving res judicata effect to the Appellate Division's determination, which, if valid, would prevail over the mandate of § 1738." *Id.* at 274 (quoting American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), *cert. denied,* 409 U.S. 1040 (1972)).

36. *Id.* at 276. Appellant apparently argued that federal civil rights claims should not be subject to the full faith and credit doctrine. The court rejected this argument: "[T]hat a federal civil rights action is involved . . . is not by itself a valid reason for denying full faith and credit to the state court proceedings." *Id.* at 274. Among the several cases the court cited in support of this proposition, some are inapposite and the remainder clearly distinguishable. *See* Brown v. DeLayo, 498 F.2d 1173 (10th Cir. 1974)(no mention of section 1738 where teacher claimed discharge violated due process); Tang v. Appellate Div., 487 F.2d 138 (2d Cir. 1973)(section 1738 not basis of decision where attorney challenged state residency requirement and there was no race issue), *cert. denied,* 416 U.S. 906 (1974); American Mannex Corp. v. Rozands, 462 F.2d

Thus, finding that the elements of res judicata were satisfied, that the presence of a final judicial determination implicated section 1738, and that the policies supporting application of res judicata and section 1738 outweighed the countervailing policy considerations, the court held that the section 1981 claim was barred.

While *Mitchell* was the first case in which a court considered the application of res judicata and section 1738 to a section 1981 claim,[37] a number of courts have considered the effect of prior state proceedings on subsequent title VII actions and generally have rejected the application of res judicata.[38] Despite several significant differences between title VII and section 1981,[39] three factors suggest that these title VII cases are relevant in examining the *Mitchell* decision. First, both provisions are directed, at least in part, toward eliminating racial discrimination in employment.[40] Second, the Supreme Court has emphasized that employment discrimination remedies are

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688 (5th Cir.)(taxpayer challenged ad valorem property tax), *cert. denied,* 409 U.S. 1040 (1972); Katz v. Connecticut, 433 F.2d 878 (2d Cir. 1970)(per curiam)(condemnation case with no race issue; no mention of section 1738); Holm v. Shilensky, 388 F.2d 54 (2d Cir. 1968)(divorce action where the decision turned on choice of laws). In short, the cases cited bear little relation to the general proposition that civil rights claims do not form a general exception to section 1738 preclusion.

Appellant also argued that the court's holding would force future complainants to elect between title VII and section 1981 since pursuit of exhaustion under title VII might foreclose section 1981 relief. The court's response is described at text accompanying notes 83-85 *infra.*

37. Although complainant in Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975), sought relief under both section 1981 and title VII, the court confined its opinion to the effect of prior proceedings on title VII actions.

38. *See* Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975); Ferrell v. American Express Co., 8 Empl. Prac. Dec. 5458 (E.D.N.Y. 1974); Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973); notes 46-75 *infra* and accompanying text.

39. Principal among these differences are title VII's explicit and detailed procedural system, *see* note 7 *supra,* and its greater substantive breadth. While section 1981 bans discrimination only on grounds of race, *see, e.g.,* Runyon v. McCrary, 427 U.S. 160 (1976)(section 1981 not addressed to discrimination based on sex); DeGraffenreid v. General Motors Assembly Div., 558 F.2d 480 (8th Cir. 1977)(section 1981 not addressed to discrimination based on sex); Mouriz v. Avondale Shipyards, Inc., 428 F. Supp. 1025 (E.D. La. 1977)(section 1981 not addressed to discrimination based on religion or national ancestry), title VII specifies several illegal discriminatory classifications, including sex, religion, and national origin, *see* 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975). Other differences are suggested in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

40. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 470 (1975)(Marshall, J., concurring in part and dissenting in part); Emporium Capwell Co. v. WACO, 420 U.S. 50, 66 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

"parallel or overlapping"[41] and "independent but related."[42] Indeed, it has been suggested that the principles governing construction and application of title VII procedural requirements apply with equal force in the section 1981 context.[43] Finally, although the *Mitchell* court suggested that its holding was limited to section 1981,[44] there are significant indications in the court's decision that title VII is implicated as well.[45]

The few title VII cases in which the issue of res judicata has been raised manifest a judicial reluctance to allow state proceedings to foreclose federal employment discrimination claims and generally rely on important congressional and social policies in rejecting the application of res judicata. In *Alexander v. Gardner-Denver Co.*,[46] for example, the complainant had sought title VII relief in federal court after an adverse ruling in mandatory final arbitration under a collective bargaining agreement.[47] In holding that the title VII claim was not barred by prior submission of the complaint to final arbitration,[48] the Supreme Court relied on the broad policy goals supporting employment discrimination legislation,[49] the parallel or overlapping structure of employment discrimination remedies,[50] and the fact that the complementary relationship of the forums made it possible for the

41. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

42. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 468 (1974)(Marshall, J., concurring in part and dissenting in part).

43. *See* Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974). In *Long* the Sixth Circuit suggested that McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), should be controlling in section 1981 actions on the issues of burden and order of proof, stating, "Although *McDonnell Douglas* was a Title VII case, the principles governing these procedural matters apply with equal force to a § 1981 action." 496 F.2d at 505 n.11; *cf.* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1316 (6th Cir. 1974)("[I]n fashioning a substantive body of law under section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction."), *cert. denied*, 425 U.S. 997 (1976).

44. *See* 553 F.2d at 275 n.13.

45. *See* notes 80-88 *infra* and accompanying text.

46. 415 U.S. 36 (1974).

47. The collective bargaining agreement contained an antidiscrimination clause. *See id.* at 39.

48. *See id.* at 59-60.

49. "Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Id.* at 44.

50. [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.

Id. at 48 (footnote omitted).

objectives of both forums to be served.[51] The Court summarized its attitude toward employment discrimination actions in strong terms: "[C]ourts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability of this forum."[52]

Three circuit courts have considered the effect of extensive proceedings in state agencies on title VII actions. In *Voutsis v. Union Carbide Corp.*,[53] complainant brought a sex discrimination claim in the New York Division of Human Rights. Although Division efforts resulted in a settlement of the claim,[54] the settlement was appealed twice to the appellate division and remanded each time to the Division to resolve problems of vagueness in the employer's obligations to the complainant.[55] The Second Circuit held that the subsequent title VII action in federal court was not barred by res judicata, stating, "The federal remedy is independent and cumulative, . . . [and] the federal claim allows the district court to conduct a 'full scale inquiry into the charged unlawful motivation in employment practices.' "[56] Moreover, in another part of the opinion, the court stated that procedural technicalities should not be allowed to defeat potentially valid employment discrimination claims.[57]

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51. "[T]he relationship between the forums [arbitration and Title VII action in federal court] is complementary since consideration of the claim by both forums may promote the policies underlying each." *Id.* at 50-51.

Other considerations upon which the Court relied included the informality of arbitration proceedings and consequent loss to complainant of procedural safeguards, *see id.* at 57-58, the inappropriateness of the waiver by contract argument in the title VII context, *see id.* at 51-52, and the "legally independent origins" of contract and title VII rights, *see id.* at 52-53.

52. *Id.* at 60 n.21.

53. 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

54. Under the Human Rights Law, the Division may negotiate a conciliation agreement with respondent. Although complainant may object to the terms and force a hearing on the merits of his complaint, if the Division finds that the objections are "without substance," it may dismiss the complaint at any time before the hearing. Such exercise of the Division's discretion is unreviewable. *See* N.Y. EXEC. LAW art. 15, § 297(3)(b)-(c)(McKinney 1972).

55. *See* State Div. of Human Rights v. Union Carbide Corp., 35 App. Div. 2d 664, 315 N.Y.S.2d 401 (1970)(mem.); State Div. of Human Rights v. Union Carbide Corp., 34 App. Div. 2d 636, 310 N.Y.S.2d 396 (1970)(per curiam). The *Voutsis* court noted that at the time it reached its decision, the settlement was pending in the Division "for the purpose of making a record appropriate for judicial scrutiny." 452 F.2d at 893.

56. 452 F.2d at 893 (quoting Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968)).

57. In addition to the res judicata defense, defendant claimed complainant had filed her complaint with the EEOC before expiration of the deferral period prescribed by title VII. *See* 42 U.S.C. § 2000e-5 (Supp. V 1975). The court suggested that "the

In *Batiste v. Furnco Construction Co.*,[58] the Seventh Circuit rejected an argument that an order by the Illinois Fair Employment Practices Commission was res judicata on any issue in a subsequent federal action under title VII and section 1981, despite the fact that such orders were final and had res judicata effect in Illinois courts.[59] The court found "a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII."[60] This policy, the court emphasized, required "that res judicata not be applied to state adjudications."[61] The court also disposed of the argument that full faith and credit should be given to state adjudications under section 1738 by suggesting that section 1738 was essentially statutory res judicata and was therefore subject to the same countervailing policies that precluded application of common law res judicata.[62]

In *Cooper v. Phillip Morris, Inc.*,[63] minority workers discharged by defendant complained to the Kentucky Commission on Human Rights, seeking restoration of their jobs and backpay. After six days of public hearings, the Commission ordered the employer to rehire complainants, but denied backpay on the ground that "the evidence was too speculative."[64] Complainants subsequently initiated a title VII action in federal court seeking backpay and attorneys' fees. The district court granted the defendant's motion for summary judgment on the ground that state proceedings were final and therefore

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intent of Title VII is remedial and that plaintiffs under it should not be held accountable for a procedural prescience that would have made a Baron Parke happy or a Joseph Chitty proud." 452 F.2d at 892.

A judicial willingness to relax procedural restrictions in the face of employment discrimination claims has been indicated by other courts. *See, e.g.*, Shaffield v. Northrup Worldwide Aircraft Serv., Inc., 373 F. Supp. 937, 940 (M.D. Ala. 1974); Antonopulos v. Aerojet-General Corp., 295 F. Supp. 1390, 1395 (E.D. Cal. 1968).

58. 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

59. The district court had ruled that the Fair Employment Practices Commission (FEPC) order was res judicata on every issue on which the FEPC "had the power to award the same kind of relief as is available under [title VII]." Batiste v. Furnco Constr. Corp., 350 F. Supp. 10, 15 (N.D. Ill. 1972), *rev'd*, 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975). Since the FEPC had no power to award attorneys' fees, the lower court awarded them to plaintiffs, but only those incurred in prosecuting their federal claim. *See id.*

60. 503 F.2d at 450. The court relied in part on a then-recent amendment to title VII requiring the EEOC to accord substantial but not conclusive weight to findings of state or local authorities. *See* Public Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. § 2000e-5(b) (1970)). The court felt that this amendment was "strongly indicative of the Congressional policy that final responsibility for the administration of Title VII rests within the federal system." 503 F.2d at 450 (footnote omitted).

61. 503 F.2d at 450.

62. *See id.*

63. 464 F.2d 9 (6th Cir. 1972).

64. *Id.* at 10.

preclusive of the federal claim.[65] The Sixth Circuit reversed and, relying primarily on *Voutsis*, held that the title VII action was not barred by res judicata.[66]

Finally, in *Benneci v. Department of Labor, New York State Division of Employment*,[67] the case most closely analogous to *Mitchell* on its facts, a federal district court held that a final judgment in a state appeals court would not foreclose subsequent title VII relief in federal court.[68] In that case, an employee of the New York Department of Labor alleged discrimination on the basis of his religion and national ancestry. When his complaint was dismissed by the Division of Human Rights for lack of probable cause, he pursued the same course as the appellant in *Mitchell*, including appeal to the Appellate Division of the New York Supreme Court.[69] After the appellate division affirmed the administrative determination, complainant complied with EEOC filing requirements and brought a timely title VII action in federal district court.[70] In the district court, defendant moved for summary judgment, arguing that the state proceedings should be accorded res judicata effect by the federal court. The court rejected this argument, relying on the federal courts' " 'plenary powers to secure compliance with Title VII' "[71] and important congressional policies embodied in the act.[72]

While the *Benneci* court did not explicitly state that a different result would have been reached had the prior proceedings included a trial on the merits in state court, it did rule that the appellate proceedings were of "no consequence"[73] in the federal action because the limited scope of review in the appellate division precluded a de novo consideration by that court.[74] This suggests that state proceedings

65. *See id.*

66. *See id.* at 11-12. The *Cooper* court also relied on the 1972 amendment to title VII, *see id.* at 12, as did the court in *Batiste*, *see* note 60 *supra*.

67. 388 F. Supp. 1080 (S.D.N.Y. 1975).

68. *See id.* at 1082.

69. *See* Benneci v. State Div. of Human Rights, 38 App. Div. 2d 918, 330 N.Y.S.2d 987 (1972) (mem.).

70. *See* 388 F. Supp. at 1081. *See also* note 9 *supra*.

71. 388 F. Supp. at 1081 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974)).

72. *See id.* at 1081-82. The overriding congressional policy, of course, is elimination of employment discrimination. Other congressional policies embodied in title VII include settlement of employment discrimination claims locally through " 'conference, conciliation, and persuasion,' " *id.* at 1081 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)), and availability of a " 'federal remedy if the state machinery has proved inadequate,' " *id.* at 1082 (quoting Voutsis v. Union Carbide Corp., 452 F.2d 889, 893 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972)).

73. *Id.* at 1082.

74. *See id. See generally* note 6 *supra*.

including de novo consideration by a state court might have generated a different result.[75]

Thus, before *Mitchell*, res judicata had rarely been applied to bar federal employment discrimination claims. In the single reported instance in which pursuit of state remedies resulted in preclusion of a subsequent federal claim, the state proceedings had included a trial on the merits in state court,[76] and it is only in this context that there was any hint prior to *Mitchell* that pursuing the full gamut of state procedures might endanger a federal civil rights claim.

The basis on which the *Mitchell* court distinguished this line of cases is the distinction between administrative remedies, which both title VII and section 1981 complainants may pursue without endangering their federal claims,[77] and appellate judicial relief, which, if pursued, erects a bar of res judicata, at least against a section 1981 claim.[78] As the court made clear, res judicata attaches only when complainant "crosses the line" from administrative to judicial proceedings.[79]

As a rationale for applying res judicata, this distinction may be criticized on three grounds. First, despite the court's assurance that its ruling applies only to section 1981 claims, the rationale is not so easily cabined, and the case may be but a preface to a broader application of res judicata to employment discrimination cases in general. Second, the rule will inevitably tend to undermine the congressional preference for local as opposed to federal dispute settlement. Finally, a mechanical application of the judicial/administrative distinction without regard to the quality of the proceeding at each stage leads to anomalies.

There are substantial indications that the *Mitchell* rule is not

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75. While the court emphasized de novo consideration, it seems likely that an original trial on the merits would possess the same advantages as a de novo proceeding following administrative proceedings.

76. *See* Bennun v. Board of Governors of Rutgers, 413 F. Supp. 1274 (D.N.J. 1976). In *Bennun*, a teacher commenced an action in state court alleging that the university regents had denied him tenure because of his nationality. After the complainant's state court action was dismissed at the close of his case in chief, he instituted a title VII action grounded on substantially the same events. The federal district court held that the state court trial had res judicata effect on the subsequent title VII action:

> Principles of res judicata are fully applicable to actions brought under the federal Civil Rights Act. . . . Thus, where a cause of action which encompasses a claim under the Civil Rights Act reaches judgment in one court, the judgment of that court will be given the same preclusive effect by a second court as would any other judgment of that first court.

Id. at 1278.

77. *See* 553 F.2d at 275-76.

78. *See id.* at 276.

79. *Id.*

limited to section 1981 actions. Although the court expressly declined to discuss the effect of prior judicial proceedings on subsequent title VII actions, it carefully distinguished several cases holding that res judicata did not apply to title VII actions on the ground that those cases "did not involve resort to state judicial remedies."[80] In distinguishing these cases, however, the *Mitchell* court made no reference to the decision in *Benneci v. Department of Labor, New York State Division of Employment*,[81] where a federal district court had refused to apply res judicata to bar a subsequent title VII claim in federal court, even though there had been resort to state judicial remedies after administrative exhaustion.[82] Moreover, in rejecting the appellant's argument that the application of res judicata would prohibit complainants from pursuing title VII and section 1981 remedies concurrently by giving preclusive effect in a section 1981 action to state remedies undertaken in satisfaction of title VII exhaustion requirements,[83] the court in *Mitchell* relied on the proposition that "deferral requirements of Title VII do not contemplate resort to state judicial review."[84] In the court's view, according preclusive effect to determinations of state appellate courts created no conflict between section 1981 and the exhaustion requirements of title VII because those exhaustion requirements did not explicitly include available appellate review.[85] But this argument applies with equal force in the case where, after pursuit of state judicial remedies, or of any other remedy not explicitly included in title VII exhaustion requirements, a complainant seeks title VII relief.[86] Thus, despite the court's assurances to the contrary,[87] its broad language indicates that the limitation imposed on section 1981 actions may be extended to title VII actions. Ultimately, complainants may be forced to make an irrevocable choice between state appellate remedies and *any* federal cause of action.[88] Nor have these implications escaped defendants in employ-

80. *Id.* at 275 n.13.

81. 388 F. Supp. 1080 (S.D.N.Y. 1975).

82. *See* notes 67-72 *supra* and accompanying text.

83. *See generally* note 7 *supra.*

84. 553 F.2d at 276.

85. *See id.*

86. It could be suggested that while a section 1981 claimant may exhaust only those remedies stated explicitly in title VII, a title VII claimant must exhaust the required remedies but may exhaust others as well. There is no support for this interpretation in either title VII or section 1981, however, and the *Mitchell* court did not suggest a basis for such a distinction.

87. *See* 553 F.2d at 275 n.13.

88. The Supreme Court apparently rejected such a literal and restrictive approach to construction of title VII exhaustion requirements in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). There the Court found that resort to final arbitration, although not a procedural prerequisite to a federal action, did not foreclose title VII

ment discrimination actions. In at least two cases arising after *Mitchell*, defendants have argued that the court's holding extended to bar title VII actions instituted after state proceedings.[89]

While the *Mitchell* court was willing to accept only "arguendo" that the policies allowing one to exhaust state remedies without foreclosing title VII remedies were applicable in the section 1981 context,[90] there appears to be no reason why the differences in scope and procedure between section 1981 and title VII[91] should require the inference that the congressional policies underlying title VII are inappropriate in a section 1981 context. Clearly, the fundamental social policy underlying title VII, eliminating discrimination in employ-

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relief, in part, because "[t]here is no suggestion in the statutory scheme that a prior arbitral decision . . . forecloses an individual's right to sue [under title VII]." *Id.* at 47.

Several other courts have suggested that both title VII and section 1981 are to be construed liberally. *See, e.g.,* Davis v. Valley Distrib. Co., 522 F.2d 827, 832 (9th Cir. 1975)(title VII is remedial and should be construed liberally), *cert. denied,* 429 U.S. 1090 (1977); Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974)(courts should adopt broad outlook in enforcing section 1981); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974)(courts should give a "wide scope" to title VII); EEOC v. Delaware Trust Co., 416 F. Supp. 1040, 1045 (D. Del. 1976)(courts construe title VII liberally so as to avoid allowing procedural technicalities to defeat claim); Spiess v. C. Itoh & Co. (America), 408 F. Supp. 916, 928 n.7 (S.D. Tex. 1976)(section 1981 is to be liberally construed); Player v. Alabama Dep't of Pensions and Security, 400 F. Supp. 249, 265 (M.D. Ala. 1975)(section 1981 to be liberally construed to effect remedial purposes), *aff'd mem.*, 536 F.2d 1385 (5th Cir. 1976); Kyles v. Calcasieu Parish Sheriff's Dep't, 395 F. Supp. 1307, 1310 (W.D. La. 1975)(title VII to be given broad construction).

89. *See* Gilinsky v. Columbia Univ., 440 F. Supp. 1120, 1121 (S.D.N.Y. 1977); Al-Hamdani v. State Univ., 438 F. Supp. 299, 301-03 (W.D.N.Y. 1977). In *Gilinsky,* complainant appealed a dismissal by the State Human Rights Division to the Appeal Board, and the dismissal was reversed. The defendant thereafter appealed to the New York Appellate Division, which affirmed the Appeal Board, and then to the Court of Appeals, which reversed. *See* State Div. of Human Rights v. Columbia Univ., 39 N.Y.2d 612, 350 N.E.2d 396, 385 N.Y.S.2d 19 (1976), *rev'g* 48 App. Div. 2d 1012, 372 N.Y.S.2d 208 (1975)(mem.), *cert. denied,* 429 U.S. 1096 (1977). In complainant's subsequent title VII suit, defendant urged application of res judicata, relying on *Mitchell.* The court refused to apply res judicata, relying in part upon the *Mitchell* court's express reservation of this issue in the situation where the defendant appeals. *See* 440 F. Supp. at 1121-22 (citing Mitchell v. National Broadcasting Co., 553 F.2d 265, 275 n.13 (2d Cir. 1977)). In *Al-Hamdani,* complainant pursued an identical course as complainant in *Mitchell* including appeal to the appellate division. *See* State Div. of Human Rights v. State Univ., 43 App. Div. 2d 663, 350 N.Y.S.2d 886 (1973). Complainant in *Al-Hamdani,* however, brought her federal action under title VII rather than section 1981. Defendant relied on *Mitchell* to argue that complainant's title VII action should be barred by res judicata. The court found Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972), to be controlling, however, and refused to bar complainant's action.

90. *See* 553 F.2d at 274-75. *But see id.* at 278 (Feinberg, J., dissenting).

91. *See* note 39 *supra.*

ment,[92] is an appropriate consideration in applying any other device designed to achieve that end, including section 1981. This similarity alone argues strongly against any distinction between the two courses of action with respect to the accessibility of a federal forum.

But even the more specific policy goals of title VII may be served by section 1981. Title VII procedures are thought to embody congressional judgments that the preferred means of resolving employment discrimination disputes are persuasion and conciliation at the local level[93] and that the opportunity to litigate in federal court should be available but deferred until conciliatory measures have been attempted.[94] Since section 1981 creates a federal cause of action for private litigants, it advances the latter goal of providing a federal forum for federally guaranteed rights. Section 1981 complainants, however, need not exhaust administrative remedies before proceeding to federal court.[95] Nevertheless, that administrative exhaustion is not required in section 1981 actions does not compel the conclusion that such exhaustion is undesirable and that those who exhaust not only their state administrative remedies but also their state appellate remedies should be penalized by depriving them of their section 1981 cause of action. Most judicial statements that administrative exhaustion is not required in section 1981 actions have been made in circumstances in which administrative resolution was no longer feasible when the section 1981 action was brought.[96] Thus, it seems reasonable to interpret section 1981 as preserving the alternative of bypassing administrative remedies when local resolution is perceived by the complainant as unfeasible. In all other circumstances, however, the advantages of local resolution are as compelling in section 1981 actions as in actions brought under title VII. Even if limited to section 1981, therefore, the *Mitchell* court's holding may frustrate the con-

92. *See* cases cited note 40 *supra*. There are indications that the employment situation of minority workers may be worse today than when title VII was passed in 1964. For example, while the percentage of all employed males over sixteen years of age fell from 81.5% in 1965 to 78.1% in 1976, the percentage employed of "Black and other" males fell from 80.3% to 71.9%. *See* U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 388 (98th ed. 1977).

93. *See* cases cited note 118 *infra*.

94. *See* sources cited note 119 *infra*.

95. *See, e.g.*, Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 166 (7th Cir.), *cert. denied*, 429 U.S. 986 (1976); Guerra v. Manchester Terminal Corp., 498 F.2d 641, 652 (5th Cir. 1974); Long v. Ford Motor Co., 496 F.2d 500, 503-04 (6th Cir. 1974). *Compare* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1315 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976), *with* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 487 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

96. *See, e.g.*, Long v. Ford Motor Co., 496 F.2d 500, 502 (6th Cir. 1974)(complainant's title VII remedy unavailable because of failure to file within limitations period).

gressional preference for local dispute resolution embodied in title VII by forcing litigants to abandon state procedures in order to preserve federal remedies.

The most serious shortcoming of the judicial/administrative distinction as a basis for determining the applicability of res judicata is its failure to take into account the quality of the hearing afforded the complainant. Since res judicata attaches only when the complainant "crosses the line" from administrative to judicial relief, one who is accorded very thorough administrative proceedings, including an evidentiary hearing, an administrative appeal based on a complete factual record, and even an award of relief, is apparently free to pursue subsequent federal remedies under title VII or section 1981.[97] A complainant like Mitchell, however, whose complaint is summarily dismissed without an evidentiary hearing, whose administrative appeal is conducted without the benefit of a factual record, and who is awarded no relief, but whose pursuit of state remedies included appeal to a state court, is foreclosed from seeking federal relief under section 1981 and possibly under title VII as well.

The *Mitchell* court justified this result, in large part, by reference to the policies underlying res judicata. But res judicata is a salutary equitable doctrine, the purpose of which is to conserve the resources of the legal system and avoid subjecting parties to burdensome, repetitious litigation by barring relitigation of claims already fully and fairly litigated to final judgment.[98] Equity and the specific policies underlying res judicata depend on factors such as the fairness, completeness, or extensiveness of prior proceedings. Thus, the *Mitchell* court's reliance on the distinction between administrative and judicial relief, rather than on the thoroughness of the consideration offered appellant, appears to be misplaced.

In a related context, the Supreme Court has determined that the adequacy of the prior proceedings is relevant in deciding whether res judicata should bar a subsequent title VII action. In *Alexander v. Gardner-Denver Co.*,[99] the complainant had pursued a collectively bargained mandatory grievance procedure that included a hearing, to final arbitration.[100] In declining to give preclusive effect to the arbitration proceedings, the Supreme Court found that

> [t]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and

97. *See, e.g.*, Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972).

98. *See* 553 F.2d at 268.

99. 415 U.S. 36 (1974), *discussed at* notes 46-52 *supra* and accompanying text.

100. *See id.* at 38-43.

> procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of title VII issues than the federal courts.[101]

Although the state proceedings in *Mitchell* and the arbitral proceedings in *Alexander* are distinguishable,[102] the differences between them appear to be insignificant in this context.[103] It is likely that state administrative proceedings are as vulnerable as arbitral proceedings to the "procedural infirmities" identified by the Supreme Court.[104] In fact, this procedural infirmities analysis was relied on by the court in *Ferrell v. American Express Co.*[105] to reach its conclusion that proceedings of the New York Division of Human Rights should not be accorded preclusive effect.

The *Ferrell* court identified an additional procedural infirmity that is also relevant to *Mitchell.* The defendant in *Ferrell* argued that the state proceedings were analogous to a summary judgment ruling, that is, "a holding that plaintiff has no claim even if his assertions are accepted as true."[106] The court responded that "[h]ere, however, the state agency found that plaintiff's claims were overcome by defendant's evidence, without plaintiff having the aid of counsel to evaluate the evidence and determine what further evidence would be helpful."[107]

The language in *Alexander* and *Ferrell* is relevant to the issues in *Mitchell* in two respects. First, these cases indicate that, contrary to the *Mitchell* court's flat denial, infirmities in state proceedings are material concerns in deciding whether to accord preclusive effect to such proceedings. Second, they suggest that the procedural infirmities of administrative proceedings are best cured by de novo proceedings in a trial court. The advantages of a trial court, however, are

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101. *Id.* at 57-58.

102. For example, the arbitration proceedings in *Alexander* were neither judicial nor conducted under the authority of the state. Moreover, in the arbitration proceedings, the complainant sought to enforce *contract* rights rather than rights founded in state or federal law.

103. *Cf.* Ferrell v. American Express Co., 8 Empl. Prac. Dec. 5458, 5461 (E.D.N.Y. 1974)("Plaintiff would distinguish *Alexander v. Gardner-Denver Co.* . . . on the ground that the prior determination of no discrimination had been made by arbitrators under a collective bargaining agreement and not by a state agency. This is not a valid distinction.").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

not available in an appellate court. Appellate courts do not gather facts, but rather depend upon the record of facts gathered and evidence presented in proceedings below. Since the infirmities in administrative proceedings include incompleteness of the record and weakness in the gathering of facts, the appellate courts are, in a sense, subject to the same infirmities as administrative hearings.[108] In this additional important respect, therefore, the *Mitchell* court's distinction between administrative and appellate judicial relief seems clearly inappropriate.

The *Mitchell* court's analysis of the section 1738 issue may be similarly criticized. Section 1738 requires federal courts to accord the same effect to state court judgments as would the state itself. Thus, the critical question in *Mitchell* was what effect New York courts would accord the state proceedings in a subsequent section 1981 action in state court. Since New York courts had never considered this question, the certainty with which the *Mitchell* court found that the section 1981 claim would be barred by New York courts was inappropriate.[109] As the *Mitchell* court recognized, however, even if the decision of the Appellate Division was final within the meaning of section 1738, the demands of both section 1738 and res judicata would give way in the face of sufficiently weighty countervailing interests. Nevertheless, it ultimately found that the policies furthered by section

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108. *Cf.* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970). The *Waters* court, in declining to apply to a section 1981 action the statute of limitations of the Illinois Fair Employment Practices Act § 8, ILL. REV. STAT. ch. 48, § 858 (1967), *as amended,* ILL. ANN. STAT. ch. 48, § 858 (Smith-Hurd Supp. 1978), which provided for an administrative remedy and judicial appellate review, stated,

> We are not convinced that the Illinois F.E.P.A. is the most analogous state action under these provisions. The Illinois act provides only for an administrative remedy and review of the F.E.P.C.'s findings in the state courts. Different considerations obviously apply to suits by private litigants in courts of law. In contrast to the Illinois F.E.P.A., the entire burden of investigating and developing a case under section 1981 lies with the private litigant. Furthermore, the short limitations period contained in the Illinois act is designed to encourage conciliation and private settlement. When an aggrieved party seeks court relief, conciliation has generally failed.

427 F.2d at 488. *See generally* Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105, 1118-19 (1977)("corrective state appellate work does not adequately substitute for vigorous constitutional protection at the trial level"); Shaman & Turkington, Huffman v. Pursue, Ltd.: *The Federal Courthouse Door Closes Further,* 56 B.U.L. REV. 907, 921-22 (1976)("There is a dramatic difference between the typical context of court review of, on one hand, a claim that an agency has exceeded the scope of its powers and, on the other hand, a civil action under section 1983 for vindication of constitutional rights.").

109. The court said that "there is no question that a determination of the Appellate Division affirming [a Division dismissal] operates as an absolute bar to any other action on the same facts in the courts of New York." 553 F.2d at 273.

1738 and res judicata outweighed any countervailing considerations raised by appellant's claim.[110] Other courts, however, have not found these policies persuasive,[111] and in any case it is not certain that the *Mitchell* decision will advance all of the policies upon which it relied.

Conservation of judicial resources, for example, was a recurring theme in *Mitchell*.[112] Even the *Mitchell* holding will allow substantial expenditure of *nonjudicial* legal resources without invoking res judicata,[113] and it seems this result is to some extent dictated by the emphasis that federal employment discrimination legislation places on persuasion and conciliation in the resolution of discrimination claims.[114] It would not be unreasonable to suggest that this emphasis indicates congressional willingness to sacrifice economy in the legal system to promote the elimination of employment discrimination. It might be argued, however, that Congress did not contemplate any sacrifice of *judicial* economy and that the situation in *Mitchell*, involving potential duplication of judicial effort, therefore requires application of res judicata.[115] Still, it is not clear that the rule in *Mitchell* will result in increased judicial economy in the long run.

A likely result of the decision will be to encourage complainants to abandon state remedies at the earliest possible opportunity in order to preserve their federal causes of action.[116] Some of these claims surely would have been resolved at the administrative level had the claimant persisted, and in others, the administrative proceedings

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110. *See id.* at 274-77.

111. *See* cases cited note 118 *infra*.

112. *See* 553 F.2d at 268, 276. The court begins and ends its opinion with this refrain.

113. *See id.* at 276 ("Res judicata attached when plaintiff chose to pursue her claim in the state courts, and not before.").

114. *See* cases cited note 118 *infra*.

115. The court did not suggest, however, why administrative resources are less valuable or less deserving of conservation than judicial resources.

116. An analogous concern was expressed in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), where the Court noted that requiring federal courts to defer to prior arbitration determinations

> might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

Id. at 59. Similarly, Judge Leventhal, concurring in Hackley v. Roudebush, 520 F.2d 108 (D.C. Cir. 1975), noted that granting a summary judgment against plaintiff in a title VII case on the basis of an administrative record "is likely to undercut availability of the [agency's] expertise by encouraging [complainants] to exercise their option to proceed to court forthwith, for immediate relief, without pursuing an appeal to the [administrative appeal board]." *Id.* at 171.

might have clarified and crystalized issues. These effects, which clearly enhance economy of judicial resources, will be diminished to the extent that *Mitchell* deters persistence in state remedies.[117] A

117. *Compare* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461, 465 (1975), *with* Alexander v. Gardner-Denver Co., 415 U.S. 36, 59 (1974). Although only a year apart, these two decisions seem to express different views about the significance of the potential adverse effect a particular decision would have on administrative conciliation and voluntary compliance. In *Alexander,* in the context of a decision whether to allow arbitral proceedings to preclude subsequent title VII actions, a unanimous Court found the "adverse effects" argument persuasive. *See id.* In *Johnson,* however, in deciding that the running of the statute of limitations against a section 1981 action was not tolled by pursuit of title VII remedies, the Court said,

> [I]t is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding. One answer to this, although perhaps not a highly satisfactory one, is that the plaintiff in his § 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed. But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII.

421 U.S. at 465 (footnote omitted). This language is difficult to reconcile with *Alexander.* Indeed, Justice Marshall, in his concurring and dissenting opinion in *Johnson,* argued that the reasoning in *Alexander* was equally compelling in the statute of limitations context:

> In *Alexander* v. *Gardner-Denver* . . . we examined the relationship between compulsory arbitration and litigation under Title VII, a relationship analogous to that between the EEOC factfinding and conciliation process and litigation under § 1981, and accommodated both avenues of redress. The reasoning leading to that result is equally compelling here. Forced compliance with a short statute of limitations during the pendency of a charge before the EEOC would discourage and/or frustrate recourse to the congressionally favored policy of conciliation, . . . and "[t]he possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less." . . .
>
> Congressional effort, with the 1972 amendments, to strengthen the administrative remedy by increasing EEOC's ability to conciliate complaints is frustrated by the majority's requirement that an employee file the § 1981 action prior to the conclusion of the Title VII conciliation efforts in order to avoid the bar of the statute of limitations. Legislative pains to avoid unnecessary and costly litigation by making the informal investigatory and conciliatory offices of EEOC readily available to victims of unlawful discrimination cannot be squared with the formal mechanistic requirement of early filing for the technical purpose of tolling a limitations statute. In sum, the federal policies weigh strongly in favor of tolling.

Id. at 472-73 (footnote and citations omitted).

Although *Johnson* reflects a changing attitude by the Court concerning the significance of section 1981's role in the scheme of employment discrimination, it is possible to reconcile *Alexander* with *Johnson* without vitiating the role of section 1981. This

similar effect may be predicted if complainants who fully exhaust administrative remedies proceed directly to federal court instead of appealing within the state court system. Thus, at best, the *Mitchell* court has exchanged the privilege of access to the federal forum for a speculative enhancement of judicial economy. At worst, the decision will advance neither the cause of eliminating employment discrimination nor judicial economy.

Perhaps a more significant criticism, however, is that many of the arguments raised in *Mitchell* have been dismissed summarily by other courts in the face of two congressional policies to which the *Mitchell* court referred only in passing: the desirability of local resolution of employment discrimination claims[118] and the importance of preserving access to a federal forum.[119]

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reading would stress the effect of each case in terms of its preclusion of alternate remedies.

Thus, in *Alexander,* the consequences of according preclusive effect to arbitral proceedings would have been to deny access to such proceedings to any complainant who desired to preserve title VII remedies. This would force complainants to elect between arbitration and title VII remedies. In *Johnson,* however, the Court's decision does not, necessarily, force such an election. Administrative conciliation and voluntary compliance may be pursued without jeopardizing the section 1981 remedy as long as the statute of limitations is not exceeded. In some states, the statute will provide ample time during which to exhaust administrative remedies. *See, e.g.,* Greene v. Carter Carburetor Co., 532 F.2d 125 (8th Cir. 1976)(applying five-year Missouri statute of limitations); Beamon v. W.B. Saunders Co., 413 F. Supp. 1167 (E.D. Pa. 1976)(applying six-year Pennsylvania statute of limitations); Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397 (M.D.N.C. 1975)(applying three-year North Carolina statute of limitations). Even the one-year statute under which complainant was barred in *Johnson* may be sufficient to exhaust *local* conciliation remedies, which are often expedited. In *Mitchell,* for example, appellant exhausted all *local* resolution remedies within one year of her dismissal. *See* 553 F.2d at 266-67. Moreover, the *Johnson* court suggested that if a complainant desires to pursue administrative conciliation and yet preserve the section 1981 remedy from the bar of the statute, he may file a section 1981 action and ask the court to stay proceedings until chances for local resolution are exhausted. Although this latter alternative may deter voluntary compliance and conciliation, *see* 421 U.S. at 465, it seems equally likely that the filing of a section 1981 action while administrative exhaustion is being pursued may spur settlement efforts.

It is suggested that since *Mitchell* will force complainants to elect between a remedy that may enhance local resolution (state appellate review of the local resolution process) and the section 1981 remedy, it is more analogous to *Alexander* than to *Johnson.*

118. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Voutsis v. Union Carbide Corp., 452 F.2d 889, 891-92 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972); Ferrell v. American Express Co., 8 Empl. Prac. Dec. 5458, 5460 (E.D.N.Y. 1974).

119. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974); Voutsis v. Union Carbide Corp., 452 F.2d 889, 894 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972); Ferrell v. American Express Co., 8 Empl. Prac. Dec. 5458, 5460 (E.D.N.Y. 1974); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1212 (1971).

The *Mitchell* court curtly dismissed the argument that its holding would discourage local resolution, stating, "[O]f course, by the time appellant sought review in the Appellate Division, all efforts at conciliation had long been concluded."[120] The court, however, ignored the possibility that appellate review by state courts may have long-range benefits enhancing local resolution. Vigorous appellate review is essential to the vitality and integrity of local administrative remedies. In the context of civil rights legislation, complex and controversial procedural and substantive issues that must be resolved by state courts will necessarily arise. If the price of state appellate review is the sacrifice of federal remedies under section 1981 and title VII, these issues might not be raised. Some complainants will not be deterred by potential loss of federal remedies, but others will avoid appellate review and proceed directly to federal court, thus reducing the opportunity for state courts to review and improve state administrative proceedings. This will retard the growth of local administrative programs in the long run and perhaps even diminish their current effectiveness.

Another aspect of the role of appellate review in local resolution is that, in many circumstances, if complainant's appeal is successful, the case will be remanded to the administrative agency for reconsideration. Such a remand seems particularly appropriate in situations such as that in *Mitchell*, where the court has an incomplete factual record to review.[121] Thus, while the parties may have sacrificed the immediacy and economy of local resolution by appealing to state court, a second opportunity for the local agency to secure voluntary resolution through conciliation and persuasion may be preserved. This opportunity would be lost if complainants desiring to preserve federal remedies were forced to forgo appellate review and the possibility of reconsideration by the local agency.

A second specific congressional policy involved in employment discrimination actions is the importance of access to a federal forum. Other courts have emphasized not only their "plenary powers"[122] to enforce compliance with federal employment discrimination legisla-

120. 553 F.2d at 276.

121. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974)(suggesting that one factor in assigning responsibility within the federal judicial system for resolution of constitutional issues is that the administrative "factfinding process," particularly in arbitration, "is not equivalent to judicial factfinding," and that the relative incompleteness of the record in arbitral proceedings is a consideration in this determination); Ferrell v. American Express Co., 8 Empl. Prac. Dec. 5458, 5461 (E.D.N.Y. 1974)(applying the Supreme Court's analysis in *Alexander* in the context of a dismissal for lack of probable cause by the New York Division of Human Rights).

122. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974); Benneci v. Department of Labor, N.Y. State Div. of Employment, 388 F. Supp. 1080, 1081 (S.D.N.Y. 1975).

tion but also their responsibility to do so.[123] The particular dimensions of this responsibility seem to require that a federal court make its own findings. In *Batiste v. Furnco Construction Co.*,[124] for example, the case was remanded to the district court in part because it "merely accepted the ruling of [the state agency] and it did not attempt to make its own determination."[125] Similarly, in *Benneci v. Department of Labor, New York State Division of Employment*,[126] the court stressed the power of the federal court "to conduct a full scale inquiry . . . and to make *de novo* findings of fact."[127] Thus, several courts, including the Supreme Court, have recognized that the congressionally mandated role of the federal courts in employment discrimination actions encompasses a responsibility to conduct de novo proceedings aimed at ensuring that employment discrimination complainants have an adequate opportunity to present their claims in a forum free from the "procedural infirmities" that characterize state administrative proceedings. In sharp contrast, the *Mitchell* court seems to suggest a much more restricted role for federal courts, a role in which judicial economy assumes greater significance in the determination of a complainant's rights than does the overriding congressional goal of eliminating employment discrimination or the specific congressional goals embodied in the mechanism designed to implement that goal, a role that further closes the door to the federal courts for civil rights litigants at a time when the unfulfilled promise of employment discrimination legislation demands more aggressive and imaginative participation by these courts.[128]

These criticisms are not intended to suggest that res judicata is never appropriate in an employment discrimination action in federal

123. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974); Voutsis v. Union Carbide Corp., 452 F.2d 889, 894 (2d Cir. 1971)("[T]he purposes underlying enactment of [title VII] were clearly based on the congressional recognition that . . . 'state and local [antidiscrimination] laws vary widely in effectiveness. In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. Big interstate industry cannot effectively be handled by the states.' ")(quoting 2 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES 1290 (1970)(remarks of Sen. Clark)), *cert. denied*, 406 U.S. 918 (1972); Ferrell v. American Express Co., 8 Empl. Prac. Dec. 5458, 5460 (E.D.N.Y. 1974)(" 'The basic rights protected are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that they are fully protected.' ") (quoting 110 CONG. REC. 12725 (1964)(remarks of Sen. Humphrey)).

124. 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), *discussed at* notes 58-62 *supra* and accompanying text.

125. *Id.* at 451.

126. 388 F. Supp. 1080 (S.D.N.Y. 1975), *discussed at* notes 67-75 *supra* and accompanying text.

127. *Id.* at 1082.

128. *See also* Shaman & Turkington, *supra* note 108.

court. Rather, an approach is recommended that takes into account the competing interests of state and federal courts and of plaintiffs and defendants in employment discrimination cases while advancing the substantial policies underlying employment discrimination legislation. Important factors underlying such an approach include the degree to which the state proceedings were free from the "procedural infirmities" to which administrative and appellate judicial remedies may be subject,[129] policies of federalism and comity between state and federal courts,[130] and the interest of defendants in avoiding burdensome and repetitious litigation.

Although it might be possible to weigh the suggested factors in order to balance the competing interests on a case-by-case basis, such an analysis could be perceived as an inappropriate attempt by federal courts to assume an appellate role in relation to state courts.[131] Moreover, the severity of the consequences of preclusion and the potential for surprise and injustice call for predictability and notice to those whose claims may be threatened. Adoption of a per se rule, however, would ameliorate both of these problems. Since the rule and not the presence or absence of error in the state proceedings would govern the decision whether to preclude, the problem of federal review of state proceedings would be avoided. The existence of the rule would also serve as notice to employment discrimination complainants.

The rule urged by this analysis is that res judicata effect be accorded to state proceedings in a subsequent federal employment discrimination action only when the state proceedings included a trial on the merits.[132] It is suggested that for several reasons this rule

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129. *Cf.* McCormack, *supra* note 15, at 257-59 (recommending the establishment of a "reasonable preclusion policy" in section 1983 actions):

> The integrity of the state courts depends on their decisions' being authoritative, and the authority of those courts is weakened if they become, as a matter of course, merely a stopping-off place on the way to final decision. On the other hand, these policies must not be allowed to overwhelm the importance of protecting constitutional rights. A proper assessment should take into account the institutional interests of the respective court systems, the character of the claim and the way in which it arose, the nature of the interests the plaintiff seeks to vindicate, the possibility of prejudice to the defendant, and other factors that bear on the proper balance between correct resolution of constitutional claims and the policies behind res judicata. Sufficient flexibility in the modern doctrine of res judicata can be demonstrated to allow this balancing process.

130. *See generally* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 55-107 (1973); McCormack, *supra* note 15.

131. *See, e.g.*, Bricker v. Crane, 468 F.2d 1228, 1231 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); Frazier v. East Baton Rouge Parish School Bd., 363 F.2d 861 (5th Cir. 1966).

132. Trial "on the merits" is used here in a rather specialized sense to include

will best serve the competing interests and policies involved in employment discrimination actions and, at the same time, achieve the advantages of a per se rule. First, a trial on the merits would be less subject to the procedural infirmities that characterize administrative and appellate remedies.[133] Second, the policies supporting res judicata, particularly judicial economy and defendants' interest in repose, may weigh more heavily when the state proceedings included a trial on the merits.[134] Finally, the suggested rule reconciles the cases prior to *Mitchell* more satisfactorily and completely than does the *Mitchell* decision.[135]

The corollary of this recommendation is that, in the absence of a trial on the merits, administrative and appellate judicial proceedings should not be accorded res judicata effect in subsequent federal employment discrimination actions. Rather, the federal court should receive the facts developed in such state proceedings in the same manner as any other relevant evidence on the merits of a claim and accord the state proceedings weight in proportion to their thoroughness, the protections they afford to complainant's rights, and the extent to which they avoid the "procedural infirmities" identified by the Supreme Court.[136] Thus, for example, facts developed during administrative or appellate proceedings in which complainant was adequately represented and had full opportunity to present his case and to test his opponent's case and in which an adequate record was established might warrant the finding that there exists no genuinely disputed factual issue, thereby enabling defendant to prevail on a

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some pretrial dismissals considered to be on the merits. Thus, for example, a grant of summary judgment for defendant after adequate discovery could be accorded preclusive effect. Access to discovery by plaintiff and his attorney would go far to cure the procedural infirmities of administrative hearings. The discretion of the trial court to refuse to preclude a claim when injustice would result would ensure that preclusion based on summary judgment would not become oppressive.

Dismissal in state court for failure to state a claim, however, although technically "on the merits," *see* RESTATEMENT (SECOND) OF JUDGMENTS § 48, Comment d (Tent. Draft No. 1, 1973), should *not* be accorded res judicata effect in employment discrimination actions in federal court. Pleading requirements as well as substantive coverage of the state and federal laws may differ sufficiently that a complaint inadequate on its face in state court might survive in federal court. Moreover, other factors, such as judicial economy and the potential for prejudice to defendant, are not as strongly implicated when the prior action is limited to dismissal for failure to state a claim.

133. *See* notes 101-08 *supra* and accompanying text.

134. *See* text accompanying note 98 *supra*; note 112 *supra* and accompanying text.

135. *See* notes 46-75 *supra* and accompanying text.

136. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974) (weight to be given an arbitral determination in a subsequent judicial proceeding), *discussed at* notes 46-52 & 99-101 *supra* and accompanying text.

motion for summary judgment,[137] just as he would if pretrial discovery disclosed equivalent facts. On the other hand, state proceedings such as those in *Mitchell*, in which the complainant was unrepresented during the fact-gathering process, in which there was no evidentiary hearing, and in which no adequate record was established, would be accorded little weight by the federal trial court.

In a case of first impression, the *Mitchell* court concluded that pursuit of state remedies beyond the administrative level to the state appellate judiciary resulted in preclusion of a subsequent federal claim under section 1981. There are persuasive indications that the court is prepared to extend its holding to include title VII actions. In reaching its decision the court accorded great weight to policies underlying res judicata and found that there were no persuasive countervailing policy considerations. But the foregoing analysis suggests that the policy arguments arrayed against the *Mitchell* decision are substantial and that other courts have found them to be conclusive in the context of title VII. This analysis concludes that an alternative to the rule laid down in *Mitchell* will promote a more reasonable balance among the competing policies and interests involved in employment discrimination actions as well as reconcile the case law prior to *Mitchell*. The alternative recommended is that res judicata effect should be accorded to state proceedings in a subsequent federal employment discrimination action only where the state proceedings included a trial on the merits. In all other cases, facts developed in state proceedings should be considered only insofar as they illuminate the relative merits of the claim of discrimination.

137. *See* note 25 *supra* and accompanying text.