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A New Split on Old Age: Preclusion of § 1983 Claims and the ADEA

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In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA) to combat employer bias against older workers and to reject the idea that the job performance of all employees declines with age. The ADEA provides a statutory scheme for addressing age discrimination against employees aged forty years and older. Some older workers, however, have turned instead to the Equal Protection Clause of the Fourteenth Amendment, using § 1983 claims as a means of relief.

A six-to-one circuit split has emerged as to whether the ADEA is the exclusive remedy for age discrimination or whether an aggrieved older worker can seek relief by means of an equal protection–based § 1983 claim. In Levin v. Madigan*, the Seventh Circuit became the first circuit court to conclude that the ADEA does not preclude age discrimination claims brought pursuant to § 1983. Recently, the U.S. Supreme Court granted a writ of certiorari in the* Levin *case and is set to resolve this split in its upcoming term.*

This Note examines the legal conflict surrounding the ADEA's preclusion of § 1983 claims. Based on recent developments in the doctrine of implied preclusion, the ADEA's language, legislative history, and a comparison of rights and remedies, this Note argues that the Supreme Court should adopt the approach of the Seventh Circuit and find that the ADEA does not preclude § 1983 claims. It suggests that comparisons both of Title VII with the ADEA, and of age discrimination claims with race discrimination claims under the Equal Protection Clause of the Fourteenth Amendment, further support this position.

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INTRODUCTION

Whether due to the national economic downturn or perhaps the aging of the Baby Boomer generation, there are more older men and women striving to remain in the American workforce.[1] As the number of older workers grows, the problem of age discrimination in the workplace has become increasingly prevalent, and its effects cannot be overstated. Arbitrary age discrimination results in social costs such as "unused productive hours, social insurance, and welfare programs."[2] These are in addition to the individual's suffering, as one court observed that "[t]he cumulative effect of an arbitrary and illegal termination of a useful and productive older employee is a cruel blow to the dignity and self-respect of one who has devoted his life to productive work and can take a dramatic toll."[3] In the midst of the increasing prevalence of age discrimination, various circuit courts have grappled with the issue of which remedies are available to aggrieved older workers.

Workers aged forty years and older are protected from age discrimination in the workplace by statute under the Age Discrimination in Employment Act[4] (ADEA). Congress enacted the ADEA in 1967 in order to combat employer bias against older workers and to reject the idea that the job performance of all employees declines with age.[5] In addition to the ADEA, workers are also protected from age discrimination under the Equal Protection Clause of the U.S. Constitution.[6] Some older workers have asserted

1. *See* Don Lee, *More Older Workers Making Up Labor Force*, L.A. TIMES (Sept. 4, 2012), http://articles.latimes.com/2012/sep/04/business/la-fi-labor-seniors-20120903. Lee states that "many older Americans are delaying retirement and being added to the workforce in record numbers. Nearly 1 in 5 Americans ages 65 and older are working or looking for jobs—the highest in almost half a century." *Id.*

2. BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 4 (2003).

3. *Id.* at 5 (quoting Rogers v. Exxon Research & Eng'g Co., 404 F. Supp. 324, 329 (D.N.J. 1975)).

4. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006); *see infra* Part I.B.ii.

5. *See infra* Part I.B.i.

6. *See infra* Part I.E.

equal protection claims[7] via 42 U.S.C. § 1983 in place of a claim under the ADEA.[8] Recently, a circuit split has emerged as to whether state and local government employees may only bring age discrimination claims under the ADEA or whether such workers can seek relief by bringing age discrimination claims under the Equal Protection Clause through § 1983.

In 2012, the Seventh Circuit confronted the issue of ADEA exclusivity in *Levin v. Madigan*[9] and became the first circuit court to conclude that the ADEA does not preclude age discrimination claims brought pursuant to § 1983.[10] As a result, the Seventh Circuit permitted the plaintiff in that case to pursue equal protection–based age discrimination claims under § 1983 even though the plaintiff could not proceed under the ADEA.[11] In so holding, the Seventh Circuit knowingly created a six-to-one circuit split with other circuit courts,[12] which have held that the ADEA is the exclusive remedy for age discrimination claims.[13] On March 18, 2013, the U.S. Supreme Court granted a petition for writ of certiorari in the *Levin* case in order to resolve this conflict.[14] The Court is poised to hear *Levin* in its upcoming October 2013 Term.[15]

This Note examines the legal conflict surrounding the ADEA's preclusion of § 1983 claims. Based on changes in the implied preclusion doctrine since the earliest ADEA exclusivity cases and an analysis of the ADEA's language, legislative history, and a comparison of rights and remedies provided by each statute, this Note argues that the Seventh Circuit was correct in finding that the ADEA does not preclude § 1983 claims. It suggests that parallels between Title VII and the ADEA, along with a comparison of age and race discrimination claims under the Equal Protection Clause, further support this position.

Part I of this Note examines the problem of age discrimination and then outlines the ADEA, including its provisions, legislative history, and relationship with other federal statutes. Part I also explores the provisions and legislative history of § 1983, and analyzes the standard for finding preclusion of § 1983 claims under the implied preclusion doctrine. Part II of this Note focuses on the circuit split over whether the ADEA is the exclusive remedy for age discrimination claims. Finally, Part III suggests that the Supreme Court should conclude that the ADEA does not preclude § 1983 claims.

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7. *See infra* notes 122–34 and accompanying text.

8. *See infra* Part II. Section 1983 is a federal statute that provides a cause of action to remedy violations of federally guaranteed rights caused by the actions of a state official.

9. 692 F.3d 607 (7th Cir. 2012).

10. *See id.* at 617.

11. *See id.* at 610.

12. *See id.* at 616.

13. *See infra* Part II.A.

14. Madigan v. Levin, 133 S. Ct. 1600 (2013).

15. *See* Lyle Denniston, *Court Grants Three Cases*, SCOTUSBLOG (Mar. 18, 2013, 9:37 AM), http://www.scotusblog.com/2013/03/court-grants-three-cases-2/.

I. BACKGROUND PRINCIPLES: THE ADEA, § 1983 CLAIMS, AND EVALUATING EXCLUSIVITY

Part I of this Note explores three topics at the core of this circuit split: the ADEA, § 1983, and the implied preclusion doctrine. Part I begins by introducing the issue of age discrimination, followed by an overview of the ADEA. Next, Part I describes § 1983's history, its key provisions, and how it is used to bring a constitutional age discrimination claim. Finally, Part I details the Supreme Court's jurisprudence on the implied preclusion doctrine, which governs the analysis of whether a statutory scheme is an exclusive remedy that forecloses other remedies.

A. An Introduction to the Problem of Age Discrimination

This section explores how the issue of age discrimination has grown in recent years, and examines the biases that lead to age discrimination. First, this section provides an overview of statistics that show that Americans are living and working longer while also filing more formal complaints alleging age discrimination. Next, the section identifies the biases and financial concerns that often cause employers to engage in discriminatory actions and implement discriminatory policies in the workplace.

1. Statistical Evidence of a Growing Problem

In general, Americans are living longer and, simultaneously, the effects of aging are occurring later.[16] According to the Administration on Aging, the population of Americans aged sixty-five or older totaled 40.4 million in 2010, an increase of approximately 5.4 million over the previous decade.[17] While people over age sixty-five constituted 13.0 percent of the American population in 2010, the Department of Health and Human Services estimates that such persons will constitute 20.2 percent of the population by 2050.[18]

At the same time, there are more older men and women in the workforce. According to the Bureau of Labor Statistics, the number of workers over age sixty-five increased by 101 percent between 1977 and 2007.[19] Furthermore, the number of workers between ages sixty-five and seventy-four is predicted to grow by 83.4 percent between 2006 and 2016.[20]

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16. *See* LINDEMANN & KADUE, *supra* note 2, at 4.

17. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. ON AGING, A PROFILE OF OLDER AMERICANS: 2011 (February 2012), *available at* http://www.aoa.gov/aoaroot/aging_statistics/Profile/2011/2.aspx.

18. GRAYSON K. VINCENT & VICTORIA A. VELKOFF, U.S. DEP'T OF COMMERCE, THE NEXT FOUR DECADES, THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050, at 7 (May 2010), *available at* http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/DOCS/p25-1138.pdf.

19. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, ARE THERE MORE SENIORS IN THE WORKPLACE? (July 2008), *available at* http://www.bls.gov/spotlight/2008/older_workers/.

20. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, PROJECTED GROWTH IN LABOR FORCE PARTICIPATION BY SENIORS, 2006–2016 (July 2008), *available at* http://www.bls.gov/opub/ted/2008/jul/wk4/art04.htm/.

Along with this marked increase in the general aged population and the percentage of aged workers, the problem of age discrimination in the workplace has also grown. This trend is reflected by the rising number of age discrimination related charges filed with the Equal Employment Opportunity Commission (EEOC). While 15,785 age discrimination charges were filed in 1997, the number of claims filed in 2011 totaled 23,465, demonstrating an almost 50 percent increase over that time period.[21] This "graying" of the American workforce, coupled with the rise in age discrimination claims, heightens the need for effective means of remedying these claims in the workplace.

2. Commonly Held Biases Against Older Workers

Age discrimination in the workplace is not a new phenomenon. Throughout much of the twentieth century, employers made such discrimination explicit through the establishment of workplace policies requiring retirement of older workers by a certain age and the use of job postings that specified the desired age of prospective applicants.[22] Age discrimination persists in the workplace today even though the ADEA's enactment prohibited it in 1967.[23] Older workers often experience adverse employment decisions due to commonly held notions about age that are either false or rooted in stereotypes.[24] Employers may assume that older workers are experiencing mental or physical deterioration when in fact this may not be the case.[25] Furthermore, employers may perceive older workers as resistant to change and generally inferior to younger workers, who may be viewed as having more energy or willingness to work hard.[26] Rapid technological innovations have only served to reinforce stereotypes against older workers, who can be perceived as less skilled at using new technology and unable or unwilling to learn.[27]

Financial concerns may also motivate employers to hold biases against older workers: employers may not want to pay the higher salaries that older workers can command, or they may fear that older workers will cost them more in health and retirement benefits.[28] Additionally, employers may be unwilling to invest resources in training an older worker when they perceive

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21. EEOC, CHARGE STATISTICS: FY 1997 THROUGH FY 2012, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Sept. 20, 2013).

22. *See* Joanna N. Lahey, *How Do Age Discrimination Laws Affect Older Workers?*, WORK OPPORTUNITIES FOR OLDER AMS. (CENTER FOR RETIREMENT RES. B.C., Chestnut Hill, Mass.), Oct. 2006, at 1, *available at* http://crr.bc.edu/wp-content/uploads/2007/01/wob_5.pdf; *see also* RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 6 (2001).

23. *See supra* notes 21–22 and accompanying text.

24. *See* GREGORY, *supra* note 22, at 5.

25. *See id.*

26. *See* Vincent J. Roscigno et al., *Age Discrimination, Social Closure and Employment*, 86 SOC. F. 313, 314–15 (2007).

27. *See* LINDEMANN & KADUE, *supra* note 2, at 4–5.

28. *See* Roscigno et al., *supra* note 26, at 315.

that younger employees will provide a higher return on that investment.[29] As a result of such stereotyping, older workers may suffer adverse employment actions, such as termination or failure to be hired or promoted, or face other consequences like involuntarily exit from the labor market.[30]

B. The Age Discrimination in Employment Act of 1967: History, Key Provisions, and Subsequent Amendments

This section provides an overview of the ADEA, first considering the history of its enactment, and then reviewing its key provisions. This section then discusses amendments to the ADEA that expanded the scope of its coverage. Last, the section concludes with a brief explanation of the ADEA's relationship to § 1983.

1. Legislative History of the ADEA

Although there were proposals to address age discrimination in employment as early as the 1950s,[31] the issue gained national prominence during the congressional debate over Title VII of the Civil Rights Act of 1964 (Title VII).[32] Efforts to protect age under Title VII were ultimately unsuccessful, as the House of Representatives rejected Representative John Dowdy's proposed amendment to add "age" as an additional protected class.[33] The Senate also voted down a comparable proposal by Senator George Smathers.[34] At the time of these proposals, Congress felt it could not create legislation because it had "woefully insufficient information"[35] about the issue of age discrimination in the workplace.[36] As a result, Title VII contained a provision directing the Secretary of Labor to "make a full and complete study of factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[37]

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29. *See* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 231–33 (1990).

30. *See* Roscigno et al., *supra* note 26, at 315.

31. *See* EEOC v. Wyoming, 460 U.S. 226, 229 (1983) (reviewing congressional efforts to address the problem of arbitrary age discrimination); *see also Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 90th Cong. 23 (1967) (statement of Sen. Jacob K. Javits) ("Since 1957 I have been proposing in the Senate legislation to deal with the problem of age discrimination in employment.").

32. *See* LINDEMANN & KADUE, *supra* note 2, at 5; *see also* 42 U.S.C. §§ 2000e to 2000e-17 (2006).

33. *See* 110 CONG. REC. 2596–99 (1964).

34. *See id.* at 9911–13, 13,420–92.

35. *See id.* at 2596 (statement of Rep. Celler).

36. *See Wyoming*, 460 U.S. at 229.

37. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964); *see also Wyoming*, 460 U.S. at 229–30.

The Secretary of Labor, Willard Wirtz, issued a report to Congress on age discrimination in the workplace in June of 1965.[38] In his report, Secretary Wirtz recommended that Congress adopt "[a] clear-cut and implemented Federal policy . . . [that] would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age."[39] After reviewing this report, Congress directed the Secretary of Labor to submit legislative proposals prohibiting discrimination based on age in 1966.[40] In his Older Americans Message on January 23, 1967, President Lyndon B. Johnson urged Congress to adopt a solution to the age discrimination problem, stating, "We must end arbitrary age limits on hiring."[41] Later that same year, a draft of a bill was submitted. [42]

Thereafter, Congress engaged in its own studies, and both the House of Representatives and the Senate conducted hearings on the proposed legislation.[43] The resulting congressional report brought about the enactment of the ADEA in 1967.[44] According to its preamble, the ADEA was enacted "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."[45] Additionally, the ADEA was intended "to help employers and workers find ways of meeting problems arising from the impact of age on employment," stemming from deterioration in skills, morale, and employer acceptability.[46]

Emphasizing the individual and social costs of age discrimination, "[t]he original intent of the drafters of what was to become the ADEA was merely to accord age the same protected status as that extended to race and sex under Title VII."[47] In this way, Title VII had a clear influence on the structure and provisions of the ADEA. As for the remedial scheme, however, Congress modeled much of the ADEA on the Fair Labor Standards Act of 1938 (FLSA).[48] Therefore, the ADEA has been deemed "a hybrid: part Title VII, part FLSA."[49]

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38. WILLARD WIRTZ, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER § 715 OF THE CIVIL RIGHTS ACT OF 1964, H.R. REP. NO. 805 (1965).

39. H.R. REP. NO. 805, at 226.

40. *See* Fair Labor Standards Act Amendments of 1966, § 606, Pub. L. No. 89-601, 80 Stat. 845 (codified as amended at 42 U.S.C. § 2000e-14 (2006)).

41. 113 CONG. REC. 1377, 34,743–44 (1967).

42. *See id.* at 1377.

43. *Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 90th Cong. 23 (1967); *Age Discrimination in Employment: Hearings Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 90th Cong. (1967); *see also Hearings on Ret. and the Individual Before the Sen. Special Comm. on Aging*, 90th Cong. (1967).

44. JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 2 (1986).

45. 29 U.S.C. § 621(b) (2006).

46. *Id.*

47. *See* KALET, *supra* note 44, at 2.

48. *See id.* at 3; 29 U.S.C. §§ 201–19.

49. *See id.*; *see also infra* Part I.C.

2. Key Provisions of the ADEA

The ADEA prohibits employers from discriminating against an employee who is at least forty years old on the basis of the employee's age.[50] Discriminatory acts may include failing or refusing to hire a covered individual, terminating him or her, or taking other adverse employment actions with respect to compensation, terms, conditions, or privileges of employment on the basis of age.[51]

The ADEA requires aggrieved older workers to file a charge with the EEOC,[52] the agency responsible for the enforcement of all federal employment discrimination laws.[53] In this way, an aggrieved older worker may not proceed directly to court under the ADEA without first fulfilling the prerequisite of exhausting this administrative process.[54] The worker must file a charge of discrimination with the EEOC within 180 days of the date on which the alleged age discrimination occurred.[55] In states that have their own administrative agencies for handling discrimination claims, the charge must be filed within 300 days of the alleged discrimination.[56] Upon receiving the charge, the EEOC will notify the parties involved, including prospective defendants, and seek to resolve the dispute by informal methods such as conciliation, conference, and persuasion.[57] The aggrieved worker may not file a lawsuit pursuant to the ADEA until sixty days after the filing of a charge with the EEOC.[58]

An employer, for the purposes of the ADEA, is a person engaged in an industry affecting interstate commerce with twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.[59] The ADEA also covers the employer's agents,[60] as well as states, state subdivisions, and interstate agencies.[61] Labor unions and employment agencies are similarly prohibited from engaging in age-based discrimination.[62]

If an employer is found to have violated the provisions of the ADEA, the court may compel employment of the older worker or order reinstatement or promotion.[63] Additionally, the employer may be required to pay unpaid minimum wages or overtime compensation.[64] The ADEA also provides

50. *See* 29 U.S.C. § 631(a). The ADEA protects employees who are at least forty years of age. *See id*. Therefore, the ADEA confers no protections on persons under the age of forty. *See id.*
51. *See id.* § 623(a)(1).
52. *See id.* § 626(d)(1).
53. *See* GREGORY, *supra* note 22, at 183.
54. *See* 29 U.S.C. § 621.
55. *See id.* § 626 (d)(1).
56. *See id.* § 626(d)(2).
57. *See id.*
58. *See id.* § 626(d).
59. *See id.* § 630(b).
60. *See id.*
61. *See id.*
62. *See id.* § 623(c).
63. *See id.* § 626(b).
64. *See id.*

that liquidated damages are available in cases of willful violations,[65] and under a provision of the FLSA incorporated into the ADEA, the amount of liquidated damages is equal to the amount of actual damages.[66]

3. Subsequent Amendments to the ADEA

As it was originally enacted in 1967, the ADEA did not apply to the federal government, the states or their political subdivisions, or to employers with fewer than twenty-five employees.[67] In 1973, a Senate committee became concerned with the gap in coverage for governmental employees, remarking, "'There is . . . evidence that, like the corporate world, government managers also create an environment where young is somehow better than old.'"[68] In 1974, Congress amended the ADEA to expand the scope of the statute's coverage and close the gap.

Notably, the 1974 amendments to the ADEA modified the definition of "employer." According to the amendment, employers also included a state, any agency of the state, and any interstate agency.[69] Most federal employees were also given ADEA rights under the 1974 amendments.[70] In *EEOC v. Wyoming*,[71] the Supreme Court reviewed the validity of the 1974 amendment and concluded that the "extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress' powers under the Commerce Clause."[72] The Court reasoned that the amendment did not "directly impair" a state government's ability to "structure integral operations in areas of traditional governmental functions," and so the amendment did not violate principles of state sovereignty under the Tenth Amendment.[73]

Later, in 1978, Congress raised the ADEA's age ceiling for state, local, and private employees from age sixty-five to seventy and altogether removed the age ceiling for federal workers.[74] Taken together, this series of amendments tends to show that Congress was motivated to make the protections of the ADEA available to a broader range of employees in comparison to the statute as it was originally enacted.

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65. *See id.*
66. *See id.* § 216(b).
67. *See* EEOC v. Wyoming, 460 U.S. 226, 233 (1983).
68. *Id.* (quoting S. SPEC. COMM. ON AGING, 93d Cong., IMPROVING THE AGE DISCRIMINATION LAW 14 (Comm. Print 1973)).
69. *See* Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259 § 28(a)(2), 88 Stat. 55, 74 (codified at 29 U.S.C. § 630(b)(2) (2006)).
70. *See id.* (codified at 29 U.S.C. § 633a(a)).
71. 460 U.S. 226 (1983).
72. *Id.* at 243.
73. *Id.* at 239 (internal quotation marks omitted).
74. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 § 3, 92 Stat. 189 (1978) (codified at 29 U.S.C. § 631(b)); *Wyoming*, 460 U.S. at 233 n.5.

4. The ADEA on Preclusion of § 1983 Claims

The ADEA simply provides a mechanism for enforcing the substantive rights it creates. The language of the ADEA does not expressly mention § 1983 claims, nor does it purport to provide a remedy for incursions on federal constitutional rights. Additionally, the legislative history does not reflect an explicit intent to foreclose the possibility of § 1983 claims of age discrimination. What one should infer from this silence is at the heart of the debate over the exclusivity of the ADEA.

C. The ADEA's Relationship to Title VII and the FLSA: Finding the Proper Analogy

While the ADEA is substantively similar to Title VII, its remedial provisions track those of the FLSA. This raises the question of whether courts should interpret the ADEA by analogy to Title VII or the FLSA. This section discusses the relationship between the ADEA and both Title VII and the FLSA, as well as how courts have approached the issue of preclusion of § 1983 claims by Title VII and the FLSA.

1. Title VII and Its Relationship with the ADEA

The ADEA was largely modeled after Title VII, both in terms of substantive provisions and overall purpose.[75] Title VII makes it unlawful for an employer to discriminate against employees because of an "individual's race, color, religion, sex, or national origin."[76] Among these prohibited bases for employment discrimination, eliminating racial discrimination against African Americans was of particular concern to legislators when enacting Title VII.[77] Notably, although there was some support for including discrimination based on age, it was not prohibited under Title VII.[78]

The purpose and language of the ADEA mirrors that of Title VII in many ways. In particular, the antidiscrimination language of each statute is practically identical.[79] In fact, certain language of the ADEA was "derived *in haec verba* from Title VII."[80] Title VII prohibits discrimination "because of"[81] race, color, religion, sex, or national origin, and so too does the

75. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) ("Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of § 14(b) [of the ADEA] is almost *in haec verba* with § 706(c) [of Title VII], and since the legislative history of § 14(b) indicates that its source was § 706(c), we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c).").

76. 42 U.S.C. § 2000e-2(a)(1)–(2).

77. *See* Katherine Krupa Green, Comment, *A Reason To Discriminate: Curtailing the Use of Title VII Analysis in Claims Arising Under the ADEA*, 65 LA. L. REV. 411, 414 (2005) (noting that the legislative history of Title VII indicates Congress was primarily interested in eliminating employment discrimination against African Americans).

78. *See* LINDEMANN & KADUE, *supra* note 2, at 5.

79. *Compare* 29 U.S.C. § 623(a)(1, *with* 42 U.S.C. § 2000e-2(a)(1).

80. Lorillard v. Pons, 434 U.S. 575, 584 (1978).

81. 42 U.S.C. § 2000e-2(a)(1).

ADEA prohibit discrimination "because of" age.[82] In light of the similarities between the ADEA and Title VII, courts have applied their interpretations of Title VII equally to the ADEA. For example, in *Oscar Mayer & Co. v. Evans*,[83] the Supreme Court held that § 14(b) of the ADEA, mandating that a claimant not bring suit in federal court unless he or she has exhausted appropriate state administrative proceedings, should be interpreted so as to mirror Title VII § 706(c), which served as a template for § 14(b).[84] In so holding, the Court recognized that the ADEA and Title VII "share a common purpose, the elimination of discrimination in the workplace."[85] As a result of these similarities in statutory language and purpose, courts have traditionally interpreted the ADEA by analogy to Title VII.[86]

Nevertheless, there are instances in which the ADEA differs from Title VII and in which Title VII has been interpreted differently than the ADEA.[87] For example, not all theories of discrimination on which a Title VII plaintiff may predicate his or her claim are wholly equivalent to those available under the ADEA. One such theory of discrimination is disparate impact, which holds that employment discrimination occurs when a facially neutral employment practice impacts a particular group more adversely than another and cannot otherwise be justified by a legitimate business necessity.[88] In *Smith v. City of Jackson*,[89] the Supreme Court held that disparate impact claims are available under the ADEA, though they are much narrower in scope than disparate impact claims available under Title VII.[90] Unlike Title VII, the ADEA creates an exception under which an employer will not be liable for discrimination resulting from a facially-neutral employment action if that action is based on "'reasonable factors other than age.'"[91] Equivalent limiting language does not exist in Title VII, so evaluating a claim based on disparate impact theory under the ADEA does not operate in the same way as a disparate impact theory under Title VII.[92]

Furthermore, the nature of the discrimination prohibited by the ADEA and that prohibited by Title VII are not entirely interchangeable.[93] The comparison between race and age illustrates this observation. Secretary Wirtz remarked on this distinction in his report that informed and motivated

82. *See* 29 U.S.C. § 623(a)(1).
83. 441 U.S. 750 (1979).
84. *See id.* at 753–54.
85. *Id.* at 756.
86. *See* LINDEMANN & KADUE, *supra* note 2, at 419; Green, *supra* note 77, at 418–19.
87. *See* Green, *supra* note 77, at 423.
88. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609–10 (1993) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977)).
89. 544 U.S. 228 (2005).
90. *See id.* at 240.
91. *See id.* at 233–34 (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).
92. *See id.*
93. For a discussion of antidiscrimination principles and some difficulties associated with analogizing race and age, see generally Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839 (2004).

the enactment of the ADEA.[94] He found that age discrimination, unlike race discrimination, is not motivated by "dislike or intolerance of the older worker," but rather is predicated on "unsupported general assumptions about the effect of age on ability."[95] This is in contrast to race discrimination, which is generally thought of as being motivated by intolerance of and animus toward a racial group.[96]

In addition to the idea that race and age discrimination are predicated on different motivations, the nature of race is different than age. Race is an immutable characteristic and can never lawfully be relevant to an employer's decisionmaking process.[97] In comparison, the ADEA protects age, a characteristic that some courts have observed is not necessarily immutable or merely temporal.[98] As to immutability, the state of being over forty—the protected class under the ADEA—is involuntary, permanent, and discrete, just as race. The most significant difference between age and race, therefore, is that age is sometimes relevant in employment decisions. The ADEA provides that an employer can assert a defense to a claim of age discrimination by showing that age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[99] Additionally, the unequal treatment of older employees in the workplace cannot realistically be said to equal the longstanding history of invidious discrimination against workers of color, both in the workplace and in other aspects of public and private life.

As to the issue of preclusion under Title VII, courts have held that Title VII is not an exclusive remedy. In *Alexander v. Gardner-Denver Co.*,[100] the Supreme Court concluded that a private employee alleging race discrimination may still seek relief under Title VII even after first pursuing his grievance through a collective bargaining agreement's arbitration process.[101] In so holding, the *Alexander* Court observed that

> the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.[102]

94. *See* WILLARD WIRTZ, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER § 715 OF THE CIVIL RIGHTS ACT OF 1964, H.R. REP. NO. 805, at 5 (1965).

95. *See id.* at 5.

96. *See id.* at 6.

97. *See* William R. Bryant, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 213–18 (1998) (discussing exclusion of a bona fide occupational qualifications (BFOQ) defense for race).

98. *See* Laugesen v. Anaconda Co., 510 F.2d 307, 313 n.4 (6th Cir. 1975) ("The progression of age is a universal human process.").

99. 29 U.S.C. § 623(f)(1) (2006).

100. 415 U.S. 36 (1974).

101. *See id.* at 49.

102. *Id.* at 48–49.

The Supreme Court specifically mentioned § 1983 as one such "parallel or overlapping remed[y]" to the ADEA.[103] Therefore, Title VII is not an exclusive remedy for the types of employment discrimination it prohibits.

2. The FLSA and Its Relationship with the ADEA

The ADEA was also modeled, in part, on the FLSA. The FLSA is a federal statute that "sets forth employment rules concerning minimum wages, maximum hours, and overtime pay" and prohibits employers from discharging any employee because that employee has filed a complaint alleging a violation of the statute's provisions.[104]

The ADEA incorporates the FLSA's enforcement and remedial provisions into its own. The ADEA incorporates §§ 211(b), 216, and 217 of the FLSA.[105] Sections 209 and 215 of the FLSA are also incorporated by reference.[106] The Supreme Court in *Lorillard v. Pons* noted that

> "[a]mounts owing . . . as a result of a violation" of the ADEA are to be treated as "unpaid minimum wages or unpaid overtime compensation" under the FLSA and the rights created by the ADEA are to be "enforced in accordance with the powers, remedies and procedures" of specified sections of the FLSA.[107]

Nevertheless, the ADEA permits courts to also "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA]."[108]

On exclusivity, the FLSA has been interpreted as "the sole remedy available to the employee for enforcement of whatever rights he may have *under the FLSA*."[109] However, the issue of preclusion in those cases arose in the context of a violation of rights conferred by the FLSA itself. The FLSA has not been interpreted to preclude § 1983 claims to vindicate rights stemming from an independent source, such as the Constitution. The issue of whether the FLSA also forecloses similar yet independently sourced constitutional claims remains unanswered. This is not surprising considering that the FLSA "did not create a statutory right which arguably was already guaranteed by the Constitution."[110] Because of this, some courts have maintained that the "FLSA is not particularly helpful in determining the effect of a statute upon prior constitutional claims."[111]

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103. *Id.* at 47 n.7.
104. *See* 29 U.S.C. § 215(a)(3); Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1329 (2011).
105. *See* 29 U.S.C. § 626(b).
106. *See id.* § 626(a)–(b).
107. 434 U.S. 575, 578–79 (1978) (alteration in original) (quoting 29 U.S.C. § 626(b)).
108. 29 U.S.C. § 626(b).
109. Lerwill v. Inflight Motion Pictures, Inc., 343 F. Supp. 1027, 1029 (N.D. Cal. 1972) (emphasis added); *see also* Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1369 (4th Cir. 1989).
110. Christie v. Marston, 451 F. Supp. 1142, 1147 n.4 (N.D. Ill. 1978).
111. *Id.*

D. Section 1983: Purpose and Scope

Government employees may attempt to bring a constitutional age discrimination claim instead of bringing a claim under the ADEA. Age discrimination by a public employer has been held to be a violation of the Equal Protection Clause of the Fourteenth Amendment.[112] To bring this type of constitutional claim, an employee would bring an action under 42 U.S.C. § 1983.[113]

1. History of § 1983

Section 1983 was originally enacted as section 1 of the Civil Rights Act of 1871[114] during the Reconstruction Era "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.'"[115] Congress passed the Civil Rights Act of 1871 in order to rid the nation of the violent hostility and discrimination against African Americans in the post–Civil War era.[116] The Thirteenth Amendment (prohibiting slavery), the Fourteenth Amendment (declaring African Americans citizens of the United States and guaranteeing them the right to due process and equal protection under the law), and the Fifteenth Amendment (granting all citizens the right to vote), were all added to the Constitution after the Civil War.[117] Despite these new constitutional guarantees, groups like the Ku Klux Klan terrorized African Americans to ensure that they remained marginalized in society.[118]

Because states could not, or refused to, control the wave of violence and enforce the laws, Congress was concerned about the insecurity of life and property in the southern states.[119] Therefore,

> while the Klan itself provided the principal catalyst for the legislation, the remedy created in [section 1 of the Civil Rights Act] 'was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'[120]

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112. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2000) (holding that states may not discriminate based on age if the age classification in question is not rationally related to a legitimate state interest).

113. In relevant part, § 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

114. Ngiraingas v. Sanchez, 495 U.S. 182, 187 (1990) (internal quotation marks omitted).

115. *See* Maine v. Thiboutot, 448 U.S. 1, 25 n.15 (1980) (Powell, J., dissenting) (alteration in original) (quoting Act of Apr. 20, 1871, ch. 22, 17 Stat. 13).

116. *See Ngiraingas*, 495 U.S. at 187.

117. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 293–94 (4th ed. 2011).

118. District of Columbia v. Carter, 409 U.S. 418, 425–26 (1973).

119. *See id.* at 426; Monroe v. Pape, 365 U.S. 167, 172 (1961).

120. *Carter*, 409 U.S. at 426 (alteration in original) (quoting *Monroe*, 365 U.S. at 175–76).

In this way, the essential purpose of § 1983 is to provide a remedy for violations of federally guaranteed rights, with a special focus on the perceived evil of abuse at the hands of states or state actors.[121]

2. Section 1983's General Provisions

Section 1983 provides private individuals with a means of enforcing federal rights conferred by federal statutes and the Constitution.[122] To enforce those rights, § 1983 provides a cause of action to remedy violations of a federal statutory or constitutional right that are committed by any person acting "under color of . . . State [law]."[123]

The color of law element of a § 1983 claim has been interpreted to mean that the defendant has abused power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[124] Individual public officers,[125] municipalities, and local government bodies[126] are among those who may be liable under § 1983. Section 1983 also permits a plaintiff to sue individuals such as state and local officers acting in their personal capacity.[127] Overall, to act "under color of state law," the defendant's conduct must be "otherwise chargeable to the State."[128]

A cause of action under § 1983 also requires deprivation of a federally guaranteed right. Providing a remedy for incursions on constitutional rights is clearly a key concern of § 1983, but the text of § 1983 also provides a remedy for violations of federal statutory rights. By the language of the statute itself, § 1983 also creates a remedy for violations secured by the laws of the United States.[129] The Supreme Court concluded in *Maine v. Thiboutot*[130] that the laws covered by § 1983 are not limited to any subset of laws in light of the fact that "Congress attached no modifiers" to that language in the statute.[131]

Section 1983, however, does not create any independent rights. It may only be invoked when the plaintiff has been deprived of a right identified and conferred by a separate federal statute or the Constitution.[132] It follows, then, that § 1983 claims cannot be used to enforce rights conferred by

121. *See Ngiraingas*, 495 U.S. at 188.
122. *See* 42 U.S.C. § 1983 (2006).
123. *See id.*
124. United States v. Classic, 313 U.S. 299, 326 (1941).
125. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).
126. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 660–61 (1978).
127. *See* LINDEMANN & KADUE, *supra* note 2, at 829; *see also* Hafer v. Melo, 502 U.S. 21, 23 (1991).
128. Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).
129. Section 1983 refers to the "deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*." 42 U.S.C § 1983 (2006) (emphasis added).
130. 448 U.S. 1, 2–3 (1980) (holding that § 1983 may be used to bring a claim of a violation of rights conferred by the Social Security Act).
131. *Id.* at 4.
132. *See* LINDEMANN & KADUE, *supra* note 2, at 826–27.

those statutes such as the ADEA that already provide their own comprehensive remedial scheme.[133]

As to remedies, § 1983 states that those who infringe on a federally guaranteed right "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[134] This implies that various forms of remedy are available to plaintiffs in a § 1983 suit.[135] A § 1983 action may be defended or limited by a number of restrictions.[136] These include the defenses of qualified or absolute immunity for some government officials as well as the doctrine of preclusion.[137]

E. Age Discrimination As an Equal Protection Claim

Age discrimination may violate an individual's rights under the Equal Protection Clause of the Fourteenth Amendment.[138] The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[139] When a litigant asserts an equal protection claim, the basic inquiry is whether the government, in drawing a distinction among people based on a certain characteristic, can identify a sufficiently important purpose for that discrimination.[140] Whether a sufficient justification exists depends on the basis for the government's distinction, as courts are more suspicious of certain classifications.[141]

For example, racial classifications are inherently suspect and are therefore subject to the most searching review, strict scrutiny.[142] Under strict scrutiny, a law that discriminates based on a suspect class, such as race or national origin, will be upheld only if the government can show that the law serves a compelling interest and is narrowly tailored to achieve that purpose.[143] A less searching review, called intermediate scrutiny, is applied when reviewing classifications based on gender, for example.[144] Finally,

133. *See id.* at 827; *see also* Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 617–18 (1979).

134. 42 U.S.C. § 1983.

135. *See* Jacob E. Meyer, *"Drive-By Jurisdictional Rulings": The Procedural Nature of Comprehensive Remedial Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 420–21 (2009).

136. *See id.*

137. *See id.*

138. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2000) (holding that states may not discriminate based on age if the age classification in question is not rationally related to a legitimate state interest).

139. U.S. CONST. amend. XIV, § 1.

140. *See* CHEMERINSKY, *supra* note 117, at 685; *see also, e.g.*, Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 135 (2011) ("The government must simply justify any legal distinction between individuals with a sufficient rationale.").

141. *See* CHEMERINSKY, *supra* note 117, at 686; Strauss, *supra* note 140, at 135–36.

142. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). In *Adarand*, the Supreme Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.*

143. *See id.*

144. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996). In *Virginia*, to survive intermediate scrutiny, the Supreme Court stated that a state must show that its gender classi-

the least searching review of laws challenged under the Equal Protection Clause is known as the rational basis test.[145] Under rational basis review, a court will uphold a law if it is rationally related to a legitimate government purpose.[146] Unlike strict scrutiny, the purpose need not be compelling, nor does the scheme need to be narrowly tailored; the scheme chosen simply must be a rational way to achieve the government purpose.[147]

To determine the appropriate level of scrutiny, the Supreme Court has considered several factors.[148] One such factor is whether the government bases its classification on an immutable characteristic, as it would be unfair to discriminate on the basis of a condition that one did not choose.[149] This is, in part, why race and national origin are subject to strict scrutiny. A second factor is whether the group discriminated against is able to protect itself through the political process.[150] Finally, the Court also considers the history of discrimination against the group in question.[151]

The Supreme Court has held that age classifications are subject only to rational basis review.[152] This is because age is not a suspect classification under the Equal Protection Clause.[153] In *Massachusetts Board of Retirement v. Murgia*, the Court justified its application of rational basis review as follows:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[154]

Because the Massachusetts law at issue, mandating retirement for police officers over fifty years old, was rationally related to the State's objective to

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fication is needed to achieve an important state interest, and it must also provide exceedingly persuasive evidence of its justification for that state interest. *Id.*

145. *See* CHEMERINSKY, *supra* note 117, at 688; Strauss, *supra* note 140, at 136 (describing rational basis review as "highly deferential to the legislative judgment").

146. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–32 (1996) (holding that the Equal Protection Clause was violated when a state law designed to prohibit the legislature from protecting homosexual individuals from discrimination could not be said to have a rational relationship to a legitimate state interest).

147. *See* CHEMERINSKY, *supra* note 117, at 688.

148. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that "more searching judicial inquiry" may be required when a law is directed at "discrete and insular minorities," or "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

149. *See id.*; CHEMERINSKY, *supra* note 117, at 688. *See generally* Strauss, *supra* note 140, at 161–65 (describing treatment of immutability within the courts).

150. *See Carolene Prods. Co.*, 304 U.S. at 152 n.4; CHEMERINSKY, *supra* note 117, at 688.

151. *See* CHEMERINSKY, *supra* note 117, at 688.

152. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976).

153. *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985); Vance v. Bradley, 440 U.S. 93, 97 (1979); *Murgia*, 427 U.S. at 313.

154. *Murgia*, 427 U.S. at 313.

promote public safety by ensuring physically fit police officers, the *Murgia* Court held that the statute did not violate the Equal Protection Clause.[155]

Even though age is not a suspect class and classifications based on age are only subject to rational basis review, this does not mean that the aged do not have rights under the Equal Protection Clause.[156] However, practically speaking, "[i]n cases where a classification burdens neither a suspect group nor a fundamental interest, courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws."[157] In that sense, employees may find it difficult to succeed on a claim asserting age discrimination in violation of the Equal Protection Clause.

F. A Remedial Black Hole: Qualified Immunity

When a state or local government employee asserts a claim of age discrimination in the workplace under the ADEA, the employer may raise the issue of Eleventh Amendment qualified immunity as a bar to the lawsuit. The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."[158] The Eleventh Amendment has been interpreted to mean that individuals cannot sue a state without its consent.[159] To determine whether a federal statute makes a state subject to suit, the Supreme Court has "applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'"[160]

Applying this test in *Kimel v. Florida Board of Regents*,[161] the Supreme Court held that the Eleventh Amendment bars any ADEA lawsuit by an individual against a state because "Congress did not validly abrogate the States' sovereign immunity to suits by private individuals."[162] Therefore, under the ADEA, a state employee does not have a damages cause of action against her state employer. The *Kimel* court did not, however, speak to the specific issue of § 1983 suits by individuals against states or state actors. Justice O'Connor, writing for the majority, emphasized that state employees experiencing age discrimination by state employers could find recourse using other means, including state age discrimination statutes.[163] As a result of *Kimel*, the damages remedy Congress wanted to provide for state em-

155. *See id.* at 314–15.
156. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2000).
157. *Ashcroft*, 501 U.S at 470–71 (internal quotation marks omitted).
158. U.S. CONST. amend. XI.
159. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).
160. Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).
161. 528 U.S. 62 (2000).
162. *See id.* at 91.
163. *See id.* at 91–92.

ployees through its 1974 amendments to ADEA[164] is limited, and state employees suing under the ADEA do not have a damages remedy.[165]

G. Standard for Preclusion of § 1983 by a Comprehensive Statutory Scheme

The Supreme Court has set forth guiding principles for analyzing whether a federal statute provides the exclusive remedy for a wrong or an injury that another statute also seems to address. According to the implied preclusion doctrine, when a federal statute provides remedies that are deemed "sufficiently comprehensive," the Supreme Court may infer that Congress intended to preclude plaintiffs from relying on § 1983 to provide additional or alternative remedies.[166] When deciding an issue of preclusion, the Supreme Court cautioned in *Wright v. City of Roanoke Redevelopment and Housing Authority*[167] that it would not "'lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right."[168]

1. Preclusion of § 1983 Claims To Enforce Federal Statutory Rights

The Supreme Court originally recognized the implied preclusion doctrine in *Middlesex County Sewerage Authority v. National Sea Clammers*.[169] In *Sea Clammers*, the plaintiffs brought a suit for damages via § 1983 under the Federal Water Pollution Control Act[170] (FWPCA) and the Marine Protection, Research and Sanctuaries Act of 1972[171] (MPRSA). Notably, the purpose of the plaintiffs' § 1983 suit was to vindicate federal statutory rights, not a right conferred by the Constitution. The Supreme Court held that such a suit for damages could not be brought pursuant to § 1983.[172]

In its analysis of § 1983 preclusion, the Court stated, "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[173] The Court also stated that "when 'a state official is

164. *See* Pub. L. No. 93-259, § 28, 88 Stat. 74 (codified at 29 U.S.C. § 630(b)); *see also supra* notes 67–74 and accompanying text.

165. *See* Mustafa v. Neb. Dep't of Corr. Servs., 196 F. Supp. 2d 945, 955 (D. Neb. 2002) (stating that the practical effect of ADEA exclusivity coupled with the *Kimel* decision is "elimination of all age discrimination claims made against state actors in federal court").

166. *See* Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

167. 479 U.S. 418 (1987).

168. *Id*. at 423–24 (internal quotation marks omitted).

169. *See also* Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not "Imply" Congressional Preclusion of § 1983 Constitutional Claims*, 77 FORDHAM L. REV. 775, 783 (2008).

170. 33 U.S.C. §§ 1251–1387 (2006).

171. Pub. L. No. 92-532, 86 Stat. 1052 (codified as amended in scattered sections of 16 U.S.C. and 33 U.S.C.).

172. *See* Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

173. *Id.*

alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.'"[174] In other words, when the remedies provided by a particular statute are comprehensive, it may be inferred that Congress intended to preclude individuals from bringing § 1983 claims.

Both the FWPCA and the MPRSA set forth "quite comprehensive" enforcement schemes, including citizen-suit provisions that allow private citizens to sue for prospective relief, as well as notice provisions requiring plaintiffs to notify the Environmental Protection Agency, the State, and the alleged violator as a prerequisite to filing suit.[175] Because of the unusually elaborate enforcement provisions of the statutes, the *Sea Clammers* Court reasoned that parallel § 1983 claims would thwart congressional intent and thus held that § 1983 suits were precluded.

Many years after its decision in *Sea Clammers*, the Supreme Court rejected a plaintiff's attempt to assert a federal statutory right under § 1983 in *Rancho Palos Verdes v. Abrams*.[176] In *Rancho Palos Verdes*, the plaintiff filed suit seeking an injunction under the Communications Act of 1934, as added by the Telecommunications Act of 1996[177] (TCA) and sought damages and attorney's fees via §§ 1983 and 1988.[178] Like *Sea Clammers*, *Rancho Palos Verdes* also involved a plaintiff that used § 1983 to enforce rights conferred by a federal statutory scheme. The Court noted, "The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."[179] The TCA imposed limits on the authority of state and local governments to regulate wireless communications facilities.[180] Furthermore, under the TCA, the local government is required to provide a written decision, supported by substantial evidence, in response to requests for permits.[181] An individual may seek judicial review of the decision within thirty days of its issuance, and the court is required to hear and decide the case on an expedited basis.[182] The TCA further provides that a plaintiff may not be entitled to compensatory damages or attorney's fees.[183] For these reasons, the Court concluded that the TCA was a sufficiently comprehensive scheme, and Congress did not intend for the TCA to coexist with § 1983 claims.[184] Thus, the Court held the TCA was an exclusive remedy.[185]

174. *Id.* (quoting Mayerson v. Arizona, 507 F. Supp. 859, 864 (D. Ariz. 1981)).
175. *See Sea Clammers*, 453 U.S. at 6–7.
176. 544 U.S. 113 (2005).
177. Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 332(c)(7)(B)(v) (2006)).
178. *See Rancho Palos Verdes*, 544 U.S. at 118.
179. *Id.* at 121.
180. *See id.* at 115–16.
181. *See id.* at 116.
182. *See id.*
183. *See id.* at 122–23.
184. *See id.*
185. *See id.* at 127.

2. Preclusion of § 1983 Claims To Enforce Federal Constitutional Rights

While the plaintiffs in *Sea Clammers* and *Ranchos Palos Verdes* sought to enforce federal *statutory* rights via § 1983,[186] the Supreme Court has also confronted the issue of preclusion when plaintiffs use § 1983 to enforce federal *constitutional* rights.

The Supreme Court applied the implied preclusion doctrine for the first time in a case to enforce federal constitutional rights in *Smith v. Robinson*.[187] In *Smith*, the Supreme Court rejected a § 1983 claim when it inferred that Congress intended the Education for All Handicapped Children Act of 1975[188] (EHA) to provide an exclusive remedy. The plaintiff, an eight-year-old suffering from cerebral palsy and several other disabilities, claimed that he was denied the right to secure a free appropriate public education because of his disabilities.[189] The plaintiff sought relief under two statutes—the EHA and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978[190]—and under the Constitution.[191] The lower courts ruled for the plaintiff on his EHA claim, but because the EHA did not provide for attorney's fees, the plaintiff sought attorney's fees on the basis of his § 1983 claims.[192]

The Court recognized that the plaintiff's § 1983 claims were based on violations of constitutional rights, not alleged violations of the EHA.[193] However, the Court acknowledged, "The EHA is a comprehensive scheme . . . to aid the States in complying with their *constitutional obligations* to provide public education for handicapped children."[194] The *Smith* Court observed that the EHA's legislative history and provisions reflected that the statute was designed to address constitutional issues.[195] Specifically, the EHA stated that its purpose was "to ensure equal protection of the law"[196] and that during its enactment, it was the "'intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protec-

186. *See supra* notes 172–85 and accompanying text.

187. 468 U.S. 992 (1984); *see* Levinson, *supra* note 169, at 783 (noting that the Supreme Court took the implied congressional foreclosure doctrine "one step further" in *Smith* by applying it to constitutional claims).

188. 20 U.S.C. § 1400 (2006). The EHA was later modified and renamed the Individuals with Disabilities Act (IDEA). *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103, 1141–42.

189. *Smith*, 468 U.S. at 994–95.

190. 29 U.S.C. § 794 (2006).

191. *Smith*, 468 U.S. at 999–1000 (noting that the petitioners sought relief under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

192. *See id.* at 1003–05.

193. *See id.* at 1008–09.

194. *Id.* at 1009 (emphasis added).

195. *See id.* at 1010.

196. 20 U.S.C. § 1400(c)(6) (2006).

tion of the laws.'"[197] In this way, the EHA could be considered a statute intended to protect constitutional rights.

Furthermore, the Court concluded that "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."[198] Once again, the Court reiterated that the key consideration when assessing an issue of preclusion is "what Congress intended."[199] First, the Court interpreted the constitutional claims as too similar to the statutory claim under the EHA.[200] Also, the Court found it unbelievable that Congress would have created a comprehensive scheme in the EHA while leaving the door open to equal protection claims via § 1983.[201]

3. A Key Distinction in Preclusion Cases

The Supreme Court's most recent decision on implied preclusion doctrine, *Fitzgerald v. Barnstable School Committee*,[202] clarified the standard for finding preclusion of § 1983 claims by explicitly recognizing a key distinction among previous cases regarding preclusion.[203] In cases where the plaintiff's § 1983 claim alleges a violation of a right conferred by a statute, "evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[204] This may apply in a case where a litigant asserts a § 1983 claim to enforce rights created by the ADEA.

In contrast, when the plaintiff's § 1983 claim is based on a constitutional violation, "lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution."[205] Thus, if the rights and protections under the statute are different than those that exist under the Constitution, it is correct to infer that Congress did not intend to foreclose § 1983 suits.[206] This framework may apply in cases where the litigant asserts a § 1983 claim to enforce a right with an independent source in the Constitution.

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197. *Smith*, 468 U.S. at 1010 (quoting S. REP. NO. 94-168, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1437).
198. *Id.* at 1009.
199. *Id.* at 1012.
200. *See id.* at 1009.
201. *See id.* at 1011–12.
202. 555 U.S. 246 (2009).
203. *See* Timothy Davis & Kevin E. Smith, *Eradicating Student-Athlete Sexual Assault of Women: Section 1983 and Personal Liability Following* Fitzgerald v. Barnstable, 2009 MICH. ST. L. REV. 629, 640 (noting the *Fitzgerald* Court's recognition of the "dissimilarity between the rights and protections afforded under a statute and those afforded by the Constitution"); Martin A. Schwartz, *Supreme Court § 1983 Decisions—October 2008 Term*, 45 TULSA L. REV. 231, 241 (2009) ("The Court drew an important distinction between the enforcement of federal statutory rights under § 1983 and enforcement of federal constitutional rights.").
204. *Fitzgerald*, 555 U.S. at 251.
205. *Id.* at 252.
206. *See id.* at 252–55.

In reflecting on previous implied preclusion cases, including *Sea Clammers*, the Supreme Court recognized that it had "placed primary emphasis on the nature and extent of that statute's remedial scheme."[207] However, the *Fitzgerald* court further refined the implied preclusion doctrine by including a comparison of the rights and protections guaranteed under the Equal Protection Clause.[208] In this way, the *Fitzgerald* court held that the focus of the implied preclusion inquiry was not limited solely to the "nature and extent of that statute's remedial scheme"; rather, the "divergent coverage" of the statute in comparison to the constitutional claim is also part of the calculus.[209] Applying this test, the *Fitzgerald* court found that Congress did not intend for Title IX to preclude § 1983 claims because the protections of Title IX are in some ways broader and in other ways narrower than those guaranteed under the Equal Protection Clause.[210]

H. Presumption Against Implicit Statutory Repeals

The implied preclusion doctrine must function alongside another well-established principle—the presumption against implicit statutory repeals. Under this canon of statutory interpretation, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."[211] If there is no such affirmative showing, and the statutes may coexist together, a court is "not at liberty to pick and choose among congressional enactments."[212] Rather, the court should find that each statute remains in effect, and the later statute did not impliedly repeal the earlier statute.[213] In making this analysis, courts should look to the language and the legislative history of the later statute as an indication of congressional intent to repeal.[214] The presumption against implicit statutory repeals is not necessarily at odds with the implied preclusion doctrine. To harmonize these doctrines, a court must find "clear repugnancy" between the earlier and later statutes before concluding that Congress intended to preclude a previously enacted statute.[215]

II. THE CONFLICT OVER ADEA PRECLUSION OF § 1983 CLAIMS

Part II of this Note details the conflict between the U.S. Courts of Appeals and lower district courts regarding whether the ADEA is the exclusive remedy for age discrimination claims. Courts differ as to whether the legislative history and purpose of the ADEA weighs in favor of finding preclu-

207. *Id.* at 253.
208. *See id.* at 256.
209. *Id.* at 257–58.
210. *Id.* at 256.
211. Morton v. Mancari, 417 U.S. 535, 550 (1974).
212. *Id.* at 551.
213. *See id.*
214. *See id.* at 550.
215. United States v. Fausto, 484 U.S. 439, 452–53 (1988).

sion. This Part addresses each court's decision on the issue of ADEA exclusivity in turn.

A. Courts Finding That the ADEA Precludes § 1983 Claims

The First, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits have held that ADEA precludes equal protection–based age discrimination claims brought under § 1983. This section focuses on the analyses of the preclusion issue by these courts.

1. The Fourth Circuit: *Zombro v. Baltimore City Police Department*

In *Zombro v. Baltimore City Police Department*,[216] the Fourth Circuit held that the ADEA provides the exclusive remedy for age discrimination claims.[217] James Zombro, a forty-five year old police officer with the Baltimore City Police Department, sued his employer in federal court, alleging that the police department discriminated against him on the basis of his age when it transferred him to a job of lesser status.[218] Zombro brought a claim under § 1983 because more than six months had elapsed since his transfer,[219] well beyond the time limit for filing a charge with the EEOC.[220] This delay foreclosed the possibility of bringing suit under the ADEA, although Zombro's age discrimination claim otherwise would have fallen squarely within the scope of the statute's provisions. On appeal, the Fourth Circuit affirmed the lower court's holding in favor of the Police Department, but it reached this holding on different grounds. The Fourth Circuit held that Zombro could not bring a § 1983 claim for violation of his rights under the Equal Protection Clause because the ADEA is the exclusive remedy for age discrimination claims.[221]

The Fourth Circuit first described the ADEA's remedial framework that includes an administrative process through the EEOC.[222] According to the Fourth Circuit, this framework was "structured to facilitate and encourage compliance through an informal process of conciliation and mediation."[223] The Fourth Circuit was especially concerned that if plaintiffs could resort to § 1983 claims, the administrative process would be totally undermined.[224]

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216. 868 F.2d 1364 (4th Cir. 1989).
217. *See id.* at 1369.
218. *See id.* at 1365–66.
219. *See* Colleen Gale Tremi, Note, Zombro v. Baltimore City Police Department*: Pushing Plaintiffs Down the ADEA Path in Age Discrimination Suits*, 68 N.C. L. REV. 995, 996 & nn.12–13 (1990).
220. *See* 29 U.S.C. § 626(d)(1)(A) (2006) (requiring a charge alleging unlawful discrimination be filed with the EEOC "within 180 days after the alleged unlawful practice occurred" in order to bring a civil action).
221. *Zombro*, 868 F.2d at 1369.
222. *See id.* at 1366.
223. *Id.*
224. *See id.*

Applying the implied preclusion doctrine,[225] the Fourth Circuit found that the ADEA is such a "precisely drawn, detailed statute"[226] that it manifests congressional intent to preclude § 1983 claims.[227] Even though Zombro's § 1983 claim was wholly predicated on the violation of his constitutional rights, rather than a violation of rights created by the ADEA, this did not matter to the Fourth Circuit.[228] The court predicted that it was probably "unusual" for plaintiffs to bring claims of age discrimination via § 1983 as violations of their rights under the Equal Protection Clause,[229] but nevertheless, it found that the policy of precluding § 1983 claims when Congress has provided a comprehensive statutory scheme applies *with equal force* in cases where a plaintiff brings a wholly constitutional claim using § 1983.[230] According to the Fourth Circuit, a comprehensive statute should preclude § 1983 claims unless the legislative history and structure show intent to allow § 1983 claims to coexist with claims under the statute.[231]

Turning to the language and legislative history of the ADEA, the *Zombro* court concluded that neither the text nor the legislative history suggest congressional intent to allow § 1983 claims to coexist with claims under the statute.[232] According to the text of the ADEA, its provisions "shall be enforced in accordance with . . . section[] 216."[233] Section 216 is part of the FLSA,[234] a statute that has also been interpreted to be the exclusive remedy for rights it confers.[235] Additionally, the Fourth Circuit found it "implausible that Congress would have intended to preserve the private cause of action under § 1983 for age discrimination when that cause of action would severely undermine, if not debilitate, the enforcement mechanism created by Congress under the ADEA."[236]

The *Zombro* court also expressed particular concern over the effect of allowing § 1983 age discrimination claims to proceed against government employers.[237] Because government employers—especially a police department like the defendant in *Zombro*—must be given "wide[] latitude"[238] to manage their own affairs and dispatch and reassign employees as needed, the Fourth Circuit argued that allowing § 1983 claims against government

225. *See supra* notes 169–75 and accompanying text. This standard states that when a particular statute provides sufficiently comprehensive remedies, the comprehensiveness may suffice to demonstrate Congress's intent to preclude § 1983 claims as an alternative remedy.

226. *Zombro*, 868 F.2d at 1369.

227. *See id.* at 1368.

228. *See id.*

229. *Id.* at 1367. The fact that other plaintiffs have based their claims of age discrimination on the Constitution rather than the ADEA may call this assessment into doubt. *See infra* Parts II.A.ii–II.B.

230. *See Zombro*, 868 F.2d at 1368–69.

231. *See id.*

232. *See id.*

233. 29 U.S.C. § 626(b) (2006).

234. *Id.* §§ 201–219.

235. *See* Lerwill v. Inflight Motion Pictures, Inc., 343 F. Supp. 1027 (N.D. Cal. 1972).

236. *Zombro*, 868 F.2d at 1369.

237. *See id.* at 1369–70.

238. *See id.* at 1370 (citing Sampson v. Murray, 415 U.S. 61, 83 (1974)).

employers would be especially troublesome. Therefore, the Fourth Circuit concluded that "in the light of the existence of comprehensive ADEA remedies, the employer-employee relationship in this case—involving police discipline, morale and public safety—is a special factor that counsels hesitation in recognizing a constitutional cause of action absent affirmative contrary indications from Congress."[239]

Following this lengthy discussion of the exclusivity of the ADEA, the Fourth Circuit also held that "Zombro's claim as asserted under the Fourteenth Amendment, based upon alleged discriminatory transfer, [was] not justiciable."[240] The Fourth Circuit noted that the Supreme Court has explicitly stated that the elderly are not a suspect class in need of special protection that would necessitate "strict judicial scrutiny."[241] Absent discrimination based on race, sex, or an employee's exercise of his or her First Amendment rights, the *Zombro* court was not prepared to "intervene on constitutional grounds in the hiring, discharge, or promotion of public employees."[242]

2. The Ninth Circuit: *Ahlmeyer v. Nevada System of Higher Education*

After the Fourth Circuit's decision in *Zombro*, the Ninth Circuit also held that the ADEA is the exclusive remedy for age discrimination claims in *Ahlmeyer v. Nevada System of Higher Education*.[243] Plaintiff Linda Ahlmeyer sued her employer, the Nevada System of Higher Education, after she was denied certain privileges of employment.[244] In particular, Ahlmeyer, who was over forty years old, was denied an assistant and was not allowed to take classes during work time, unlike her younger coworkers.[245] Ahlmeyer also alleged that her employer punished her for actions for which younger employees were not reprimanded.[246] Ahlmeyer brought a claim under the ADEA in the district court, which was dismissed based on qualified immunity grounds.[247] In response, Ahlmeyer moved to amend her claim, instead asserting an age discrimination claim under § 1983.[248] The district court denied the motion to amend and entered an order dismissing her claims with prejudice.[249]

On appeal, the Ninth Circuit concluded that the ADEA precludes § 1983 claims. The Ninth Circuit first observed that all other circuit courts that considered the issue had, at that time, held that ADEA was the exclusive

239. *Zombro*, 868 F.2d at 1370.
240. *Id.* at 1371.
241. *Id.* at 1370 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976)).
242. *Zombro*, 868 F.2d at 1371 (quoting Clarke v. Whiting, 607 F.2d 634 (4th Cir. 1979)).
243. 555 F.3d 1051 (9th Cir. 2009).
244. *See id.* at 1054.
245. *See id.*
246. *See id.*
247. *See id.*
248. *See id.*
249. *See id.*

remedy for claims of age discrimination in the workplace.[250] Of those circuit court decisions, the Ninth Circuit found the *Zombro* decision especially persuasive.[251] Citing additional federal appellate court decisions that reached the same conclusion, the Ninth Circuit decided to follow in the path of its sister circuit courts and hold that the ADEA provides the exclusive remedy for age discrimination claims.[252]

The Ninth Circuit was therefore not persuaded by the reasoning of district courts, such as the court in *Mummelthie v. City of Mason City*.[253] There, the Northern District of Iowa rejected *Zombro* and held that the ADEA does not preclude § 1983 claims because of the presumption against implied preclusion and the distinction between applying implied preclusion when considering constitutional versus statutory claims.[254] Responding to the *Mummelthie* court's reliance on the presumption against implied preclusion, the Ninth Circuit concluded that the implied preclusion doctrine represents an exception to that presumption.[255] As to the *Mummelthie* court's distinction between applying the implied preclusion doctrine in the context of constitutional claims versus statutory claims, the Ninth Circuit responded that the implied preclusion doctrine applies when the constitutional claim and statutory claim are virtually identical.[256] In its application of the implied preclusion doctrine, the Ninth Circuit found that the ADEA represents the type of comprehensive remedial scheme that evidences Congress's intent for it to be an exclusive remedy for claims of age discrimination in the workplace.[257]

The Ninth Circuit also found the differences between Title VII and the ADEA significant enough to warrant the conclusion that the availability of § 1983 claims to enforce Title VII has no bearing on the ADEA.[258] Instead, the Ninth Circuit found that the remedial provisions of the ADEA are most relevant to the subject of preclusion.[259] The Ninth Circuit found it significant that the remedial provisions of the ADEA do not mirror Title VII. Instead, the ADEA's remedial provisions incorporate provisions of the FLSA, which does provide the exclusive remedy for claims arising under its provisions.[260] The ADEA's divergence from Title VII on the issue of remedies convinced the Ninth Circuit not to make § 1983 claims available to ADEA plaintiffs as they are available to Title VII plaintiffs.[261] Finally, the Ninth Circuit did not find it significant that aggrieved older workers asserting

250. *See id.* at 1056–57.
251. *See id.*
252. *See id.* at 1057.
253. 873 F. Supp. 1293 (N.D. Iowa 1995); *see infra* Part II.B.ii.1.
254. *Ahlmeyer*, 555 F.3d at 1057.
255. *See id.* at 1057–58.
256. *See id.* at 1058.
257. *See id.*
258. *See id.* at 1058–59.
259. *See id.* at 1059.
260. *See id.* at 1058–59.
261. *See id.* at 1059–69.

claims against state employers would not have a remedy in light of the Supreme Court's decision in *Kimel*.[262]

3. The First, Fifth, Tenth, and D.C. Circuits: Following Suit

In keeping with the Fourth Circuit's decision in *Zombro*, the First,[263] Fifth,[264] Tenth,[265] and D.C.[266] Circuits have also held that the ADEA is an exclusive remedy for age discrimination claims. These decisions, however, did little to enhance or refine the case law on the issue of ADEA exclusivity, as the courts in these decisions merely relied on *Zombro* without engaging in much independent analysis. For example, in *Chennareddy v. Bowsher*,[267] the D.C. Circuit assumed that the ADEA provides the exclusive remedy for age discrimination claims by citing *Zombro*.[268] The D.C. Circuit engaged in no analysis of its own regarding the issue of § 1983 preclusion, stating only, "It is undisputed that the ADEA provides the exclusive remedy for a federal employee who claims age discrimination."[269] Likewise, the Tenth Circuit in *Migneault* merely cited *Zombro* and *Lafleur* in support of this conclusion, citing "numerous, well-founded reasons," which the court declined to repeat and on which it did not elaborate.[270]

B. A New Circuit Split: Courts Finding That the ADEA Does Not Preclude § 1983 Claims

The Seventh Circuit, along with several district courts, have held that the ADEA does not preclude equal protection–based age discrimination claims brought under § 1983. This section focuses on the holdings of these courts.

1. The Seventh Circuit: *Levin v. Madigan*

Recently, in *Levin v. Madigan*,[271] the Seventh Circuit held that the ADEA is not the exclusive remedy for age discrimination and, therefore, does not preclude a claim under § 1983 for a violation of the Equal Protection Clause based on age discrimination in the workplace.[272]

Plaintiff Harvey N. Levin was employed as an Illinois assistant attorney general until his termination on May 12, 2006.[273] During his tenure, Levin

262. *See id.* at 1060 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2006)) (holding that the Eleventh Amendment bars claims under the ADEA against state actors).
263. Tapia-Tapia v. Potter, 322 F.3d 742, 745 (1st Cir. 2003).
264. Lafleur v. Tex. Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997).
265. Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998), *rev'd on other grounds sub nom.* Bd. of Regents of Univ. of N.M. v. Migneault, 528 U.S. 1110 (2000).
266. Chennareddy v. Bowsher, 935 F.2d 315, 318 (D.C. Cir. 1991).
267. 935 F.2d at 315.
268. *See id.* at 318.
269. *Id.*
270. *Migneault*, 158 F.3d at 1140.
271. 692 F.3d 607 (7th Cir. 2012).
272. *See id.* at 617.
273. *See id.* at 609.

consistently performed to his employer's satisfaction, as indicated by his yearly performance evaluations.[274] When he was terminated, however, his employer alleged that he displayed poor litigation skills and judgment, and that he socialized too much.[275] Levin was over sixty years of age when he was fired, and his employer subsequently replaced him with an attorney in her thirties.[276] Younger attorneys were also hired to replace two of Levin's colleagues, who were also over age forty.[277]

Levin sued the Office of the Illinois Attorney General, a state government organization, and his supervisors in their individual capacities, asserting claims of age discrimination under both the ADEA and the Equal Protection Clause by way of § 1983.[278] On appeal, the individual defendants asserted qualified immunity from damages for the equal protection claim and further asserted that the ADEA was the exclusive remedy for claims of age discrimination in employment.[279]

The Northern District of Illinois held that Levin was not an "employee" within the meaning of the ADEA.[280] The district court also went on to say that the ADEA did not foreclose Levin's § 1983 claim, and furthermore, Levin's employer was not entitled to qualified immunity on Levin's age discrimination claim under § 1983, because the individual defendants should have known that they were violating a clearly established constitutional right.[281] The district court so concluded because the Fourteenth Amendment clearly prohibits arbitrary age discrimination; therefore, qualified immunity was inapplicable.[282]

In deciding the issue of § 1983 preclusion raised on appeal, the Seventh Circuit first considered the applicable standard for finding preclusion of § 1983 claims.[283] While recognizing the implied preclusion doctrine,[284] the Seventh Circuit observed that the Supreme Court "does not 'lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federal right."[285] To determine whether a statutory scheme precludes a § 1983 equal protection claim, the Seventh Circuit concluded that "the most important consideration is congressional intent."[286] This may be construed from the statutory language, the legislative history, the nature and extent of the remedial scheme, and a comparison of the rights and protections afforded by the statutory scheme versus a § 1983 claim.[287]

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274. *See id.*
275. *See id.*
276. *See id.*
277. *See id.*
278. *See id.*
279. *See id.*
280. *See id.* at 610.
281. *See id.*
282. *See id.*
283. *See id.* at 611–17.
284. *See* Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).
285. *Levin*, 692 F.3d at 613 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).
286. *Id.* at 615.
287. *See id.*

The Seventh Circuit highlighted a critical difference between two types of Supreme Court cases analyzing the implied preclusion doctrine; it carefully distinguished those cases where the plaintiff brings a § 1983 claim to enforce a right under the statute in question from other cases where a plaintiff uses § 1983 to enforce independently sourced rights, such as those arising under the Constitution.[288]

Turning to the issue of whether the ADEA precludes a § 1983 claim, the Seventh Circuit acknowledged that all other circuit courts that had addressed the issue of § 1983 preclusion held that the ADEA is the exclusive remedy for age discrimination claims.[289] Recognizing that this was "admittedly a close call, especially in light of the conflicting decisions from our sister circuits," the Seventh Circuit nevertheless held that the ADEA is not the exclusive remedy.[290]

The Seventh Circuit's first reason for this conclusion was that "[n]othing in the text of the ADEA expressly precludes a § 1983 claim or addresses constitutional rights."[291] The Seventh Circuit interpreted congressional silence on preclusion not as an indication of exclusivity, as the *Zombro* court did, but rather as evidence that Congress perhaps did not even consider the issue of exclusivity.[292] To the Seventh Circuit, congressional silence did not reveal that Congress intended for the ADEA to preclude such constitutional age discrimination claims.[293] The Seventh Circuit added that a finding of preclusion requires "more . . . than a comprehensive statutory scheme."[294] Therefore, the ADEA's remedial scheme, though comprehensive, was not enough for the Seventh Circuit to imply preclusion in the absence of a clear congressional indication.[295] This approach followed the Supreme Court's admonition that "'repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.'"[296]

The Seventh Circuit also found it significant that the rights and protections provided by the ADEA are not the same as those afforded by an equal protection claim under § 1983.[297] The Seventh Circuit distinguished prior cases finding preclusion of § 1983 claims on the basis that the statutory schemes at issue "were specifically designed to address constitutional issues," whereas the ADEA does not provide a remedy for constitutional rights and only enforces rights created by the ADEA itself.[298] Moreover, a

288. *See id.* at 612 ("While the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes* sought to assert federal *statutory* rights under § 1983, two other Supreme Court cases have examined whether a plaintiff is precluded from asserting *constitutional* rights under § 1983 when a remedial statutory scheme also exists.").
289. *See id.* at 616.
290. *Id.* at 617.
291. *Id.*
292. *See id.* at 617–18.
293. *See id.*
294. *Id.* at 619.
295. *See id.*
296. *Id.* at 618 (quoting Hui v. Castaneda, 559 U.S. 799 (2010)).
297. *See id.* at 621.
298. *Id.*

plaintiff may only sue the employer, employment agency, or labor organization under the ADEA.[299] By contrast, under § 1983, a plaintiff may sue a governmental organization, as well as *individuals*, for depriving him or her of a constitutional right.[300] Additionally, the ADEA prohibits certain individuals for bringing a claim under the statute; specifically, elected officials, law enforcement officers, or firefighters cannot bring ADEA claims.[301] In comparison, § 1983 has no comparable limits on claims by certain individuals.[302] Finally, the Seventh Circuit noted that state employees have no damages remedy under the ADEA because damages claims are barred by the Eleventh Amendment; therefore, preclusion of § 1983 claims would leave state employees without a federal damages remedy.[303]

Based on the foregoing, the Seventh Circuit concluded that Levin's § 1983 equal protection claim was not foreclosed by the ADEA. Turning then to the issue of qualified immunity, the Seventh Circuit held that age discrimination is a clearly established violation of the Equal Protection Clause under *Kimel*. Therefore, the individual defendants, as state actors, were not entitled to qualified immunity.[304]

2. Northern District of Iowa: *Mummelthie v. City of Mason City*

In *Mummelthie*,[305] the Northern District of Iowa[306] held that the ADEA does not preclude § 1983 claims for age discrimination.[307] The City of Mason City, Iowa, had employed plaintiff Carol A. Mummelthie, aged fifty-five, as a clerk and word processor operator.[308] Mummelthie sued her employer for its failure to promote her to the position of Deputy City Clerk, a decision she claimed was motivated by discrimination due to her age.[309] Mummelthie did not timely file a claim with the EEOC, one of the preconditions for suit under the ADEA. As a result, she brought a § 1983 claim alleging age discrimination in violation of the Equal Protection Clause.[310]

The *Mummelthie* court acknowledged that "the great weight of recent authority" had held that the ADEA is the exclusive remedy for age discrimination in employment.[311] The court did find, however, that there were flaws in the Fourth Circuit's reasoning in *Zombro*, the leading case of those finding preclusion.[312] Specifically, the court said, "Although the court in

299. *See id.* (citing 29 U.S.C. § 623 (2006)).
300. *See id.*
301. *See id.* (citing 29 U.S.C. §§ 623(j), 630(f)).
302. *See id.*
303. *See id.*
304. *See id.* at 622.
305. 873 F. Supp. 1293 (N.D. Iowa 1995).
306. The Northern District of Iowa sits in the Eighth Circuit.
307. *Mummelthie*, 873 F. Supp. at 1322–23.
308. *See id.* at 1308–09.
309. *See id.* at 1309–10.
310. *See id.* at 1312.
311. *Id.* at 1317.
312. *See id.* at 1317–19.

Zombro considered legislative intent in arriving at its ruling, it did so via the '*Sea Clammers* doctrine,' inferring legislative intent based on its examination of the comprehensiveness of the ADEA, and not by examining the actual legislative history of the act."[313] This was a fundamental flaw according to the court in *Mummelthie*, so it engaged in its own analysis of the language and legislative history of the ADEA.[314] To the *Mummelthie* court, the language of the ADEA does not suggest in any way that Congress intended to preclude claims for relief under § 1983.[315]

The *Mummlethie* court's holding was also based in part on its comparison of the ADEA to Title VII, which does not preclude § 1983 claims.[316] For example, both statutes were amended to give state and local government employees causes of action.[317] During a hearing preceding the 1972 amendment to Title VII, Senator Lloyd Bentsen stated that "those principles underlying the provisions in the EEOC bill (extending Title VII to state and local employees) are directly applicable to the Age Discrimination in Employment Act."[318] According to the *Mummelthie* court, Senator Bentsen's reference to "principles" included the idea that § 1983 claims would be retained after the passage of the 1972 amendment to Title VII.[319] Because the Supreme Court and other courts relied on Senator Bentsen's comments as evidence of congressional intent in enacting the ADEA amendments two years later in 1974, the *Mummelthie* court concluded that the natural inference was that § 1983 claims should be retained under the ADEA as well.[320]

3. District of Nebraska: *Mustafa v. Nebraska Department of Correctional Services*

In *Mustafa v. Nebraska Department of Correctional Services*,[321] plaintiff Vernon Mustafa, aged approximately fifty, claimed his employer discriminated against him based on his age in violation of the Equal Protection Clause of the Fourteenth Amendment.[322] Mustafa also claimed his employer engaged in racial and religious discrimination and retaliation.[323] Instead of relying on the ADEA, Mustafa brought his claim for age discrimination under § 1983.[324] In its analysis of the exclusivity of the ADEA, the District of Nebraska[325] noted that finding the ADEA to preclude § 1983

313. *Id.* at 1319.
314. *See id.* at 1323–29.
315. *See id.* at 1325.
316. *See id.* at 1320–21.
317. *See id.* at 1325 (citing 42 U.S.C. § 2000e (2006); Pub. L. No. 93-259, § 28, 88 Stat. 74 (codified at 29 U.S.C. § 630(b))).
318. *Mummelthie*, 873 F. Supp. at 1325 (quoting 118 CONG. REC. 15,895 (1972)).
319. *See id.* at 1325.
320. *See id.* at 1325–36 (citing Lehman v. Nakshian, 453 U.S. 156, 166–67 nn.14–15 (1981); Kelly v. Wauconda Park Dist., 801 F.2d 269, 271 (7th Cir. 1986); EEOC v. Elrod, 674 F.2d 601, 607 (7th Cir. 1972)).
321. 196 F. Supp. 2d 945 (D. Neb. 2002).
322. *See id.* at 949–50.
323. *See id.* at 950.
324. *See id.* at 955.
325. The District of Nebraska sits in the Eighth Circuit.

claims would have the practical effect of eliminating all age discrimination claims against state actors, because the Eleventh Amendment bars claims under the ADEA against states.[326] Aggrieved state employees claiming age discrimination against a state actor would therefore suffer from a "remedial vacuum," as they would be left without an available federal forum.[327] The *Mustafa* court found the 1974 amendments to the ADEA significant, as extending the ADEA's coverage to state and local governments showed congressional intent to provide a remedy for age discrimination against state employers.[328] Finally, the *Mustafa* court relied on the presumption against implied repeal to reach its conclusion.[329]

4. Southern District of New York: *Shapiro v. New York City Department of Education*

In *Shapiro v. New York City Department of Education*,[330] the Southern District of New York[331] decided against finding preclusion of § 1983 claims by the ADEA.[332] Previously, the Second Circuit had declined to hold that Title VII preempted a § 1983 claim for gender discrimination in *Saulpaugh v. Monroe Community Hospital*.[333] The *Shapiro* court saw no reason to treat the ADEA, a sister statute of Title VII, differently than Title VII in this respect.[334] Thus, the *Shapiro* court concluded that "the weight of authority in the Second Circuit favors the position that the ADEA does not preempt claims under § 1983 for age discrimination."[335]

III. AGAINST PRECLUSION: ADOPTING THE APPROACH OF THE SEVENTH CIRCUIT

When the Supreme Court attempts to resolve this circuit split in its upcoming term, it should find that the ADEA is not the exclusive remedy for age discrimination, as the Seventh Circuit found in *Levin*. Part III examines the implied preclusion doctrine in the wake of *Fitzgerald*,[336] followed by an analysis of the divergent rights and protections guaranteed under the ADEA and the Constitution. This Part then contends that the text and legislative history of the ADEA, along with the presumption against implied statutory repeals, weigh against a finding that the ADEA is the exclusive remedy for age discrimination claims. Finally, this Part argues that Title VII is more useful as a comparison than the FLSA on the issue of preclusion, and this

326. *See Mustafa*, 196 F. Supp. 2d at 955.
327. *Id.* at 956.
328. *See id.*
329. *See id.*
330. 561 F. Supp. 2d 413 (S.D.N.Y. 2008).
331. The Southern District of New York sits in the Second Circuit.
332. *See Shapiro*, 561 F. Supp. 2d at 419–20.
333. 4 F.3d 134, 143–44 (2d Cir. 1993).
334. *See Shapiro*, 561 F. Supp. 2d at 420.
335. *Id.* at 420 (quoting Donlon v. Bd. of Educ., No. 06-CV-6027T, 2007 WL 4553932, at *3 n.1 (W.D.N.Y. Dec. 20, 2007)).
336. *See supra* notes 166–207 and accompanying text.

comparison opposes a finding of exclusivity, regardless of arguable differences between the nature of age and race discrimination.

A. The Impact of Fitzgerald *Calls into Doubt Circuit Court Decisions Upholding ADEA Exclusivity*

The Supreme Court's most recent decision on the implied preclusion doctrine, *Fitzgerald v. Barnstable School Committee*, represents a significant development in the implied preclusion doctrine.[337] For the first time, the Supreme Court explicitly recognized a key distinction among claims brought under § 1983: those that are based on rights conferred under a statutory scheme, versus those that are based on rights conferred under the Constitution.[338] Furthermore, the Court in *Fitzgerald* expanded the exclusivity inquiry. What was once a one-sided focus on the extent of a statute's remedial scheme was broadened to include an assessment of the instances where the protections under the statute and under the Equal Protection Clause diverge.[339]

The *Zombro* decision predates *Fitzgerald* by two decades.[340] When the Fourth Circuit reached its conclusion in *Zombro* that the ADEA is the exclusive remedy for age discrimination claims, it applied the implied preclusion doctrine, as it existed at that time.[341] In other words, the Fourth Circuit only had the benefit of *Sea Clammers* and *Smith*, in which the Court did not highlight nor explain this key distinction.[342] The Fourth Circuit's failure to meaningfully confront this distinction represents a significant error. In fact, the Fourth Circuit simply dismissed the argument that such a distinction was meaningful, noting instead that constitutionally based age discrimination claims under § 1983 were probably "unusual."[343] In light of the number of cases raising this issue since the *Zombro* decision,[344] this characterization has not proven accurate.

Had the Fourth Circuit, or any of the circuit courts following its lead, evaluated the issue of ADEA exclusivity in the wake of *Fitzgerald*, it is likely that these courts would have agreed with the Seventh Circuit in *Levin*,[345] and would have concluded that the ADEA does not preclude age discrimination claims brought via § 1983.

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337. *See supra* Part I.G.iii.
338. *See supra* notes 203–06 and accompanying text.
339. *See supra* notes 207–10 and accompanying text.
340. The Fourth Circuit decided *Zombro* in 1989, while the Supreme Court handed down the *Fitzgerald* decision in 2009. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009); Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1367 (4th Cir. 1989).
341. *See supra* notes 226–31 and accompanying text.
342. *See supra* notes 187–201 and accompanying text.
343. *See Zombro*, 868 F.2d at 1367.
344. *See supra* Part II.
345. *See supra* notes 283–304 and accompanying text.

1. Divergence: A Comparison of Rights and Protections Weighs Against ADEA Exclusivity

Fitzgerald also advanced the implied preclusion doctrine by adding that an appropriate measure of exclusivity involves a comparison between the rights and protections under a statutory scheme and those conferred under the Constitution.[346] In a comparison between a claim brought under ADEA and a § 1983 equal protection claim, the rights and remedies diverge.[347] For example, under the ADEA, an aggrieved older worker may only sue his employer, employment agency, or a labor organization.[348] If, however, the worker brings a § 1983 suit, the worker may sue any individual, so long as that individual caused the deprivation of that worker's federally guaranteed right while acting under the color of state law.[349]

Additionally, claims under the ADEA are limited in other ways that § 1983 claims are not. For example, the ADEA prohibits an individual younger than forty years of age from bringing reverse age discrimination claims.[350] Also, certain individuals are barred from bringing a claim under the ADEA, including elected officials, certain members of elected officials' staff, law enforcement officers, or firefighters.[351] And state employees, such as Levin, would be left in a "remedial vacuum" under the ADEA because of Eleventh Amendment immunity for state employers.[352] Section 1983 claims are not similarly limited and provide a federal damages remedy to state employees who would be otherwise without a remedy.

In many significant ways, therefore, claims allowed under the ADEA diverge from those framed as § 1983 equal protection claims. The principle elucidated in *Fitzgerald*, that divergence suggests congressional intent not to preclude § 1983 claims, applies with full force in the context of the ADEA as well. Therefore, the ADEA should not be interpreted to preclude constitutional age discrimination claims under § 1983.

2. The Language and Legislative History of the ADEA Do Not Compel a Finding of Preclusion

Congressional intent has uniformly been the key inquiry in deciding the issue of a statute's exclusivity.[353] To find preclusion, the ADEA should reflect express congressional intent to preclude § 1983 claims or, alternatively, be framed in such a way that it could not coexist with a § 1983 claim.[354] However, the text of the ADEA is silent on the issue of constitutional rights

346. *See supra* notes 202–07 and accompanying text.
347. *See supra* notes 297–303 and accompanying text.
348. *See supra* note 299 and accompanying text.
349. *See supra* note 302 and accompanying text.
350. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 593 (2004).
351. *See* Levin v. Madigan, 692 F.3d 607, 621 (7th Cir. 2012).
352. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000); *supra* notes 158–63 and accompanying text.
353. *See supra* note 207 and accompanying text.
354. *See supra* notes 173–74 and accompanying text.

under the Equal Protection Clause of the Fourteenth Amendment.[355] Nothing in the text of the ADEA expressly forecloses the possibility of bringing a § 1983 claim, nor does the ADEA address constitutional rights.[356]

The legislative history of the ADEA equally lacks persuasive evidence of exclusivity. First, there is no explicit legislative history indicating congressional intent to preclude § 1983 claims. While the *Zombro* court and its progeny have interpreted the lack of legislative history as congressional intent *not* to allow § 1983 claims,[357] this is not persuasive. Silence on the issue of § 1983 or constitutional rights does not indicate that Congress ever considered the issue of preclusion. At the time of the ADEA's enactment, however, the constitutional right to be free from age discrimination by state actors was recognized and enforced.[358] Congress did not express any disapproval of such constitutional challenges. In such circumstances, if Congress had intended the ADEA to be the exclusive remedy for age discrimination claims, one might expect that Congress would have explicitly addressed the issue of preclusion. Moreover, knowing that litigants were bringing equal protection–based age discrimination claims under § 1983, Congress amended the ADEA to expand its coverage. From this, it can be inferred that Congress was seeking to make effective remedies for age discrimination claims more readily available. Removing a federal remedy for age discrimination runs counter to that purpose.

B. The Presumption Against Repeal of Legislation by Implication Disfavors Finding ADEA Exclusivity

The Supreme Court stated in *Wright v. City of Roanoke Redevelopment and Housing Authority*[359] that it would not "'lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right."[360] The Fourth Circuit's application of the implied preclusion doctrine in *Zombro* is in tension with this statement as well as a well-established principle, the presumption against implicit statutory repeals.[361] In *Zombro*, the Fourth Circuit's application of the implied preclusion doctrine is predicated on the concept that Congress's enactment of a statute containing a comprehensive remedial scheme compels the conclusion that Congress repealed all existing remedies for violations of rights similar to those created under the statute.[362] The Fourth Circuit reached this conclusion despite the absence of any *explicit* showing of such intent,[363] as required by the presumption against repeals of legislation by implication.[364] The issue remains whether "the earlier and later statutes are

355. *See supra* Part I.B.iv.
356. *See supra* Part I.B.iv.
357. *See supra* Part II.A.
358. *See supra* notes 152–57 and accompanying text.
359. 479 U.S. 418 (1987).
360. *Id.* at 423–24 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).
361. *See supra* notes 211–16 and accompanying text.
362. *See supra* notes 225–31 and accompanying text.
363. *See supra* notes 232–36 and accompanying text.
364. *See supra* notes 212–15 and accompanying text.

irreconcilable."[365] An ADEA claim and a § 1983 equal protection–based age discrimination claim are not irreconcilable, as a comparison of the rights and protections provided under each are not the same.[366] Thus, the ADEA and § 1983 may coexist, and invoking the implied preclusion doctrine to implicitly repeal § 1983 claims is inappropriate.

C. Title VII Analogy: Interpretations of Title VII Should Apply to the ADEA

A finding that the ADEA is not the exclusive remedy has support not just in the wake of the *Fitzgerald* holding, but also by analogy to its "sister statute," Title VII.[367] Although the ADEA imports some provisions of the FLSA into its remedial scheme,[368] courts should look to Title VII rather than the FLSA when interpreting the exclusivity of the ADEA. Title VII has been considered "the legislation which most closely parallels the ADEA."[369] The analogy between Title VII and the ADEA is well-recognized as the statutes share important similarities in their overall purposes, substantive provisions, and their legislative histories. Because the legislative history is a key part of applying the implied preclusion doctrine, the logical conclusion would be to analogize the ADEA to the statute whose legislative history is most pertinent. Title VII has been interpreted as coexisting with similar, yet alternative, § 1983 claims, so the same interpretation should apply to the ADEA.

This conclusion is further supported by an examination of the weaknesses of the analogy between the ADEA and the FLSA in the context of the preclusion issue. As the Seventh Circuit stated in *Kelly v. Wauconda Park District*,[370] "the connection of the ADEA amendment to the legislation enacting FLSA amendments was largely fortuitous."[371] Cases concerning FLSA exclusivity only hold that the FLSA is the sole means of vindicating rights conferred under the FLSA.[372] Unlike Title VII, the FLSA does not purport to create a right under the statute that was previously guaranteed by the Constitution.[373] As shown in *Fitzgerald*, the distinction between § 1983 claims to enforce federal statutory rights and those brought to enforce federal constitutional rights is significant.[374] Therefore, applying the preclusion analysis of the FLSA, a statute for which there is no corresponding or similar constitutional right, is illogical. Once again, the ADEA should

365. Morton v. Mancari, 417 U.S. 535, 550 (1974) (citing Georgia v. Penn. R.R. Co., 324 U.S. 439, 456–57 (1945)).
366. *See supra* notes 297–303 and accompanying text.
367. *See supra* notes 115–21 and accompanying text.
368. *See supra* notes 104–08 and accompanying text.
369. Mummelthie v. City of Mason City, 873 F. Supp. 1293, 1324 (N.D. Iowa 1995) (quoting EEOC v. Elrod, 674 F.2d 601, 607 (7th Cir. 1972)).
370. 801 F.2d 269 (7th Cir. 1986).
371. *Id.* at 271 n.2 (quoting *Elrod*, 614 F.2d at 610).
372. *See supra* notes 109–11 and accompanying text.
373. *See supra* note 110 and accompanying text.
374. *See supra* notes 202–05 and accompanying text.

therefore be interpreted by analogy to Title VII, its "sister statute" for which there is a corresponding constitutional right.

D. Making Sense of the Analogy Between Race Discrimination and Age Discrimination in the Context of Preclusion

Even if one accepts the similarities between Title VII and the ADEA, the issue remains that the classes protected under the statutes are not interchangeable, and differences exist when comparing the nature of race discrimination and the nature of age discrimination.[375] Because race discrimination and age discrimination are not necessarily interchangeable, one may question whether this compels the conclusion that the ADEA must be treated differently than Title VII on the issue of exclusivity.

Even assuming that race and age discrimination are not interchangeable, a comparison of the treatment of race and age as equal protection claims and their effect on the statutory schemes gives weight to the argument that the ADEA should not be interpreted to preclude § 1983 claims. When a litigant brings a claim under the Equal Protection Clause to contest a policy of racial discrimination, the reviewing court must use strict scrutiny, the highest standard of review.[376] A claim of race discrimination in employment as an equal protection claim would likely be very attractive to litigants because strict scrutiny is a very exacting standard of review. The racially discriminatory conduct would be unlikely to survive strict scrutiny analysis. Despite the attractiveness of bypassing the enforcement mechanisms provided by Title VII, Congress was evidently willing to tolerate that risk which may undermine Title VII's statutory scheme.[377]

In contrast, age discrimination is subject to only rational basis review, the lowest standard of review.[378] Given that rational basis review is much less stringent than strict scrutiny, it is unlikely that litigants alleging an equal protection–based age discrimination claim would be successful. The fact that age is not a suspect class and triggers only rational basis review means that equal protection claims for age discrimination present little threat to the statutory scheme of the ADEA. This perceived threat is a common thread running throughout the decisions that conclude that the ADEA is an exclusive remedy,[379] but the comparison between race and age reveals that this fear is likely overstated.

CONCLUSION

There is a compelling need to enforce fully Congress's intent to eliminate age discrimination in the workplace in light of the increased number of age discrimination charges with the EEOC and the increasing number of older

375. *See supra* notes 93–99 and accompanying text.
376. *See supra* notes 140–43 and accompanying text.
377. *See supra* notes 100–03 and accompanying text.
378. *See supra* notes 145–47 and accompanying text.
379. *See, e.g.*, *supra* note 224 and accompanying text.

men and women in the workforce.[380] An alternative holding would create a "remedial vacuum"[381] for many state employees who would be left without a federal damages remedy in light of the Supreme Court's holding in *Kimel* that the ADEA does not provide an individual damages cause of action for a state employee.[382] Notably, the *Zombro* decision, along with most of the other circuit court opinions finding that the ADEA is an exclusive remedy, predate *Kimel*.[383] The need to close that remedial gap is especially heightened in light of the *Kimel* decision and could not have factored into the reasoning of those courts that ruled that the ADEA is an exclusive remedy prior to *Kimel*. Armed with awareness of the gap created by *Kimel*, the Supreme Court should elect to follow the Seventh Circuit's approach in *Levin*.

In a more general sense, courts should use caution when reviewing whether a statutory scheme is exclusive and precludes § 1983 claims. Limiting the use of § 1983 claims seems counter to its purpose of protecting newly expanded civil rights in the Reconstruction era.[384] The significance of § 1983 as an important safeguard of fundamental constitutional rights continues to be recognized, as its continued prominence in civil litigation suggests. Finding preclusion of § 1983 by implication curtails the statute's ability to further that purpose and may have ramifications for its applicability in other areas of fundamental rights. This is a consequence that courts should weigh heavily and should not reach by implication.

380. *See supra* Part I.A.
381. *See supra* note 165 and accompanying text.
382. *See supra* notes 161–65 and accompanying text.
383. *See supra* notes 161–65 and accompanying text.
384. *See supra* notes 115–21 and accompanying text.