Cornell Law Review

Volume 76
Issue 2 *January 1991*

Article 4

Mandatory Retirement of State-Appointed Judges Under the Age Discrimination in Employment Act

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NOTES

MANDATORY RETIREMENT OF STATE-APPOINTED JUDGES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT†

The Age Discrimination in Employment Act ("ADEA" or "Act") prohibits employers from discharging or refusing to hire employees because of their age.[1] Congress enacted the statute in 1967 after it had determined that older workers faced significant disadvantages in obtaining and retaining employment.[2] The Act was an outgrowth of Congress's general intent to foster an environment in which employment decisions would be based solely on ability,[3] and it supplemented previous legislation that prohibited discrimination based on race, religion, color, and sex.[4]

One employment practice specifically targeted in the ADEA is mandatory retirement. In its statement of purpose, Congress noted that the setting of "arbitrary" age limits has become a common practice among employers.[5] To remedy this injustice, the Act prohibits employers from requiring employees to retire at a particular age.[6] Instead, it requires employers and workers to develop alternative means for addressing the problems that arise from the impact of age on employment.[7]

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† As this Note was going to print, the United States Supreme Court granted certiorari in one of the cases cited frequently throughout, Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

1 29 U.S.C. §§ 621-634 (1988).

2 *Id.* § 621(a)(1) ("in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs").

3 *Id.* § 621(b).

4 *See, e.g.*, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-56 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)) [hereinafter Title VII]. For a discussion of the relation between the definitions of "employee" in Title VII and the ADEA, see *infra* notes 261-70 and accompanying text.

5 29 U.S.C. § 621(a)(2) (1988).

6 Section 623(a) of the Act provides: "It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

7 One purpose of the ADEA is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b). To further that goal, Congress authorized the Secretary of Labor to undertake studies concerning

The ADEA broadly protects older workers. After amendments in 1974, 1978, and 1986, the Act now applies to all employees age forty and above,[8] including state and municipal employees,[9] provided that their employers employ twenty or more individuals.[10] Nevertheless, the Act does contain several exceptions to its definition of "employee" that limit the scope of its protection. For example, the ADEA excludes from its definition of protected "employee" "any person elected to public office" and anyone appointed on the "policymaking level."[11]

Recently, these exceptions have sparked much litigation concerning the ADEA's applicability to state requirements that judges retire at age seventy.[12] The courts agree that the Act does not protect elected judges, as they fall within the exception for "persons

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the needs and abilities of older workers and to make such information available to the public. *Id.* § 622.

8 *See infra* notes 16-24 and accompanying text.

9 In 1974, Congress amended the Act's definition of "employer" to include states and municipalities. Pub. L. No. 93-259, § 28(a)(1), 88 Stat. 74 (1974) (codified as amended at 29 U.S.C. § 630(b) (1988)). For a discussion of the implications of this amendment, see *infra* notes 147-49 and accompanying text.

10 29 U.S.C. § 630(b) (1988).

11 The definition is as follows:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

Id. § 630(f).

12 Thirty-one states currently have either constitutional or statutory mandatory retirement provisions. *See* ALA. CONST. amend. 328, § 6.16 (retirement at age 70); ALASKA CONST. art. IV, § 11 (retirement at age 70); ARIZ. CONST. art. VI, § 20 (retirement at age 70); COLO. CONST. art. VI, § 23 (retirment by age 72); CONN. CONST. art. V, § 6 (retirement at age 70); FLA. CONST. art. V, § 8 (retirement at age 70); LA. CONST. art. V, § 23 (retirement at age 70); MD. CONST. art. IV, § 3 (retirement at age 70); MASS. CONST. amend. art. XCVIII (retirement at age 70); MICH. CONST. art. VI, § 19 (retirement at age 70); MO. CONST. art. V, §§ 26, 27 (retirement at age 70, legislature may raise to 76); N.H. CONST. pt. 2, art. 79 (retirement at age 70); N.Y. CONST. art. VI, § 25 (retirement at age 70); N.C. CONST. art. IV, § 8 (empowers legislature to set retirement age); N.D. CONST. art. VI, §§ 12, 12.1 (empowers legislature to set retirement); PA. CONST. art. V, § 16 (retirement at age 70); TEX. CONST. art. V, § 1-a (retirement at age 75); VT. CONST. ch. II, § 35 (retirement at age 70); WASH. CONST. art. IV, § 3(a) (legislature to set age between 70 and 75); WIS. CONST. art. VII, § 24 (retirement at 70 unless legislature allows longer term); ARK. STAT. ANN. § 24-8-215 (Supp. 1989) (retirement by age 70 to keep benefits); GA. CODE ANN. § 47-9-70 (Supp. 1989) (retirement by age 75 to keep benefits); ILL. REV. STAT. ch. 37, para. 23.71 (1972) (retirement at age 75); KAN. STAT. ANN. § 20-2608 (1988) (retirement at age 70); MINN. STAT. § 490.125 (1989) (retirement at age 70); N.J. STAT. ANN. § 43:6A-7 (West Supp. 1989) (retirement at age 70); OR. REV. STAT. § 1.314 (1987) (retirement at age 70); S.C. CODE ANN. § 9-1-1530 (Law. Co-op. 1976) (retirement at age 70); S.D. CODIFIED LAWS ANN. §§ 16-1-4.1, 16-6-31 (1987) (retirement at age 70); VA. CODE ANN. § 51-167 (1988) (retirement at age 70); WYO. STAT. § 5-1-106 (1977) (retirement by age 70 to get benefits).

elected to public office."[13] However, whether the Act protects appointed judges is still very much at issue. Most courts, relying to varying degrees both on concerns about federalism and on the Act's language and history, have found that appointed judges fall outside the scope of the ADEA's protection.[14] Conversely, other courts have invalidated state requirements that judges retire, holding that the ADEA protects appointed judges.[15]

This Note attempts to resolve the conflict among the various jurisdictions that have considered whether appointed state judges may assert the protection of the ADEA to block mandatory retirement. Part I relates the Act's history and describes its present form. Part II presents the various approaches courts have taken to determine whether appointed state judges are outside the ADEA's scope. Part III evaluates the various statutory interpretation methods that courts have utilized and argues that the proper reading of the ADEA protects appointed judges from mandatory retirement provisions.

I
THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. The Historical Development of the Act

As originally enacted in 1967, the ADEA was limited in scope.[16] Only employers of fifty or more individuals had to comply with its provisions.[17] Furthermore, states were not "employers" under the Act's original definition of the term.[18] And perhaps most siguificant, the ADEA did not protect employees over the age of sixty-five.[19]

However, Congress made provisions for the Secretary of Labor to study the need for additional statutory protection.[20] In response

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13 *See, e.g.*, EEOC v. New York, 907 F.2d 316 (2d Cir. 1990); EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990); Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990); EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988); Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 517 N.E.2d 141 (1988).

14 *See Gregory*, 898 F.2d 598; EEOC v. Massachusetts, 858 F.2d 52; EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989); *Apkin*, 401 Mass. 427, 517 N.E.2d 141; *In re* Stout, 521 Pa. 571, 559 A.2d 489 (1989). For a discussion of the facts, holdings, and reasonings of these cases, see *infra* notes 43-105 and accompanying text.

15 *See* EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990); *Schlitz*, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988). For a discussion of the facts, holdings, and reasonings of these cases, see *infra* notes 43-105 and accompanying text.

16 *See* Pub. L. No. 90-202, 81 Stat. 602 (1967) (current version at 29 U.S.C. §§ 621-634 (1988)).

17 *Id.* § 11(b), 81 Stat. 605 (current version at 29 U.S.C. § 630(b) (1988)).

18 *Id.*

19 *Id.* § 12, 81 Stat. 607 (current version at 29 U.S.C. § 631 (1988)).

20 *Id.* § 3, 81 Stat. 602 (current version at 29 U.S.C. § 622 (1988)).

to the results from the Secretary's investigation, Congress amended the statute in 1974.[21] The amendment expanded the definition of "employer" to include states and municipalities and lowered to twenty the maximum number of employees an "employer" could have and still be exempt from the Act.[22] In 1978, Congress again amended the statute by raising the upper age limit of employees covered under the ADEA from sixty-five to seventy.[23] Finally, in 1986, Congress eliminated entirely the upper age limit on the Act's coverage.[24]

B. The Current Age Discrimination in Employment Act

The ADEA prohibits employers from failing or refusing to hire, and from discharging, employees because of their age.[25] An individual relying on the ADEA to challenge employment decisions must show three things: first, that the employer has violated the Act's general prohibition against age discrimination;[26] second, that the employer is included under the ADEA's definition of "employer;"[27] and third, that the individual is an "employee" protected under the Act.[28]

1. *Violation*

The ADEA's prohibition against age discrimination is broad, but the Act does contain several exceptions. For example, the Act permits otherwise discriminatory behavior when age is a bona fide occupational qualification, or if required by a bona fide employee benefit plan.[29] Additionally, the Act expressly preserves the employer's lawful right to discipline or discharge an employee for good cause.[30] When private employers have been able to prove that their mandatory retirement provisions fall into one of the above excep-

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21 Pub. L. No. 93-259, § 28(a), 88 Stat. 74 (1974) (codified as amended at 29 U.S.C. §§ 621-634 (1988)).

22 *Id.*

23 Pub. L. No. 95-256, § 3, 92 Stat. 189 (1978) (current version at 29 U.S.C. § 631(a) (1988)).

24 Pub. L. No. 99-592, § 2, 100 Stat. 3343 (1986) (codified as amended at 29 U.S.C. § 630(a) (1988)).

25 29 U.S.C. § 623 (1988). For the text of this provision, see *supra* note 6. For an excellent discussion of the current version of the ADEA, see Charles B. Craver, *The Application of the Age Discrimination in Employment Act to Persons Over Seventy*, 58 GEO. WASH. L. REV. 52 (1989); Chapter, *The Age Discrimination in Employment Act: A Case Study*, 58 GEO. WASH. L. REV. 877 (1989) (developed by Suzanne M. Boris).

26 29 U.S.C. § 623 (1988).

27 *Id.* § 630(b).

28 *Id.* § 630(f). For the text of this provision, see *supra* note 11.

29 *Id.* § 623(f).

30 *Id.*

tions, courts have upheld the provisions as valid under the statute.[31] However, the states have never defended their mandatory retirement provisions as falling within any of these exceptions. In fact, courts have deemed such state mandatory retirement requirements prima facie violations of the Act.[32]

2. *"Employer"*

The Act designates who must comply with its provisions. Any "person engaged in an industry affecting commerce" with twenty or more employees is an "employer" under the ADEA.[33] The statutory definition also includes any "State or political subdivision of a State."[34] The Supreme Court has upheld Congress's power to regulate both state and municipal employment plans under the Act.[35] Thus, the state, as an employer of judges, certainly must comply with the ADEA's provisions.

3. *"Employee"*

An individual who has been the victim of treatment proscribed by the ADEA, and whose employer is included in the Act's definition, still must fall within the ADEA's definition of "employee"[36] in order to assert the ADEA's protection. The statute contains four exceptions to its definition of "employee."[37] Courts have focused on these exceptions to ascertain whether judges are employees for purposes of the ADEA.[38] The Act excepts both the personal staff of state officials and "immediate adviser[s] with respect to the exercise of the constitutional or legal powers."[39] Clearly, judges fall into neither of these categories.[40] Most litigation[41] concerning

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31 *See, e.g.*, EEOC v. Trabucco, 791 F.2d 1 (1st Cir. 1986) (mandatory retirement of police officers at age 50 is a bona fide occupational qualification).

32 *See, e.g.*, Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 430, 517 N.E.2d 141, 142-43 (1988) (citing *Trabucco*, 791 F.2d at 3 (mandatory retirement is a prima facie violation of the ADEA)).

33 29 U.S.C. § 630(b) (1988).

34 *Id.*

35 *See* Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985) (application of ADEA to municipal governments is a valid exercise of federal power to regulate commerce); EEOC v. Wyoming, 460 U.S. 226 (1983) (application of ADEA to state governments is a valid exercise of federal power to regulate commerce).

36 29 U.S.C. § 630(f) (1988). For the text of this provision, see *supra* note 11.

37 *Id.*

38 *See infra* notes 43-132 and accompanying text.

39 29 U.S.C. § 630(f) (1988). For the text of this provision, see *supra* note 11.

40 *See* EEOC v. New York, 907 F.2d 316 (2d Cir. 1990); EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989); Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988); Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 517 N.E.2d 141 (1988); *In re* Stout, 521 Pa. 571, 559 A.2d 489 (1989).

41 *See infra* notes 43-132 and accompanying text.

mandatory retirement and the ADEA has focused, therefore, on whether judges fall within either the exception for elected officials or the exception for "appointee[s] on the policymaking level."[42]

II
THE DISAGREEMENT AMONG THE COURTS

Courts have easily determined that the ADEA does not protect an elected state judge from age discrimination.[43] Such an individual is clearly excepted as a "person elected to public office."[44] Courts have differed, however, as to whether the ADEA protects appointed state judges.

A. *Apkin v. Treasurer and Receiver General of Massachusetts*: State Mandatory Retirement Provision Prevails

The first court to rule on the issue was the Supreme Judicial Court of Massachusetts in *Apkin v. Treasurer and Receiver General*.[45] Judge Apkin, an appointed Massachusetts District Court judge, sought to enjoin the state from enforcing its constitutional provision that required his retirement at age seventy.[46] Judge Apkin asserted that the state provision was contrary to the ADEA's prohibition against mandatory retirement and that, since he was an employee for purposes of the Act, the supremacy clause of the United States Constitution required that the court enjoin Massachusetts from mandating his retirement.[47] Massachusetts conceded that Judge Apkin was an employee under the ADEA,[48] but nevertheless argued that the supremacy clause did not mandate the Act's preemption of its state constitutional provision because Congress failed to enact a

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42 29 U.S.C. § 630(f) (1988).

43 *See supra* note 13 and accompanying text.

44 29 U.S.C. § 630(f) (1988). The rationale for excluding elected judges from protection appears to have been to allow such individuals' competence to be tested "at the polls." 118 CONG. REC. 4492 (1972).

The EEOC itself has opined that the "elected official" exception means the statute does not protect "a state or local court judge who is elected by the general electorate or who is appointed by the governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection." Applicability of Age Discrimination in Employment Act to Appointed State Court Judges, EEOC Opinion Letter to Rep. Claude Pepper (Apr. 7, 1987), *reprinted in* EEOC Compl. Man. (BNA) at N: 1001 n.2. A recent federal court of appeals case bas considered whether retired state judges, formerly elected but thereafter appointed and certified by the governor to serve in senior capacity, fall under the ADEA exception for "elected officials." *See* EEOC v. New York, 907 F.2d 316 (2d Cir. 1990) (certified state judge is "elected" within meaning of ADEA exception from definition of "employee").

45 401 Mass. 427, 517 N.E.2d 141 (1988).

46 *Id.* at 428, 517 N.E.2d at 142.

47 U.S. CONST. art. VI, cl. 2. For a discussion of the supremacy clause and its relevance to interpreting the ADEA, see *infra* notes 136-87.

48 *Apkin*, 401 Mass. at 430 n.5, 517 N.E.2d at 143 n.5.

"clear statement" of its intent to apply the Act to state-appointed judges.[49]

Despite its admitted obligation to declare invalid state constitutional provisions that conflict with federal legislation, the Supreme Judicial Court denied relief.[50] It did so after concluding that "a [federal] statute should not be read in derogation of a State's sovereign interests unless it clearly appears that Congress so intended."[51] Congress, the court found, had failed to provide a "clear statement" of its intent to preempt state law. The statute, when "read literally, might apply to appointed State judges, [but] in fact did so only inadvertently and in an irrationally random way."[52]

The court thought it absurd to interpret the ADEA as protecting appointed state judges.[53] It first noted that the vast majority of state judges in this country are elected, not appointed.[54] The court reasoned that Congress would have no rational basis for extending protection to so small a minority of state judges.[55] If anything, it concluded, Congress had reason to leave appointed judges unprotected. The court noted that in the case of elected judges the voters have the opportunity to weed out "superannuated judges" at the polls.[56] Apparently, the court assumed that, in contrast, mandatory retirement is the only way in which the public can ensure that its appointed judges do not suffer from the effects of old age.

Additionally, the *Apkin* court relied on the overriding policy behind the Massachusetts retirement provision. Mandatory retirement, the court reasoned, avoids the delay and expense involved in evaluating each judge's competence individually[57] and allows the state judiciary to better serve the interests of the state's citizens.[58]

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49 *Id.* at 431, 517 N.E.2d at 143.

50 *Id.* at 436, 517 N.E.2d at 146.

51 *Id.* at 431, 517 N.E.2d at 143.

52 *Id.* at 433 n.6, 517 N.E.2d at 144 n.6.

53 *Id.* at 434, 517 N.E.2d at 145. For a discussion of the "absurd result" method of statutory interpretation and its relevance to determining the ADEA's applicability to appointed state judges, see *infra* notes 232-52 and accompanying text.

54 *Apkin*, 401 Mass. at 430, 517 N.E.2d at 143. The extent to which states appoint or elect their judges defies easy description because the methods vary so greatly from state to state. Noteworthy, however, is the fact that only 25 states appoint judges at any level, whereas 40 states elect at least a portion of their judiciary. For detailed discussions of the various state judicial selection methods, see Legislative Research Council, Report Relative to Judicial Selection in the United States, H.R. Doc. No. 5492 (Mass. 1976); LARRY BERKSON, SCOTT BELLER & MICHELE GRIMALDI, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (1980).

55 *Apkin*, 401 Mass. at 434, 517 N.E.2d at 145.

56 *Id.*

57 *Id.* at 435, 517 N.E.2d at 146.

58 *Id.*

B. *Schlitz v. Virginia*: The Act Supersedes State Mandatory Retirement Provision

Contrary to the result in *Apkin*, the United States District Court for the Eastern District of Virginia held in *Schlitz v. Virginia*[59] that the state could not mandate retirement for its appointed state judges. In *Schlitz*, an appointed state circuit court judge brought suit for age discrimination under the ADEA.[60] The state had refused to reappoint him at the end of his term because he was seventy years old, the age at which Virginia law required all judges to retire.[61]

As did Massachusetts in *Apkin*, Virginia argued that appointed state judges were excluded from protection under the ADEA.[62] The State maintained that the United States Constitution did not empower Congress to interfere with its ability to structure the state's judiciary.[63] Furthermore, it argued that even if Congress could have preempted state mandatory retirement provisions, it did not sufficiently express in the statute its intent to do so.[64]

The district court found that the ADEA did preempt Virginia's mandatory retirement provision.[65] It dismissed Virginia's assertion that Congress lacked the power to regulate the tenure of state judges, and specifically rejected the *Apkin* court's finding that Congress failed to express clearly its intent to preempt state law.[66] In the view of the *Schlitz* court, Congress's intent to displace state law would be evident when compliance with both the federal and state laws was impossible and when state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law.[67]

Furthermore, the court noted, its reading does not produce an "absurd result," as the *Apkin* court had concluded.[68] Even though the vast majority of state judges are elected, not appointed, Congress was not necessarily unreasonable in treating the two groups differently.[69] To the contrary, the *Schlitz* court reasoned, the Act distinguishes between elected and appointed *officials*, not just be-

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59 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

60 *Id.* at 331.

61 *Id.* (citing VA. CODE ANN. § 51-167(a) (1988)).

62 *Id.*

63 *Id.* at 332. For a discussion of how the *Schlitz* court addressed the State's power argument, see *infra* note 177.

64 *Schlitz*, 681 F. Supp. at 332.

65 *Id.* at 334.

66 *Id.* at 332-33.

67 *Id.* at 333.

68 *Apkin* had held that the distinction between elected and appointed judges was arbitrary and absurd. *See infra* notes 232-52 and accompanying text; *see also supra* note 53 and accompanying text.

69 *Schlitz*, 681 F. Supp. at 334.

tween elected and appointed *judges*.[70] The ability of elected judges to remain in office, as is true of all elected officials, inevitably depends on the voters' support.[71] Congress, in excluding all elected officials, rationally may have trusted the electorate not to discriminate unfairly between candidates at the polls.[72]

C. *EEOC v. Massachusetts*: Ascertaining the Meaning of "Policymaking"

Shortly after the Eastern District of Virginia decided *Schlitz*, the First Circuit Court of Appeals considered the ADEA's applicability to appointed state judges in *EEOC v. Massachusetts*.[73] In that case, the Equal Employment Opportunity Commission brought suit on behalf of Massachusetts's appointed judiciary, maintaining that the ADEA barred the state from retiring its judges as required by the Massachusetts constitution.[74] Massachusetts argued, as it did in *Apkin*,[75] that the ADEA did not demonstrate that Congress intended to preempt state law.[76] Additionally, the state argued that its appointed judges were outside of the statute's definition of "employee" because they were " 'appointee[s] on the policymaking level.' "[77] The District Court had held that the Act did not preempt the state provision.[78] It had reasoned that the exceptions to the definition of "employee" within the Act were ambiguous with regard to appointed state judges.[79] Therefore, the District Court had found no "clear statement" of congressional intent to preempt state law in this area.[80]

The First Circuit Court of Appeals affirmed.[81] In part, the court based its decision on the rationale expressed by the *Apkin* court: Congress's intervention into the states' sovereign affairs required it to "clearly and unequivocably manifest[ ] an intent" to pre-

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70 *Id.*

71 *See infra* note 246 and accompanying text.

72 *Schlitz*, 681 F. Supp. at 334. Another possible justification for the distinction is that Congress recognized the electorate's right to discriminate at the polls on whatever grounds it chooses. Such a position is not unfair to elected officials, since their ability to remain in office is necessarily subject to the voters' approval in any event. In contrast, we do not think of appointed officials, and appointed judges in particular, as directly accountable to the electorate.

73 858 F.2d 52 (1st Cir. 1988).

74 *See* MASS. CONST. amend. art. XCVIII.

75 *See supra* note 49 and accompanying text.

76 EEOC v. Massachusetts, 858 F.2d at 54.

77 *Id.* (quoting 29 U.S.C. § 630(f) (1988)).

78 EEOC v. Massachusetts, 680 F. Supp. 455 (D. Mass. 1988).

79 *Id.* at 462.

80 *Id.* at 465.

81 EEOC v. Massachusetts, 858 F.2d at 53.

empt state law.[82] As did the *Apkin* court, the circuit court concluded that Congress did not express such an intent.[83]

In addition, the First Circuit Court of Appeals agreed with Massachusetts's contention that appointed judges are "appointees on the policymaking level," and thus outside the ADEA's protection.[84] The court reasoned that judicial decisionmaking clearly falls within the plain meaning of the word "policymaking."[85] The court pointed out that the judiciary often must consider policy in fulfilling its responsibilities, not unlike legislators and executives.[86] In particular, it noted that judges often rely on policy when interpreting statutes or filling gaps in legislation.[87] Furthermore, the circuit court cited the legislative history of the ADEA to support inclusion of appointed state judges within the "appointee on the policymaking level" exception.[88] It reasoned that Congress, in creating the exceptions, had sought to strike a balance between protecting individuals from discrimination and protecting the states' sovereign interests.[89] The court concluded that in this case, Congress's concern for state sovereignty overrode its concern for the individual.[90] As additional support, the court repeated the compelling justifications upon which the *Apkin* court had relied, including the costs associated with evaluating each judge individually and the value in having a judiciary more representative of the total citizenry.[91]

D. *In re Stout*: Another Court Finds Appointed Judges Unprotected

The Supreme Court of Pennsylvania, in *In re Stout*,[92] also found that the ADEA did not protect appointed judges. Justice Stout had been appointed by the Governor to fill a vacancy on the Pennsylvania Supreme Court,[93] but she reached the age of seventy before her term had expired.[94] The Court Administrator sought a declara-

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82 *Id.* at 54.
83 *Id.* at 58.
84 *Id.* at 56.
85 *Id.* at 55.
86 *Id.*
87 *Id.* (citing EEOC v. Massachusetts, 680 F. Supp. at 462).
88 EEOC v. Massachusetts, 858 F.2d at 55.
89 *Id.* at 56-57.
90 *Id.* at 57. In so holding, the Court rejected the EEOC's argument that the Act's history suggests the exceptions to the definition of "employee" should be construed narrowly.
91 *Id.*; *see supra* text accompanying notes 57-58.
92 521 Pa. 571, 559 A.2d 489 (1989).
93 *Id.* at 574, 559 A.2d at 491. Pennsylvania normally elects its supreme court justices, but vacancies are filled temporarily after appointment by the Governor and confirmation by the state's Senate.
94 *Id.* at 575, 559 A.2d at 491.

tory judgment as to Justice Stout's rights in light of the state's constitutional requirement that judges retire at age seventy.[95] Justice Stout argued that she was not an "appointee on the policymaking level," and that the ADEA therefore offered her protection.[96]

In rejecting Justice Stout's argument, the court purported to rely on the plain meaning of the ADEA exception.[97] First, it defined the term "policymaking" by citing the dictionary definition of "policy": "the act of elaborating . . . 'a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.' "[98] The court determined that Pennsylvania's supreme court justices do make policy within that definition.[99] Among the factors the court considered dispositive were a judge's role in administering the court system and the rulemaking quality of the common law.[100] As the *Stout* court concluded: "To suggest that a Justice of the Supreme Court of Pennsylvania is not involved in policymaking matters is to ignore the character of the duties and responsibilities imposed upon [its] members . . . by the Constitution of Pennsylvania."[101]

E. A Majority View Emerges: Appointed Judges Are Unprotected by the ADEA

With decisions from federal courts in the Northern District of Illinois[102] and the Eighth Circuit,[103] a clear majority of jurisdictions that have addressed the question now holds that state-appointed judges are outside the scope of ADEA protection.

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95 PA. CONST. art. V, § 16.

96 *Stout*, 521 Pa. at 582, 559 A.2d at 495. Justice Stout asserted two other grounds on which the court should have held the mandatory retirement provision inapplicable to her. First, she argued that under Pennsylvania law, the state's constitutional mandate of retirement at age 70 did not apply to gubernatorial appointees to vacancies in the supreme court. *Id.* at 577, 559 A.2d at 492. The court rejected this approach. Second, she maintained that mandatory retirement violated the equal protection clause of the United States Constitution, and that the state retirement provision therefore was invalid. *Id.* at 586, 559 A.2d at 497. The court rejected this argument as well, relying on its holding in Gondelman v. Commonwealth, 520 Pa. 451, 554 A.2d 896 (1989) (uniform mandatory retirement provision does not violate equal protection). *See* Malmed v. Thornburgh, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980) (Pennsylvania mandatory retirement provision not unconstitutional); Note, *Pennsylvania Constitutional Provision Compelling State Judges to Retire at Age 70 Does Not Deny Equal Protection or Due Process of Law*—Malmed v. Thornburgh, *621 F.2d 565 (3d Cir.)*, cert. denied, *101 S. Ct. 361 (1980)*, 54 TEMP. L.Q. 374 (1981) (authored by Meryl S. Diamond).

97 *Stout*, 521 Pa. at 583, 559 A.2d at 495.

98 *Id.* at 583-84, 559 A.2d at 495 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 910 (1985)).

99 *Id.* at 586, 559 A.2d at 497.

100 *Id.*, 559 A.2d at 497.

101 *Id.* at 583, 559 A.2d at 495.

102 EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989).

103 Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

In *EEOC v. Illinois*,[104] the EEOC argued that Illinois's statutory requirement that judges retire at age seventy-five violates the ADEA's prohibition of age discrimination. The district court examined both the ADEA's language and its legislative history, and concluded that neither supported the interpretation that the EEOC bad suggested.[105] The court found that the ADEA lacked the necessary clear statement of intent to preempt state mandatory retirement requirements,[106] following the principle that Congress must explicitly indicate its intent before it may intrude into the states' sovereign affairs.[107] Additionally, the district court found that appointed judges were "appointee[s] on the policymaking level" outside of the ADEA definition of "employee,"[108] reasoning that Congress would have little reason to distinguish between elected judges, who are explicitly excluded from ADEA protection (as are all elected officials), and appointed judges.[109]

In *Gregory v. Ashcroft*,[110] the Eighth Circuit Court of Appeals upheld Missouri's mandatory retirement provision[111] as valid under the ADEA.[112] It too determined that Congress failed to clearly evidence its intent that state judges be deemed employees for purposes of the statute.[113] Furthermore, the *Gregory* court expressly adopted the First Circuit's reasoning in holding that the state's appointed judges engage in " 'policymaking,' " and thus are outside the Act's protection as " 'appointee[s] on the policymaking level.' "[114] The court agreed that in resolving disputes judges necessarily engage in "the same sort of thoughtful judgment" required of appointed policymakers in other branches of government.[115] It also emphasized that high-level judges "exercise considerable policymaking responsibility" in supervising the entire Missouri court system.[116] Finally, the circuit court relied on the "irrationality" of excluding

104 721 F. Supp. 156 (N.D. Ill. 1989).

105 *Id.* at 159.

106 *Id.*

107 *See supra* text accompanying notes 82-83.

108 29 U.S.C. § 630(f) (1988). For the text of this provision, see *supra* note 11.

109 EEOC v. Illinois, 721 F. Supp. at 159.

110 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

111 Mo. CONST. art. V, § 26.

112 The Eighth Circuit also found the provision to be valid under the fourteenth amendment. *Gregory*, 898 F.2d at 604.

113 *Id.* at 600.

114 *Id.* at 601 (quoting 29 U.S.C. § 630(f) (1988)).

115 *Id.* The Eighth Circuit, in citing with approval EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988) (discussed *supra* notes 73-91 and accompanying text), explicitly rejected the reasoning of both Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988) (discussed *supra* notes 59-72 and accompanying text), and EEOC v. Vermont, 717 F. Supp. 261 (D. Vt. 1989), *aff'd*, 904 F.2d 794 (2d Cir. 1990) (discussed *infra* notes 118-32 and accompanying text).

116 *Gregory*, 898 F.2d at 602.

only elected judges from ADEA protection, while treating appointed judges differently without a "principled basis" for doing so.[117]

F. *EEOC v. Vermont*: The Second Circuit Disagrees

Despite the emerging consensus that state-appointed judges are beyond the ADEA's scope, the Second Circuit Court of Appeals, in *EEOC v. Vermont*,[118] recently affirmed a district court holding that the ADEA does protect state-appointed judges from mandatory retirement.

The EEOC brought a discrimination suit on behalf of Justice Louis Peck, a seventy-year-old state supreme court justice whom the state sought to retire.[119] Justice Peck argued that under the supremacy clause[120] the ADEA preempted the Vermont mandatory retirement provision.[121] Vermont asserted that its appointed judges were " 'on the policymaking level' " and thus outside the scope of the ADEA.[122]

The circuit court relied in large part on the legislative history of the exceptions to the "employee" definition.[123] According to the court, such history indicates that Congress intended to exclude only "such appointees as would normally work closely with and be accountable to the official who appointed them."[124] Judges cannot fall within Congress's intended meaning, the *Vermont* court reasoned, because the separation of powers doctrine dictates that judges cannot be held accountable to the executive.[125]

The circuit court also criticized the approach focusing on the literal meaning of the phrase "policymaking"[126] in a majority of the prior decisions.[127] The *Vermont* court conceded that judges do at

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117 *Id.* at 603. The court did acknowledge that the ADEA's legislative history could support the opposite result in the case, but it nevertheless dismissed such evidence, "since the only reliable guide to legislative intent is the language and structure of the statute itself." *Id.* at 602.

118 904 F.2d 794 (2d Cir. 1990), *aff'g* 717 F. Supp. 261 (D. Vt. 1989).

119 *Id.* at 796.

120 U.S. CONST. art. VI, cl. 2. For a discussion of the supremacy clause as it affects the applicability of the ADEA to appointed state judges, see *infra* notes 136-87 and accompanying text.

121 VT. CONST. ch. II, § 35.

122 EEOC v. Vermont, 904 F.2d at 797 (quoting 29 U.S.C. § 630(f) (1988)).

123 *See infra* notes 253-97 and accompanying text for a discussion of the definition's legislative history and its implications for the Act's applicability to state-appointed judges.

124 904 F.2d at 800.

125 *Id.* In Vermont, the separation of powers principle is expressly incorporated into the state constitution. VT. CONST. ch. II, § 5 ("The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.").

126 EEOC v. Vermont, 904 F.2d at 800.

127 *See* Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507

times state or clarify policy.[128] However, it disagreed with those courts that held that this fact necessarily excludes appointed judges from ADEA protection as "appointee[s] on the policymaking level."[129] Instead, the court concluded, the ADEA definition of employee is better interpreted to exclude only appointees whose *primary* responsibilities involve the creation or adoption of policy as opposed to its implementation.[130] Note that the lower court had similarly distinguished between a court's "lawmaking" function, which sets "mandatory standards of conduct," and a government administrator's "policy-making" function, which sets "guidelines for present and future conduct."[131] Under its formulation of the standard, the Second Circuit held that appointed judges should be considered "employees" under the ADEA because, although such judges may implement policy, they are not "policymakers."[132]

III
DISCUSSION

The foregoing chronology of cases reveals not only disagreement among the courts as to whether the ADEA protects appointed state judges from state mandatory retirement provisions, but also more fundamental differences as to how to approach the problem. Some courts[133] have focused on whether the Age Discrimination in Employment Act preempts state law under the supremacy clause.[134] Other courts bave accepted that the ADEA preempts contrary state law, but instead have discussed whether Congress intended the ADEA to apply to appointed judges.[135]

The following discussion critiques the courts' preemption analysis and their reliance on various approaches to statutory interpretation. It then argues that the ADEA does apply to appointed state judges.

(1990); EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); *In re* Stout, 521 Pa. 571, 559 A.2d 489 (1989); *see supra* notes 114-16, 84-88, 98-101 and accompanying text.

128 EEOC v. Vermont, 904 F.2d at 800.

129 *Id.*

130 *Id.* at 801.

131 EEOC v. Vermont, 717 F. Supp. at 265.

132 The Second Circuit Court of Appeals also rejected Vermont's arguments that the application of the ADEA to its judiciary violated the tenth amendment to the United States Constitution. EEOC v. Vermont, 904 F.2d at 802.

133 *See* Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990); EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989); Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 517 N.E.2d 141 (1988).

134 U.S. CONST. art. VI, cl. 2.

135 *See* EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990); Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988); *In re* Stout, 521 Pa. 571, 559 A.2d 489 (1989).

A. The Preemption Argument

If the courts hold that the ADEA supersedes contrary state mandatory retirement provisions, they must do so under the authority of the supremacy clause of the United States Constitution.[136] Under the supremacy clause, courts must resolve conflicts between federal and state law in favor of the federal law.[137] Thus, when a federal statute on its face conflicts with a state provision, the former preempts the latter.[138]

In *Apkin*,[139] *EEOC v. Massachusetts*,[140] *EEOC v. Illinois*,[141] and *Gregory*,[142] the courts read the supremacy clause to require a "clear statement" of Congressional intent before reading a federal statute to preempt state law.[143] According to this analysis, the supremacy clause does empower Congress to preempt state law by enacting contrary federal legislation.[144] However, these courts reasoned, out of respect for state autonomy, judges never should *presume* congressional intent to supersede state law; instead, they should interpret a federal statute to preempt state law only upon finding *express* congressional intent for such a result.[145]

All four courts found that the ADEA lacked such a clear statement of intent to preempt state mandatory retirement provisions.[146]

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136 U.S. CONST. art. VI, cl. 2.

137 *Id.* ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

138 *See, e.g.*, Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) (federal regulation requiring "due on sale" clauses in certain loan agreements preempted state limitations on the use of the clause).

139 401 Mass. 427, 431, 517 N.E.2d 141, 142-43 (1988).

140 858 F.2d 52, 54 (1st Cir. 1988).

141 721 F. Supp. 156, 159 (N.D. Ill. 1989).

142 898 F.2d 598, 600 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

143 For general treatment of the "clear statement" rule as a mode of interpretation, see Harold J. Krent, *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209 (1983); William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211 (1982/83); William P. Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule*, 39 DE PAUL L. REV. 345 (1990); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) (authored by William W. Bratton, Jr.); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

144 *See, e.g.*, Public Utils. Comm'n v. United States, 355 U.S. 534 (preemption of state law making government rate-setting of interstate carriers contingent on state approval), *reh'g denied*, 356 U.S. 925 (1958); Hines v. Davidowitz, 312 U.S. 52 (1941) (preemption of Pennsylvania Alien Registration Act of 1939 in light of Federal Alien Registration Act of 1940).

145 *Gregory*, 898 F.2d at 600; EEOC v. Massachusetts, 858 F.2d at 54; EEOC v. Illinois, 721 F. Supp. at 159; *Apkin*, 401 Mass. at 431, 517 N.E.2d at 143.

146 *Gregory*, 898 F.2d at 603-04; EEOC v. Massachusetts, 858 F.2d at 53; EEOC v. Illinois, 721 F. Supp. at 159; *Apkin*, 401 Mass. at 434, 517 N.E.2d at 145.

According to the courts' reasoning, Congress could not have intended to preempt state mandatory retirement provisions because, while Congress expressly extended the ADEA's coverage to include the states as employers in its 1974 amendment,[147] the state mandatory retirement provisions were still valid under the ADEA until Congress abolished the maximum age limit for covered employees in 1986.[148] In effect, the courts appear to be saying that because Congress extended the statute's scope in two separate steps, it did not adequately consider the ramifications the Act would have on the states' mandatory retirement provisions.[149]

The courts' preemption analysis has two flaws. First, the "clear statement" requirement is not relevant to interpreting the ADEA. Second, even if a clear statement of intent were necessary, Congress has satisfied that requirement.

1. *Relevance of the Clear Statement Requirement*

The Supreme Court has interpreted the supremacy clause as empowering Congress to preempt state law; such preemption can be manifested in two different ways. First, preemption can arise when a state regulation is in actual conflict with federal law.[150] The Supreme Court has held that actual conflict occurs when compliance with both federal and state law is impossible,[151] or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[152] As commentators have pointed out, however, "preemption questions seldom arise under such clear cut circumstances."[153]

The second, more frequent instance where federal law preempts state law is where Congress has enacted legislation on a mat-

147 *See supra* notes 21-22 and accompanying text.

148 *See supra* note 24 and accompanying text.

149 *See, e.g.*, EEOC v. Massachusetts, 858 F.2d at 54; *Apkin*, 401 Mass. at 434, 517 N.E.2d at 145.

150 *See, e.g.*, Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190, 204 (1983) ("state law is pre-empted to the extent that it actually conflicts with federal law."); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) (federal regulation requiring "due on sale" clause in certain loan agreements preempts state restrictions on use of the clause).

151 Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (federal regulations did not preempt more stringent state law regulating avocados, because both could be enforced without impairing federal superintendence of the field).

152 Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (federal alien registration statute preempted state alien registration statute, even though not contradictory, because state statute stood as an obstacle to the execution of the federal statute).

153 JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § 9.1 (3d ed. 1986). For insightful discussions of supremacy clause preemption powers which formed the basis for this section's analysis, see *id.*; LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 481 (2d ed. 1988).

ter and a state law supplements or modifies, but does not facially contradict, the federal law.[154] The inquiry then focuses on whether Congress "intended" to exercise exclusive regulation in the field. The Supreme Court has held that Congress must " 'manifest its intention clearly,' "[155] but this clear statement requirement does not mean that Congress must express its intent to preempt state law explicitly in statutory language. For example, in *Pennsylvania v. Nelson*,[156] the Supreme Court found that federal anticommunist legislation preempted Pennsylvania's Sedition Act, even though the statutes were not facially in conflict.[157] The Court based its decision on three criteria. First, it noted that the breadth and number of anticommunist statutes left no room for the states to supplement them.[158] The Court concluded that "Congress ha[d] intended to occupy the field" exclusively.[159] Second, the Court emphasized the need for uniformity in the area of anticommunist legislation.[160] It determined that seditious conduct was "a matter of vital national concern, . . . [and] in no sense a local enforcement problem."[161] Finally, the Court emphasized the danger that the state law would obstruct administration of the federal law.[162] In particular, it cited executive branch documents that cautioned against the adverse effects that sporadic local enforcement of state sedition acts would have on the federal statute's effectiveness.[163]

The relationship between the ADEA and state mandatory retirement statutes is more analogous to those cases in which the federal and state laws are in actual conflict than those cases in which Congress may or may not have chosen to "occupy the field" of regu-

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154 *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (state tort law providing for punitive damages from nuclear waste accident challenged as preempted by federal nuclear power legislation, even though no facial conflict existed), *reh'g denied*, 465 U.S. 1074 (1984); Xerox Corp. v. County of Harris, 459 U.S. 145 (1982) (state tax on goods imported from Mexico challenged as preempted by federal law, even though no facial conflict existed); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (state community property law challenged as preempted as applied to retirement benefits created by federal statute, even though no facial conflict existed); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973) (New York requirement that federal assistance be conditioned on recipients' acceptance of work challenged as preempted by federal law, even though no facial conflict existed).

155 *Dublino*, 413 U.S. at 413 (no preemption of state requirement that federal welfare assistance be conditioned on recipients' acceptance of work) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)).

156 350 U.S. 497, *reh'g denied*, 351 U.S. 934 (1956). For a discussion of the case, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 153, § 9.2.

157 *Nelson*, 350 U.S. at 509.

158 *Id.* at 502.

159 *Id.* at 504.

160 *Id.*

161 *Id.* at 505.

162 *Id.*

163 *Id.* at 506-07.

lation. The ADEA broadly prohibits age discrimination, including mandatory retirement requirements, and includes the states among the employers who must comply with this prohibition.[164] Conversely, the state provisions require the mandatory retirement of judges.[165] Thus, unless appointed state judges are not employees for purposes of the Act,[166] compliance with both the federal and state laws is impossible. In such an instance, the statutes are in conflict and the supremacy clause requires preemption of the state law.[167] The clear statement requirement, therefore, is not relevant to resolving this issue because the situation is one of actual conflict, not of preemption implied from Congress's intent to "occupy the field."[168]

The *Apkin*, *EEOC v. Massachusetts*, and *Gregory* courts relied on *United States v. Bass*[169] in requiring a clear statement of congressional intent to preempt state law.[170] In *Bass*, the defendant challenged his conviction under a federal statute that criminalized the possession of a firearm by anyone with a prior felony conviction.[171] Bass argued that the government failed to demonstrate that the firearm had been distributed through interstate commerce, while the government maintained that the statute did not require such a showing.[172] The Supreme Court rejected the government's argument and held that the federal gun-control statute applied only to guns transported in interstate commerce,[173] stating that: "unless Congress conveys its purpose clearly, it will not be deemed to have siguificantly

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164 *See supra* notes 8-9 and accompanying text.

165 *See supra* note 12.

166 In *Apkin*, Massachusetts conceded that appointed state judges are such "employees." Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 430 n.5, 517 N.E.2d 141, 143 n.5 (1988).

167 Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (" 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' ") (quoting Free v. Bland, 369 U.S. 663, 666 (1962)).

168 A third category of preemption, "express preemption," occurs when Congress specifically expresses in the statutory language its intent to preempt state entrance into a field of regulation. *See* L. TRIBE, *supra* note 153, § 6-25, at 481 n.14. No express intent is evident in the ADEA, so discussion of this third category is omitted.

169 404 U.S. 336 (1971).

170 Gregory v. Ashcroft, 898 F.2d 598, 600 (8th Cir.) (" 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' " (quoting *Bass*, 404 U.S. at 349)), *cert. granted*, 111 S. Ct. 507 (1990); EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988) (quoting same language in *Bass*, 404 U.S. at 349); *Apkin*, 401 Mass. at 434, 517 N.E.2d at 145 (" 'unless Congress conveys its purposes clearly, it will not be deemed to have significantly changed the federal-state balance' ") (quoting *Bass*, 404 U.S. at 349).

171 *Bass*, 404 U.S. at 337.

172 *Id.* at 338.

173 *Id.* at 347.

changed the federal-state balance."[174]

While the *Bass* language[175] appears to support the conclusion that a clear statement of intent to preempt is necessary, the question in that case can be distinguished from the present issue. The *Bass* Court refused to read the statute as reaching handguns not sold in interstate commerce absent a clear statement of congressional intent because such an intent, if present, would have implicated constitutional questions as to Congress's power to enact the statute.[176] In contrast, the commerce clause unquestionably gives Congress the power to remedy age discrimination by enacting the ADEA.[177] The issue is merely whether or not Congress has chosen to do so. The courts' reliance on *Bass* is therefore misplaced, because the power issues implicit in *Bass* are quite different from the preemption question that the ADEA raises. The courts instead should have recognized that the ADEA is in actual conflict with state mandatory retirement provisions, in which case further inquiries into Congress's intent are not even relevant to the analysis.

2. *Congress Has Clearly Expressed Its Intent to Displace State Law*

This Note has argued that the clear statement requirement is not relevant to determining whether the ADEA protects appointed state judges from state mandatory retirement provisions.[178] Nevertheless, if Congress needed to state clearly its intent to preempt state law, it has sufficiently done so in this instance. While the Supreme Court has held that " '[t]he exercise of federal supremacy is not lightly to be presumed,' "[179] this presumption is rebuttable by

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174 *Id.* at 349.

175 See *Bass* Court language quoted *supra* note 170.

176 *Bass*, 404 U.S. at 349-50.

177 The *Apkin* court itself recognized that the Supreme Court has held that the ADEA is a valid exercise of the federal commerce power. *Apkin*, 401 Mass. at 431, 517 N.E.2d at 143. *See, e.g.*, Johnson v. Mayor of Baltimore, 472 U.S. 353, 359 (1985); EEOC v. Wyoming, 460 U.S. 226, 243 (1983) ("The extension of the ADEA to cover state and local governments . . . was a valid exercise of Congress' powers under the Commerce Clause."); *see also* Schlitz v. Virginia, 681 F. Supp. 330, 332 (E.D. Va.) ("The ADEA applies under the Commerce Clause to state employees in general."), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

In *Schlitz*, Virginia argued that Congress did not have the power under the United States Constitution to preempt state mandatory retirement provisions. *Id.* at 332. The State maintained that structuring its judiciary was a "core state function" reserved to it under the tenth amendment. *Id.* The court rejected this argument, citing Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985), for the proposition "that where Congress has power to legislate under the Commerce Clause, [U.S. CONST. art. 1, § 8, cl. 3,] notions of traditional state functions will not preclude exercise of that federal power." *Schlitz*, 681 F. Supp. at 332. For further discussion of *Schlitz*, see *supra* notes 59-72 and accompanying text.

178 *See supra* notes 150-77 and accompanying text.

179 New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973)

other than the express language of the statute. As stated above,[180] the Supreme Court has inferred preemption from the federal scheme's pervasiveness,[181] the need for uniformity,[182] and the danger of conflict between state and federal programs.[183]

In the case of the ADEA, the courts had sufficient grounds to infer preemption under any of the above standards. Congress intended the ADEA to be pervasive; the legislative history of the Act reveals that Congress intended it to reach broadly, and its exceptions to be construed narrowly.[184] Furthermore, the need for uniformity in the application of the ADEA's remedial provisions is all too apparent. The legislative history of the original Act refers to the need for a " 'clear cut and implemented Federal policy' "[185] and "the advisability of Federal action."[186] Finally, and perhaps most damaging to the *Apkin*, *Massachusetts*, and *Gregory* courts' findings, not only does the state provision endanger the enforcement of the federal legislation, but it flatly contradicts it.[187]

B. Statutory Interpretation Arguments

Once it is determined that the ADEA preempts contrary state provisions, the question remains whether the Act does in fact apply to appointed state judges. If the ADEA applies to appointed state judges, then the supremacy clause mandates that courts apply the Act in lieu of state mandatory retirement provisions.[188]

In ascertaining whether the ADEA protects appointed judges, the courts have relied on various statutory interpretation techniques. These techniques include reliance on the plain meaning of the statutory language,[189] public policy,[190] avoidance of absurd or

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(quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)) (The *Dublino* court sustained a New York requirement that federal assistance be conditioned on the recipients' acceptance of work.).

180 *See supra* notes 154-63 and accompanying text.

181 White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (state taxes on commerce with Indians preempted by federal law); Jones v. Rath Packing Co., 430 U.S. 519 (preemption of more stringent state labeling requirements for food), *reh'g denied*, 431 U.S. 925 (1977).

182 Pennsylvania v. Nelson, 350 U.S. 497 (state sedition act preempted by federal anticommunist legislation), *reh'g denied*, 351 U.S. 934 (1956). For a discussion of this case, see *supra* text accompanying notes 156-63.

183 *See infra* notes 271-85 and accompanying text.

184 H.R. CONF. REP. No. 899, 92d Cong., 2d Sess. 15-16 (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2179-80.

185 H.R. REP. No. 805, 90th Cong., 1st Sess. 2 (1967) (quoting SECRETARY OF LABOR STUDY, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT (June 1965), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214.

186 *Id.* at 3, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS at 2215.

187 *See supra* notes 164-68 and accompanying text.

188 *See supra* text accompanying notes 136-87.

189 *See* Gregory v. Ashcroft, 898 F.2d 598, 601 (8th Cir.), *cert. granted*, 111 S. Ct. 507

unreasonable constructions,[191] and legislative history.[192] The remainder of this Note discusses each of these methods, critiques the courts' reliance on them, and argues that the correct reading of the ADEA protects appointed state judges from mandatory retirement.

1. *Plain Meaning*

One of the most fundamental tenets of statutory interpretation is the "plain meaning rule."[193] Put simply, the rule requires a court to look no further than the statutory language when such language is "clear and unambiguous."[194] If, on the other hand, a court determines that the language at issue is ambiguous, the court then must resort to the various other methods of interpretation at its disposal.[195] A finding of ambiguity often hinges on whether the statute is capable of being understood by "reasonably well-informed persons" in more than one sense.[196]

Some of the courts that have addressed the ADEA's applicability to appointed state judges have relied, at least in part, on the

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(1990); EEOC v. Massachusetts, 858 F.2d 52, 54-55 (1st Cir. 1988); *In re* Stout, 521 Pa. 571, 582-83, 559 A.2d 489, 495 (1989).

190 *See* EEOC v. Massachusetts, 858 F.2d at 57; Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 435-36, 517 N.E.2d 141, 146 (1988).

191 *See Gregory*, 898 F.2d at 602; EEOC v. Massachusetts, 858 F.2d at 57; EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989); *Apkin*, 401 Mass. at 436, 517 N.E.2d at 146.

192 *See* EEOC v. Vermont, 904 F.2d 794, 798 (1990); EEOC v. Massachusetts, 858 F.2d at 56.

193 2A C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1984).

194 *Id.* at 86. The seminal case for the plain meaning rule is Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.") (citation omitted). In *Caminetti*, the Court upheld petitioner's conviction under the White Slave Traffic Act. The Court refused to accept his argument that the Act's legislative history showed that Congress, in prohibiting the carriage of women across state borders for "any other immoral purpose," did not intend to criminalize the transport of women for non-commercial ends because the statute's plain meaning was clear and unambiguous.

For additional cases refusing to go beyond the "plain meaning" of statutory language, see, *e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) (plain meaning of § 703(h) of Civil Rights Act of 1964 required finding that exception to Act's prohibition against age discrimination for bona fide seniority system applied to post-Act adoption of such systems); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947) (foremen considered employees for purposes of National Labor Relations Act in compliance with "plain meaning" of the statute, with no need to look to legislative history).

195 *See infra* text accompanying notes 218-85.

196 Wisconsin Dep't of Revenue v. Nagle-Hart Inc., 70 Wis. 2d 224, 227, 234 N.W.2d 350, 352 (1975) (plain meaning of tax exemption for "other ordinary and necessary [business] expenses" did not include reasonable entertainment expenses); *see also* Consolidated Freightways Corp. v. Nicholas, 258 Iowa 115, 120, 137 N.W.2d 900, 904 (1965) (ambiguity exists when language will "bear two or more constructions").

"plain meaning" of the Act. The court in *In re Stout*,[197] for example, found Pennsylvania's appointed judiciary outside the protection of the ADEA as "appointee[s] on the policymaking level" because the nature of judges' duties clearly fell within the plain meaning of the word "policymaking."[198] In particular, the *Stout* court relied upon the Pennsylvania justices' responsibilities in administering the state judiciary brancb.[199] Similarly, the First Circuit in *EEOC v. Massachusetts*[200] held that the judiciary of Massachusetts fell within the policymaking exception to the ADEA definition of "employee" because the very nature of judging requires one to consider policy when filling gaps in statutory text.[201]

For the courts to base their interpretation of the ADEA on the "plain meaning" of "appointee on the policymaking level" is inappropriate because the statutory language is far from "clear and unambiguous." Given that the "plain meaning" test is whether the statute is capable of being understood by reasonably informed persons in more than one sense,[202] the fact that so many litigants in so many jurisdictions have offered different readings[203] suggests that no one interpretation is necessarily correct.[204] As the *Stout* court

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197 521 Pa. 571, 559 A.2d 489 (1989). For a detailed discussion of the facts and reasoning of the case, see *supra* notes 92-101 and accompanying text.

198 *Stout*, 521 Pa. at 582-83, 559 A.2d at 495.

199 *Id.* at 583-85, 559 A.2d at 495-96.

200 858 F.2d 52 (1st Cir. 1988).

201 *Id.* at 55. For a more detailed discussion of the case's facts and reasoning, see *supra* text accompanying notes 73-91; *see also* Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.) (citing with favor EEOC v. Massachusetts, 858 F.2d 52), *cert. granted*, 111 S. Ct. 507 (1990).

202 *See supra* note 194 and accompanying text.

203 For example, compare the states' and judges' arguments in EEOC v. Massachusetts, 858 F.2d 52; *Stout*, 521 Pa. 571, 559 A.2d 489; and *Gregory*, 898 F.2d 598. In each case the state argued that the judges fell within the plain meaning of "appointee on the policymaking level," 29 U.S.C. § 630(f), while the plaintiff argued that judges are outside the plain meaning of the language. See *supra* text accompanying notes 73-101, 110-17 for a discussion of the facts and holding of these cases. For a summary of the courts' plain meaning analysis, see *supra* notes 139-49 and accompanying text.

Contrast EEOC v. Vermont, 904 F.2d 794 (1990), in which the Second Circuit Court of Appeals rejected the "plain meaning" approach, and accepted Justice Peck's argument that although judges at times make policy, they are not "policymakers" within the meaning of the ADEA. *See supra* notes 126-32 and accompanying text for a discussion of this court's plain meaning analysis.

204 One might argue in response to this assertion that the plain meaning rule therefore would never be relevant, since presumably issues of statutory interpretation ouly come before the court when parties disagree about a statute's meaning. One must remember, however, that when statutes are "plain and unambiguous," Caminetti v. United States, 242 U.S. 470, 489 (1917), "the duty of interpretation does not arise." *Id.* at 485. In other words, courts invoke the plain meaning rule in order to bar litigants from suggesting interpretations that clearly conflict with the statutory language. In contrast, when two or more parties offer differing interpretations based primarily on the legislative text, an ambiguity is apparent and the court *must* look to outside sources such as legislative history or public policy to resolve the dispute. In the case of the ADEA, tex-

maintained, state judges do seem to fall within the dictionary definition of "policymaking," in so far as the judges chart "a definite course of action"[205] for the judiciary and select its "method of action from various alternatives at hand."[206] Yet, as the Second Circuit Court of Appeals noted in *EEOC v. Vermont*,[207] "the *principal* business of the courts is the resolution of disputes."[208] To the extent that we ask courts to resolve inconsistencies in the law, the *Vermont* court reasoned, it is more accurate to qualify such activity as "stat[ing] or clarify[ing] policy" rather than "fashion[ing] new policy."[209]

In both cases, each court insisted that the statute's "plain meaning" supported its holding.[210] Yet, the holdings of the two courts are contradictory. Clearly, literal interpretation alone is insufficient for determining the statute's intended meaning. We need to know the context in which the language arose before we can choose from among the possible interpretations.

An additional criticism of the courts' "plain meaning" analysis is that, as the Second Circuit Court of Appeals noted in *EEOC v. Vermont*,[211] to say that judges resolve conflicts in policy at times is not to say they are "on the policymaking level."[212] Under the definition of "policymaking" on which the *Stout* court relied,[213] *most* governmental positions involve the formulation of policy to some degree. Therefore, under the *Stout* analysis, the exception to the Act's definition of employee would leave virtually all government employees unprotected.[214] In effect, the Act's provisions that specifically apply the ADEA to government employees[215] would be ren-

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tual arguments have been made favoring both inclusion and exclusion of judges from protection. Reliance on the language alone clearly is inadequate to resolve the issue, so outside modes of interpretation must be utilized.

205 *Stout*, 521 Pa. at 586, 559 A.2d at 497.

206 *Id.* The court defined "policymaking" as "the act of elaborating policy" and in turn defined "policy" according to its dictionary definition as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." *Id.* at 583-84, 559 A.2d at 495.

207 904 F.2d 794 (2d Cir. 1990).

208 *Id.* at 800 (emphasis added).

209 *Id.*

210 *Stout*, 521 Pa. at 583, 559 A.2d at 495 (" 'policymaking' . . . is to be construed according to its *common and approved usage*.") (emphasis added); EEOC v. Vermont, 904 F.2d at 801 (referring to the "ordinary meaning" of "policymaking").

211 904 F.2d 794.

212 *See supra* notes 126-32 and accompanying text.

213 *See supra* note 206.

214 The district court in EEOC v. Vermont relied on such reasoning. EEOC v. Vermont, 717 F. Supp. 261, 266 (D. Vt. 1989).

215 *See* 29 U.S.C. § 630(b) (1988) ("The term 'employer' means . . . a State or political subdivision of a State"); *id.* § 633(a) ("Nondiscrimination on account of age in Federal Government Employment").

dered meaningless.[216]

A better reading of the statutory language, as the Second Circuit Court of Appeals suggested in *EEOC v. Vermont*, would except only those appointees whose primary responsibilities involve the *formulation* of policy. While judges certainly do fill gaps in the law, and while they do accept policy-based arguments from attorneys, the judges' primary function is interpretation, not policymaking. This reading of the statute is supported by the use of other methods of interpretation.[217]

2. *Public Policy*

Once it is determined that a statutory provision is ambiguous,[218] courts resort to other interpretive techniques to ascertain the statute's meaning.[219] A reliance on public policy is one such technique.[220] Although difficult to describe in concrete terms,[221] courts rely on an indeterminate number of societal values when making policy choices between alternative readings of a statute. Robert E. Keeton[222] has referred to public policy interpretation as "resolv[ing] the problem at hand in a way that in the court's view produces the best total set of rnles, including those within the core area of the statute and other cognate rnles of law, whatever their source."[223]

The courts in *Apkin* and *EEOC v. Massachusetts* justified their holdings that appointed state judges are outside the ADEA's protection by emphasizing the positive effects that mandatory retirement provisions have for society.[224] Both courts empbasized the need for

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216 EEOC v. Vermont, 717 F. Supp. at 264; *see also infra* notes 232-52 and accompanying text (discussion of the presumption that Congress does not enact meaningless provisions and the role of that presumption in avoiding absurd results in statutory interpretation).

217 *See infra* notes 219-85 and accompanying text.

218 *See supra* text accompanying note 196.

219 *See, e.g.*, United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (courts may look beyond language if ambiguous); American Oil Co. v. State Highway Bd., 122 Vt. 496, 177 A.2d 358, 360 (1962) (interpretation is necessary whenever the meaning of statutory language is subject to various interpretations).

220 2A C. SANDS, *supra* note 193, § 56.01.

221 *Id.*

222 Now United States District Judge Keeton of the District of Massachusetts.

223 ROBERT E. KEETON, VENTURING TO DO JUSTICE 94-95 (1969), *quoted in* 2A C. SANDS, *supra* note 193, § 45.09, at 41.

224 *See* EEOC v. Massachusetts, 858 F.2d 52, 57-58 (1st Cir. 1988); Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 435-36, 517 N.E.2d 141, 146 (1988); *see also* Gregory v. Ashcroft, 898 F.2d 598, 605 (8th Cir.) (citing the *Apkin* and *EEOC v. Massachusetts* decisions with favor in finding a "rational basis" for mandatory retirement of judges), *cert. granted*, 111 S. Ct. 507 (1990).

a judiciary that represents the various elements of society.[225] Since discrimination based on race, religion, and sex was still widespread during the period when many older judges were appointed, they argued, requiring their retirement at age seventy allows the state to replace a predominantly white, male judiciary with judges from underrepresented minorities.[226] Furthermore, mandatory retirement allows states to avoid the otherwise costly and difficult process of conducting individual evaluations of its older judges.[227]

This policy analysis disregards the very purpose of the ADEA.[228] Congress, in enacting the Age Discrimination in Employment Act, sought to promote the very individualized, merit-based system for evaluating job performance that these courts claim would be too costly for states to implement.[229] While the ADEA effectively prohibits employers from drawing inferences about an individual's ability based on that individual's age, the *Apkin* and *Massachusetts* courts used identical inferences to justify their exclusion of appointed judges from the statute's protection.[230] In so doing, the courts actually subordinated federal public policy to state public policy, since Congress had already set a policy against age discrimination with its enactment of the ADEA.[231]

3. *The Absurd Result Argument*

According to the Supreme Court, "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."[232] Courts frequently invoke this "absurd re-

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225 EEOC v. Massachusetts, 858 F.2d at 58; *Apkin*, 401 Mass. at 436, 517 N.E.2d at 146.

226 EEOC v. Massachusetts, 858 F.2d at 58; *Apkin*, 401 Mass. at 436, 517 N.E.2d at 146.

227 EEOC v. Massachusetts, 858 F.2d at 57.

228 According to Sands, "purposive" analysis can take the form of either an attempt to ascertain legislative intent or an attempt to ascertain the "meaning" of the statutory language. 2A C. SANDS, *supra* note 193, § 45.08. The difference stems merely from the amount of weight that the court is willing to give extrinsic evidence in construing the statute. *Id.* When this Note refers to "purpose," therefore, the term refers to the general effect the statute is to have, whether that effect be the one intended by the legislature or the one reasonably foreseeable from the statutory language.

229 *See supra* notes 1-7 and accompanying text.

230 The Second Circuit Court of Appeals relied on this reasoning in rejecting Vermont's public policy arguments for the exclusion of appointed state judges from ADEA protection. EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990) ("Congress enacted the ADEA precisely in order to permit older employees to be evaluated on their merits rather than simply on the basis of age. . . . Under the Supremacy Clause, Congress's [sic] determination supersedes any state scheme to avoid decisions on an individual's merits.").

231 *See supra* notes 1-7 and accompanying text; *see also infra* notes 253-85 and accompanying text.

232 American Tobacco Co. v. Pattersou, 456 U.S. 63, 71 (1982) (rejecting interpreta-

sult" criterion in rejecting proposed interpretations.[233] The rationale for such an approach is that Congress is presumed to be a rational body that could not intend to render already existing statutes meaningless, or to include contradictory provisions within one act.[234]

The courts in *Apkin*, *EEOC v. Massachusetts*, *EEOC v. Illinois*, and *Gregory* concluded that it is absurd to read the ADEA as protecting appointed, but not elected, judges.[235] The *Apkin* court determined that "[t]here is no logical or rational reason why elected Justices of the Supreme Court of Washington . . . may be required by state law to retire at a given age and [the appointed] Justices of this court may not."[236] It therefore concluded that Congress inadvertently omitted the phrase "appointed judges" from the statutory language.[237] Similarly, the First Circuit Court of Appeals in *EEOC v. Massachusetts* found that "[t]he distinction between elected and appointed state judges . . . is nonsensical. . . . As far as their functions within the state government are concerned, the two kinds of judges are identical."[238] The district court in *EEOC v. Illinois* concurred: "There is no principled basis, either in the language of the statute or in the expressed legislative intent, to treat appointed judges differently from elected judges."[239]

Not all of the courts that have considered the question agree that the protection of appointed, but not elected, judges is absurd.

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tion of statute which would make illegal employers' adoption of seniority systems which the statute would protect if the system had predated the statute).

233 *See, e.g.*, Lovely v. Cunningham, 796 F.2d 1 (1st Cir. 1986) (favoring interpretation which, although in effect required excision of words from statute, rendered statute meaningful and avoided absurdity); Grand Light & Supply Co. v. Honeywell Inc., 771 F.2d 672 (2d Cir. 1985) (courts should deviate from literal interpretation of a statute if that iuterpretation would lead to an absurd result).

234 Markham v. Cabell, 326 U.S. 404, 409 (1945) ("The process of interpretation . . . misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less than literal reading would preserve."); Singer v. United States, 323 U.S. 338, 344 (1945) ("where another interpretation is wholly permissible, we would be reluctant to give a statute that construction which makes it wholly redundant."); *see* 2A C. SANDS, *supra* note 193, § 45.12, and cases cited therein.

235 Gregory v. Ashcroft, 898 F.2d 598, 603 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990); EEOC v. Massachusetts, 858 F.2d 52, 57 (1st Cir. 1988); EEOC v Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989); Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 436, 517 N.E.2d 141, 146 (1988).

236 *Apkin*, 401 Mass. at 434, 517 N.E.2d at 145.

237 *Id.*, 517 N.E.2d at 146.

238 EEOC v. Massachusetts, 858 F.2d at 57.

239 EEOC v. Illinois, 721 F. Supp. at 159; *see also Gregory*, 898 F.2d at 603 ("where the majority of state judges are elected, the irrationality of not excluding appointed judges from the ADEA . . . is even more pronounced").

In *Schlitz v. Virginia*[240] and *EEOC v. Vermont*,[241] the courts justified their holdings that only appointed judges were protected as entirely reasonable.

In *Schlitz*, the district court rejected the State's argument that because elected state judges far outnumber appointed ones, it would be absurd for the ADEA to protect the tiny minority of appointed judges.[242] The court reasoned that "the [alleged] absurdity . . . is the result of [the State's] improperly narrow view of the ADEA."[243] It pointed out that Congress excluded elected *officials* from protection, not just elected *judges*.[244] In the view of the *Schlitz* court, the distinction was entirely rational.[245]

The *Schlitz* court was correct in its assessment that the distinction between protecting appointed and elected officials from age discrimination is rational. To protect elected judges from age discrimination would be of little practical import since they hold their positions entirely at the whim of the voters.[246] Presumably, nothing exists to stop the voters from depriving an elected official of continued employment for even the most arbitrary reasons. Similarly, elected officials' immediate advisers remain in office only as long as the electorate supports their superiors. Conversely, other appointed officials are not immediately accountable to the public; such individuals hold their positions independent of popular support. In the case of appointed judges, therefore, age discrimination would unjustly deprive them of their otherwise secure positions of employment, whereas elected officials rely on no such assumptions.

The court in *EEOC v. Vermont* also rejected the suggestion that the protection of appointed judges under the ADEA would lead to an "absurd result."[247] The circuit court presumed that Congress

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240 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988). For a more detailed discussion of the facts and holding of this case, see *supra* text accompanying notes 59-72.

241 904 F.2d 794 (2d Cir. 1990). For a more detailed discussion of the facts and holding of this case, see *supra* text accompanying notes 118-32.

242 *Schlitz*, 681 F. Supp. at 334.

243 *Id.*

244 *Id.*

245 *Id.*

246 This argument necessarily assumes no practical difference between voters refusing at the polls to elect a judge over 70 years of age and production of the same result through their representatives via legislation. One might contend, to the contrary, that representative government does not closely approximate the wishes of the voting public. Such a debate, however, is outside the scope of this Note.

247 EEOC v. Vermont, 904 F.2d at 801-02. In fact, the district court in that case had reasoned that to except appointed judges from ADEA protection would be "manifestly illogical." *Id.* In its view, a definition of "policymaker" broad enough to exclude appointed judges from protection would also exclude virtually every government employee. *See supra* notes 129-32 and accompanying text.

was aware that some judges are elected and that some are appointed; it reasoned that Congress could have avoided the different treatment of each type by so providing in the Act.[248] One could even argue that the State's interpretation itself would also raise an absurdity, because it would render meaningless Congress's attempt to apply the ADEA both to the states and to the federal bureaucracy.[249]

The blanket assertion made by the *Apkin*, *EEOC v. Massachusetts*, *Gregory*, and *EEOC v. Illinois* courts[250]—that ADEA protection solely of appointed state judges is absurd—misapplies the "absurd result" standard. As the *Schlitz* and *EEOC v. Vermont* opinions demonstrate, one can formulate rational justifications for an interpretation that would include appointed judges as "employees" under the Act.[251] The interpretations that the courts dismiss as "absurd" are in fact nothing of the kind. Truly absurd interpretations would render parts of a statute meaningless or cause conflict between different sections of a single act.[252]

Perhaps when the courts label as absurd the inclusion of appointed judges within the ADEA definition of "employee," they really mean to imply that such a reading of the statute is unlikely to be what Congress intended. As the discussion below indicates, however, the legislative history of the ADEA exceptions supports the outcome reached in the *Schlitz* and *Vermont* cases—that the ADEA protects appointed state judges from mandatory retirement.

4. *The Legislative History of the ADEA Exceptions*

If a statute's meaning remains unclear even after a court has scrutinized the language and ruled out all readings that are absurd or contrary to overriding policy concerns, then it might turn to extrinsic evidence such as legislative history.[253] Such history might in-

248 EEOC v. Vermont, 904 F.2d at 802 ("Any perceived imprudence in this dichotomy is a matter to be addressed to Congress.").

249 *See supra* notes 232-34 and accompanying text.

250 Gregory v. Ashcroft, 898 F.2d 598, 603 (8th Cir.) ("no principled basis" for different treatment of elected and appointed judges), *cert. granted*, 111 S. Ct. 507 (1990); EEOC v. Massachusetts, 858 F.2d 52, 57 (1st Cir. 1988) ("the distinction between elected and appointed state judges . . . is nonsensical"); EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989) (only a reading of the ADEA which excludes appointed state judges from ADEA protection is "rational"); Apkin v. Treasurer and Receiver Gen., 401 Mass. 427, 436, 517 N.E.2d 141, 146 (1988) (application of ADEA to appointed state judges is an "absurd result").

251 *See supra* notes 242-49 and accompanying text.

252 Kuzma v. IRS, 821 F.2d 930 (2d Cir. 1987) (rejecting interpretation that would render related statute meaningless); Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984) (rejecting interpretation of section in statute that would render another section meaningless).

253 Courts sometimes are willing to consider legislative history even without a pre-

clude the circumstances and events leading to a statute's enactment, and statements made by committees and individuals during the legislative process.[254]

In considering whether appointed state judges are included in the ADEA's definition of "employee," the courts in *EEOC v. Massachusetts* and *EEOC v. Vermont* both looked to the legislative history of the ADEA's exceptions.[255] The *EEOC v. Massachusetts* court concluded from the history that Congress excepted appointed judges from ADEA protection when it excluded "appointee[s] on the policymaking level."[256] The *EEOC v. Vermont* court, however, reached the opposite conclusion.[257] The *EEOC v. Vermont* court relied heavily on both the Conference Report that first set out the exceptions[258] and the floor debate in the Senate leading up to the exceptions' enactment.[259] In the report, the committee specified that the exceptions were to be construed narrowly.

As the analysis below indicates, the *EEOC v. Vermont* approach is the better reading of the ADEA. After explaining the similarities between the ADEA exceptions and Title VII's exceptions,[260] the remainder of this section will argue that the legislative history of the exceptions demonstrates conclusively that Congress intended the ADEA to protect appointed state judges from mandatory retirement.

a. *Reliance on Title VII in Interpreting the ADEA*

The ADEA's legislative history is remarkable because of the lack of attention Congress devoted to defining the statutory exceptions to "employee." In fact, nowhere in the debates or legislative record does one find any mention of judges at all.[261] The legislative

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liminary finding that the statutory language is unclear or ambiguous. *See, e.g.*, Escobar v. INS, 838 F.2d 1020 (9th Cir. 1988) (legislative history relevant, despite clarity of statutory language, to indicate purpose of statute as a whole).

254 *See* 2A C. SANDS, *supra* note 193, § 48.01.

255 *See* EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990).

256 EEOC v. Massachusetts, 858 F.2d at 56.

257 EEOC v. Vermont, 904 F.2d at 802.

258 H.R. CONF. REP. No. 899, 92d Cong., 2d Sess. 15-16, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2179-80. For a discussion of the use of Title VII in interpreting the ADEA, see *infra* text accompanying notes 261-70.

259 118 CONG. REC. 4096, 4483, 4492-93 (1972).

260 42 U.S.C. § 2000(e)-(f) (1988).

261 *See, e.g.*, H.R. REP. No. 756, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5628; S. REP. No. 467, 98th Cong., 2d Sess. 1, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2974; H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 528; S. REP. No. 493, 95th Cong., 1st Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504; H.R. REP. No. 805, 90th Cong., 1st Sess. 1, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213.

history of the ADEA exceptions therefore offers little help in clarifying their precise meaning. However, the legislative history of Title VII of the Civil Rights Act of 1964,[262] as modified by The Equal Employment Opportunities Act ("EEOA"),[263] is particularly relevant to interpretating the ADEA because it contains the identical definition for "employee," as well as the identical exceptions.[264]

The Supreme Court expressly endorsed the use of Title VII analogies for purposes of interpreting the ADEA in *Oscar Mayer & Co. v. Evans*.[265] In *Oscar Mayer*, the plaintiff brought suit in federal court to challenge his employer's mandatory retirement requirements as violative of the ADEA.[266] The Supreme Court dismissed the suit because the plaintiff failed to exhaust state remedies.[267] While nothing in the ADEA's legislative history suggested such a result, the Court relied exclusively on Title VII's history, which did suggest that plaintiffs must exhaust state remedies before resorting to suit in federal court.[268] The Court noted that both statutes share the purpose of eliminating discrimination in the workplace, both have identical language in many parts, and in many instances Title VII was the actual source of language for the ADEA.[269] Accordingly, the court held that reliance on Title VII's history to interpret the comparable ADEA provision was entirely appropriate.[270]

b. *The Legislative History Supports Protection of Appointed Judges*

As discussed below, much in the legislative history of Title VII suggests that appointed state judges are protected employees under the ADEA.[271] First, although the House Committee Report does not mention judges in its discussion of who is to fall within the exceptions to the Title VII definition of "employee," the Report does state that the Committee intended the exceptions to be construed

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262 Pub. L. No. 88-352, 78 Stat. 253 (1964).

263 Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972).

264 Courts have recognized the usefulness in looking to identical langnage in related provisions of different statutes. *See, e.g.*, Commissioner v. Estate of Ridgway, 291 F.2d 257 (3d Cir. 1961) (meaning of "transfer" in Internal Revenue Code provision pertaining to trusts determined by reference to same term appearing in different sections of the Code).

265 441 U.S. 750, 756 (1979); *see* Lorillard v. Pons, 434 U.S. 575 (1978); EEOC v. Board of Trustees, 723 F.2d 509 (6th Cir. 1983); Lopez v. Bulova Watch Co., 582 F. Supp. 755 (D.R.I. 1984).

266 *Oscar Mayer*, 441 U.S. at 750-51.

267 *Id.* at 755.

268 *Id.*

269 *Id.* at 756.

270 *Id.*

271 The Second Circuit Court of Appeals relied heavily on the legislative history of the ADEA in determining that appointed judges are protected. *See* EEOC v. Vermont, 904 F.2d 794, 798-800 (2d Cir. 1990).

"narrowly."[272] Second, the Senate debates reveal that the drafters of the exceptions anticipated the exclusion only of elected officials and their closest advisers. Applicability of the "policymaking" exception to judges was not even contemplated during the Senate's deliberations.

The Committee Report for the EEOA reveals that Congress clearly had no intent to exclude appointed judges from ADEA protection.[273] The Committee states that the purpose of the exceptions is to

> exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisers or to policymaking positions at the highest levels of *the departments or agencies* of the State or local governments, *such as cabinet officers, and persons of comparable responsibilities at the local level.*[274]

Apparent from the Committee's formulation of "policymaking" is that it intended to limit the exception to members of the executive branch; the report speaks only of "departments," "agencies," and "cabinet officers."[275] The Committee very likely intended its list to be exclusive, as it continues to say that "this exemption shall be construed narrowly."[276]

A construction of the term "appointee on the policymaking level" that would not include appointed judges, thus leaving them under the ADEA's protection, is consistent with the Senate floor debates over Senator Ervin's proposal to add the exceptions to the statute.[277] Absent from the senators' discussion is any mention of the exceptions applying to judges, either elected or appointed. What appears instead to have concerued Senator Ervin is the appli-

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272 H.R. CONF. REP. No. 899, 92d Cong., 2d Sess. 15-16, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2179-80.

273 Committee reports are one of the most persuasive historical sources for use in resolving ambiguities in language. *See* IT&T v. General Tel. & Electronics Corp., 518 F.2d 913 (9th Cir. 1975) (committee reports entitled to great weight in interpretation); Housing Auth. v. United States Hous. Auth., 468 F.2d 1 (8th Cir. 1972) (committee reports are the most persuasive indicia of congressional intent). The rationale for using committee reports is the high probability that when Congress enacts legislation, it adopts the judgment of the committee. This seems especially likely where Congress passes legislation without changing the language that the committee drafted. 2A C. SANDS, *supra* note 193, § 48.06.

274 H.R. CONF. REP. No. 899, 92d Cong., 2d Sess. 15-16, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2179-80 (emphasis added).

275 *Id.*

276 *Id.*

277 118 CONG. REC. 4483-94 (1972).

While floor debates in general are not as persuasive an authority as to legislative intent as other sources, statements made by the drafters of legislation are often afforded more weight. The rationale for granting such weight to the statements of draftsmen is that a legislature is more likely to consider their interpretation of a statute when voting on it. 2A C. SANDS, *supra* note 193, § 48.13.

cation that Title VII might have had to high ranking government officials were they not excepted from the statute's definition of "employee."[278] Noting that Title VII was to extend the definition of "employer" to include states and municipalities,[279] the Senator expressed his fear that the statute would empower the courts to police state elections and appointments to state cabinet posts and similar advisory positions.[280] He stated that "it is a monstrous proposal that Federal judges should have to lay aside their judicial knitting in order to embark upon a course of action which is essentially supervising who shall be the officers and the employees of a State."[281] Senator Williams thereafter questioned Senator Ervin as to the scope he envisioned for the exceptions to the "employee" definition.[282] Senator Williams was concerned that a broad interpretation of the exception might leave vast numbers of public employees unprotected.[283] It was agreed, however, that the exceptions for appointees and advisers were to be limited to those individuals closest to the Executive.[284]

The impression conveyed by the foregoing is that the "appointee" that Congress intended to except from its definition of "employee" is the individual in close confidence with officials in the political branches.[285] By excepting such individuals, Congress

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278 118 CONG. REC. 4483 (1972).

279 *See supra* text accompanying note 22 for a discussion of the similar ADEA amendment extending the definition of "employer" to include states and municipalities.

280 118 CONG. REC. 4493 (1972).

281 *Id.*

282 *Id.*

283 *Id.* at 4492-93.

284 *Id.* The relevant portion of the exchange between Senators Erwin and Williams was as follows:

> Mr. WILLIAMS. . . . [T]he purpose of the amendment [excluding certain categories of employees from coverage is] to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisers. Is that basically the purpose of the Senator's amendment?
>
> Mr. ERVIN. . . . [T]hat is the purpose of the amendment. I feel that those elected officials who are legal advisers or who are personal assistants or legal advisors, as to how he should exercise his constitutional, legal rights and responsibilities, should also be exempt. . . .
>
> Mr. WILLIAMS. That is my understanding. As to the degree, certainly it would cover those who are in a Governor's cabinet . . . . [I]s that not correct?
>
> Mr. ERVIN. That is what is intended by this amendment, plus his immediate legal advisers.

Id. at 4493.

285 A number of state attorneys general have issued opinions that concur with this interpretation of the exceptions' legislative history. *See* Op. Att'y Gen. Md. 86-068 (1986); Op. Att'y Gen. S.C. (1987); Op. Att'y Gen. Vt. 87-8 (1987). The EEOC has also

could ensure that elected officials and their staff members could be chosen by the electorate on any ground. The legislators apparently deemed such reliance crucial to efficient governing.

In contrast with the elected branches, we traditionally view the judiciary as a branch separate and apart from the political branches. Congress would have little or no reason to except judicial appointments from ADEA protection. In fact, Congress would be especially justified in protecting judges against age discrimination, since by extending such protection it could better insulate judges from undue influence by the legislative or executive branch.

C. Appointed Judges Should Be Protected

When Congress enacted the ADEA in 1967, it had in mind a broad remedial statute that would change the very way in which employers and employees think about age in the workplace.[286] As the Act went through subsequent amendments, its scope grew broader and its effect farther reaching.[287] In its current form, the ADEA even regulates the employment practices of states and municipalities.[288]

The exceptions to the Act's definition of "employee" that have given rise to this controversy had as their origin a very narrow concern—that the Act should not protect elected officials and their closest appointed advisers.[289] Perhaps this is the reason why the committee report in which the exceptions first appear states that they are to be construed "narrowly."[290]

Those courts that have found appointed state judges to be outside the ADEA's protection have offered a number of justifications for such a holding.[291] This Note has attempted to show that all such justifications are without merit. Congress did not fail to meet the requirements of the supremacy clause of the United States Constitution, as no clear statement of intent is necessary when the federal statute directly conflicts with state law.[292] Furthermore, the plain meaning of the ADEA exceptions is not readily apparent,[293] nor is an interpretation that extends the Act's protection

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issued an opinion letter concurring with the result that this Note supports. *See* Application of ADEA to Appointed Judges, Op. EEOC 102 (1987).

286 *See supra* notes 1-7 and accompanying text.

287 *See supra* text accompanying notes 16-24.

288 *See supra* text accompanying note 22.

289 *See supra* notes 277-84 and accompanying text.

290 *See supra* text accompanying notes 273-76.

291 *See supra* text accompanying notes 43-132.

292 *See supra* text accompanying notes 136-87.

293 *See supra* notes 193-217 and accompanying text.

to appointed state judges absurd[294] or contrary to public policy.[295] In fact, the ADEA's legislative history supports a reading of the Act that would protect appointed state judges.[296]

Absent a compelling reason why the ADEA ought not to protect appointed state judges from state mandatory retirement provisions, the Act should apply. The broad remedial purpose behind the ADEA, to eliminate age discrimination, is best served by such a construction. Congress's intent to address the problems faced by older workers is set out expressly in the text of the Act.[297] Courts should be wary of contradicting that stated purpose through reliance on the narrow exceptions contained therein.

CONCLUSION

Congress enacted the Age Discrimination in Employment Act as a broad remedy for the injustices that elderly Americans have faced in retaining and regaining employment. The courts, in attempting to determine whether appointed state judges are included among the employees protected under the Act, have focused on differing modes of interpreting the exception for "appointee[s] on the policymaking level." However, the legislative history of Title VII, an analogous remedial statute, conclusively shows that Congress did not intend the exception at issue to exclude appointed state judges from the Act's protection. To the contrary, mandatory retirement represents the very type of discrimination that Congress, through the ADEA, sought to eliminate.

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294 *See supra* notes 232-52 and accompanying text.
295 *See supra* notes 218-31 and accompanying text.
296 *See supra* notes 253-85 and accompanying text.
297 *See supra* note 2.