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Michael D. Moberly

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# A BETTER ADEA?: USING STATE WAGE PAYMENT LAWS TO ENHANCE REMEDIES FOR AGE DISCRIMINATION

Michael D. Moberly†

## I. INTRODUCTION

The Age Discrimination in Employment Act of 1967 (the "ADEA")<sup>1</sup> is "the first federal statute which had as its purpose a prevention of discrimination in employment on account of age, by providing a remedy to . . . victims of age discrimination."<sup>2</sup> Subject to certain limited exceptions,<sup>3</sup> the ADEA prohibits employers from discriminating against persons forty years of age or over.<sup>4</sup> That prohibition is patterned after the prohibition of discrimination on the basis of race, color, religion, sex and national origin in Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>5</sup>

However, unlike Title VII, which is "a comprehensive and detailed statutory scheme . . . provid[ing] specific remedies for [the] rights created therein,"<sup>6</sup> the ADEA contains no specific remedial provisions for the enforcement of its prohibitions.<sup>7</sup> Rather, the ADEA is enforced primarily through incorporation of

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† B.B.A., J.D., University of Iowa; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona; Chairman, Arizona Agricultural Employment Relations Board; Editor, *The Arizona Labor Letter*.

1. 29 U.S.C. §§ 621-634 (1988).

2. *Platt v. Burroughs Corp.*, 424 F. Supp. 1329, 1340 (E.D. Pa. 1976). The stated purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988).

3. *See, e.g.*, 29 U.S.C. §§ 623(f), 631(c) (1988).

4. *See* 29 U.S.C. §§ 623(a), 631(a) (1988). As originally enacted, the ADEA only protected persons between the ages of forty and sixty-five. *See Crozier v. Howard*, 11 F.3d 967, 969 (10th Cir. 1993). The upper age limit for the ADEA's protected class was extended to seventy in 1978, and eliminated entirely in 1986. *See id.*

5. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1988). *See also Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("There are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII."); *Morelock v. NCR Corp.*, 546 F.2d 682, 686 (6th Cir. 1976) ("The prohibitions of the ADEA are in terms virtually identical to those of Title VII . . . except that 'age' has been substituted for 'race, color, religion, sex or national origin.'").

6. *Tafoya v. Adams*, 612 F. Supp. 1097, 1101 (D. Colo. 1985).

7. *See Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1317 n.4 (9th Cir. 1982) ("The ADEA's proscription against age discrimination is [not] enforced . . . through independent ADEA remedies.").

various Fair Labor Standards Act ("FLSA")<sup>8</sup> provisions.<sup>9</sup> Where the ADEA has been violated, the FLSA provides for recovery of any unpaid wages<sup>10</sup> and, if the employer's discriminatory conduct has been willful,<sup>11</sup> an additional, equal amount of liquidated damages.<sup>12</sup> Compensatory and punitive damages, on the other hand, are not available under either the FLSA<sup>13</sup> or the ADEA.<sup>14</sup>

Courts and commentators have occasionally suggested that existing remedies for discrimination may be insufficient both under the ADEA<sup>15</sup> and other

8. See 29 U.S.C. §§ 201-219 (1988). Congress passed the FLSA to protect workers from substandard wages by requiring the payment of a uniform minimum wage and additional compensation for overtime work to most individuals employed in interstate commerce. See 29 U.S.C. §§ 206, 207; *Stewart v. Region II Child & Family Serv.*, 788 P.2d 913, 917 (Mont. 1990) (observing Congress passed the FLSA to "maintain a minimum living standard" for workers); *Elkins v. Showcase, Inc.*, 704 P.2d 977, 987 (Kan. 1985) ("The expressed Congressional purpose in passing the FLSA was to enable a substantial part of the American workforce to maintain a minimum standard of living.").

9. Section 7(b) of the ADEA provides that the act is to be enforced in accordance with the powers, remedies and procedures provided for in the FLSA. See 29 U.S.C. §626(b) (1988); see also *Lorillard*, 434 U.S. at 584-85 ("[R]ather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII's substantive prohibitions."); *Kelly v. American Standard Inc.*, 640 F.2d 974, 977-78 (9th Cir. 1981) ("[The ADEA] is enforced through express incorporation of the remedial rights and procedures of the Fair Labor Standards Act . . . rather than through independent ADEA remedies."); *Morelock*, 546 F.2d at 687 ("Although the prohibitory provisions of Title VII and the ADEA are in terms identical, the enforcement sections of these acts differ. The enforcement provisions of . . . the ADEA essentially follow those of the Fair Labor Standards Act . . .").

10. See 29 U.S.C. § 216(b). "Amounts owing to a person as a result of a violation of [the ADEA are] deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of . . . the Fair Labor Standards Act . . ." *Drez v. E.R. Squibb & Sons*, 674 F. Supp. 1432, 1440 (D. Kan. 1987) (quoting 29 U.S.C. § 626(b)).

11. An employer's conduct is considered willful for this purpose if it either knew or showed reckless disregard for whether its conduct was prohibited by the ADEA. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614-17 (1993).

12. See 29 U.S.C. §§ 216(b), 626(b) (1988). The characterization of the additional damages available for willful violations of the ADEA as "liquidated" has been described as a misnomer, on the ground that they are more akin to punitive damages. See *Schmitz v. Commissioner*, 34 F.3d 790, 797 (9th Cir. 1994) (Trott, J., dissenting).

13. See, e.g., *Eggleston v. South Bend Community Sch. Corp.*, 858 F. Supp. 841, 853 (N.D. Ind. 1994) (observing that "compensatory damages are not recoverable under the FLSA"); *Fiedler v. Indianhead Truck Line Inc.*, 670 F.2d 806, 810 (8th Cir. 1982) ("[D]amages for pain and suffering have never been awarded under the FLSA."); *Skrove v. Heiraas*, 303 N.W.2d 526, 531-32 (N.D. 1981) (holding that punitive damages are unavailable under the FLSA); *King v. J.C. Penney Co.*, 58 F.R.D. 649, 650 (N.D. Ga. 1973) ("The F.L.S.A. itself does not provide for the recovery of punitive damages, and this court is unaware of any judicial decision allowing punitive damages to be recovered.").

14. See, e.g., *Bruno v. Western Elec. Co.*, 829 F.2d 957, 966 (10th Cir. 1987) ("[A]ll . . . circuits that have [addressed the issue] . . . deny punitive damages in ADEA cases."); *Naton v. Bank of Cal.*, 649 F.2d 691, 699 (9th Cir. 1981) ("All circuit courts that have addressed [the] question have concluded that the ADEA does not authorize an award of damages for pain and suffering."); *Bailey v. Container Corp.*, 594 F. Supp. 629, 633 (S.D. Ohio 1984) ("[N]either compensatory nor punitive damages are available under the ADEA."); but see *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123, 1132 (N.D. Ill. 1976) (concluding that "a plaintiff under the [ADEA] is entitled to demonstrate damages for pain and suffering"), *aff'd on reh'g*, 432 F. Supp. 952 (N.D. Ill. 1977).

15. See, e.g., *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841-42 (3d Cir. 1977) (describing the unavailability of damages for emotional distress under the ADEA as "a disappointing [result] to . . . plaintiffs"); *Bertrand*, 419 F. Supp. at 1132 ("The real injury suffered by [an age] discriminatee may . . . be poorly compensated by an award of mere back wages."); Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1206-07 n.365 (1993) (suggesting that "[t]he denial of [compensatory and punitive] damages in age cases . . . [may have had a] negative effect . . . on the enforcement and litigation of age discrimination claims" because "the lack of such valuable remedies" has contributed to "a dearth of attorneys willing and able to litigate ADEA cases") (quoting Catherine Ventrell-Monsees, *Ageism: The Segregation of a Civil Right*, EXCHANGE ON AGEING, LAW & ETHICS, BULLETIN No. 8, Spring 1992, at 4-5).

employment discrimination statutes.<sup>16</sup> This deficiency<sup>17</sup> was addressed, in part, by the Civil Rights Act of 1991 (the "1991 CRA").<sup>18</sup> That act expanded the remedies available to employment discrimination victims<sup>19</sup> by making compensatory and punitive damages available in certain cases of intentional wrongdoing.<sup>20</sup> In the age discrimination context, however, the perceived remedial deficiency has not been corrected by that enactment, because the provision of the 1991 CRA that expanded the remedies available to some victims of employment discrimination<sup>21</sup> does not apply in ADEA cases.<sup>22</sup>

An alternative means of addressing the perceived insufficiency of statutory discrimination remedies is reflected in cases permitting tort recovery<sup>23</sup> for a

16. See *Broomfield v. Lundell*, 767 P.2d 697, 705 (Ariz. Ct. App. 1988) (observing that statutory remedies for discrimination "may, at times, prove to be inadequate"); *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292, 1303 (Or. 1984) (concluding that statutory remedies for discrimination often "fail to capture the personal nature of the injury done to a wrongfully discharged employe [sic]").

17. There are, of course, those who do not perceive the ADEA to be deficient at all, but who believe instead that Congress specifically did not intend to provide for the recovery of tort damages under that act. See, e.g., *Bruno v. Western Elec. Co.*, 829 F.2d 957, 967 (10th Cir. 1987); see also *Conyers v. Safelite Glass Corp.*, 825 F. Supp. 974, 976 (D. Kan. 1993) (characterizing the statutory remedies available under the ADEA as "adequate"). Underlying that conclusion is the view that the availability of tort damages might undermine the ADEA goal of encouraging the voluntary resolution of age discrimination disputes because plaintiffs who cannot recover tort damages "more willingly participate in agency reconciliation efforts." *Bruno*, 829 F.2d at 967. See generally *Eggleston v. South Bend Community Sch. Corp.*, 858 F. Supp. 841, 853 (N.D. Ind. 1994) (quoting BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 525-27 (2d ed. 1983)):

[R]ecoverability under the ADEA of the full panoply of tort remedies could interfere with the EEOC's efforts to reconcile informally the parties through conciliation by creating an incentive for bypassing the administrative processes, since the plaintiff would be more interested in the possibility of large jury awards than in good faith negotiations with the defendant.

18. Pub. L. No. 102-166, 105 Stat. 1071 (1991). The passage of the 1991 CRA was the result of a lengthy and sometimes bitter struggle in Congress over the issue of civil rights reform. See *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir. 1992) ("In late November of [1991], Congress culminated a two-year political struggle with the passage of the Civil Rights Act of 1991 . . ."); *Joyner v. Monier Roof & Tile Inc.*, 784 F. Supp. 872, 876 (S.D. Fla. 1992) ("The signing of the new Act on November 21, 1991 culminated an often bitter two year effort by many members of Congress to enact some form of civil rights protection.").

19. See David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAW. 849, 850 (1992). For a broader consideration of the 1991 CRA by the author, see Michael D. Moberly & Linda H. Miles, *The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability*, 18 OKLA. CITY U. L. REV. 475 (1993).

20. See 42 U.S.C. § 1981a(a)(1) (Supp. IV 1993). Specifically, the 1991 CRA "authorize[s] recovery of compensatory and punitive damages from a respondent in a Title VII action who . . . engage[s] in unlawful intentional discrimination not actionable under 42 U.S.C. § 1981." *Berry v. North Ala. Elec. Coop.*, 61 Fair Empl. Prac. Cas. (BNA) 1331, 1333 (N.D. Ala. 1993). Prior to the act's passage, compensatory and punitive damages were available only to victims of race or ethnic discrimination under 42 U.S.C. § 1981; individuals alleging sex or religious discrimination under Title VII were only entitled to equitable relief. See 42 U.S.C. § 2000e-5(g) (1988); see generally Cathcart & Snyderman, *supra* note 19, at 850.

21. The pertinent provision "changed the remedial structure of Title VII [so that] plaintiffs may seek compensatory damages in cases alleging intentional race, color, religion, sex, or national origin discrimination or retaliation against opponents for [sic] such discrimination . . ." *Eggleston v. South Bend Community Sch. Corp.*, 858 F. Supp. 841, 853 n.3 (N.D. Ind. 1994).

22. See *Lee v. Sullivan*, 787 F. Supp. 921, 930 (N.D. Cal. 1992) ("We note that the 1991 [CRA] . . . does not authorize compensatory damages for age discrimination."); *Morgan v. Servicemaster Co. Ltd. Partnership*, 57 Fair Empl. Prac. Cas. (BNA) 1423, 1424 (N.D. Ill. 1992) (observing that "age" is not one of the types of discrimination the CRA was intended to "clarify"). The failure of Congress to address age discrimination when it expanded the remedies available to other victims of employment discrimination has been sharply criticized. See, e.g., *Eglit*, *supra* note 15, at 1206 n.365 (discussing *Ventrell-Monsees*, *supra* note 15).

23. See *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1222-23 (Okla. 1992) (discussing cases permitting "tort remedies [to] supplement employment discrimination statutes" where the statutory remedies are per-

wrongful discharge<sup>24</sup> which violates public policy reflected in the ADEA<sup>25</sup> and other age discrimination legislation.<sup>26</sup> However, that approach also may be unsatisfactory, because many courts refuse to extend the public policy exception to the employment at will rule<sup>27</sup> on which the tort is based<sup>28</sup> beyond the wrongful discharge context.<sup>29</sup> Thus, victims of age discrimination in hiring and promotion<sup>30</sup> may continue to be limited to remedies that "at times, prove to be inadequate,"<sup>31</sup> even though the public policies underlying the ADEA and other employment discrimination laws clearly apply to hiring and promotion decisions.<sup>32</sup>

ceived to be inadequate).

24. Although the term "wrongful discharge" (or "wrongful termination") is occasionally given a broader interpretation, *see, e.g.*, Ronald Weisenberger, Note, *Remedies for Employer's Wrongful Discharge of an Employee from Employment of an Indefinite Duration*, 21 IND. L. REV. 547, 566 n.116 (1988) ("Wrongful discharge" refers to any discharge for which the employer is or may be liable.), in the present context the term refers to a common law tort claim premised upon the "public policy" exception to the employment at will rule. *See, e.g.*, Woerth v. City of Flagstaff, 808 P.2d 297, 303 (Ariz. Ct. App. 1990); Adler v. American Standard Corp., 432 A.2d 464, 467 & n.2 (Md. Ct. App. 1981).

25. *But see* Conyers v. Safelite Glass Corp., 825 F. Supp. 974, 976 (D. Kan. 1993):

The essence of . . . decisions recognizing a tort action for wrongful discharge is that the law imposes a duty upon all employers to refrain from discharging employees when this action violates important public policies. When, however, Congress or [a state] legislature has already seen fit to embody that same public policy in an adequate statutory remedy such as the ADEA . . . courts [should] defer to the remedies and procedures created by the legislature for the vindication of those policies.

(Quotations and citations omitted.)

26. *See, e.g.*, Gesina v. General Elec. Co., 780 P.2d 1376, 1379 (Ariz. Ct. App. 1989) ("An employee's right not to be discharged on the basis of age is a common law right based upon public policy and is independent of any rights accruing under either state or federal civil rights statutes."); Bernstein v. Aetna Life & Casualty, 843 F.2d 359, 361, 364-65 (9th Cir. 1988) (employee alleging age discrimination in violation of the ADEA also permitted to pursue common law wrongful discharge claim based on same factual allegations); Payne v. Rozendaal, 520 A.2d 586, 588-90 (Vt. 1986) (recognizing a common law wrongful discharge claim based on the "clear and compelling public policy against age discrimination").

27. The employment at will rule has been described as "uniquely a product of the American common law." Wagner v. City of Globe, 722 P.2d 250, 252 (Ariz. 1986). The "classic statement" of the rule is that an employer may discharge an employee "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 211 (N.D. 1987) (quoting Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds* by Hutton v. Watters, 179 S.W. 134 (Tenn. 1915)).

28. As a general proposition, the public policy exception protects employees from being discharged for performing an act that public policy encourages or refusing to perform an act that public policy condemns. *See* Wagner v. City of Globe, 722 P.2d 250, 256 (Ariz. 1986). For the author's view of the exception, see Michael D. Moberly, *Begging the Federal Question: Removal Jurisdiction in Wrongful Discharge Cases*, 20 SEATTLE U. L. REV. (forthcoming 1996); Michael D. Moberly, *Fair Labor Standards Act Preemption of "Public Policy" Wrongful Discharge Claims*, 42 DRAKE L. REV. 525, 526-27 (1993).

29. *See, e.g.*, Mintz v. Bell Atl. Sys. Leasing Int'l, 905 P.2d 559, 562 (Ariz. Ct. App. 1995) ("We know of no court that recognizes the tort of wrongful failure-to-promote."); Burris v. City of Phoenix, 875 P.2d 1340, 1348 (Ariz. Ct. App. 1993) ("[W]e have found no state or federal court that has recognized the tort of wrongful failure to hire even though federal law and the laws of many states prohibit discrimination in hiring. . . ."). *See generally* Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97, 114 (1991) (observing that the "common law modifications of employment at will have been limited to wrongful discharge").

30. In some jurisdictions, employees subjected to discriminatory demotions may be permitted to pursue common law tort remedies, *see, e.g.*, Zimmerman v. Buccheit of Sparta, 615 N.E.2d 791, 792-94 (Ill. App. Ct. 1993), *rev'd*, 645 N.E.2d 877 (Ill. 1994); Hoopes v. City of Chester, 473 F. Supp. 1214, 1223 n.4 (E.D. Pa. 1979), on the ground that demotions are more closely analogous to discharges than are promotions and hiring decisions. *See Zimmerman*, 615 N.E.2d at 793 (concluding that there is "little difference" between terminations and demotions); *but see* LaFriniere v. Group W Cable Inc., 670 F. Supp. 897, 898 (D. Mont. 1987) ("[U]nder Montana law, an employee has no cause of action for wrongful demotion.").

31. *Broomfield v. Lundell*, 767 P.2d 697, 705 (Ariz. Ct. App. 1988).

32. *See, e.g., Burris*, 875 P.2d at 1348; *but cf. Crommie v. California*, 61 Empl. Prac. Dec. (CCH)

Applying state wage payment statutes in ADEA cases may represent a more promising means of expanding the remedies available for age discrimination.<sup>33</sup> Proponents of that approach<sup>34</sup> argue that, given the limited remedies available under the ADEA, state legislatures should be allowed to "provide remedies for discriminatees in addition to those provided for in the [ADEA]."<sup>35</sup> Opponents of that view, on the other hand, contend that Congress intended to preclude state legislation "on the matter of what damages are available under the ADEA."<sup>36</sup>

This article explores the relative merits of those conflicting views.<sup>37</sup> Parts II and III of the article discuss arguments for and against the use of state laws to supplement the remedies available under the ADEA.<sup>38</sup> Part IV analyzes the issue further by considering closely analogous FLSA cases.<sup>39</sup> Part V considers the ADEA deferral provision's impact on state wage payment laws.<sup>40</sup> The article ultimately concludes that the language of the ADEA and the manner in which its deferral provision operates<sup>41</sup> strongly suggest that the federal statutory remedies are exclusive in ADEA cases.<sup>42</sup>

## II. THE VIEW THAT SUPPLEMENTAL STATE LAW REMEDIES ARE AUTHORIZED

Most states have statutes regulating the payment of wages,<sup>43</sup> many of which are potentially applicable in cases involving violations of federal discrimination laws such as the ADEA.<sup>44</sup> In many cases, the remedies available under

¶ 42,286, at 75,387 (N.D. Cal. 1993) ("Clearly, California law supplies a cause of action in tort to workers who are denied promotions in retaliation for challenging their employers' unlawful business practices."); Rothstein, *supra* note 29, at 102 (asserting that "a judicially-recognized public policy exception to the at-will rule should be applied to hiring").

33. See generally Elizabeth D. Harter, *Paying the Price of Judicial Activism Under the Wage Payment and Collection Act*, 96 W. VA. L. REV. 743, 744 (1994) ("[A]s the rights of the American worker continue to be enhanced, state [wage payment] statutes . . . are subjected to the expansive interpretation of activist courts.").

34. See *id.* at 745 (observing that "employee advocates constantly pursue novel [wage payment act] theories both to avoid less advantageous . . . federal laws and to take advantage of [a wage payment act's] broad remedial provisions").

35. *Bailey v. Container Corp.*, 594 F. Supp. 629, 633 (S.D. Ohio 1984).

36. *Id.* at 632.

37. See generally *National Metalcrafters v. McNeil*, 784 F.2d 817, 820 (7th Cir. 1986) (observing that "state . . . wage payment act[s] . . . seem rich in potential for conflict with . . . federal labor and employee financial security laws").

38. See *infra* notes 43-114 and accompanying text.

39. See *infra* notes 115-39 and accompanying text.

40. See *infra* notes 140-75 and accompanying text.

41. One court has stated that the construction of the deferral provision is "not easy," with many judges having "failed to comprehend [its] details." *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123, 1130 (N.D. Ill. 1976).

42. See *infra* notes 176-93 and accompanying text.

43. See *National Metalcrafters v. McNeil*, 784 F.2d 817, 820 (7th Cir. 1986). The purpose of such statutes generally is to protect employees by "insur[ing] the regularity and frequency of wage payments," *Atchley v. Heritage Cable Vision Assocs.*, 904 F. Supp. 870, 875 (N.D. Ind. 1995), and "assist[ing] them in the collection of compensation wrongly withheld." *Mullins v. Venable*, 297 S.E.2d 866, 869 (W. Va. 1982).

44. See, e.g., *Davis v. Jobs for Progress Inc.*, 427 F. Supp. 479 (D. Ariz. 1976) (holding that an employer who failed to compensate a female employee at the same rate as similarly-situated employees in violation of Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988), could be liable for treble damages

those wage payment statutes exceed the remedies provided for directly under the applicable federal law.<sup>45</sup>

Arizona, for example, has a statute providing for the recovery of treble damages when an employer fails to pay wages due to an employee.<sup>46</sup> The Arizona legislature has defined "wages" for purposes of that statute to mean "compensation due an employee in return for labor or services rendered . . . for which the employee has a reasonable expectation to be paid."<sup>47</sup> Whether that definition encompasses amounts due as the result of ADEA violations<sup>48</sup> is an open question.<sup>49</sup> However, the state statute is at least arguably applicable in ADEA cases in which the plaintiff has been compensated at a lower rate than similarly-situated younger employees.<sup>50</sup>

In *Davis v. Jobs for Progress*,<sup>51</sup> for example, the court held that an employer that violated Title VII by failing to compensate a female employee at the same rate as similarly-situated male employees could be liable for treble damages under the Arizona wage payment statute.<sup>52</sup> Although the court ultimately declined to award treble damages,<sup>53</sup> it cited the Title VII saving clause<sup>54</sup> and

under Arizona's wage payment statute).

45. Cf. *Aragon v. Bravo Harvesting*, 1 Wage & Hour Cas. 2d (BNA) 982, 984 (D. Ariz. 1993) (observing that "the remedies provided under Arizona statutory and common law are more beneficial to employees than remedies provided under the FLSA"). See generally *Alaska Int'l Indus. v. Musarra*, 602 P.2d 1240, 1246 (Alaska 1979) (observing that "state law[s] on [the] payment of [wages] may differ from the standards set forth in [a] federal statute").

46. See ARIZ. REV. STAT. ANN. § 23-355 (West 1995). That provision is not unusual. Cf. W. VA. CODE § 21-5-4 (1989) (providing for the recovery of "liquidated" damages when an employer "fails to pay an employee wages").

47. ARIZ. REV. STAT. ANN. § 23-350.5 (West 1995). This definition is fairly representative of that appearing in other state wage payment acts. Cf. W. VA. CODE § 21-5-1(c) (1989) (defining "wages" to mean "compensation for labor or services rendered by an employee").

48. Amounts owing due to discriminatory employer conduct are deemed to be unpaid "wages" for purposes of the ADEA. See 29 U.S.C. § 626(b) (1988); *Drez v. E.R. Squibb & Sons*, 674 F. Supp. 1432, 1440 (D. Kan. 1987).

49. Cf. *Marshall v. Bernat Enters.*, 24 Wage & Hour Cas. (BNA) 78 (D. Ariz. 1978) (concluding that the Arizona legislature did not intend for the Arizona treble damage statute to apply in cases involving FLSA violations).

50. See, e.g., *Foster v. Arcata Assocs.*, 772 F.2d 1453, 1466 (9th Cir. 1985) (considering a claim of "intentional wage discrimination because of [the plaintiff's] age in violation of ADEA").

51. 427 F. Supp. 479 (D. Ariz. 1976).

52. See *id.* at 483.

53. See *id.* The award of treble damages under the Arizona statute is discretionary. See *Apache East, Inc. v. Wiegand*, 580 P.2d 769, 773 (Ariz. Ct. App. 1978); *Aragon v. Bravo Harvesting*, 1 Wage & Hour Cas. 2d (BNA) 982, 984 n.8 (D. Ariz. 1993). In exercising its discretion to decline to make such an award, the *Davis* court relied upon *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), where the court refused to permit a Title VII plaintiff to recover punitive damages under state law because (at the time) such damages were not available under Title VII. See *id.* at 835-38, 840.

54. See 42 U.S.C. § 2000e-7 (1994). In the present context, the term "saving clause" refers to a provision in a federal statutory scheme that prevents a state law regulating the same subject from being preempted by the federal scheme. See *Phoenix Mut. Life Ins. Co. v. Adams*, 828 F. Supp. 379, 384 (D.S.C. 1993); see also *Webster v. Bechtel, Inc.*, 621 P.2d 890, 900 (Alaska 1980) (noting that "a saving clause may prevent preemption of state statutes which conflict with the purpose of a federal statute"). The Title VII saving clause "was designed to preserve the effectiveness of state antidiscrimination laws," *Jones v. Metal Prods. Co.*, 281 N.E.2d 1, 7 (Ohio 1972), and state laws therefore are preempted by Title VII "only if they actually conflict with federal law." *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1222 (Okla. 1992) (emphasis omitted).

a Supreme Court decision interpreting Title VII<sup>55</sup> in holding that the Arizona statute was not preempted.<sup>56</sup>

That conclusion appears to be correct,<sup>57</sup> because the Arizona statute is intended to punish employers who fail to compensate their employees in accordance with the law,<sup>58</sup> and Title VII's saving clause specifically provides that Title VII does not relieve an employer from any "punishment" provided for under state law.<sup>59</sup> However, because the ADEA contains no specific counterpart to Title VII's saving clause,<sup>60</sup> the impact of *Davis* in ADEA cases is unclear.<sup>61</sup>

The *Davis* court nevertheless provided some guidance on the issue by indicating that, like Title VII,<sup>62</sup> the FLSA does not preempt the Arizona wage payment statute.<sup>63</sup> That view was reiterated in *Spieth v. Adasen Distributing*<sup>64</sup>

55. See *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). *Johnson* held that Title VII does not preempt employment discrimination actions against private employers under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1994), which prohibits racial discrimination in contractual relations. See *Keller v. Prince George's County*, 827 F.2d 952, 956 (4th Cir. 1987). "Despite Title VII's comprehensive framework, the [*Johnson*] Court concluded from the legislative history of Title VII that Congress intended to allow individuals independently to pursue their rights under Title VII and other applicable federal statutes." *Id.*

56. See *Davis v. Jobs for Progress*, 427 F. Supp. 479, 483 (D. Ariz. 1976); cf. *Munday Constr. Co. v. Waste Management of N. Am.*, 858 F. Supp. 1364, 1381 (D. Md. 1994) (relying on Title VII's savings clause to hold that "state laws which provide additional . . . remedies for employment discrimination are not preempted as such by Title VII").

57. See *Rains v. Criterion Sys.*, 80 F.3d 339, 345 (9th Cir. 1996) ("Title VII does not completely preempt state law. Rather Title VII only preempts state law inconsistent with it."); *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1223 (Okla. 1992) ("[S]tates' remedies for relief from employment discrimination and for the compensation of its victims may be both different from and broader than those provided by Title VII."); but see *Munday Constr.*, 858 F. Supp. at 1381 (stating that a plaintiff "should not be permitted to obtain damages under state law which are unavailable under the very federal law [Title VII] which itself provides the right which plaintiff is enforcing"); *National Org. for Women v. Sperry Rand Corp.*, 457 F. Supp. 1338, 1349 (D. Conn. 1978) (interpreting *Van Hoomissen* as precluding a Title VII plaintiff from "utilizing state law to obtain a remedy which would not be available under the federal law claim").

58. See, e.g., *Apache East, Inc. v. Wiegand*, 580 P.2d 769, 773 (Ariz. Ct. App. 1978) ("[T]he treble damages provision authorized by the legislature . . . was directed against employers who seek to delay payment of wages without reasonable justification or who seek to defraud employees of wages earned."); *Rogers v. Speros Const. Co.*, 580 P.2d 750, 754 (Ariz. Ct. App. 1978) (finding that a contractor's liability to unpaid employees of a subcontractor would not include liability for treble damages under the statute).

59. See 42 U.S.C. § 2000e-7 (1994); but cf. *Munday Constr.*, 858 F. Supp. at 1381 (holding that, notwithstanding the saving clause, a Title VII plaintiff "should not be permitted to obtain damages under state law which are unavailable under the very federal law which itself provides the right which [the] plaintiff is enforcing").

60. See *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543, 545 (S.D.N.Y. 1994); *Godby v. Electroflux Corp.*, 65 Fair Empl. Prac. Cas. (BNA) 211, 212 n.2 (N.D. Ga. 1994); but cf. *Lukus v. Westinghouse Elec. Corp.*, 419 A.2d 431, 444 n.20 (Pa. Super. Ct. 1980) (observing, without explanation, that "the Age Discrimination in Employment Act . . . contains a savings provision similar to 42 U.S.C. § 2000e-7").

61. In *Zamore v. Dyer*, 597 F. Supp. 923 (D. Conn. 1984), the court held that "any age discrimination decisions regarding preemption are inapposite" in Title VII cases because the ADEA has no counterpart to the Title VII saving clause. *Id.* at 928 n.4; cf. *McKnight v. General Motors Corp.*, 908 F.2d 104, 117 (7th Cir. 1990) (concluding that ADEA precedents are not dispositive in Title VII cases "since the remedial schemes of the two statutes differ markedly"). The converse proposition—that Title VII preemption decisions are inapposite in ADEA cases—presumably is equally true. See *Lorillard v. Pons*, 434 U.S. 575, 583-84 (1978) (declining to follow Title VII precedent in interpreting ADEA remedial provisions because of the "significant differences" between the "remedial and procedural provisions of the two laws"); but cf. *Mummelthie v. City of Mason City*, 873 F. Supp. 1293, 1324 (N.D. Iowa 1995) (concluding that "the exclusivity of the ADEA may properly be considered by analogy to Title VII"), *aff'd*, 78 F.3d 589 (8th Cir. 1996).

62. See *supra* notes 51-56 and accompanying text.

63. See *Davis v. Jobs for Progress*, 427 F. Supp. 479, 483 (D. Ariz. 1976). The court undoubtedly found it appropriate to address this issue because the plaintiff had asserted a claim under the Equal Pay Act of 1963,



and *Aragon v. Bravo Harvesting*,<sup>65</sup> and because the ADEA generally incorporates the FLSA remedial scheme,<sup>66</sup> suggests that the holding in *Davis* may apply in ADEA cases.<sup>67</sup>

Consistent with that view, other courts have concluded that state statutory remedies exceeding those available under the ADEA can be invoked to expand a plaintiff's recovery for age discrimination.<sup>68</sup> In *Bailey v. Container Corp. of America*,<sup>69</sup> for example, the plaintiff brought suit under the ADEA after his employment was terminated.<sup>70</sup> He also alleged a claim under Ohio's age discrimination statute,<sup>71</sup> which provided for the recovery of compensatory and punitive damages<sup>72</sup> that are unavailable under the ADEA.<sup>73</sup>

The employer moved to dismiss the claim for compensatory and punitive damages,<sup>74</sup> arguing that "Congress intended to displace state legislation on the matter of what damages are available under the ADEA."<sup>75</sup> The court denied the motion, concluding that the plaintiff could invoke state statutory remedies for age discrimination "because there is no clear statement of Congressional intent to preempt, no requirement upon any party to act in accordance with state law at the risk of violating federal law, and nothing inherent in the nature of age discrimination which requires federal preeminence."<sup>76</sup>

29 U.S.C. § 206(d) (1988), and the Equal Pay Act "is a part of the Fair Labor Standards Act." 29 C.F.R. § 1620.1 (1995); see also *Hill v. J.C. Penney Co.*, 688 F.2d 370, 372 n.1 (5th Cir. 1982) ("The rubric Equal Pay Act refers to one portion of the comprehensive Fair Labor Standards Act.").

64. 29 Wage & Hour Cas. (BNA) 252, 253-54 (D. Ariz. 1989).

65. 1 Wage & Hour Cas. 2d (BNA) 982, 984-87 (D. Ariz. 1993).

66. See *supra* notes 8-12 and accompanying text.

67. See *Coston v. Plitt Theatres*, 831 F.2d 1321, 1328 (7th Cir. 1987) (concluding that courts must follow the FLSA "in the computation of damages" under the ADEA), *vacated on other grounds*, 486 U.S. 1020 (1988); *Platt v. Burroughs Corp.*, 424 F. Supp. 1329, 1340 (E.D. Pa. 1976) ("[The] conclusion reached with respect to the [FLSA] is the conclusion required by the reference to it in [the] ADEA.").

68. See *Hillman v. Consumers Power Co.*, 282 N.W.2d 422, 424 (Mich. Ct. App. 1979) (noting that "Congress did not expressly or impliedly oust the states from their power to legislate as to age discrimination").

69. 594 F. Supp. 629 (S.D. Ohio 1984).

70. See *id.* at 630.

71. See OHIO REV. CODE ANN. § 4101.17 (Anderson 1980) (recodified at OHIO REV. CODE ANN. § 4112.14 (Supp. 1995)).

72. See *Bailey*, 594 F. Supp. at 634; see also *Merkel v. Scovill, Inc.*, 573 F. Supp. 1055, 1061 (S.D. Ohio 1983) (finding that "compensatory damages are available under . . . § 4101.17"); but see *Schlosser v. Firestone Tire & Rubber Co.*, 33 Fair Empl. Prac. Cas. (BNA) 1403, 1405 (N.D. Ohio 1983) (holding that a "request for general, compensatory, and punitive damages pursuant to § 4101.17 fails to state a claim").

73. See *Bailey*, 594 F. Supp. at 633.

74. See *id.* at 630.

75. *Id.* at 632 (internal quotations omitted). However, the employer cited no authority supporting that proposition. See *id.*

76. *Id.* at 633. The court based its holding in part upon the decision in *Simpson v. Alaska State Comm'n for Human Rights*, 423 F. Supp. 552 (D. Alaska 1976), *aff'd*, 608 F.2d 1171 (9th Cir. 1979). See *Bailey*, 594 F. Supp. at 632. In *Simpson*, the court rejected the employer's argument that state age discrimination statutes are preempted to the extent that they are broader than the ADEA, noting that "Congress intended only to establish 'minimum' standards" in enacting the ADEA. *Simpson*, 423 F. Supp. at 556. The *Simpson* court therefore held that a state statute that contained no upper age limit was not preempted even though the ADEA (at the time) only prohibited employment discrimination based on age against "persons [aged] 40 through 64." *Id.* at 555-56; cf. *Maine Human Rights Comm'n v. Kennebec Water Power Co.*, 468 A.2d 307 (Me. 1983) (reaching a similar conclusion with respect to another state age discrimination statute). The *Simpson* court stated:

A similar result was reached in *Hillman v. Consumers Power Co.*<sup>77</sup> The plaintiff in that case retired after being bypassed for a promotion in favor of a younger coworker.<sup>78</sup> The plaintiff subsequently brought suit against his employer under Michigan law alleging that he had been denied a promotion and effectively forced to retire<sup>79</sup> because of his age.<sup>80</sup> The trial court entered judgment in favor of the employer on the ground that the plaintiff's claim was preempted by the ADEA,<sup>81</sup> and the plaintiff appealed.<sup>82</sup>

Noting that the ADEA preemption issue was one of first impression in Michigan, the appellate court began its analysis by observing that preemption occurs "when compliance with both Federal and State regulations is physically impossible, when the nature of the subject matter requires Federal supremacy and uniformity or when Congress intended to displace the State legislation."<sup>83</sup> The court noted that the state law at issue was not preempted under the first prong of this test because an employer could comply with both the state and federal statutes<sup>84</sup> merely by refraining from engaging in age discrimination.<sup>85</sup> The court also concluded that Congress has not expressly or impliedly divested the states of authority to legislate with respect to age discrimination,<sup>86</sup> noting

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Since there are no specific conflicts between the state and federal statutes and since Congress has expressly left the states the power to act in this field, the fact that [the state] has gone beyond the federal government in enacting a complementary scheme in this area does not make the [state] law void.

*Simpson*, 423 F. Supp. at 556.

77. 282 N.W.2d 422 (Mich. Ct. App. 1979).

78. *See id.* at 423. Replacement by a younger individual is a significant element of an ADEA plaintiff's prima facie case. *See O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996) (noting that a plaintiff's replacement by a "substantially younger" worker is a "reliable indicator of age discrimination").

79. Whether a resignation or retirement was "forced" (that is, whether the plaintiff was "constructively discharged") is a frequently litigated ADEA issue. *See Ira M. Saxe, Note, Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 *FORDHAM L. REV.* 963, 972 (1987) ("Although it is well recognized that constructive discharge is actionable under the ADEA, . . . disagreement exists regarding the elements required to establish the plaintiff's case."); Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 *U. CHI. L. REV.* 561, 569 (1986) (referring to the "very different orientations" of the "two principal tests [that have evolved] for evaluating constructive discharge claims under . . . the ADEA").

As a general proposition, a constructive discharge occurs where the employer deliberately makes an employee's working conditions so intolerable that the employee is effectively forced to resign. *See Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980). The denial of a promotion ordinarily is insufficient to satisfy that standard. *See Bristow v. Daily Press*, 770 F.2d 1251, 1256 n.4 (4th Cir. 1985); *Nobler v. Beth Israel Medical Ctr.*, 702 F. Supp. 1023, 1031 (S.D.N.Y. 1988).

80. *See Hillman*, 282 N.W.2d at 423-24.

81. As a general proposition, the case for ADEA preemption is weak. Indeed, a regulation issued by the Department of Labor specifically states: "The ADEA does not preempt State age discrimination in employment laws." 29 C.F.R. § 1625.10(g) (1995).

82. *See Hillman*, 282 N.W.2d at 424.

83. *Id.* (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963)); *cf. Simpson v. Alaska State Comm'n for Human Rights*, 423 F. Supp. 552, 555 (D. Alaska 1976) (applying same test), *aff'd*, 608 F.2d 1171 (9th Cir. 1979).

84. *See Simpson*, 423 F. Supp. at 554 ("delineating the scope of the [state] statute . . . is the first step necessary to determine if the [ADEA] has preempted the states in the field of age discrimination").

85. *See Hillman*, 282 N.W.2d at 424. The absence of preemption on this ground is particularly apparent with respect to state law remedies for age discrimination that exceed those provided for in the ADEA, because "compliance with both federal and state law in [that regard] is not physically impossible; it simply ups the ante." *Bailey v. Container Corp. of Am.*, 594 F. Supp. 629, 632 (S.D. Ohio 1984).

86. *See Hillman*, 282 N.W.2d at 424; *cf. Simpson*, 423 F. Supp. at 556 ("Nothing in the scope or intent

that preemption cannot be inferred simply by the comprehensive nature of the ADEA.<sup>87</sup>

Indeed, the court observed that the states have historically exercised broad authority to regulate employment practices,<sup>88</sup> and stated that “[o]nce the power of the State to regulate is conceded, the remedy and mode of enforcement is a matter of State discretion, absent such a conflict with Federal remedies as will require application of the doctrine of Federal supremacy.”<sup>89</sup> Because the court perceived no such conflict in the age discrimination context,<sup>90</sup> it held that there is “no sound basis to conclude that the [ADEA] precludes [state law] remedies.”<sup>91</sup>

### III. THE VIEW THAT SUPPLEMENTAL STATE LAW REMEDIES ARE PRECLUDED

The view that supplemental state law remedies are preempted by the ADEA is perhaps best represented by *Chambers v. Capital Cities/ABC*.<sup>92</sup> The plaintiff in *Chambers* brought suit under the ADEA,<sup>93</sup> and sought to supplement his potential remedies by invoking a provision of the New York City Human Rights Law<sup>94</sup> that provides victims of unlawful discrimination with a right to recover punitive damages.<sup>95</sup> The employer moved to dismiss the claim for punitive damages,<sup>96</sup> arguing that the city ordinance was inconsistent with the purposes of the ADEA.<sup>97</sup>

The court began its analysis by observing that because the ADEA contains no express preemption provision,<sup>98</sup> states and their instrumentalities are free to

of the [ADEA] indicates that Congress intended to oust the states from this area of concern.”).

87. See *Hillman*, 282 N.W.2d at 424; but cf. *Zombro v. Baltimore City Police Dep’t*, 868 F.2d 1364, 1366 (4th Cir. 1989) (concluding that the ADEA’s “comprehensive statutory scheme” is “inconsistent with the notion that the remedies it affords could be supplanted by alternative judicial relief”); *Ring v. Crisp County Hosp. Auth.*, 652 F. Supp. 477, 482 (M.D. Ga. 1987) (“By establishing the ADEA’s comprehensive scheme for the resolution of employee complaints of age discrimination, Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA.”).

88. See *Hillman*, 282 N.W.2d at 424; see also *Simpson*, 423 F. Supp. at 556 (“In the field of employment practices states possess broad authority under their police powers and state laws in the field are not easily preempted.”).

89. *Hillman*, 282 N.W.2d at 425.

90. Cf. *Bailey*, 594 F. Supp. at 632 (referring to the “peaceful coexistence of federal and state regulation of employment discrimination in recent years”).

91. *Hillman*, 282 N.W.2d at 425; see also *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 209-10 (6th Cir. 1990) (concluding that the ADEA does not preempt an award of emotional distress under the Michigan age discrimination statute).

92. 851 F. Supp. 543 (S.D.N.Y. 1994).

93. See *id.* at 544.

94. NEW YORK CITY, N.Y. ADMIN. CODE §§ 8-101 to 8-807 (1992).

95. See *Chambers*, 851 F. Supp. at 544. In pertinent part, the city ordinance provided that “any person claiming to be aggrieved by an unlawful discriminatory practice . . . shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages.” NEW YORK CITY, N.Y. ADMIN. CODE § 8-502(a) (1992).

96. See *Chambers*, 851 F. Supp. at 544.

97. See *id.* at 545.

98. See *id.* at 545; *United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 362 (11th Cir. 1994) (noting that “the ADEA [does] not contain an express statement of preemption”); *Hillman v. Consumers Power Co.*, 282 N.W.2d 422, 424 (Mich. Ct. App. 1979) (stating that “Congress did not expressly . . . oust the states from their power to legislate as to age discrimination”).

regulate age discrimination as long as their enactments do not frustrate the objectives of the federal law.<sup>99</sup> Noting that the ADEA remedial scheme was designed to encourage voluntary, prelitigation resolution of age discrimination disputes,<sup>100</sup> the court concluded that “[t]he addition of punitive damages to [the ADEA’s] remedial structure would be a major shift encouraging litigation rather than settlements.”<sup>101</sup> Because the potential for an award of punitive damages “would tend to obliterate resort to mediation and cause the [local] law to trump all other antidiscrimination laws,” the court concluded that application of the city ordinance would undermine the ADEA’s objectives,<sup>102</sup> and therefore dismissed the plaintiff’s claim for punitive damages.<sup>103</sup>

As suggested earlier,<sup>104</sup> the notion that expansive remedies would undermine the conciliation process is one that appears frequently in ADEA cases.<sup>105</sup> In *Bruno v. Western Electric Co.*,<sup>106</sup> for example, the court stated that “an ADEA plaintiff who may be able to recover punitive damages in a court action would be less inclined to seek reconciliation at the agency level.”<sup>107</sup>

Similarly, the court in *Sant v. Mack Trucks*<sup>108</sup> concluded that “[i]f large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.”<sup>109</sup> Numerous other courts have reached the same conclusion.<sup>110</sup>

Other courts have analyzed the issue differently.<sup>111</sup> In *Hillman v. Consumers Power Co.*,<sup>112</sup> for example, the court rejected the employer’s argument that the recognition of supplemental state remedies would conflict with the ADEA’s “informal voluntary compliance provisions.”<sup>113</sup> The court stated:

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99. See *Chambers*, 851 F. Supp. at 545.

100. See *id.* at 546; cf. *Nolan v. Otis Elevator Co.*, 505 A.2d 580, 588 (N.J. 1986) (discussing the “important ADEA statutory goals of . . . opportunity for voluntary resolution, and avoidance of litigation”).

101. *Chambers*, 851 F. Supp. at 546.

102. *Id.*

103. See *id.* at 545.

104. See *supra* note 17 and accompanying text.

105. A particularly colorful expression of that view appears in *Platt v. Burroughs*, 424 F. Supp. 1329, 1337 (E.D. Pa. 1976) (citations and quotations omitted):

[T]he threat of “large dollar pain and suffering recoveries” . . . would aid in the conciliatory . . . technique devised by Congress about as much as the “subtle” threat that would be implied if the alleged discriminatee was permitted to enter the conference room armed with a blackjack and a 45 calibre revolver.

106. 829 F.2d 957 (10th Cir. 1987).

107. *Id.* at 967.

108. 424 F. Supp. 621 (N.D. Cal. 1976).

109. *Id.* at 622.

110. See, e.g., *Rogers v. Exxon Research & Eng’g Co.*, 550 F.2d 834, 841-42 (3d Cir. 1977); *Eggleston v. South Bend Community Sch. Corp.*, 858 F. Supp. 841, 853 (N.D. Ind. 1994); *Hannon v. Continental Nat’l Bank*, 427 F. Supp. 215, 217 (D. Colo. 1977); *Platt*, 424 F. Supp. at 1337.

111. At least one court has found it unnecessary to reach the issue. See *Bailey v. Container Corp. of Am.*, 594 F. Supp. 629, 633 (S.D. Ohio 1984).

112. 282 N.W.2d 422 (Mich. Ct. App. 1979).

113. *Id.* at 424; see also *Bailey*, 594 F. Supp. at 633 (discussing the argument that “enhanced remedies under [state] law may well increase the possibility of conciliation,” and concluding that those who favor that view “probably have a point”).

Different remedies are provided in the State and Federal Statutes. However, . . . the [ADEA] accords a degree of priority to state enforcement in preference to Federal enforcement. From such subordination, we infer that Congress, as a general principle, intended to encourage state enforcement rather than Federal and did not consider [the pursuit of] state [remedies] to be inconsistent with Federal enforcement.<sup>114</sup>

#### IV. THE ANALOGY TO FLSA CASES

The conclusion that supplemental state law remedies for age discrimination are preempted by the ADEA draws additional support from cases interpreting the FLSA,<sup>115</sup> the ADEA's remedial parent.<sup>116</sup> In *Hendrix v. Delta Air Lines*,<sup>117</sup> for example, a state appellate court indicated that, in the case of a failure to pay minimum wages, the FLSA would preempt a state statutory remedy applicable when employers fail to pay wages due to an employee who is discharged or resigns.<sup>118</sup>

Citing *Divine v. Levy*<sup>119</sup> and *Sirmon v. Cron & Gracey Drilling Corp.*,<sup>120</sup> the *Hendrix* court concluded that because Congress had provided a remedy for a delay in paying wages due under the FLSA, the states probably

114. *Hillman*, 282 N.W.2d at 424-25 (discussing 29 U.S.C. § 633(b) (1988)); see also *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1376 (4th Cir. 1989) (Murnaghan, J., concurring in part and dissenting in part) (concluding that "Congress intended to tolerate the . . . risk that age discrimination plaintiffs might forego the ADEA remedies" in favor of more attractive alternatives).

115. See, e.g., *Tombrello v. USX Corp.*, 763 F. Supp. 541, 545 (N.D. Ala. 1991) ("[A] plaintiff cannot circumvent the exclusive remedy prescribed by Congress by asserting equivalent state law claims in addition to [a] FLSA claim."); *Carter v. Marshall*, 457 F. Supp. 38, 40-41 (D.D.C. 1978) ("Because the [FLSA] specifically outlines the type of relief available and also provides for liquidated damages, it appears that Congress intended the relief provided to be exclusive."); but see *Davis v. Jobs for Progress*, 427 F. Supp. 479 (D. Ariz. 1976), discussed in text accompanying *supra* notes 51-63.

116. See *Sperling v. Hoffman-LaRoche, Inc.*, 24 F.3d 463, 470 (3d Cir. 1994) (describing the FLSA as a "parent" of the ADEA). Consistent with its hybrid origins, the ADEA has also been described as an "offspring" of Title VII. *Morelock v. NCR Corp.*, 546 F.2d 682, 686 (6th Cir. 1976).

117. 234 So. 2d 93 (La. Ct. App. 1970).

118. See *id.* at 94-95.

119. 36 F. Supp. 55 (W.D. La. 1940). In *Divine*, the court specifically held that in a case involving a claim for unpaid minimum wages, the FLSA "supersedes the penalty provisions of the . . . state statute." *Id.* at 58.

120. 44 F. Supp. 29 (W.D. La. 1942). In *Sirmon*, the court concluded that the same state statute that had been at issue in *Divine* was also preempted in a case involving a claim for unpaid overtime. The court reasoned that the states are without power to regulate with respect to wages and hours because Congress occupied the field when it enacted the FLSA. See *id.* at 30-31. The conclusion that Congress has occupied the field of wage and hour regulation ignores the impact of the FLSA saving clause, 29 U.S.C. § 218(a) (1988), and therefore is not correct. See *Aragon v. Bravo Harvesting, 1 Wage & Hour Cas. 2d* (BNA) 982, 985 (D. Ariz. 1993) (observing that the FLSA saving clause "reveals that Congress did not intend to 'occupy the field'"); *Stewart v. Region II Child & Family Serv.*, 788 P.2d 913, 917 (Mont. 1990) (stating that "in passing the F.L.S.A., Congress declined to preempt the entire field of wage and hour regulation"); *Pacific Merchant Shipping Ass'n v. Aubry*, 709 F. Supp. 1516, 1524 (C.D. Cal. 1989) (concluding that "the FLSA would preempt state law, were it not for the FLSA's savings clause"). However, the *Sirmon* court's apparent failure to consider the impact of the saving clause does not invalidate its ultimate holding, because a state statute that is not entirely preempted (*i.e.*, one that falls within the saving clause) nevertheless may be preempted in part. See *Doctors Hosp. v. Silva Recio*, 558 F.2d 619, 623 (1st Cir. 1977); cf. *Nolan v. Otis Elevator Co.*, 505 A.2d 580, 586 (N.J. 1986) (discussing partial preemption in ADEA case).

were without power to provide a greater remedy for the same wrong.<sup>121</sup> The court stated:

Where, as in *Divine*, less than minimum wage is paid, the federal law provides a 100% penalty and the State may very clearly be unable to override Congress and decide the penalty for underpayment should be more. And if the only *delay* charged is delay in paying the difference between agreed-upon and minimum, a statute purporting to penalize that delay might be beyond the State's power.<sup>122</sup>

In *Lerwill v. Inflight Motion Pictures*,<sup>123</sup> an employee brought suit for unpaid overtime.<sup>124</sup> He elected not to pursue a claim directly under the FLSA, but instead brought suit under state law on the premise that the provisions of the FLSA were incorporated into his employment contract.<sup>125</sup>

The court denied the plaintiff's motion for summary judgment, holding that the FLSA provides the exclusive remedy for a failure to compensate employees for overtime.<sup>126</sup> The court noted that Congress had amended the FLSA on several occasions in an effort to avoid imposing unanticipated and economically disruptive liabilities on employers,<sup>127</sup> while simultaneously assuring a minimally acceptable level of compensation for employees.<sup>128</sup> The court concluded that these amendments were indicative of an intent to preempt alternative state law remedies that are more beneficial to employees than the FLSA remedy.<sup>129</sup>

The holdings in *Hendrix* and *Lerwill* are instructive because the ADEA's incorporation of the FLSA remedial scheme suggests that courts should look to FLSA precedent in analyzing ADEA damages issues.<sup>130</sup> Indeed, the analysis in *Lerwill* was specifically extended to the ADEA in *Platt v. Burroughs Corp.*<sup>131</sup>

The plaintiff in *Platt* alleged that he was discharged in retaliation for filing a charge of age discrimination<sup>132</sup> after being demoted and then passed over for

121. See *Hendrix*, 234 So. 2d at 95.

122. *Id.*

123. 343 F. Supp. 1027 (N.D. Cal. 1972).

124. See *id.* at 1028.

125. See *id.*

126. See *id.* at 1028-29.

127. See *id.* at 1029; see also *Stewart v. Region II Child & Family Serv.*, 788 P.2d 913, 917 (Mont. 1990) (noting that FLSA was amended because judicial interpretations of the Act as originally enacted had imposed unexpected liabilities on employers).

128. See *Lerwill*, 343 F. Supp. at 1029. Perhaps most significantly, Congress amended the FLSA to make an award of liquidated damages discretionary in some FLSA cases in an effort to more properly balance the competing interests of employers and employees. See *id.*

129. See *id.*; cf. *Berry v. 34 Irving Place Corp.*, 4 Wage & Hour Cas. (BNA) 564, 564 (S.D.N.Y. 1944) ("Nothing in the [FLSA] suggests anything but a legislative intention to provide a uniform rule as to . . . damages, a rule in no way dependent upon the varying standards and provisions of the several states.")

130. See, e.g., *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1328 (7th Cir. 1987) ("The ADEA in general requires that courts follow the Fair Labor Standards Act . . . in the computation of damages . . ."), *vacated on other grounds*, 486 U.S. 1020 (1988); see also *Bailey v. Container Corp. of Am.*, 594 F. Supp. 629, 633 (S.D. Ohio 1984) (analyzing the present issue in light of a state's decision to "provide remedies for discriminatees in addition to those provided for in the Fair Labor Standards Act").

131. 424 F. Supp. 1329 (E.D. Pa. 1976).

132. See *id.* at 1331. Section 4(d) of the ADEA makes it unlawful for employers to retaliate against their employees for "ma[king] a charge" under the ADEA. 29 U.S.C. § 623(d) (1988).

promotion.<sup>133</sup> He brought suit against his former employer and several of its agents under the ADEA and the Civil Rights Act of 1871.<sup>134</sup> The defendants moved to dismiss, arguing that the plaintiff's claim under the Civil Rights Act<sup>135</sup> was preempted by the ADEA.<sup>136</sup>

The court relied on *Lerwill* in holding that ADEA remedies are exclusive in age discrimination cases.<sup>137</sup> The *Platt* court observed that the reasoning in *Lerwill* "amply justify[ed]" that court's conclusion that "the statutory remedy . . . is the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA."<sup>138</sup> Referring to the ADEA's incorporation of the FLSA remedial scheme, the *Platt* court then stated that "the conclusion reached with respect to the Fair [Labor] Standards Act [in *Lerwill*], is the conclusion required by the reference to [the FLSA] in the ADEA."<sup>139</sup>

## V. THE IMPACT OF THE ADEA DEFERRAL PROVISION

The precedential impact of *Lerwill* in ADEA cases is undermined<sup>140</sup> by Congress' failure to incorporate into the ADEA several FLSA provisions,<sup>141</sup> including the FLSA saving clause<sup>142</sup> (which obviously has an impact upon the preemptive effect of the FLSA).<sup>143</sup> However, the failure to incorporate the FLSA saving clause actually supports the conclusion reached in *Platt* and other ADEA cases following *Lerwill*<sup>144</sup> that the statutory remedies are exclusive in ADEA cases.<sup>145</sup>

133. See *Platt*, 424 F. Supp. at 1332-33.

134. See *id.* at 1331, 1340 (citing 42 U.S.C. §§ 1985(3) and 1986 (1988)).

135. Age discrimination claims may not be cognizable under sections 1985 and 1986, see *Presnick v. Berger*, 837 F. Supp. 475, 480 (D. Conn. 1993); *Brewton v. Washington Hosp. Ctr.*, No. CIV.A.86-2261, 1991 WL 73173, at \*2 (D.D.C. Apr. 26, 1991); *Abbott v. Moore Business Forms Inc.*, 439 F. Supp. 643, 650 (D.N.H. 1977), but the *Platt* court found it unnecessary to reach that issue in light of its preemption analysis. See *Platt*, 424 F. Supp. at 1340-41.

136. See *Platt*, 424 F. Supp. at 1331.

137. See *id.* at 1340.

138. *Id.*

139. *Id.*

140. See generally *Mummelthie v. City of Mason City*, 873 F. Supp. 1293, 1324 (N.D. Iowa 1995) (concluding that "the exclusivity of the ADEA [should not] be considered by analogy to . . . the FLSA"), *aff'd*, 78 F.3d 589 (8th Cir. 1996).

141. See *Trans World Airlines v. Thurston*, 469 U.S. 111, 125 (1985) ("[T]he remedial provisions of the two statutes are not identical. Congress declined to incorporate into the ADEA several FLSA sections."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (discussing the "selectivity that Congress exhibited in incorporating [FLSA] provisions" into the ADEA); *Cavanaugh v. Texas Instruments*, 440 F. Supp. 1124, 1128 (S.D. Tex. 1977) (observing that "Congress did not . . . incorporate the exemptions of the FLSA into the ADEA").

142. Section 7(b) of the ADEA provides that the ADEA is to be enforced "in accordance with . . . sections 211(b), 216 (except for subsection (a) thereof), and 217" of the FLSA. 29 U.S.C. § 626(b) (1988). The saving clause appears in section 218. 29 U.S.C. § 218(a) (1988).

143. See, e.g., *Spieth v. Adasen Distributing, Inc.*, 29 Wage & Hour Cas. (BNA) 252, 253-54 (D. Ariz. 1989); *Webster v. Bechtel, Inc.*, 621 P.2d 890, 899-900 (Alaska 1980).

144. See, e.g., *Britt v. The Grocers Supply Co.*, 978 F.2d 1441, 1448 (5th Cir. 1992); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir. 1989).

145. Even if the ADEA incorporated the FLSA saving clause, there is serious doubt as to whether the clause, which "refers only to minimum wages, maximum workweek, and child-labor," *Divine v. Levy*, 36 F. Supp. 55, 58 (W.D. La. 1940), saves the remedial provisions of a state wage payment statute. See, e.g., *Aragon v. Bravo Harvesting*, 1 Wage & Hour Cas. 2d (BNA) 982, 986, 987 n.9 (D. Ariz. 1993) (describing

The FLSA saving clause's closest analogue in the ADEA is the ADEA's "deferral" provision,<sup>146</sup> which "manifests [a] Congressional intent to defer to the states' efforts to remedy age discrimination within their own boundaries."<sup>147</sup> Thus, like the FLSA,<sup>148</sup> the ADEA "expressly anticipates and encourages state regulation."<sup>149</sup>

However, the ADEA deferral provision<sup>150</sup> has been characterized as reflecting only minimal federal deference to state law remedies.<sup>151</sup> Thus, it provides little support for the view that state statutory remedies can be used to expand the ADEA's remedial scheme in cases brought under the federal act.<sup>152</sup>

Indeed, the conclusion that supplemental remedies available under a state wage payment statute are preempted by the ADEA is suggested by the very language of the deferral provision, which "saves"<sup>153</sup> only those state laws

the issue of whether the FLSA preempts a claim under the Arizona wage payment statute as a "very close one," and declining to decide whether the FLSA saving clause "permits a state to provide to employees remedies more beneficial than FLSA remedies"). See generally *Davenport Taxi Inc. v. Labor Comm'r*, 319 A.2d 386, 389 (Conn. 1973) ("Had Congress intended that the states have concurrent jurisdiction to enforce state laws respecting the domain . . . covered by the [FLSA] we believe it would not have . . . specifically limited [the saving clause] to instances where the state minimum wage is higher and the state maximum workweek is lower than wages and hours provided by the FLSA."); *Divine*, 36 F. Supp. at 58 ("[T]he act of Congress, through [the saving clause], by implication, supersedes the penalty provisions of the various state statutes on the relation of employer and employee.").

146. 29 U.S.C. § 633 (1988); see *Victa v. Merle Norman Cosmetics Inc.*, 24 Cal. Rptr. 2d 117, 125 (Cal. Ct. App. 1993) (comparing the ADEA deferral provision with the FLSA saving clause); *California Hosp. Ass'n v. Henning*, 770 F.2d 856, 861 (9th Cir. 1985) (describing the FLSA's saving clause and the ADEA deferral provision as "federal laws regulating employee compensation . . . [that] permit the states to provide more stringent protections if they wish").

147. *Skoglund v. Singer Co.*, 403 F. Supp. 797, 801 (D.N.H. 1975).

148. See *Webster v. Bechtel, Inc.*, 621 P.2d 890, 899 (Alaska 1980) (stating that "Congress expressly indicated that it wished to allow state regulations concerning wages and hours").

149. *Simpson v. Alaska State Comm'n for Human Rights*, 423 F. Supp. 552, 556 (D. Alaska 1976), *aff'd*, 608 F.2d 1171 (9th Cir. 1979); see also *Maine Human Rights Comm'n v. Kennebec Water Power Co.*, 468 A.2d 307, 310 (Me. 1983) ("It is clear that Congress, in enacting the ADEA, intended to leave room for states to supply consistent legislation.").

150. The deferral provision states, in relevant part, as follows:

(a) Federal action superseding State action

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

(b) Limitation of Federal action upon commencement of State proceedings

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

29 U.S.C. § 633 (1988).

151. See *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123, 1129 (N.D. Ill. 1976), *aff'd on reh'g*, 432 F. Supp. 952 (N.D. Ill. 1977); see also *Curry v. Continental Airlines*, 513 F.2d 691, 694 (9th Cir. 1975) (stating that the deferral provision requires "respectful but modest deference to a state that has evidenced interest") (quoting *Pacific Maritime Ass'n v. Quinn*, 465 A.2d 108, 110 (9th Cir. 1972)).

152. See *Nolan v. Otis Elevator Co.*, 505 A.2d 580, 587 (N.J. 1986) (observing that "deferral should not be confused with enlargement of the federal right"); see also *Bertrand*, 419 F. Supp. at 1127 (stating that the ADEA's deferral provision permits "concurrent federal and state alternatives for victims of age discrimination") (emphasis added).

153. "Saving" actually is too strong a characterization of the impact of the deferral provision. The provision merely requires federal deferral to state age discrimination proceedings for sixty days, see *Bertrand*, 419 F. Supp. at 1130 (referring to "the token sixty-day deference period"), and states that the commencement of an ADEA action at the conclusion of that period "shall supersede [the] State action." 29 U.S.C. § 633(a) (1988); see *Bertrand*, 419 F. Supp. at 1127 ("It is noteworthy that [the deferral provision] . . . mandates that



“prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice.”<sup>154</sup> Thus, a plaintiff invoking the ADEA deferral provision must demonstrate that two separate statutory requirements are satisfied: “[t]here must be a state law against age discrimination, and there must also be a state authority charged with granting or seeking relief against such discrimination.”<sup>155</sup>

Although the state statute at issue need not “mirror” the ADEA in order to satisfy the first of these requirements,<sup>156</sup> it must specifically address the issue of age discrimination.<sup>157</sup> Most state wage payment statutes do not satisfy that requirement, and therefore are not “saved” by the ADEA deferral provision.<sup>158</sup>

Even if a state wage payment statute did involve a “specific legislative authorization to act in the field of [age] discrimination,”<sup>159</sup> that fact, standing alone, would be insufficient to bring the ADEA deferral provision into play.<sup>160</sup> In order for the deferral provision to apply, the wage payment act also must authorize “a state agency . . . to seek relief for individuals suffering age discrimination.”<sup>161</sup>

State wage payment laws ordinarily contain no such provision.<sup>162</sup> The Arizona statutory scheme, for example, permits an employee to pursue a claim under the Arizona wage payment statute before the Arizona Industrial Commission,<sup>163</sup> which has the authority to investigate<sup>164</sup> and pursue judicial relief on the employee’s behalf in connection with such a claim.<sup>165</sup> However, because the Industrial Commission is not authorized to address age discrimination,<sup>166</sup> its statutory authority to investigate and litigate claims under Arizona’s wage payment statute is insufficient to trigger application of the ADEA deferral provision.<sup>167</sup>

an action under the [ADEA] will supersede any state action.”).

154. 29 U.S.C. § 633(b) (1988).

155. *Bertrand*, 419 F. Supp. at 1127.

156. *See Nolan*, 505 A.2d at 588.

157. *See Curry v. Continental Airlines*, 513 F.2d 691, 694 (9th Cir. 1975).

158. As noted earlier, there may be a legitimate question as to whether a state wage payment statute applies to an age discrimination claim. *See supra* notes 48-49 and accompanying text; *cf. Aragon v. Bravo Harvesting*, 1 Wage & Hour Cas. 2d (BNA) 982, 984 (D. Ariz. 1993) (holding that the Arizona wage payment statute only applies to contractual claims for wages). In order for the ADEA deferral provision to apply, however, the state statute must make express reference to age discrimination. *See Curry*, 513 F.2d at 694.

159. *Curry*, 513 F.2d at 693.

160. *See Mizrany v. Texas Rehabilitation Comm’n*, 522 F. Supp. 611, 616-17 (S.D. Tex. 1981), *aff’d*, 685 F.2d 1384 (5th Cir. 1982).

161. *Id.* at 616.

162. *See, e.g., Woods v. Midwest Conveyor Co.*, 648 P.2d 234, 244 (Kan. 1982) (noting that the Kansas employment discrimination laws are enforced by the Kansas Commission on Civil Rights, while the Kansas Wage Payment Act is enforced by the Kansas Department of Human Resources).

163. *See ARIZ. REV. STAT. ANN. § 23-356.A* (West 1995). The Arizona Industrial Commission is the state agency authorized to “[a]dminister and enforce all laws for the protection of life, health, safety and welfare of employees in every case and under every law when such duty is not specifically delegated to any other board or officer.” *ARIZ. REV. STAT. ANN. § 23-107.A.2.* (West 1995).

164. *See ARIZ. REV. STAT. ANN. § 23-357.A.* (West 1995).

165. *See ARIZ. REV. STAT. ANN. § 23-356.B.* (West 1995).

166. In Arizona, that authority is given to the Arizona Civil Rights Division. *See ARIZ. REV. STAT. ANN. § 41-1481* (West 1992).

167. In *Curry v. Continental Airlines*, 513 F.2d 691, 693 (9th Cir. 1975), for example, the court held that

Finally, the principal purposes of the ADEA deferral provision are "(1) to provide rapid and more expeditious disposition of cases, including mediation rather than litigation, and (2) to avoid burdening the federal system."<sup>168</sup> As discussed earlier, most courts that have considered the issue have concluded that expanding the remedies available for age discrimination beyond those specifically provided for in the ADEA would serve neither purpose.<sup>169</sup> Applying the deferral provision to save state wage payment acts with more expansive remedies than those available under the ADEA instead would make ADEA plaintiffs "less inclined to seek reconciliation,"<sup>170</sup> and thereby "encourage[ ] litigation rather than settlements[.]"<sup>171</sup>

In short, the language and purpose of the ADEA deferral provision, coupled with Congress' failure to include a true saving clause in the ADEA,<sup>172</sup> suggest that Congress intended to preempt state laws that otherwise might be available to expand the remedies provided for in the ADEA.<sup>173</sup> If that is correct,<sup>174</sup> neither the courts nor state legislatures can disturb the federal statutory scheme by "inserting into the ADEA [remedial] provision[s] which Congress did not mention."<sup>175</sup>

## VI. CONCLUSION

There is some support for the conclusion that state legislation intended to supplement the ADEA is not preempted.<sup>176</sup> That view is based in large measure on the proposition that the ADEA deferral provision<sup>177</sup> reflects Congress' "approval of the use of state remedies."<sup>178</sup>

the California Department of Human Resources Development was not the type of state authority within the contemplation of the ADEA deferral provision because there was no "specific [state] legislative mandate directing the Department to act in the field of age discrimination."

168. *Nolan v. Otis Elevator Co.*, 505 A.2d 580, 588 (N.J. 1986); *see also* *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148, 152 (4th Cir. 1991) ("The purpose of [the deferral provision] is to provide state agencies an opportunity to resolve age discrimination complaints locally in the hope that a successful resolution will induce complainants not to pursue suits in federal court.").

169. *See supra* notes 17, 100-14 and accompanying text.

170. *Bruno v. Western Elec. Co.*, 829 F.2d 957, 967 (10th Cir. 1987).

171. *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543, 546 (S.D.N.Y. 1994).

172. *See generally* *Rose v. National Cash Register Corp.*, 703 F.2d 225, 229 (6th Cir. 1983) (observing that Congress "selectively and expressly incorporated provisions of the FLSA . . . into the ADEA as it deemed fit for that purpose").

173. In *Zamore v. Dyer*, 597 F. Supp. 923, 928 n.4 (D. Conn. 1984), the court observed that the statement in the ADEA deferral provision that ADEA actions supersede state age discrimination actions operates "in direct contrast" to Title VII's saving clause, which makes it clear that Title VII "does not preempt state law." *Cf. Martinez v. United Auto Workers*, 772 F.2d 348, 351 (7th Cir. 1985) (stating that "[t]he policy of deference to state authority . . . is weaker [in the ADEA] than in Title VIII").

174. *See generally* William L. Lynch, Note, *A Framework for Preemption Analysis*, 88 *YALE L.J.* 363, 366 n.12 (1978) ("By forbidding courts to preempt certain state laws, a savings clause implicitly permits preemption of other state laws. It is often argued that this implicit permission is a congressional mandate to preempt the state laws that are not expressly saved.").

175. *Rose*, 703 F.2d at 229.

176. *See, e.g.,* *Maine Human Rights Comm'n v. Kennebec Water Power Co.*, 468 A.2d 307, 310-11 (Me. 1983).

177. *See* 29 U.S.C. § 633 (1988).

178. *Lingle v. Norge Div. of Magic Chef Inc.*, 823 F.2d 1031, 1046 n.17 (7th Cir. 1987), *rev'd on other*

However, the ADEA deferral provision does not expand an ADEA plaintiff's federal rights.<sup>179</sup> It merely permits states to enact alternative age discrimination legislation<sup>180</sup> that is expressly superseded by the ADEA in cases where the federal statute is invoked.<sup>181</sup> Indeed, one court has concluded that because the deferral provision specifically recognizes the primacy of federal law,<sup>182</sup> permitting recourse to state law remedies in ADEA actions would be "nothing more than a *pro forma* gesture."<sup>183</sup> Under this view, the remedies provided for in the ADEA are the only ones available in cases brought under the ADEA.<sup>184</sup>

On balance, the better view appears to be that in cases brought directly under the ADEA, the statutory remedies provided therein are exclusive.<sup>185</sup> If they prefer, victims of age discrimination can ignore the ADEA and bring suit under a state law prohibiting age discrimination,<sup>186</sup> in accordance with the terms of the ADEA deferral provision.<sup>187</sup> When the ADEA is invoked, however, the provisions of that act supersede alternative state laws because the choice of appropriate remedies to enforce the ADEA is a matter for Congress, and not the courts or state legislatures, to decide.<sup>188</sup>

In short, individuals claiming to have been discriminated against in violation of the ADEA must accept the act as they find it.<sup>189</sup> If the ADEA as written does not eradicate the evil sought to be remedied,<sup>190</sup> Congress can act to correct the problem,<sup>191</sup> just as it has done in other employment discrimination contexts.<sup>192</sup> However, courts in ADEA cases should refrain from permitting plaintiffs to invoke supplemental state law remedies that are more expansive than the remedies available under the ADEA.<sup>193</sup>

grounds, 486 U.S. 399 (1988).

179. See *Nolan v. Otis Elevator Co.*, 505 A.2d 580, 587 (N.J. 1986).

180. See *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123, 1127 (N.D. Ill. 1976), *aff'd on rehearing*, 432 F. Supp. 952 (N.D. Ill. 1977).

181. See 29 U.S.C. § 633(a) (1988).

182. See *Nolan*, 505 A.2d at 587 (stating that the ADEA is "dominant . . . over state remed[ies]").

183. *Bertrand*, 419 F. Supp. at 1127.

184. See *Platt v. Burroughs*, 424 F. Supp. 1329, 1340 (E.D. Pa. 1976).

185. Among other things, that conclusion serves a "paramount federal interest in uniformity" underlying the ADEA. *Nolan*, 505 A.2d at 589. As one court has stated, employers in age discrimination cases should not "be subject to varying and inconsistent state regulation in the several jurisdictions . . ." *Id.* at 587.

186. See, e.g., *Maine Human Rights Comm'n v. Kennebec Water Power Co.*, 468 A.2d 307 (Me. 1983); *Hillman v. Consumers Power Co.*, 282 N.W.2d 422 (Mich. Ct. App. 1979); *Simpson v. Alaska State Comm'n for Human Rights*, 423 F. Supp. 552 (D. Alaska 1976), *aff'd*, 608 F.2d 1171 (9th Cir. 1979).

187. See 29 U.S.C. § 633 (1988).

188. See *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1376 (4th Cir. 1989) (Murnaghan, J., concurring in part and dissenting in part) ("It is up to Congress, not this Court, to balance the risks and benefits inherent in allowing alternative remedies to co-exist in the fight against [age] discrimination.").

189. See *Platt*, 424 F. Supp. at 1333.

190. See *supra* notes 15-16 and accompanying text.

191. See *Platt*, 424 F. Supp. at 1337.

192. See *supra* notes 17-22 and accompanying text.

193. See *Platt*, 424 F. Supp. at 1337.