DISCRIMINATION: AGE—RESORT TO STATE AGE DISCRIMINATION REMEDIES NOT PRECONDITION TO MAINTENANCE OF FEDERAL SUIT UNDER AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967—*Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978).

James P. Holliday was employed for almost nineteen years as a production manager at Ketchum, MacLeod & Grove, Inc. (Ketchum), an advertising agency. [1] Holliday's supervisors at Ketchum requested that he retire at the age of fifty-seven, but he refused to do so. [2] A younger person was then allegedly assigned most of his duties. [3] A

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[1] Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221, 1222 (3d Cir. 1978). Holliday was hired by Ketchum in April, 1957. Appendix to Brief for Appellant at 3a, Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) (Complaint in the United States District Court for the Western District of Pennsylvania) [hereinafter cited as Complaint].

[2] Complaint, *supra* note 1, at 3a. Ketchum gave Holliday the option of voluntarily retiring upon reaching the age of fifty-seven. *Id.* Ketchum's Employees' Pension Trust Agreement defined "Normal Retirement Date" as "the December 31st nearest (either before or after) the date upon which a Participant attains age sixty-two." Appendix to Brief for Appellant at 19a, Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) (Exhibit "B") [hereinafter cited as Agreement]. Under the provisions of the pension plan, however, "[w]ithin five years before his Normal Retirement Date, a Participant and the Corporation may mutually agree that the Participant may retire before reaching his Normal Retirement Date . . . ." Agreement, *supra*, at 33a.

Ketchum contended that Holliday's involuntary retirement was therefore "pursuant to the early retirement provisions of Ketchum's pension plan." Brief for Appellees at 4–5, Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978). However, the Age Discrimination in Employment Act Amendments of 1978 specifically stated that "no . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978) (codified at 29 U.S.C.A. § 623 (West Cum. Supp. 1979)). Although Holliday was discharged more than two years before the effective date of these amendments, the *Holliday* circuit court referred to a House Conference Report which refuted Ketchum's contention. *See* Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d at 1222 n.5.

That report stated in pertinent part:

> that the purpose of the amendment . . . is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.
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> Plan provisions in effect prior to the date of enactment are not exempt under section . . . (f)(2) by virtue of the fact that they antedate the act or these amendments.

H.R. REP. NO. 950, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1000, 1001.

[3] Complaint, *supra* note 1, at 4a. Ketchum did not dispute Holliday's contention that he was being replaced by a younger person. Arguments based upon the procedural aspects of the case caused the substantive claim of discrimination to be relegated to a position of secondary importance. Appendix to Brief for Appellant at 8a, Holliday v. Ketchum, MacLeod & Grove,

few weeks later, on January 30, 1976, Holliday was " 'involuntarily retired.' "[4] Asserting that Ketchum intentionally engaged in discriminatory conduct based upon age, and that he suffered injury as a result,[5] Holliday initiated an action under the Age Discrimination in Employment Act (ADEA).[6]

Holliday filed a notice with the United States Department of Labor 168 days after he was discharged, in which he indicated his intention to sue Ketchum.[7] This action complied with the 180 day limitations period stipulated in the ADEA.[8] Shortly thereafter, Holliday also instituted an action under state law by filing an age discrimination claim with the Pennsylvania Human Relations Commission (PHRC).[9] Since the Pennsylvania Human Relations Act allowed

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Inc., 584 F.2d 1221 (3d Cir. 1978) (Motion to Dismiss in the United States District Court for the Western District of Pennsylvania).

[4] Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d at 1222.

[5] *Id.* at 1222. The complaint by Holliday alleged:

> 16. Pursuant to a course of discriminatory conduct, Ketchum by its officers and agents intentionally and deliberately denied to plaintiff and other aging employees equal employment opportunities, specifically, the right to continued employment on the basis of performance and ability, rather than on the basis of age.

The complaint then enumerated the specific damages alleged, including deprivation of steady employment, income, and fringe benefits. The alleged injury also consisted of "humiliation and embarrassment." Complaint, *supra* note 1, at 4a–5a.

[6] 29 U.S.C. §§ 621-634 (1976) as amended by Age Discrimination in Employment Act Amendments of 1978, 29 U.S.C.A. §§ 621-634. (West Cum. Supp. 1979); *see* notes 24–31 *infra* and accompanying text.

[7] 584 F.2d at 1222. Notice of intent to sue was filed on July 15, 1976. Complaint, *supra* note 1, at 5a. Filing a notice of intent to sue is a procedural requirement under the ADEA. The statute provided, in pertinent part:

> No civil action may be commenced by an individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
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> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
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> (2) in a case to which section 14(b) [633(b)] of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7(d), 81 Stat. 605 (1967) (prior to 1978 amendment). Subsequent to Holliday's notice of intent to sue, the ADEA was amended to read "[n]o civil action may be commenced . . . until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary." 29 U.S.C.A. § 626(d) (West Cum. Supp. 1979).

[8] The ADEA mandated that notice of intention to sue be filed within 180 days after the date of the alleged unlawful practice. 29 U.S.C. § 626(d).

[9] 584 F.2d at 1223. Holliday filed an age discrimination claim with the PHRC on August 5, 1976, three weeks after notice of intent to sue was filed at the federal level. *Id.* The PHRC was established by the Pennsylvania Human Relations Act (PHRA). PA. STAT. ANN. tit. 43, § 956 (Purdon 1964) (current version at PA. STAT. ANN. tit. 43, § 956 (Purdon Cum. Supp. 1978-

only 90 days in which to file with the PHRC, [10] and Holliday filed 189 days after the alleged discriminatory act, [11] the Commission rejected Holliday's complaint for lack of jurisdiction. [12]

Pursuant to the notice of suit he had given the United States Department of Labor, Holliday filed an action under the ADEA in the United States District Court for the Western District of Pennsylvania on February 10, 1977. [13] The court disposed of Holliday's claim in a brief memorandum opinion. [14] The focus of the court's decision was section 633(b) of the ADEA, [15] which read in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. [16]

The court noted that section 633(b) was applicable, since the Pennsylvania Human Relations Act prohibited discrimination on the basis of age, and the PHRC was empowered to seek relief in such

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1979)). The PHRC was granted the power and the duty "[t]o initiate, receive, investigate and pass upon complaints charging unlawful discriminatory practices." *Id.* § 957(f). The discharge of an employee, based upon age, was among the discriminatory practices proscribed by the PHRA. *Id.* § 955(a).

The procedure under the PHRA requires the individual claiming to be aggrieved by an alleged unlawful discriminatory practice to file a verified complaint setting forth the specific disputed acts. If there is a reason to believe that unlawful discrimination has occurred the PHRC is authorized to investigate. If the investigation reveals the existence of probable cause to believe that discriminatory practices have occurred, the PHRC is obligated to halt the unlawful activity "by conference, conciliation and persuasion." *Id.* § 959. A hearing before the PHRC may be conducted if these methods are ineffective, and an order to cease discriminatory practices may be issued. *Id.*

[10] PA. STAT. ANN. tit. 43, § 959 (Purdon Cum. Supp. 1978-1979). The provision states that "[a]ny complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination." *Id.*

[11] Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d at 1223; *see* notes 9–10 *supra.*

[12] Appendix to Brief for Appellant at 78a, Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978). Plaintiff's case was closed by the PHRC on September 30, 1976. *Id.*

[13] Appendix to Brief for Appellant at 1a, Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) [hereinafter cited as Docket Entries].

[14] Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-140 (W.D. Pa., May 6, 1977).

[15] 29 U.S.C. § 633(b), *quoted in* Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-140, slip op. at 1 (W.D. Pa. May 6, 1977).

[16] 29 U.S.C. § 633(b).

cases.[17] Holliday's claim was absent equitable considerations that might have excused his late filing with the PHRC.[18] Thus, the court found that Holliday's failure to timely file with the PHRC did not meet the procedural requirements of the ADEA, and the court was deprived of federal subject matter jurisdiction.[19] Ketchum's motion to dismiss was granted.[20]

Holliday appealed from the judgment of the district court.[21] In *Holliday v. Ketchum, MacLeod & Grove, Inc.*, the Court of Appeals for the Third Circuit, *en banc*, reversed and remanded,[22] holding that "resort to state age discrimination remedies is not a precondition to maintaining a federal suit for age discrimination."[23]

The purpose of the ADEA, as stated by Congress, was to foster the employment of older workers based upon their ability rather than upon their age, and to prohibit arbitrary age discrimination in employment.[24] While the Secretary of Labor was granted the plenary power to administer, investigate, and enforce the provisions of the ADEA,[25] a person aggrieved under the terms of the Act was also given the right to bring a private civil suit.[26] Actions alleging non-

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[17] Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-140, slip op. at 1 (W.D. Pa. May 6, 1977); *see* note 9 *supra*.

[18] Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-140, slip op. at 2 (W.D. Pa. May 6, 1977). The district court distinguished Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974), in which detrimental reliance upon representations by federal and state officials had been held to excuse late filing. *Id.* at 16–17; *see* note 43 *infra* and accompanying text.

[19] Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-140, slip op. at 2–3 (W.D. Pa. May 6, 1977), *rev'd and remanded*, 584 F.2d 1221 (3d Cir. 1978). The court followed Gates v. Squibb Corp., No. 74-928 (W.D. Pa. Apr. 4, 1975) (Teitelbaum, J.) (failure to timely file with PHRC is jurisdictional defect absent special considerations). *Id.*

[20] Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-140 (W.D. Pa. May 6, 1977) (order granting defendant's motion to dismiss), *rev'd and remanded*, 584 F.2d 1221 (3d Cir. 1978).

[21] Docket Entries, *supra* note 13, at 1a.

[22] 584 F.2d at 1222, 1230. On appeal, the case was argued first on February 24, 1978, and was reargued on May 11, 1978. *Id.* at 1222.

[23] *Id.* at 1222.

[24] 29 U.S.C. § 621. An additional purpose of the Act was to assist employers and workers in dealing with those problems arising from the effect of age upon employment. *Id.*; *see* H.R. REP. No. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214. Specific practices by employers, employment agencies, and labor organizations which were deemed contradictory to the purpose of the Act, and hence unlawful, were detailed in another section of the Act. 29 U.S.C. §§ 623(a), (b), (c).

[25] 29 U.S.C. §§ 625, 626. "The investigation and enforcement provisions of the bill essentially follow those of the Fair Labor Standards Act." H.R. REP. No. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218; *see* notes 90 & 113–18 *infra* and accompanying text.

[26] 29 U.S.C. § 626(c). "Any person aggrieved may bring a civil action in any court of competent jurisdiction . . . ." *Id.*

compliance with substantive provisions of the ADEA[27] were governed by specific procedural requirements.[28] Two of the procedural sections of the Act have been the subject of controversy because they contain ambiguous language.[29] Only one of these sections, 633(b), concerning the federal-state relationship, was at issue in *Holliday*.[30] The literal language of that section did not clarify whether filing an age discrimination complaint with the appropriate state agency was intended to be a jurisdictional prerequisite to suit, or subject to waiver when a federal suit was initiated.[31]

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[27] The ADEA originally protected only persons between the ages of 40 and 65. Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, § 12, 81 Stat. 607 (1967) (prior to 1978 amendment). The 1978 amendments extended the coverage of the Act to age 70. 29 U.S.C.A. § 631(a) (West Cum. Supp. 1979).

[28] The sections of the ADEA which are relevant to private civil suit under the Act are 29 U.S.C. §§ 626(c), (d), 633(b), 633a(c), (d). Section 633a relates only to employment with the federal government. 29 U.S.C. § 633a.

[29] *See generally* Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457, 457–59 (1977); Note, *The Procedural Requirements of the Age Discrimination in Employment Act of 1967*, 9 RUT.-CAM. L.J. 540, 543–44, 550–51 (1978). These two sections, 29 U.S.C. §§ 626(d) & 633(b), both stipulate time limitations or requirements. Section 633(b) is quoted in part in the text accompanying note 16 *supra*, and section 626(d) is quoted in part in note 7 *supra*. Within the context of a single ADEA case, courts frequently discuss both of these sections. *E.g.*, Eklund v. Lubrizol Corp., 529 F.2d 247, 248 (6th Cir. 1976); Rucker v. Great Scott Supermarkets Corp., 528 F.2d 393, 394–95 (6th Cir. 1976); Cowlishaw v. Armstrong Rubber Co., 425 F. Supp. 802, 803–04 (E.D.N.Y. 1977); Smith v. Joseph Schlitz Brewing Co., 419 F. Supp. 770, 774–75 (D.N.J. 1976), *rev'd and remanded*, 584 F.2d 1231 (3d Cir. 1978); Sutherland v. SKF Indus., Inc., 419 F. Supp. 610, 614–15 (E.D. Pa. 1976).

[30] 584 F.2d at 1224. While the holding in *Holliday* turned upon the court's construction of section 633(b), the court stated that "[t]he resolution of th[e] issue depends upon the interpretation of two statutory provisions: section 626(d) . . . and section 633. . . ." *Id.* The extent of the court's discussion of section 626(d) was limited. 584 F.2d at 1227. *See* note 7 *supra*. Discerning the correct meaning of section 626(d) has proved to be quite difficult. *See generally* Note, *supra* note 29, 44 U. CHI. L. REV. at 463.

[31] The discussion in Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123, 1125 (N.D. Ill. 1976) illustrates the problems that courts encountered in attempting to analyze section 633(b). The opinion explored the range of constructions accorded section 633(b) by other courts and the choices thus available in *Bertrand*: section 633(b) could be held analogous to certain provisions of Title VII and thereby act as a potential bar to a plaintiff's cause of action; section 633(b) could be held applicable only in cases where a plaintiff chose to avail himself of state remedies; or, the court could adopt some position in between. 419 F. Supp. at 1125–26. In Smith v. Joseph Schlitz Brewing Co., 419 F. Supp. 770, 773–74 (D.N.J. 1976), *rev'd and remanded*, 584 F.2d 1231 (3d Cir. 1978), the court's chronological review of the disparate holdings of cases addressing section 633(b) resulted in the determination that this "Federal-State relationship" provision created no jurisdictional requirement. *Smith* was heard after the Court of Appeals for the Third Circuit had held that state agencies should be given the initial opportunity to act in age discrimination actions. Goger v. H.K. Porter Co., 492 F.2d 13, 15 (3d Cir. 1974). *See* notes 39–43 *infra* and accompanying text. The *Smith* court distinguished *Goger* by limiting that holding to its own facts. 419 F. Supp. at 733. *See* note 44 *infra*.

The cases which have addressed this question reveal diverse judicial interpretations of this section.[32] The first federal case to reach the precise question at issue was *Goger v. H.K. Porter Co.*[33] Ms. Goger claimed that she was dismissed by her employer, a New Jersey corporation, because of her age.[34] On November 27, 1970, her counsel gave notice to the Secretary of Labor for the United States that she intended to file a civil action under the ADEA,[35] but Ms. Goger did not complain to the appropriate state agency.[36] The district court held that while an aggrieved party need not *exhaust* state remedies, the ADEA required that a complaint be made to the appropriate state agency before suit could be brought in federal court.[37] The court opined that the suggestion that suit under the

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[32] As of May, 1978, more than 43 reported judicial decisions had sought to interpret the language of section 633(b). 46 U.S.L.W. 56 (1978). At the time *Holliday* was decided, five courts of appeals had reached the issue sub judice. Three of these courts held that section 633(b) required deference to state remedies. The other two held that resort to state remedies was voluntary under section 633(b). *See* notes 61–66 and 67–69 *infra* and accompanying text. The holdings of most district courts were in accord with one of the two positions taken by the circuits, but some cases adopted unique variations. *E.g.*, Griffin v. First Pennsylvania Bank, 17 Fair Empl. Prac. Cas. 54 (1977).

[33] No. 896-72 (D.N.J., Jan. 23, 1973) *reprinted in* 5 Fair Empl. Prac. Cas. 695 (1973), *vacated and remanded*, 492 F.2d 13 (3d Cir. 1974).

[34] 5 Fair Empl. Prac. Cas. at 696. H.K. Porter Co. claimed that it fired Ms. Goger "for good and just cause." However, the company moved for dismissal of the action on the ground that the court lacked subject matter jurisdiction because Ms. Goger failed to institute state proceedings. *Id.*

[35] *Id.* The service of notice upon the Secretary of Labor complied with section 626(d): The notice of *intent* to file a civil action was filed 35 days after the alleged unlawful practice occurred and the action *itself* was not commenced until after 60 days notice of the intent to file was given. For the text of section 626(d), see note 7 *supra*.

[36] 5 Fair Empl. Prac. Cas. at 697. "At no time did plaintiff complain of . . . discrimination to . . . the New Jersey State Agency responsible for the elimination of unlawful discrimination in employment based upon age." *Id.*

[37] *Id.* One of Ms. Goger's contentions was that the New Jersey statute did not make discriminatory discharge illegal. *Id.* In effect, Ms. Goger was claiming that New Jersey was not a "deferral state." A "deferral state" is one which conforms to the requirement that the "State . . . ha[ve] a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice." 29 U.S.C. § 633(b). In *Goger*, Chief Judge Coolahan specifically rejected plaintiff's contention, and stated: "It is established beyond question that New Jersey is a State which both has a law prohibiting discrimination in employment because of age and establishes the requisite apparatus whereby one so aggrieved can seek redress." 5 Fair Empl. Prac. Cas. at 697. The question of whether a state meets both of these requirements can sometimes require construction of the state statute. *See* Curry v. Continental Airlines, 513 F.2d 691, 693–94 (9th Cir. 1975); notes 49–54 *infra* and accompanying text.

ADEA could be brought directly in federal court "flies in the face of the clear statutory mandate."[38]

The Court of Appeals for the Third Circuit gave its imprimatur to the lower court's interpretation of section 633(b).[39] Its approval was founded upon the results of a brief statutory analysis which compared the ADEA with Title VII of the Civil Rights Act of 1964.[40] The court held that similar sections in each act were properly subject to comparison because both acts arose from a common origin and contained similar language.[41] The section of Title VII which the court compared to section 633(b) of the ADEA had previously been interpreted as mandating initial resort to state remedies.[42]

Equitable relief was granted to Ms. Goger "in view of the total absence, to . . . [the court's] knowledge, of any judicial decision con-

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[38] 5 Fair Empl. Prac. Cas. at 697. The opinion asserted that the statute was explicit in this regard: no action could be commenced in the district court prior to the expiration of a 60 day threshold period in which the state could attempt to resolve the controversy by voluntary compliance. *Id.*

[39] Goger v. H.K. Porter Co., 492 F.2d 13, 15 (3d Cir. 1974). Judge Hunter stated "[w]e agree with the district court . . . that . . . the Act . . . does require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy." *Id.* He rejected Ms. Goger's claim, which had the support of the Secretary of Labor as amicus curiae, that section 633(b) had no relevance because state proceedings had never been commenced. *Id.*

[40] 492 F.2d at 15 n.9 (quoting 42 U.S.C. § 2000e-5(c)(1976)).

[41] 492 F.2d at 15–16. The court was of the opinion that Congress recognized that Title VII omitted provisions pertaining to discrimination based upon age. The court suggested that the ADEA was created to correct this omission. The court assessed the language of the two statutes and concluded that they were "virtually identical." *Id.* at 15.

The section of Title VII which the *Goger* court referred to as "virtually identical" to the ADEA language read, in pertinent part:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a . . . law prohibiting the unlawful employment practices alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law, unless such proceedings have been earlier terminated.

42 U.S.C. § 2000e-5(c) (1976). *Compare* 42 U.S.C. § 2000e-5(c) (1976) *with* 29 U.S.C. § 633(b) (1976), quoted in part in text accompanying note 16 *supra*.

[42] 492 F.2d at 16. Love v. Pullman, 404 U.S. 522 (1972), was cited by the court as mandating resort to state remedies in Title VII cases. 492 F.2d at 15–16. The Court in *Love* stated that "[a] person claiming to be aggrieved by a violaton of Title VII . . . may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief." Love v. Pullman, 404 U.S. at 523. In *Love*, the plaintiff alleged employment discriminaton based upon race, and filed a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC orally advised the state agency of the complaint, and the state agency informed the EEOC that it waived the opportunity to act on the plaintiff's charge. The Supreme Court held that oral notice to the state agency, coupled with the agency's refusal to act, fulfilled the procedural requirements of that section of Title VII which the *Goger* court analogized to section 633(b) of the ADEA. 404 U.S. at 524–25.

struing section 633(b) during the period involved,"[43] and the case was remanded for a hearing on the merits.[44]

In a concurring opinion, Judge Garth approved the ultimate result reached by the majority.[45] However, he disputed the hypothesis that the similarity of language of Title VII and the ADEA necessitated that they be subject to the same construction.[46] Judge Garth agreed with the amicus curiae brief filed by the Secretary of Labor which stated that the limitation upon the right to file suit under the ADEA should apply only when proceedings had already been commenced under state law.[47] Interpreted in that manner, section 633(b) would operate to provide time for the state to act upon the complaints of those aggrieved individuals who chose to first proceed at the state level.[48]

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[43] 492 F.2d at 17. The court cautioned that, in the future, the intent of the Congress that state agencies be given the first opportunity to act should be strictly enforced. *Id.*

[44] *Id.* at 17. In the court's concluding paragraph, it specifically noted that its holding did not "decide on this record whether a plaintiff must always proceed first before the state agencies." *Id.*

[45] *Id.* at 17 (Garth, J., concurring).

[46] *Id.* Judge Garth believed that if any comparison were proper, it should have been made between section 2000e-5 of Title VII, see note 41 *supra*, and section 626(b) of the ADEA which details the enforcement procedures of the ADEA, and stipulates that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b) . . . of this title." 29 U.S.C. § 626(b). In effect, according to section 626(b), the provisions of the ADEA were to be enforced in accordance with procedures set forth in the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976). Judge Garth believed that section 626(b) prescribed the jurisdictional prerequisites for filing suit under the ADEA. 492 F.2d at 17 (Garth, J., concurring). He stated that the purpose of section 633(b) was to clarify the "Federal and State relationship," and not to act as a jurisdictional prerequisite. *Id.* (Garth, J., concurring).

[47] 492 F.2d at 17–18 (Garth, J., concurring). Judge Garth stated that the Secretary of Labor's interpretation was persuasive and should have been accorded great weight. *Id.* at 18 (Garth, J., concurring) (citing Udall v. Tallman, 380 U.S. 1 (1964)). In *Udall*, Chief Justice Warren, writing for a unanimous Court, stated that the Supreme Court showed "great deference" to an interpretation of a statute given by the agency charged with its adminstration. 380 U.S. at 16. *See* Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153–54 (1946) (construction given statute by agency administering it need only have "reasonable basis in the law" to be sustained by Court); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130–31 (1944) ("Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute").

[48] 492 F.2d at 17–18. Judge Garth stated that it was the putative plaintiff's option whether to seek relief at the state level. *Id. Accord*, Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353, 1357 (D.P.R. 1975). In *Vazquez*, the court held that:

> So far as the ADEA is concerned, the sole Congressional purpose underlying the enactment of Section 14 [Section 633] was to give the State time to act on a complaint if the aggrieved chose to proceed there first. To hold otherwise would be to create a procedural pitfall for unsuspecting individuals.

Id. at 1357.

Slightly more than a year after the Third Circuit decided *Goger*, the Ninth Circuit was presented with the opportunity to construe section 633(b).[49] In *Curry v. Continental Airlines*,[50] the plaintiff claimed to have been denied employment as a flight crew member solely because of his age.[51] The court approved the statutory construction, proffered in *Goger*, that deference to state remedies was a requirement of the ADEA.[52] The brevity of the court's discussion suggests that possible alternative interpretations of section 633(b) were accorded little consideration.[53] The court held that plaintiff's claim could be brought directly in federal court only because the state in which the action had originated did not have an agency authorized to seek relief on behalf of putative plaintiffs.[54]

The Second Circuit followed the apparent trend of the other circuits in *Reich v. Dow Badische Co.*,[55] decided in April, 1978. Section 633(b) was once again found to be similar to language in Title VII, and, consequently, the majority held that " '[d]eference' to state

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[49] Curry v. Continental Airlines, 513 F.2d 691 (9th Cir. 1975) (decided March 27, 1975). The court's determination regarding 633(b) might be considered dicta since it was not essential to the outcome of the case. *Id.* at 693.

[50] 513 F.2d 691 (9th Cir. 1975).

[51] *Id.* at 692. Curry was forty-one years of age when the alleged discrimination occurred. *Id.* Actions under the ADEA can properly be brought for an employer's failure or refusal to hire, for discharge, or for any other manifestation of discrimination because of an individual's age. 29 U.S.C. § 623 (1976).

[52] 513 F.2d at 693. In addition to the majority opinion in *Goger*, the court cited with approval Vaughn v. Chrysler Corp., 382 F. Supp. 143 (E.D. Mich. 1974). In *Vaughn*, the court noted that the state of Michigan, in which the action was brought, prohibited age discrimination in employment and had established a state authority to act against such discrimination. *Id.* at 145. *See* note 37 *supra*. Therefore, an employee was required to commence an action under state law and the proceedings were required to progress for 60 days before a notice could be filed with the Secretary of Labor in preparation for a federal suit. Deviation from this scheme was said to bar the plaintiff's suit under the ADEA, 382 F. Supp. at 145. These requirements could only be waived when a "plaintiff ha[d] justifiably and detrimentally relied upon official advice in neglecting to pursue state remedies." *Id.* at 146.

[53] Courts of appeals addressing this question have made at least passing reference to the split in interpreting section 633(b). *See, e.g.*, Evans v. Oscar Mayer & Co., 580 F.2d 298, 300 (8th Cir. 1978); Garbriele v. Chrysler Corp., 573 F.2d 949, 952 n.7 (6th Cir. 1978); Reich v. Dow Badische Co., 575 F.2d 363, 367 (2d Cir. 1978).

[54] 513 F.2d at 693–94. Since the court in *Curry* drew an analogy between Title VII and the ADEA, it utilized the standard developed in a Title VII case, General Ins. Co. of America v. EEOC, 491 F.2d 133, 134–35 (9th Cir. 1974), to evaluate whether the state of California had created an agency with sufficient enforcement powers to require deferral to that agency before federal suit could be initiated. This standard, which was not met in *Curry*, was "a showing of such state concern in the specific area of unfair employment practices as to result in the establishment or authorizing of an agency to act in this area." *Id.* at 135.

[55] 575 F.2d at 363 (2d Cir. 1978).

procedures where they exist is fundamental to the ADEA structure."[56] The concurring opinion in *Reich* agreed that the plaintiff should be denied relief, but recognized the fact that a recent United States Supreme Court decision had seriously questioned the validity of comparing the remedies incorporated in the ADEA with those in Title VII.[57] In the case of *Lorillard, A Division of Loew's Theatres, Inc. v. Pons*,[58] the Supreme Court had held that there was a right to a jury trial in a private action under the ADEA.[59] The Court examined the statutory language and history of the ADEA and concluded that "rather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the Fair Labor Standards Act [FLSA] procedures even while adopting Title VII's substantive prohibitions."[60] *Lorillard* had been decided in February, 1978, but its potential impact upon the construction of section 633(b) was not yet widely recognized.[61]

Three days after the *Reich* decision, the Court of Appeals for the Sixth Circuit decided the case of *Gabriele v. Chrysler Corp.*[62] The

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[56] *Id.* at 369. The majority in *Reich* seemed to have no difficulty in analyzing section 633(b). It relied upon language in a congressional report concerning the ADEA, H.R. REP. NO. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2215, which the court believed was supportive of the view that in a "deferral state," the state remedies provide a "full and adequate system of relief" and there is no reason in such a case for a plaintiff to be allowed to first present his claim in federal court. 575 F.2d at 370.

[57] 575 F.2d at 373 (Danaher, J., concurring). Although Judge Danaher stressed the fact that the ADEA had "incorporated fully the remedies and the procedures of the Federal [sic] Labor Standards Act," he did not examine section 633(b) in light of this. *Id.* (Danaher, J., concurring). Had he done so, it is possible that he would have concluded, as did the court in *Holliday*, that the FLSA does not require prior resort to "state administrative machinery." Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d at 1227.

A dissenting opinion was filed in *Reich* by Judge Feinberg. He quoted Judge Garth's concurrence in *Goger*, as well as the Secretary of Labor's interpretation of section 633(b), both of which would have applied the federal-state provision only in cases where proceedings had already been initiated under state law. 575 F.2d at 376–77 (Feinberg, J., dissenting). Judge Feinberg based his disapproval of an analogy between Title VII and the ADEA on a comparison of the legislative history of the two acts. *Id.* at 377 (Feinberg, J., dissenting).

[58] 434 U.S. 575 (1978).

[59] *Id.* at 585. The holding in *Lorillard* was subsequently codified by Congress. 29 U.S.C.A. § 626(c)(2) (West Cum. Supp. 1979).

[60] 434 U.S. at 584–85. The Supreme Court characterized the ADEA as

> something of a hybrid, reflecting, on the one hand, Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes.

Id. at 578.

[61] *Id.* at 575. The *Reich* decision was filed more than a month after *Lorillard* was decided, as was Gabriele v. Chrysler Corp., 573 F.2d 949 (6th Cir. 1978). Evans v. Oscar Mayer & Co., 580 F.2d 298 (8th Cir. 1978) was not decided until July 1978, over four months after *Lorillard*.

[62] 573 F.2d 949 (6th Cir. 1978).

majority in *Gabriele* "agree[d] with the reasoning of Judge Garth in *Goger* . . . ,"[63] "that resort to a state agency is completely optional . . . ."[64] Such a result was reached on the basis of a comparison between Title VII and the ADEA, but without any mention of the *Lorillard* decision.[65] The language of section 633(a) was the principal reason why the court perceived a distinction between the construction of section 633(b) and its counterpart under Title VII.[66] This was the same line of reasoning that Judge Garth used in his seminal concurring opinion in *Goger*: Congress would not have demanded resort to state remedies while, in section 633(a), it provided that a federal action would supersede such state action.[67]

Evans v. Oscar Mayer & Co.[68] was first heard in April, 1978, before a three-judge panel of the United States Court of Appeals for the Eighth Circuit.[69] Joseph Evans claimed that he was forced into an early retirement after having worked for the defendant for twenty-three years.[70] Evans complied with the notice requirement of the ADEA, as set forth in section 626(d),[71] but he failed to file charges with the Iowa Civil Rights Commission.[72] Once again, the

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[63] *Id.* at 953.

[64] *Id.* at 952.

[65] *Id.* at 953. The court argued that the limited amount of available legislative history supported its position. *Id.* at 954. The court quoted a House Report to the effect that section 633(b) "'provides for concurrent Federal and State actions.'" *Id.* at 953 (emphasis omitted) (quoting H.R. REP. NO. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218). Read in the context of the entire passage, this language was merely a paraphrasing of the section, and revealed little, if anything, concerning the legislative intent. The court in *Gabriele* recognized this and quoted from the House Report solely to illustrate that the clear legislative history which existed to support the construction given section 633(b)'s parallel provision under Title VII was lacking in regard to the ADEA. 573 F.2d at 953.

[66] 573 F.2d at 953. Section 633(a) provides in full:

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

29 U.S.C. § 633(a).

[67] 492 F.2d at 18 (Garth, J., dissenting). In *Gabriele*, the court reasoned that even under Chrysler's view of the proper procedural scheme, if the plaintiff initiated state action, then waited sixty days and began federal action, the state's proceedings would then be completely cut off. 573 F.2d at 953.

[68] No. 77-1692 (8th Cir. Apr. 5, 1978), *withdrawn and replaced*, 580 F.2d 298 (8th Cir. 1978), *rev'd and remanded*, 99 S. Ct. 2066 (1979). Judge Bright wrote the majority opinion and Judge Henley dissented.

[69] No. 77-1692, slip op. at 1 (8th Cir. Apr. 5, 1978).

[70] *Id.* at 1–2.

[71] *Id.* at 2. Section 626(d) is quoted in part in note 7 *supra*.

[72] No. 77-1692, slip op. at 3 (8th Cir. Apr. 5, 1978). The plaintiff's claim was filed in a state which indisputably had both a law prohibiting age discrimination in employment and an agency empowered to seek relief from such discrimination. *Id.* at 3–4. *See* note 37 *supra*.

narrow question presented to the court was whether the filing of a claim with a state agency was a prerequisite to a suit under the ADEA in federal court.[73]

Though this question was recognized as "procedural," *Lorillard* was not applied and the propriety of a comparison between Title VII and the ADEA was reaffirmed.[74] However, the court conceded that "[a] definitive answer . . . [could not] be found in either the language of the statute, its legislative history, or the policy behind it."[75] The dissent, written by Judge Henley, stated a preference for the view propounded by Judge Garth in *Goger*.[76] *Evans* was reheard by the same panel and the original opinion was withdrawn three months after the initial decision.[77] This time, the majority embraced Judge Garth's opinion and cited the then recently decided *Gabriele* decision for additional support.[78] A petition for a rehearing *en banc*, filed by the counsel for Evans, was denied.[79] However, the United States Supreme Court granted *certiorari* to the Evans case in October, 1978.[80]

The circuit court decisions discussed above, as well as numerous district court opinions,[81] formed the historical setting for the *Holliday*

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[73] No. 77-1692, slip op. at 4 (8th Cir. Apr. 5, 1978).

[74] *Id.* at 4–6. The court distinguished between "procedural" and "jurisdictional" requirements, holding that section 633(b) fell into the former category and consequently was open to equitable modification in cases where it was "necessary to effect the broad remedial purposes of the statute." *Id.* at 6. This approach had been used by the Eighth Circuit to interpret Title VII procedural requirements. Lacy v. Chrysler Corp., 533 F.2d at 353 (8th Cir. 1976), *cert. denied*, 429 U.S. 959 (1976); Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

[75] No. 77-1692, slip op. at 4 (8th Cir. Apr. 5, 1978). The court recognized and cited the split in authority among the district courts. The *Evans* court also cited the opinions of the two courts of appeals which supported its stance on section 633(b), but did not cite any which held that deference to an appropriate state agency was optional. *Id.*

[76] *Id.* at 7–8 (Henley, J., dissenting). "I think that the individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency." *Id.* at 8 (Henley, J., dissenting). Judge Henley's dissent was brief and pragmatic: he stated that both he and the majority conceded that the cases were in conflict, and that he preferred Judge Garth's view in contradistinction to the posture advanced by the majority. *Id.* (Henley, J., dissenting).

[77] 580 F.2d at 298. This time the majority opinion was authored by Judge Henley, and the dissent by Judge Bright. Senior District Judge Smith, sitting by designation, was the swing vote which altered the court's position.

[78] *Id.* at 300. The second *Evans* opinion retained the summary of facts presented in the withdrawn opinion, incorporated Judge Henley's dissent in that opinion, and added a reference to *Gabriele*. *Gabriele* had been filed only two days after the first *Evans* opinion was decided.

[79] *Id.* at 301. Judge Bright voted for a rehearing. *Id.*

[80] 439 U.S. 925 (1978).

[81] Illustrative of the multitude of lower federal court opinions is the fact that the Eastern District of Michigan issued at least eight opinions in this issue by six different judges in a period

court's analysis of the relationship between state age discrimination remedies and the maintenance of federal suits. The court recognized that the issue was identical to the one which it had confronted four years earlier in *Goger v. H.K. Porter Co.* [82] The court also acknowledged that because "[t]he proper interpretation of Section 633(b) [required] . . . the harmonization of admittedly mixed statutory signals," [83] the dichotomous positions of the majority and concurrence in *Goger* had each gathered support in the period subsequent to that decision. [84] This split of authority, coupled with an increase in the number of claimants who failed to comply with the section 633(b) procedures mandated by *Goger*, were the announced reasons for resolving section 633(b) in an *en banc* decision. [85]

Writing for the majority, Judge Garth opened his analysis of the case with a discussion of the impact of *Lorillard v. Pons* upon *Holliday*.[86] He stated that "[t]he Court explicitly *rejected* the relevance of Title VII procedures to lawsuits which allege age discrimina-

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of four years. Nickel v. Shatterproof Glass Corp., 424 F. Supp. 884 (E.D. Mich. 1976); Magalotti v. Ford Motor Co., 418 F. Supp. 430 (E.D. Mich. 1976); Gabriele v. Chrysler Corp., 416 F. Supp. 666 (E.D. Mich. 1976), *rev'd and remanded*, 573 F.2d 949 (6th Cir. 1978); Bertsch v. Ford Motor Co., 415 F. Supp. 619 (E.D. Mich. 1976); Vaughn v. Chrysler Corp., 382 F. Supp. 143 (E.D. Mich. 1974); Graham v. Chrysler Corp., 15 Fair Empl. Prac. Cas. 876 (1976); McGhee v. Ford Motor Co., 15 Fair Empl. Prac. Cas. 869 (1976); Rucker v. Great Scott Supermarkets, Inc., 11 Fair Empl. Prac. Cas. 473 (1974), *aff'd on other grounds*, 528 F.2d 393 (6th Cir. 1976).

[82] Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d at 1222, 1224. The opinion stated that *Goger* had held that "initial resort to state remedies was required." *Id.* at 1222. This conflicted with the interpretation given the *Goger* holding in Smith v. Joseph Schlitz Brewing Co., 419 F. Supp. 770, 773 (D.N.J. 1976), *rev'd and remanded*, 584 F.2d 1231 (3d Cir. 1978). *See* note 31 *supra*. If the court of appeals had agreed with the district court in *Smith* that *Goger* should be confined to its facts, it undoubtedly would not have considered it necessary to explicitly overrule *Goger*.

[83] 584 F.2d at 1224.

[84] *Id.* at 1224–25. The opinion cited the cases of *Reich* and *Curry* as those which followed the holding in *Goger*. *Id.* Hadfield v. Mitre Corp., 562 F.2d 84 (1st Cir. 1977), was also listed in this category, although it was explained that the court in *Hadfield* did not directly confront the issue of the construction of section 633(b). The primary focus of the *Hadfield* decision was the determination of whether Massachusetts is a "deferral state." *See* note 37 *supra*. The plaintiff argued for a reading of section 633(b) that would have allowed him to choose either a state or federal forum for his claim, regardless of the court's decision of the "deferral state" question. The court refused to reach this issue because it was raised for the first time on appeal. 562 F.2d at 87–88. Other courts, jurists, commentators, and the Secretary of Labor were cited as supporting the *Goger* concurrence, affording a plaintiff an initial choice of forum. Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d at 1224–25.

[85] 584 F.2d at 1225.

[86] *Id.* "While the narrow holding of *Lorillard* . . . is not relevant at our present determination, we find highly relevant the discussion in *Lorillard* which concerns the proper interpretation of the entire ADEA." *Id.*; *see* note 60 *supra*.

tion."[87] Quoting at length from the holding in *Lorillard* to support this conclusion, Judge Garth recounted that the majority opinion in *Goger* had been founded upon an analogy between the procedures incorporated in Title VII and those in the ADEA.[88] The Supreme Court's repudiation of this comparison in *Lorillard* required that "the Goger conclusion that prior state resort is necessary must also fall."[89] As a result of the impact of *Lorillard* upon *Goger*, Judge Garth stated that he was compelled to initiate a new analysis of section 633(b), with consideration accorded to the relevancy of the FLSA.[90]

The court's inquiry initially focused solely upon the language of the ADEA.[91] Free from the influence of reading the ADEA in light of Title VII,[92] an inspection of the Act revealed no explicit imposition of the requirement of resort to state remedies as a precondition to federal suit.[93] Neither was this concept found to have been implied,[94] though some courts had come to this conclusion

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[87] *Id.* (emphasis in original).

[88] *Id.* at 1226. *See* text accompanying notes 41–42 *supra*.

[89] 584 F.2d at 1226. Judge Garth quoted Judge Danaher's opinion in *Reich*, *see* note 57 *supra*, as supportive of the premise that *Lorillard* undercut the analogies between the procedures of Title VII and the ADEA and replaced them with a comparison between the ADEA and the FLSA. 584 F.2d at 1226 n.26.

[90] 584 F.2d at 1226. The court examined Title 29, sections 216 and 217 of the United States Code (1976), which addressed penalties and injunction proceedings. *Id.*

[91] *Id.* at 1227. "The language of the ADEA itself strongly supports our conclusion" that there is no requirement of initial resort to state age discrimination remedies. *Id.*

[92] The *Goger* court, for example, had compared section 633(b) directly with its "parallel provision" in the FLSA, section 2000e-5(b), because both sections arose from a "common origin." 492 F.2d at 15. Since the Title VII provision had been "repeatedly interpreted . . . as requiring that appropriate state agencies be given a prior opportunity to consider discrimination complaints before resorting to the federal courts," the court in *Goger* had construed section 633(b) in a similar manner and termed the "minor differences" between the two sections "insignificant." *Id.* at 15–16. *Accord*, Reich v. Dow Badische Co., 575 F.2d 363, 367 (2d Cir. 1978) ("The Age Discrimination in Employment Act . . . [is] not unlike Title VII"); Evans v. Oscar Mayer & Co., No. 77-1692, slip op. at 6 (8th Cir. Jan. 12, 1978) ("section 633(b) is nearly identical to . . . Title VII"), *withdrawn and replaced*, 580 F.2d 298 (8th Cir. 1978); Curry v. Continental Airlines, 513 F.2d 691, 693 (9th Cir. 1975) (quoting language in *Goger* to the effect that differences between section 633(b) and section 2000e-5(b) were insignificant); Bertsch v. Ford Motor Co., 415 F. Supp. 619, 623 (E.D. Mich. 1976) ("To the extent that a particular provision, such as § 633(b), is derived from Title VII, it may be construed consistently with that Act.").

[93] 584 F.2d at 1227.

[94] *Id.* The court stated that the sole rationale for implying that section 633(b) mandated resort to state remedies was voided by *Lorillard's* rejection of the relevance of Title VII to the ADEA. *Id. See* note 89 *supra*.

upon reading section 633(b) in light of Title VII. [95] The jurisdictional provision of the ADEA, section 626, would have been the most appropriate place in which to incorporate such a requirement, but none was included there. [96]

Judge Garth delineated three arguments, based upon the language of the ADEA, which militated against required resort to state remedies. [97] First, section 633(b) "provide[d] that a federal action filed over sixty days after commencement of the state action *must supersede* the pending state proceeding." [98] He suggested that it would have been unreasonable to import to Congress the intent to mandate state remedies which would not necessarily be concluded and would definitely be superseded if federal proceedings were instituted. [99] Second, although the relevancy of Title VII procedures to the ADEA had been disavowed in *Lorillard*, Judge Garth quoted from *Gabriele v. Chrysler Corp.* to reemphasize the differences in language between section 633(b) and section 2000e-5 of Title VII. [100] Third, the court found significant the fact that section 633 was entitled "Federal-State Relationship," not "Procedural Prerequisites" or

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[95] 584 F.2d at 1227 n.29. The *Holliday* court stated that the practice of applying Title VII requirements to section 633(b) had always been suspect. *Id.* This was due to the fact that although the legislative history of Title VII very clearly required resort to state remedies, no such background existed for section 633(b). *Id.* (quoting Gabriele v. Chrysler Corp., 573 F.2d 949, 953 (6th Cir. 1978)).

[96] 584 F.2d at 1227; *see* note 7 *supra*.

[97] 584 F.2d at 1227.

[98] *Id.* (emphasis in original).

[99] *Id.* This point was very similar to an often quoted passage in Judge Garth's concurrence in *Goger*:

> I do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under § 633(b), need not be concluded and which in any event would be superseded by the filing of the Federal action under § 633(a).

492 F.2d at 18; *see, e.g.*, Vazquez v. Eastern Airlines, Inc., 405 F. Supp. 1353, 1356 (D.P.R. 1975). *Contra*, Bertsch v. Ford Motor Co., 415 F. Supp. 619, 623 (E.D. Mich. 1976) ("the fact that the state proceedings need not be concluded . . . and may be stayed does not detract from the mandatory requirement that they be commenced").

[100] 584 F.2d at 1227. The passage in *Gabriele* presents the distinction between section 2000e-5(c), which prohibits the initiation of *any* federal action until 60 days after state proceedings have begun, and section 633(b), which merely prevents an aggrieved individual from filing a complaint in district court until a 60 day waiting period has elapsed. Under section 633, a plaintiff could file state charges at the same time administrative action by the Department of Labor was taking place. The ADEA is thus absent a period of *exclusive* state jurisdiction, a feature which is present under Title VII. *Id.* The conclusion has been drawn that the ADEA exhibits less deference to the state than does Title VII. *See* Gabriele v. Chrysler Corp., 573 F.2d 949, 954 (6th Cir. 1978); Note, *Procedural Prerequisites*, *supra* note 29, at 478–79 (1977). *Accord*, Bonham v. Dresser Industries, Inc., 569 F.2d 187, 194 n.8 (3d Cir. 1977).

"Jurisdiction," and that these latter subjects were specifically detailed in a separate section of the Act. [101]

In addition to this analysis, the court accorded substantial consideration to the view expressed by the Secretary of Labor. [102] The labor department, charged with administration of the ADEA, had strongly urged that a choice of forum be made available to litigants under the ADEA. [103] Scrutiny was also given to congressional committee reports written preparatory to the legislation amending the ADEA. [104] The 1978 amendments effectuated only minor changes in section 626 and left section 633 untouched. [105] However, a joint conference report which accompanied the legislation clearly expressed a preference for interpreting section 633(b) as Judge Garth had done in his *Goger* concurrence. [106] Although the report was clearly in accord with the court's position, the opinion recognized that the impact of a joint committee report filed in 1978 could not be said to be represen-

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[101] 584 F.2d at 1228. The court noted that procedural prerequisites and jurisdiction were treated in section 626(d). *See* note 7 *supra*.

[102] 584 F.2d at 1228; *see* note 47 *supra*.

[103] Brief for the Secretary of Labor as Amicus Curiae at 14–15, 19. The agency concluded that "[s]ection [633(b)] . . . should be read to apply only *if* the aggrieved individual *chooses* to timely resort to the state prior to bringing an ADEA suit in federal court." *Id.* at 19 (emphasis in original).

[104] S. REP. NO. 493, 95th Cong., 1st Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504 [hereinafter cited as 1977 Senate Report], cited in Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d at 1228–29.

[105] *See* note 7 *supra*. *See generally* Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 CATH.U.L.REV. 767, 773–77 (1978).

[106] JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 528 [hereinafter cited as 1978 Conference Report]. The 1978 Conference Report adopted the discussion of section 633(b) that was contained in the 1977 Senate Report, U.S. CODE CONG. & AD. NEWS, *supra* note 104, at 508–10. According to one writer, the 1978 Conference Report "expressly adopted a non-jurisdictional interpretation . . . . [A]n individual is free to proceed in court under state or federal law; the section [633(b)] . . . sixty-day waiting period applies only if the individual proceeds initially under state law and files a concurrent suit in federal court." Note, *supra* note 105, at 776.

The court quoted the report to the effect that: "'It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law.'" 584 F.2d at 1229 (quoting 1978 Conference Report, *supra*, at 528). "'The provision does not require that the individual go to the State first in every instance. Several courts have properly recognized this distinction.'" 584 F.2d at 1228 (quoting 1977 Senate Report, *supra* note 104, at 504). In addition to approving the view taken by Judge Garth in his concurrence in *Goger*, the 1978 Conference Report also cited the following cases as among those which conformed to their notion of proper interpretation: Smith v. Joseph Schlitz Brewing Co., 419 F. Supp. 770 (D.N.J. 1976); *see* note 31 *supra*; Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123 (N.D. Ill. 1976); Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353 (D.P.R. 1975).

tative of the 1967 Congress.[107] However, *a fortiori*, Judge Garth was willing to accord "consideration and weight" to the congressional commentary accompanying the 1978 amendments.[108]

In the final stage of its analysis, the court considered whether a demand for resort to state remedies would meet the purposes of the ADEA.[109] The court reiterated two major reasons proffered by other courts for requiring resort to state remedies: relief for the congested federal courts, and the relatively short delay to which plaintiffs initiating age discrimination actions would be subjected.[110] Judge Garth did not rebut these bases.[111] Nonetheless, the court refused to uphold what it considered to be a nonessential procedural barrier since it characterized the ADEA as "remedial legislation . . . entitled to be liberally construed."[112]

Although the court in *Holliday* intimated that a comparison of the ADEA with the FLSA was critical to its analysis, the court made

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[107] 584 F.2d at 1229, 1229 n.35. "We recognize, as did the Supreme Court, that . . . the views of a subsequent Congress 'provide no controlling basis' for inferring original congressional intent, '[n]onetheless, it is pertinent to note [the views of a subsequent congressional committee] . . . reporting . . . on certain proposed amendments to the Act.'" *Id.* at 1229 (quoting Haynes v. United States, 390 U.S. 85, 87–88 n.4 (1968)). *Cf.* United States v. Price, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") ("Inferences from legislative history cannot rest on so slender a reed") (Harlan, J.); Rainwater v. United States, 356 U.S. 590, 593 (1958) ("At most, the . . . amendment is merely an expression of how the . . . Congress interpreted a statute passed by another Congress . . . . Under these circumstances such interpretation has very little, if any, significance.") (Black, J.).

[108] 584 F.2d at 1229. "A fortiori the views of a joint congressional committee are entitled to consideration and weight in our re-examination of the contours of section 626(d) and 633(b) of the ADEA." *Id.*

[109] 584 F.2d at 1229. The court did not discuss the purposes of the ADEA, but generally discussed the nature of the Act. *See* text accompanying note 112 *infra*. For a discussion of the purposes of the ADEA, as they were perceived by Congress, see note 24 *supra* and accompanying text.

[110] *See* Evans v. Oscar Mayer & Co., No. 77-1692 slip op. at 5 (8th Cir. Apr. 5, 1978) (claimant can escape delay inherent in federal court action and chances of conciliation are increased), *withdrawn and replaced*, 580 F.2d 298 (8th Cir. 1978); Reich v. Dow Badische, 575 F.2d 363, 370 (2d Cir. 1978) (there is no reason to turn to federal remedies when state provides adequate system of relief); Hadfield v. Mitre Corp., 562 F.2d 84, 87 (1st Cir. 1977) (section 633(b)'s deferral requirement is grounded upon decision by Congress that courts should be spared burden of unnecessary litigation); Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973), quoted in Vaughn v. Chrysler Corp., 382 F. Supp. 143, 147 (E.D. Mich. 1974) (requirement of deferral facilitates avoidance of unnecessary litigation).

[111] 584 F.2d at 1229. Judge Garth was even willing to "recogniz[e] these arguments as well as the other advantages which may be attributed to a prior resort procedure." *Id.*

[112] *Id.* This interpretation of the ADEA was consistent with construction propounded by several other courts. In Moses v. Falstaff Brewing Corp., 525 F.2d 92 (8th Cir. 1975), the court stated that:

only passing reference to the procedural parts of the latter Act.[113] The opinion noted that "the FLSA does not require . . . that prior resort to state administrative machinery is necessary to enforce its provisions."[114] Judge Garth further interpreted the FLSA as prescribing that a complainant be afforded a choice of forum in an action seeking to enforce the provisions of the statute.[115] While the court did not quote from the language of the FLSA to support this interpretation of the Act, it did cite to two sections that it believed were the basis of such a view.[116]

> The Age Discrimination [in Employment] Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination . . . . A procedural requirement of the Act . . . should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act.

Id. at 93–94. A subsequent district court opinion echoed the view of the *Moses* court and added the caution that "[f]or this court to refuse to hear plaintiff's case due to his failure to timely notify the . . . [state] authorities would not achieve the Congressional purpose of fostering state enforcement; it would simply deny plaintiff any remedy at all." Skoglund v. Singer Co., 403 F. Supp. 797, 802 (D.N.H. 1975).

Even those courts which compared section 633(b) to Title VII provisions were inclined to accord a plaintiff the benefit of a liberal construction of the statute. Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 914 (N.D. Ga. 1973) ("The Age Discrimination Act is remedial and humanitarian in its nature as is Title VII"). This was due to the fact that many courts which construed solely the procedures of Title VII avoided overly technical interpretations which would have resulted in barring plaintiffs' actions. In Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974), the court explained its liberal construction of section 633(b)'s counterpart in Title VII:

> We do not believe that the procedures of Title VII were intended to serve as a stumbling block to the accomplishment of the statutory objective. To expect a complainant . . . to foresee and handle intricate procedural problems . . . would place a burden on the complainant which Congress neither anticipated nor intended.

Id. at 183. *Accord*, EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 189 (9th Cir. 1974) ("[Title VII] provisions are not to be interpreted too literally or too technically").

[113] 584 F.2d at 1226; *see* note 90 *supra*.

[114] 584 F.2d at 1227.

[115] *Id.*; *see* note 116 *infra*.

[116] 584 F.2d at 1227. The two sections that the court cited were 29 U.S.C.A. § 216 (West 1965 & Cum. Supp. 1979) and 29 U.S.C. § 217 (1976). The only provision in those sections which is analogous in any manner to the procedures contained in sections 626 or 633 of the ADEA reads as follows:

> An action to recover the liability prescribed in either of the preceding sentences [which stipulate certain provisions of the FLSA and the types of relief which may be awarded for violations thereof] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated . . . . The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 of this title . . . .

Although section 216(b) of the FLSA does state that an action "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction,"[117] there remains a crucial problem with the court's comparison of the two acts. In *Lorillard*, the Court stated that the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA [into the ADEA]."[118] This analysis by the Court undermined the *Holliday* court's presumption that section 216(b) of the FLSA dictated the manner in which section 633(b) of the ADEA should be interpreted.[119] *Lorillard* only transposed the jury trial provisions of the FLSA to an ADEA case because that specific procedural aspect was not provided for in the ADEA.[120] However, with regard to the maintenance of a federal suit, it can be argued that the existence of section 633(b) demonstrates that the Congress "expressly made"

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29 U.S.C.A. § 216(b) (West Cum. Supp. 1979). There is no requirement of deference to any state agency under the FLSA. The provisions merely state that in the event that the Secretary of Labor acts under section 217 (injunction proceedings), private actions seeking specific types of relief are precluded. The FLSA is also explicit about where a plaintiff may bring an action; a choice of forum is provided. *Id.*

[117] 29 U.S.C.A. § 216(b) (West Cum. Supp. 1979). In 1974, the phrase "maintained against any employer (including a public agency) in any Federal or State court" was substituted for the phrase "maintained in any court." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 6(d)(1), 88 Stat. 61.

[118] 434 U.S. at 582. The Court cited examples of selective incorporation wherein the ADEA provisions were written to diverge from their counterparts under the FLSA, including the availability of injunctive relief in suits by private individuals, the circumstances under which awards of liquidated damages would be given, and the establishment of criminal penalties for violations of the Acts. *Id.* at 581–82.

[119] 584 F.2d at 1226. The *Holliday* court stated "procedures [for the ADEA] are to be imported from the FLSA, a statute which does not require any, let alone prior, resort to state proceedings in order to redress FLSA violations, 29 U.S.C. §§ 216, 217." *Id.*

[120] "[T]he ADEA contains no provision expressly granting a right to jury trial." 434 U.S. at 577.

> However, we cannot assume, in the face of Congress' extensive knowledge of the operation of the FLSA, illustrated by its selective incorporation and amendment of the FLSA provisions for the ADEA, that Congress was unaware that courts had uniformly afforded jury trials under the FLSA. . . . We are therefore persuaded that Congress intended that . . . under the ADEA a trial by jury would be available.

Id. at 585. The Court was reluctant to incorporate a provision of the FLSA into the ADEA here, even though there was *no mention* of the right to a jury trial in the ADEA. The Court was hesitant to discern "congressional intent where the statute provides no express answer." *Id.* This suggests that the Court would have even greater difficulty clarifying an *extant* section of the ADEA by reading it in light of the FLSA.

changes in the language of the FLSA.[121] In a note accompanying his concurring opinion in *Holliday*, Judge Hunter indicated that he too had doubts about that section of the majority's opinion which interpreted *Lorillard*.[122] He believed that the analogy between Title VII and the ADEA was not rejected in toto by *Lorillard*; rather, it remained viable for certain section-to-section comparisons.[123]

Regardless of whether the juxtaposition of sections of the FLSA and the ADEA was appropriate in an examination of section 633(b), the elimination of the efficacy of that comparison, and the proposition that it supported, would not be crucial to the totality of the court's reasoning.[124] The major impact of *Lorillard* upon *Holliday* was to remove the likelihood that the court would become preoccupied with the comparison between Title VII and the ADEA, and this enabled the court to shift its focus to a straightforward exegesis of the statutory language and congressional commentary appertaining thereto.[125]

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[121] *See* text accompanying note 118 *supra*. The *Lorillard* Court stated that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and *a willingness to depart from those provisions* regarded as undesirable or inappropriate for incorporation." 434 U.S. at 581 (emphasis added).

[122] 584 F.2d at 1231 n.1. Judge Hunter stated:

> The [Holliday] Court's opinion also relies on the recent Supreme Court decision in Lorillard v. Pons . . . as undercutting the reasoning in Goger. While I agree that the Supreme Court pointed out the weakness of the analogy between Title VII and the ADEA in some contexts, I do not believe that Lorillard compels a wholesale rejection of such reasoning.

Id. Nonetheless, Judge Hunter found Judge Garth's construction of section 633(b) compelling in light of the 1978 Senate Report accompanying the ADEA amendments, see notes 103–07 *supra* and accompanying text, and the court's experience with ADEA litigation. *Id.* at 1231.

[123] 584 F.2d at 1231 n.1. "Lorillard stands only for the narrow point that the provisions of the two statutes which affect the right to a jury trial are sufficiently different that they should not be construed pari passu on that particular question." *Id.* Judge Hunter pointed out that the Court of Appeals for the Third Circuit had recently found the analogy between Title VII and the ADEA to be "quite helpful." *Id.* (citing Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978)). In *Rodriguez*, the court found the "Supreme Court's mandate on the exercise of trial court's discretion in granting monetary relief in Title VII suits . . . equally compelling in the context of ADEA actions." *Id.* at 1238. Many other analogies were drawn between aspects of Title VII and their counterparts under the ADEA. *Id.* at 1239. However, it should be noted that *Rodriguez* was decided before *Lorillard's* pronouncement regarding the efficacy of such comparisons.

[124] Judge Garth deliberately presented a line of argument for the contingency that *Title VII procedures* were relevant to the ADEA. 584 F.2d at 1227; *see* note 100 *supra* and accompanying text.

[125] The opinion clearly stated that *Lorillard* had this impact upon the court. "Lorillard compels us to disavow the Goger majority's reliance on an analogy to Title VII procedure . . . . We therefore start our inquiry afresh." 584 F.2d at 1226.

The greater part of the *Holliday* opinion was devoted to a review and expansion of the most potent of the arguments which had been posited by Judge Garth in his concurrence in *Goger* and by those courts which had followed his premises.[126] The court apparently used the intervening *Lorillard* decision as a convenient excuse to reexamine an issue which it had decided only a short time before.[127] It is evident that the court recognized a need to explain its review and reversal of *Goger*.[128] It stated that "[w]hile it may be unusual for us to reject a court precedent announced by us but four years ago, when it becomes apparent that jurisprudential integrity demands no less, we will not shrink from undertaking that assignment."[129]

The effect of the holding in *Holliday* was to remove a "judicial impediment to remedial legislation."[130] This resulted in a tangible benefit to grievants with age discrimination claims in the Third Circuit. No longer was a plaintiff's action, under the ADEA, prevented from reaching any forum solely because of a failure to pass the procedural obstacle of section 633(b). Complex issues relating to substantive provisions of the ADEA could be litigated because the cases in which they arose were not subject to involuntary dismissal for failure of the court to have subject matter jurisdiction.[131]

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[126] Judge Garth's examination of the legislative history accompanying the 1978 Age Discrimination in Employment Amendments constituted the single largest addition that he made to his concurrence in *Goger*. New support for his position was also derived from the decision in *Gabriele v. Chrysler Corp.* *See* notes 62–67 *supra* and accompanying text.

[127] As noted before, the greater part of the reasoning in the *Holliday* decision was not contingent upon the construction of *Lorillard* for its viability. *See* note 125 *supra*.

[128] 584 F.2d at 1226 n.28. "As Justice Powell so recently stated, a court must decide " 'not to reject [wisdom] merely because it comes too late.' " *Id.* (brackets in original). The court noted that its Internal Operating Procedures permitted an en banc court to overrule a previous panel decision of the Third Circuit. *Id.* at 1222 n.3.

[129] *Id.* at 1230.

[130] *Id.* The *Holliday* court itself characterized as an "impediment" the continued application of section 633(b) to mandate resort to state remedies. "Unease" with this state of the law was a contributing factor in the court's decision to overrule *Goger*. *Id.*

[131] *See* Wagner v. Sperry Univac, 458 F. Supp. 505 (E.D. Pa. 1978); Davis v. Boy Scouts of America, 457 F. Supp. 665 (D.N.J. 1978). *See also* Spaguolo v. Whirlpool Corp., 19 Fair Empl. Prac. Cas. 170 (1979).

In *Davis*, plaintiff brought an age discrimination suit against his employer, the Boy Scouts of America, a nonprofit corporation. After the court briefly reviewed the history of the interpretation of section 633(b), it found, in light of the holding in *Holliday*, that Davis had "surmounted the hurdle of the ability and/or necessity of complying with meaningful state deferral." 457 F. Supp. at 670. The court then proceeded to address the question of Davis's compliance with the notice provisions of the ADEA. *Id.* The *Davis* court's discussion of *Holliday* was not truly essential to its determination of the issue of deferral. New Jersey's age discrimination

This generally "liberal" approach developed in the *Holliday* case and applied in its progeny was short-lived. In May, 1979, eight months after *Holliday* was decided, the Supreme Court of the United States rendered a conclusive decision in the matter of resort to state age discrimination remedies under the ADEA.[132] Delivering the opinion of the Court in *Oscar Mayer & Co. v. Evans*,[133] Justice Brennan held that section 633(b) "mandates that a grievant not bring suit in federal court under . . . the ADEA until he has first resorted to appropriate state administrative proceedings."[134] This determination was unanimously accepted by the members of the Court, although four Justices dissented[135] from Justice Brennan's additional holding that "the grievant is not required . . . to commence the state proceedings within time limits specified by state law."[136]

At the outset of his analysis, Justice Brennan conceded that the "question of construction of section 633(b) is close."[137] The basis for his rejection of the approach propounded by the courts of appeals in *Evans* and *Holliday* was a reaffirmation of the propriety of interpreting the ADEA in light of Title VII.[138] Justice Brennan's reasoning

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statute provided a remedy for age discrimination carried out by anyone considered to be an "employer." At the time that *Davis* was decided, the statutory definition of "employer" did not encompass nonprofit corporations. Thus, there was technically no state agency empowered to seek relief for Davis, and no agency to which he could have ever deferred. *Id.*

Similarly, the plaintiff in *Wagner* alleged that his employer unlawfully discriminated against him on the basis of age. When the briefs were filed in *Wagner*, *Holliday* had not yet been decided and the plaintiff's delay in filing a complaint with the PHRC "would have barred him from asserting any claims based on events that took place more than 180 days prior to . . . the date on which he . . . filed his complaint." 458 F. Supp. at 517. However, the court took note of *Holliday*, and found that Wagner's delay "in no way limits the scope of federal claims that he may assert in this forum." *Id.* The court was then able to examine other aspects of Wagner's case, including the issue of the availability of certain types of damages under the ADEA.

[132] Oscar Mayer & Co. v. Evans, 99 S. Ct. 2066 (1979). The Supreme Court had granted certiorari in the *Evans* case in October, 1978. *See* note 80 *supra* and accompanying text.

[133] 99 S. Ct. at 2066.

[134] *Id.* at 2070.

[135] *Id.* at 2077 (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Chief Justice Burger, and Justices Powell and Rehnquist. *See* note 152 *infra* and accompanying text.

[136] 99 S. Ct. at 2070; *see* notes 150–51 *infra* and accompanying text.

[137] 99 S. Ct. at 2071. For a summary of the facts of the case, see notes 70–72 *supra* and accompanying text.

[138] 99 S. Ct. at 2071. The Court did not even allude to a possible comparison of the ADEA and the FLSA. The concurring opinion in Reich v. Dow Badische Co., 575 F.2d 363, 373 (2d Cir. 1978) (Danaher, J., concurring), *discussed in* notes 57–60 *supra* and accompanying text, and the majority in *Holliday*, 584 F.2d at 1225–26, *discussed in* notes 86–90 *supra* and accompanying text, had both interpreted the Supreme Court case of *Lorillard v. Pons* as undercutting the viability of comparing the ADEA with Title VII. Both opinions had interpreted *Lorillard* as preferring a comparison with the FLSA.

closely paralleled that of several of the courts of appeals which had held for mandatory deferral:[139] the ADEA and Title VII shared a common purpose,[140] the language of section 633(b) was almost *in haec verba* with Title VII,[141] and a review of the legislative history revealed that the ADEA's language was derived from Title VII.[142] Therefore, Justice Brennan concluded that it was Congress's intention that section 633(b) be construed in the same manner as the similar provision in Title VII.[143]

The respondent in *Oscar Mayer* presented several arguments in support of his position that deference to state remedies was optional under section 633(b).[144] Justice Brennan dismissed these points, which were much like those proffered by the courts that held for "optional deferral."[145] First, he noted that the simultaneous filing provision of the ADEA, as opposed to the sequential filing require-

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[139] *See* Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir. 1978), *discussed in* notes 55–61 *supra* and accompanying text; Curry v. Continental Airlines, 513 F.2d 691 (9th Cir. 1975), *discussed in* notes 49–54 *supra* and accompanying text; and Goger v. H.K. Porter, 492 F.2d 13 (3d Cir. 1974), *discussed in* notes 39–48 *supra* and accompanying text.

[140] 99 S. Ct. at 2071. The common purpose which Justice Brennan found was "the elimination of discrimination in the workplace." *Id. Compare* 29 U.S.C. § 621(b) (1976) ("it is . . . the purpose of this chapter . . . to prohibit arbitrary age discrimination in employment") *with* H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* U.S. CODE CONG. & AD. NEWS 2391, 2401 (detailing background and purpose of Title VII-Equal Employment Opportunity and stating: "The purpose of this title is to eliminate, through the utilization of formal and informal procedures, discrimination in employment based on race, color, religion, or national origin").

In contrast, the purpose of the FLSA was, in part, to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a) (1976).

[141] 99 S. Ct. at 2071; *see* note 41 *supra*.

[142] 99 S. Ct. at 2071.

[143] *Id.* Justice Brennan concluded that section 633(b), like section 2000e-5(c) of Title VII, was "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Contra*, Gabriele v. Chrysler Corp., 573 F.2d 949, 953 (6th Cir. 1978) ("there is legislative history suggesting that § 633(b) should be construed differently than § 2000e-5(c)").

Support for interpreting the scheme of Title VII in such a manner was drawn from remarks made by Senator Humphrey, discussing changes incorporated into Title VII, which read, in pertinent part:

> We recognized the good sense of permitting the appropriate State agencies ample time to resolve disagreements . . . through voluntary conciliation and mediation. . . . We sought merely to guarantee that these States . . . will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government.

110 CONG. REC. 12725 (1964), cited in 99 S. Ct. at 2071.

[144] 99 S. Ct. at 2071–73.

[145] *Id.*; *see* Evans v. Oscar Mayer & Co., 99 S. Ct. 2066 (1979), *discussed in* notes 77–78 *supra* and accompanying text; Gabriele v. Chrysler Corp., *discussed in* notes 62–67 *supra* and accompanying text.

ment of Title VII, was intended to facilitate rapid settlement of cases and did not indicate that the ADEA gave less deference to state agencies than did Title VII.[146] Second, because grievants could abort state proceedings after sixty days by filing a federal suit, this did not indicate that such state filing would be futile.[147] "Unless section 633(b) . . . is to be stripped of all meaning, state agencies must be given at least some opportunity to solve problems of discrimination."[148] Third, the comments of a 1978 committee report suggesting that resort to state remedies should be optional was not persuasive.[149]

In the final section of his opinion, Justice Brennan construed section 633(b) to require that a grievant commence state proceedings but not to require that he file within the time limitation set forth under the applicable state law.[150] A claimant could proceed in federal court only if his state complaint were dismissed as untimely or after sixty days had lapsed.[151] The dissent in *Oscar Mayer*, written by Justice Stevens, suggested that this last section of the majority opinion answered a question that was not presented for review and the Court should merely have dismissed respondent's suit.[152]

Justice Blackmun wrote a concurrence in which he enumerated the reasons why he preferred an interpretation of section 633(b) simi-

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[146] 99 S. Ct. at 2072. *Contra*, Reich v. Dow Badische Co., 575 F.2d 363, 377 (2d Cir. 1978) (Feinberg, J., dissenting) ("the ADEA reflects less deference to state mechanisms than does Title VII").

[147] 99 S. Ct. at 2072. *Contra*, Vasquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353, 1356 (D.P.R. 1975) ("such a [deferral] requirement would be inconsistent with the congressional concern to eliminate the delays occasioned by administrative proceedings"); *see* note 99 *supra* and accompanying text.

[148] 99 S. Ct. at 2072. Justice Brennan added: "While 60 days provides a limited time for the state agency to act, that was a decision for Congress to make and Congress apparently thought it sufficient." *Id.*

[149] *Id.* The court cited two recent cases for support of the proposition that legislative observations not concurrent with enactment of legislation are inapposite and do not control. United Airlines, Inc. v. McMann, 434 U.S. 192, 200 n.7 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

[150] 99 S. Ct. at 2073. Justice Brennan's holding did not comport with the arguments of either Evans or Oscar Mayer. Evans urged that because his tardy filing was a result of incorrect advice by the Department of Labor, his lateness should be excused. Oscar Mayer urged that since Iowa's statute of limitations had run, Evans could not remedy his procedural mistake, and the court was without jurisdiction. *Id.* However, "[n]either questions of jurisdiction nor excuse arise unless Congress mandated that resort to state proceedings must be within time limitations specified by the State." *Id.*

[151] *Id.*

[152] *Id.* at 2077 (Stevens, J., dissenting). "[I]n Part III of its opinion, the Court volunteers some detailed legal advice about the effect of a suggested course of conduct that respondent may now pursue." *Id.*

lar to that which was presented in *Holliday*.[153] However, he concluded that "this is one of those cases that occasionally appears in the procedural area where it is more important that it be decided . . . than that it be decided correctly."[154]

The position which the Supreme Court approved in *Evans* is equally as tenable as that which the court of appeals adopted in *Holliday*. Unfortunately, the object of both courts' interpretations was a section of the ADEA which was so poorly drafted that it defied a straightforward analysis. The liberal interpretation in *Holliday* answered the needs of the remedial, albeit confusing, legislation, while the *Evans* decision succeeded only in perfecting a procrustean scheme which could hardly have fulfilled the intent of any Congress. It is unfortunate that the enlightened view developed by the *Holliday* court will cease to control in ADEA litigation, replaced by a procedure developed for the sole purpose of attempting to keep age discrimination claims from being initiated in federal fora.

Donald R. Kaplan

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[153] *Id.* at 2076 (Blackmun, J., concurring).

> I regard the Age Discrimination in Employment Act to be a remedial statute that is to be liberally construed . . . . In addition, I could be persuaded . . . that ADEA proceedings have their analogy in Fair Labor Standards Act litigation and not in Title VII proceedings; that no waiting period is required before a complainant may resort to a federal remedy . . . ; that it seems so needless to require an untimely state filing that inevitably, and automatically, is to be rejected; that the legislative history of the 1978 amendments . . . might well be regarded, because of its positiveness and clarity, as shedding at least some helpful illumination upon persistent and continuing congressional intent in and since 1967.

Id. at 2076–77.

[154] *Id.* at 2077.