No Country for Old Men?: The Non-Preclusive Effect of the Age Discrimination in Employment Act on § 1983 Age Discrimination Claims

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NO COUNTRY FOR OLD MEN?:
THE NON-PRECLUSIVE EFFECT OF THE
AGE DISCRIMINATION IN EMPLOYMENT
ACT ON § 1983 AGE DISCRIMINATION
CLAIMS

LAUREN TAURO†

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INTRODUCTION

The nation’s population is aging.1 Between 2000 and 2010, the population of Americans aged forty-five to sixty-four years grew at a rate of 31.5%, and the population of Americans aged sixty-five years and older grew at a rate of 15.1%.2 Government projections say there will be about 97.8 million Americans who are fifty-five and older by 2020.3 As the baby boom population continues to age, employed Americans continue to age. Between 2000 and 2010, the number of employed Americans aged fifty-five and older increased from 18.7 million to 30.0 million.4 Given this increase in older Americans, it is not surprising that claims of age discrimination in employment have been on the rise. In 2011, the U.S. Equal Employment Opportunity Commission (“EEOC”) reported 23,465 charges of age discrimination, a significant increase from the 16,008 charges the EEOC reported in 2000.5 Due to the rising number of Americans aged sixty-five

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2 Id.
and older in the work force, it is pertinent now, more than ever, to understand the structure and limits of age discrimination litigation.

Age discrimination by government actors is regulated by the U.S. Constitution's Equal Protection Clause contained in the Fourteenth Amendment. The U.S. Supreme Court has interpreted the Equal Protection Clause to prohibit government actors from engaging in discrimination based on age. Section 1983 of the Civil Rights Act of 1871 ("§ 1983") is one vehicle for vindicating constitutional rights. In 1967, Congress enacted the Age Discrimination in Employment Act ("ADEA") to prohibit arbitrary age discrimination in employment. Potentially, an aggrieved plaintiff could bring claims alleging age discrimination in employment under both § 1983 and the ADEA. Until recently, every U.S. Court of Appeals faced with a § 1983 equal protection age discrimination in employment claim had held that the ADEA is the exclusive remedy for age discrimination in employment, preventing plaintiffs from bringing § 1983 suits.

District courts located in circuits where this issue has not been decided by a Court of Appeals, however, have not reached the same definitive conclusion.

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7 See Kimel, 528 U.S. at 63–64; Murgia, 427 U.S. at 313.
10 Levin v. Madigan, 692 F.3d 607, 609 (7th Cir. 2012) (holding that the ADEA is not the exclusive remedy for violations of age discrimination), cert. dismissed, 134 S. Ct. 2 (2013) (per curiam).
12 See Levin, 692 F.3d at 621–22; Shapiro v. N.Y.C. Dep't of Educ., 561 F. Supp. 2d 413, 420 (S.D.N.Y. 2008) (stating that the weight of authority in the Second Circuit holds that the ADEA does not preclude a § 1983 claim), aff'd, 376 F. App'x 82 (2d Cir. 2010), aff'd in part, vacated in part, 369 F. App'x 232 (2d Cir. 2010); cf. Kelley v. White, No. 5:10CV00288, 2011 U.S. Dist. LEXIS 108092, at *8 (E.D. Ark. Sept. 15, 2011) (holding that the ADEA is the exclusive remedy for age discrimination claims).
On August 17, 2012, the U.S. Court of Appeals for the Seventh Circuit created a split among the Courts of Appeals with its decision in Levin v. Madigan. In Levin, plaintiff Harvey Levin was fired at the age of sixty-two from his position as an Illinois Senior Assistant Attorney General and was replaced by a female attorney in her thirties. Levin asserted claims of age discrimination under both the ADEA and § 1983 in the U.S. District Court for the Northern District of Illinois. On appeal, the Seventh Circuit held that Levin’s § 1983 age discrimination claim was not precluded by the ADEA. The court reasoned that the ADEA’s lack of legislative history was insufficient to conclude that Congress intended for the ADEA to preclude § 1983 constitutional claims. The court also determined that the divergent rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim were an indication that Congress did not intend for the ADEA to be the exclusive remedy for age discrimination in employment.

Defendant Lisa Madigan filed a petition for a writ of certiorari to the U.S. Supreme Court on January 14, 2013. The Court granted the petition on March 18, 2013. The Supreme Court heard oral arguments on the case on October 7, 2013, which was the opening day of the Supreme Court’s 2013–2014 term. After what was said to be “[a] bad way to open a [t]erm,” the Supreme Court issued a per curiam opinion on October 15, 2013 dismissing the writ of certiorari as improvidently granted. Therefore, the Supreme Court has yet to address the issues presented in this Note.

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13 Levin, 692 F.3d 607.
14 Id. at 609.
15 Id.
16 Id. at 621–22.
17 Id. at 617.
18 Id.
22 Id.
This Note argues that the ADEA should not be interpreted to preclude § 1983 constitutional claims for age discrimination in employment. Part I of this Note discusses the history and development of the statutory schemes that provide protection for employees against age discrimination in the workplace: § 1983 of the Civil Rights Act and the ADEA. Part II reviews relevant case law explaining the arguments for and against § 1983 preclusion to illustrate the interaction between § 1983 and the ADEA. Finally, Part III provides an equitable approach for courts to use to analyze § 1983 claims for age discrimination in employment in light of the ADEA. First, courts should compare the rights and protections afforded under the ADEA with the constitutional right at stake. Second, courts should look to the ADEA's remedial scheme to clarify which rights it seeks to protect. Although some courts have concluded that the ADEA does not preclude § 1983 claims, no court has utilized an analysis that fully recognizes the constitutional right at stake: equal protection from employment discrimination based on age.

I. FEDERAL REMEDIES FOR AGE DISCRIMINATION

This Part sets forth the two federal statutes that can be used to remedy age discrimination in employment. Section A reviews the origins and limitations of § 1983 of the Civil Rights Act and, in doing so, demonstrates the applicability of § 1983 to age discrimination in employment claims. Section B reviews the origins and limitations of the ADEA.

A. § 1983 of the Civil Rights Act

After the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the U.S. Constitution. The Fourteenth Amendment, which provides Americans with due process and equal protection of the laws, grants Congress the power to enforce its provisions through appropriate legislation. However, Congress's Fourteenth Amendment enforcement power is remedial: It must be used in response to a deprivation of the rights granted under the Amendment. Through its enforcement power, Congress enacted the Civil Rights Act of 1871, the

25 U.S. CONST. amend. XIV, §§ 1, 5.
original version of 42 U.S.C. § 1983.27 Section 1 of the Act created a private right of action for persons who were denied a constitutional right "under color of any law, statute, ordinance, regulation, custom, or usage of any State."28 The Civil Rights Act of 1871 was enacted in response to several southern states continuing to deny African Americans many legal rights.29 Originally, section 1 did not mention rights protected by federal law.30 In 1874, however, Congress added the phrase "and laws" to section 1 of the Civil Rights Act of 1871.31

The 1874 revision to section 1 is the basis for the current 42 U.S.C. § 1983, which provides a remedy in law or equity against any person acting under color of state law to deprive any other person within the jurisdiction of the United States "of any rights, privileges, or immunities secured by the Constitution and laws."32 Section 1983 does not create any substantive rights for litigants.33 Rather, it is a vehicle to redress the deprivation of federally protected rights.34 These rights can derive from either the U.S. Constitution or a federal statute.35


Federal lawsuits that allege violations of the Constitution by state and local officials can be asserted under § 1983, which acts as a vehicle for enforcing constitutional rights.36 The Fourteenth

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30 Mitchum, 407 U.S. at 238.


33 Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979); Chun, supra note 29, at 466.

34 Baker, 443 U.S. at 140.

35 Chun, supra note 29, at 466.

Amendment, for example, sets mandatory standards for state and local officials, but it does not expressly authorize a remedy for a violation of its provisions. Section 1983 plays the critical role of vindicating violations of constitutional rights, including violations of the Fourteenth Amendment. Since § 1983 does not itself create any substantive rights, the Supreme Court's recognition of individual constitutionally protected rights shapes the scope of § 1983. A very broad range of constitutional rights could be enforced under § 1983 if plaintiffs can demonstrate that: (1) they have been deprived of a federal constitutional right, and (2) the person who deprived them of that right acted under color of state.

Claims alleging age discrimination are enforceable under § 1983. In Massachusetts Board of Retirement v. Murgia, the Supreme Court held that the Equal Protection Clause prohibits state actors from arbitrarily discriminating against individuals based on age. Arbitrary age discrimination by a state occurs when a state's age classification does not further any identifiable purpose. In other words, an arbitrary age discrimination claim can be brought under § 1983 as long as the violation occurs as a result of state action because such age discrimination violates equal protection.

However, § 1983 is not without its limits; even though the Supreme Court recognizes that a constitutional right exists, a plaintiff may be barred from enforcing that constitutional right through § 1983. Section 1983 cannot be used to enforce a constitutional right if Congress indicates by express provision or by other implicit evidence that it intended to make some other

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37 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982))).


39 Id. at 532.


42 Id. at 314.

43 Id.


federal statute the exclusive avenue through which a plaintiff could seek to remedy a government violation of a constitutional right.\textsuperscript{46} Although the Supreme Court has stated that it does not conclude that Congress intended to preclude the use of § 1983 to remedy constitutional violations without hesitation, § 1983 is nevertheless a statutory remedy that Congress has the authority to replace or repeal.\textsuperscript{47}

The Supreme Court has suggested several different factors that bear on a court's decision to infer congressional intent from a federal statute that will preclude a plaintiff's use of § 1983 as a vehicle to remedy a violation of a constitutional right. One factor the Court has considered is whether the constitutional right upon which a § 1983 claim is predicated is "virtually identical" to the right conferred by a federal statute.\textsuperscript{48} This requires a comparison of the rights and protections afforded by the federal statute with those existing under the Constitution.\textsuperscript{49} "Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to" preclude § 1983 constitutional suits.\textsuperscript{50}

For example, in Fitzgerald v. Barnstable School Committee,\textsuperscript{51} the Court compared the substantive rights guaranteed under Title IX with those guaranteed under the Equal Protection Clause.\textsuperscript{52} The Court held that because Title IX's protections were narrower in some respects than those under the Fourteenth Amendment, as enforced through § 1983, it could not agree with the First Circuit that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination" in educational institutions.\textsuperscript{53} The Court reasoned that while Title IX reaches only institutions and programs that receive federal funding, § 1983 can reach individuals and municipalities.\textsuperscript{54} Additionally, the Court determined that Title IX included many statutory exemptions,
such as military service schools, but such entities would not receive the same exemption under the Equal Protection Clause.\textsuperscript{55}

A second factor the Supreme Court has considered is whether a federal statute contains carefully tailored administrative provisions.\textsuperscript{56} A federal statute has a carefully tailored administrative scheme when it contains a provision expressly providing a plaintiff with a judicial or administrative remedy for violations of that statute.\textsuperscript{57} This suggests that Congress intended those provisions to be the exclusive means by which plaintiffs might vindicate their constitutional rights.\textsuperscript{58} The Supreme Court has reasoned that when a federal statute's remedial scheme is sufficiently comprehensive, allowing a plaintiff to assert a parallel § 1983 claim would frustrate Congress's intent in formulating that remedial scheme.\textsuperscript{59} Thus, even after plaintiffs establish the existence of a constitutional right, they may be foreclosed from enforcing that right under § 1983 if a federal statute of this type exists that protects that constitutional right.\textsuperscript{60}

For example, in Smith v. Robinson,\textsuperscript{61} the Supreme Court held that the Education of the Handicapped Act ("EHA") was "the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."\textsuperscript{62} The Court reasoned that the EHA contains a comprehensive remedial scheme because the Act provides a plaintiff with procedural safeguards, such as the right to present a complaint for any matter relating to the identification, evaluation, or educational placement of the child.\textsuperscript{63} Additionally, the statute provides a plaintiff with the right to judicial review.\textsuperscript{64} Thus, the Court determined that the remedial scheme of the EHA demonstrated

\textsuperscript{55} Id.
\textsuperscript{57} City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005).
\textsuperscript{58} See Smith, 468 U.S. at 1009 ("The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children.").
\textsuperscript{59} Fitzgerald, 555 U.S. at 253.
\textsuperscript{60} Id. at 253–54.
\textsuperscript{61} 468 U.S. 992.
\textsuperscript{62} Id. at 1009.
\textsuperscript{63} Id. at 1011; see also 20 U.S.C. § 1415(b)(1) (2012).
\textsuperscript{64} See Smith, 468 U.S. at 1011; see also 20 U.S.C. § 1415(i)(2).
Congress's intent for handicapped children with constitutional claims to pursue those claims through the statute's administrative mechanisms.65


Prior to the 1960s, courts narrowly construed § 1983 claims and limited them to civil rights cases alleging violations of federal constitutional rights.66 However, during the 1960s and 1970s, the Supreme Court broadened the scope of § 1983, approving its use to remedy "all forms of official violation of federally protected rights."67 Supreme Court decisions also suggested that § 1983 could be utilized to enforce non-constitutional rights under federal statutes.68

In 1980, in Maine v. Thiboutot,69 the Supreme Court held that § 1983 could be used to enforce both constitutional and statutory rights.70 The Court expressly stated that the intended meaning of the phrase "and laws" in § 1983 is to reach rights granted under federal statutes.71 The Court reasoned that "Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended."72

The broad reading that the Thiboutot Court gave the phrase "and laws" did not last very long.73 Perhaps in response to the Thiboutot dissenters, the Supreme Court began imposing

65 Smith, 468 U.S. at 1009.
68 See Edelman v. Jordan, 415 U.S. 651, 675 (1974) (stating in dicta that "[i]t is, of course, true that Rosado v. Wyman held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States" (citation omitted)); see also City of Greenwood v. Peacock, 384 U.S. 808, 829–30 (1966) (stating in dicta that an individual has a cause of action under § 1983 "not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well" (citing Monroe v. Pape, 365 U.S. 167, 190–91 (1961))); Mank, supra note 66, at 853.
69 448 U.S. 1 (1980).
70 Id. at 5.
71 Id. at 4.
72 Id. at 8.
limitations on the availability of § 1983 in statutory actions.\textsuperscript{74} Specifically, the Court held that a claim alleging a violation of a federal statute is not permitted under § 1983 if: (1) the statute was not intended to create an enforceable right,\textsuperscript{75} or (2) the statutory scheme reflects a congressional intent to preclude its enforcement under § 1983.\textsuperscript{76} Thus, even after a plaintiff establishes the existence of an enforceable federal statutory right, a § 1983 claim could still be precluded if a defendant could demonstrate that Congress intended to, expressly or impliedly, deny the use of § 1983 to enforce the right granted by the federal statute.\textsuperscript{77}

One method for inferring implicit congressional intent is through the presence of a “comprehensive remedial scheme” in an underlying statute.\textsuperscript{78} When “a state official is alleged to have violated a federal statute” that provides a comprehensive remedial scheme, the remedial scheme “may not be bypassed by bringing suit directly under § 1983.”\textsuperscript{79} To determine whether a statute has a comprehensive enforcement scheme, courts ordinarily look to the existence of an express provision in the statute providing a plaintiff with a means of redress.\textsuperscript{80} Courts do this on the theory that “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”\textsuperscript{81}

\textsuperscript{74} Id.
\textsuperscript{75} Blessing v. Freestone, 520 U.S. 329, 340–41 (1997). To determine whether a federal statute establishes specific and individually enforceable federal rights, the Supreme Court uses a three-part test:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

\textsuperscript{77} Id. at 20.
\textsuperscript{78} Id.
\textsuperscript{79} Id. (quoting Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)).
\textsuperscript{81} Id. at 121 (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)).
The Supreme Court first recognized that a federal statute's comprehensive remedial scheme could preclude § 1983 enforcement of that statute in Middlesex County Sewerage Authority v. National Sea Clammers Association. In Sea Clammers, the Court stated, although the parties did not suggest it, that there could be an alternative source of congressional authorization for plaintiffs to bring private suits for violation of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972. Citing Thiboutot, the Court reiterated that the plaintiffs could potentially bring a § 1983 claim to enforce their rights under both federal Acts. The Court looked to whether the remedial devices provided in the Acts were sufficiently comprehensive in order to demonstrate congressional intent to preclude the remedy of suits under § 1983. The Court held that both Acts contained comprehensive enforcement mechanisms with many specific statutory remedies and that the existence of those remedies demonstrated Congress's intent to foreclose any other remedy that would be available under § 1983.

B. The Age Discrimination in Employment Act

Age discrimination was not included in Title VII of the Civil Rights Act of 1964 because Congress believed that there were legitimate reasons for employment decisions based on age. Following this decision in 1964, Congress commissioned the Secretary of Labor to study employment discrimination with regard to older workers. The Secretary of Labor's study found that older workers were disadvantaged in their efforts to both retain employment and regain employment.

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82 453 U.S. at 20.
83 Id. at 19.
84 Id.
85 Id. at 20 (citing Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)).
86 Id.
88 Id.
Subsequently, Congress enacted the ADEA in 1967 to protect older persons from discrimination by employers, employment agencies, and labor organizations. At the time of its enactment, the ADEA’s protections were capped by an age limit because the Act was not intended to protect adults whose aging had significantly affected their ability to work. Accordingly, persons were protected if they were at least forty years of age, but not more than sixty-five. In 1986, the coverage of the Act was expanded to include all ages greater than or equal to forty.

The ADEA prohibits employers from using age as a factor in hiring, firing, promoting, and in all other terms and conditions of employment. Congress did not, however, condemn every use of age in employment decisions because the principle focus of the ADEA is to limit arbitrary age discrimination. The ADEA provides employers with four statutory exceptions. Specifically, an employer can avoid liability if: (1) age is a bona fide occupational qualification reasonably necessary to the normal operation of the business; (2) “differentiation is based on reasonable factors other than age;” (3) the age differentiation is based on the terms of a bona fide seniority or employee benefit plan; or (4) discharge or discipline is based on good cause.

The ADEA incorporates some features of Title VII and some features of the Fair Labor Standards Act of 1938 (“FLSA”). Specifically, the substantive provisions of the ADEA are modeled after Title VII, while its remedial provisions incorporate

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91 Harris, supra note 87, at 716–17.
92 Id. at 717.
93 Id. The stated purpose of the ADEA is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. § 621(b).
95 Id. § 623.
96 Id. § 623(f)(1).
97 Id.; see also Smith v. City of Jackson, 544 U.S. 228, 242 (2005) (holding that the City’s decision to grant larger raises to lower echelon employees and smaller raises to older officers for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on reasonable factors other than age).
99 Id. § 623(f)(3).
provisions of the FLSA. The ADEA expressly grants individual employees a private right of action for "such legal or equitable relief as will effectuate the purposes of this chapter." First, however, an ADEA plaintiff must file a charge with the EEOC within 180 days of the unlawful age discrimination. Then, sixty days after the charge alleging unlawful discrimination has been filed with the EEOC, an ADEA plaintiff may bring a civil charge. An employee's right to bring a civil action, however, will terminate if the EEOC subsequently commences its own lawsuit to enforce that employee's right.

In general, the ADEA provides coverage for private, state, and federal employees who are forty years of age and older, but the ADEA is subject to three notable exceptions. First, firefighters or law enforcement officers are not granted the same broad protections as other employees under the ADEA. Second, under the ADEA, the term "employee" does not include:

[A]ny person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

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101 Id.
102 29 U.S.C. § 626(c)(1).
103 Id. § 626(d)(1). "Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Id. § 626(d)(2).
104 Id. § 626(d)(1).
105 Id. § 626(c)(1).
106 See id. §§ 630(f), 631(a), 633a(a).
107 Id. § 623(j).
108 Id. § 630(f).
Third, the ADEA provides different procedural means of enforcement for claims brought by specified federal government employees.\textsuperscript{109}

II. THE RELATIONSHIP BETWEEN § 1983 AGE DISCRIMINATION IN EMPLOYMENT CLAIMS AND THE ADEA

This Part describes the interaction between § 1983 and the ADEA. Section A provides a brief overview of three different approaches taken by district courts that have determined that the ADEA does not preclude § 1983 age discrimination claims. Section B explains the trend among the Courts of Appeals to hold that the ADEA does preclude § 1983 age discrimination claims because of the ADEA's comprehensive remedial scheme. Finally, Section C describes the most recent Seventh Circuit decision that held that the ADEA does not preclude § 1983 age discrimination claims.

A. The Initial Approaches Among District Courts

Many courts have considered whether the ADEA precludes § 1983 equal protection claims, and several district courts have concluded that it does not.\textsuperscript{110} The district courts that have determined that the ADEA is not the exclusive remedy for age discrimination in employment claims generally relied on three main arguments.

1. The Presumption Against the Implied Preclusion of Another Statute

Some district courts have relied on the notion that implicit repeals of federal statutes by later enacted federal statutes are

\textsuperscript{109} Id. § 633a(a). These employees include those in: [Military departments . . . , in executive agencies . . . , in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress.  

\textsuperscript{110} See, e.g., Levin v. Madigan, 692 F.3d 607, 610 (7th Cir. 2012) (recounting what occurred procedurally in the district court case), cert. dismissed, 134 S. Ct. 2 (2013) (per curiam).
disfavored.\textsuperscript{111} The Supreme Court has articulated that a later statute will not be held to have implicitly repealed or preempted an earlier one unless there is a “clear repugnancy” between the two.\textsuperscript{112} In order words, “in 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.”\textsuperscript{113} Whether a later statute is irreconcilable with an earlier statute, however, must be determined by “clear and manifest” congressional intent.\textsuperscript{114} Repeals by implication are not favored because courts should not be permitted to step into the shoes of the legislature and repeal statutes when Congress’s intent to do so is unclear.\textsuperscript{115} Allowing the judiciary to do so would result in an impermissible usurpation of the legislature’s constitutional powers.\textsuperscript{116}

In \textit{Mummelthie v. City of Mason City},\textsuperscript{117} the U.S. District Court for the Northern District of Iowa expressed its distaste for the implied preclusion of a federal statute by a separate, subsequently enacted federal statute. In that case, the court held that the ADEA and § 1983 are capable of coexistence.\textsuperscript{118} The court reasoned that “it is the duty of courts” to regard each statute as effective “absent a clearly expressed congressional intention to the contrary.”\textsuperscript{119} Further, the court stated that the remedies available under § 1983 and the ADEA are not irreconcilable because each addresses a different wrong: Section 1983 is used to vindicate federal constitutional rights and the ADEA is used to vindicate rights secured by the ADEA.\textsuperscript{120}

\textsuperscript{111} \textit{Mummelthie v. City of Mason City}, 873 F. Supp. 1293, 1319 (N.D. Iowa 1995).
\textsuperscript{112} \textit{Id.} at 1314 (citing United States v. Fausto, 484 U.S. 439, 542–53 (1988)).
\textsuperscript{113} \textit{Id.} at 1315 (quoting St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981)).
\textsuperscript{114} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} 873 F. Supp. 1293.
\textsuperscript{118} \textit{Id.} at 1339.
\textsuperscript{119} \textit{Id.} at 1315.
\textsuperscript{120} \textit{Id.} at 1327–28.
Therefore, the court determined that the plaintiff had a cognizable constitutional claim for age discrimination, which could be asserted under § 1983, in addition to the ADEA claim.121

2. The Similarity of the ADEA to Title VII

Another line of reasoning among district courts is that the U.S. Courts of Appeals, which have determined that the ADEA is the exclusive remedy for age discrimination in employment, have failed to consider the analogy between the ADEA and Title VII.122 One argument is that courts have incorrectly relied on a comparison of the ADEA to the FLSA despite the Supreme Court's reliance on Title VII to infer congressional intent of the ADEA.123 The Supreme Court has stated that the ADEA was "derived in haec verba from Title VII."124 Thus, these district courts argue that the ADEA should be analogized to Title VII, rather than to the FLSA.125 The Supreme Court has never explicitly held that Title VII claims do not preclude § 1983 claims.126

Consequently, the Courts of Appeals have been left to answer this question on their own. Thus, in some circuits where the weight of authority favors no § 1983 preclusion by Title VII claims, district courts have relied on a comparison of the ADEA to Title VII in determining that the ADEA is not the exclusive remedy for age discrimination in employment claims.127 For example, the U.S. Court of Appeals for the Second Circuit has never decided the precise issue of whether § 1983 age discrimination in employment claims are preempted by the ADEA.128 The weight of authority in the Second Circuit,

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121 Id. at 1328.
122 E.g., id. at 1323. Title XII states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2012).
124 Id. at 1324 (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).
125 Id.
126 Id. at 1321 (citing Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975)).
127 See Shapiro v. N.Y.C. Dep't of Educ., 561 F. Supp. 2d 413, 420 (S.D.N.Y. 2008), aff'd, 376 F. App'x 82 (2d Cir. 2010), aff'd in part, vacated in part, 369 F. App'x 232 (2d Cir. 2010).
128 Id.
however, "favors the position that the ADEA does not preempt claims under § 1983 for age discrimination."129 Thus, district courts in the Second Circuit have found that there is no reason to distinguish between the ADEA and Title VII with respect to this issue and have held that the ADEA does not preempt a § 1983 claim for age discrimination in violation of the Fourteenth Amendment.130

3. The Effect of the Eleventh Amendment on Claims Under the ADEA

A third argument used by district courts in determining that the ADEA does not preempt § 1983 claims is that the implied repeal of § 1983 would eliminate the availability of the federal forum for age discrimination in employment claims merely because the plaintiff is a state employee.131 ADEA claims against state actors are barred by the Eleventh Amendment, which immunizes states from suit for monetary damages or equitable relief absent a state’s consent or express congressional abrogation in the language of a statute.132 Thus, courts have reasoned that if the ADEA is the sole remedy for age discrimination in employment, the effect is elimination of all age discrimination claims made against state actors in federal courts because of the Eleventh Amendment.133 District courts applying this reasoning have determined that Congress could not have intended to relieve state actors from the possibility of suits in federal court.134 Thus, allowing total preemption of § 1983 such

129 Id.
130 Id. Although the Courts of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have all determined that § 1983 is not precluded by Title VII, the courts in these circuits do not all compare the ADEA to Title VII. Instead, some courts have relied on a comparison of § 1983 to the FLSA to determine that the ADEA precludes § 1983 claims for age discrimination. See Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1369 (4th Cir. 1989).
132 Id. at 955 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000)); see also Kimel, 528 U.S. at 75–76.
133 Mustafa, 196 F. Supp. 2d at 955. "Although the Kimel Court ultimately determined the ADEA was not a valid exercise of Congress' power under section 5 of the Fourteenth Amendment, Congress certainly intended to provide a remedy for age discrimination against state employers when it amended the ADEA in 1974." Id. at 956 (citing Kimel, 528 U.S. at 68).
134 Id.
that no federal forum is available to address age discrimination in employment claims against state actors appears incompatible with the purpose of § 1983.135

B. The Trend Among U.S. Courts of Appeals

Other than the Seventh Circuit, all other circuit courts that have faced the issue of whether the ADEA preempts § 1983 claims have determined that the ADEA is the exclusive remedy.136 The Fourth Circuit’s decision in Zombro v. Baltimore City Police Department137 has been heavily relied upon by appellate courts across the nation to determine that the ADEA preempts § 1983 age discrimination in employment claims.138 In Zombro, the court reasoned that where Congress has enacted a comprehensive statute specifically designed to redress grievances alleged by a plaintiff, § 1983 claims should be precluded.139 Further, the court stated “this policy should be followed unless the legislative history of the comprehensive statutory scheme in question manifests a congressional intent to allow an individual to pursue independently rights under [§ 1983].”140 The court found no such intent in the language and history of the ADEA.141

In Zombro, the court reasoned that the ADEA “is a precisely drawn, detailed statute, similar to other statutory schemes which have been held to provide the exclusive judicial remedy for a stated abuse.”142 The court stated that the ADEA requires plaintiffs to file a charge with the EEOC before they can bring a private action.143 The ADEA also states that a plaintiff’s right to commence a private action will terminate if the EEOC files its own action.144 Thus, the court held that the comprehensiveness of the ADEA’s statutory scheme evinced congressional intent to preclude actions for age discrimination in employment under

135 Id.
137 868 F.2d 1364 (4th Cir. 1989).
138 Levin, 692 F.3d at 616.
139 Zombro, 868 F.2d at 1369.
140 Id.
141 Id.
142 Id.
143 Id. at 1366.
144 Id.
§ 1983. To allow an action under § 1983, the court stated, would allow the aggrieved party to bypass the ADEA’s specific procedural provisions.

C. The Seventh Circuit’s Approach: Levin v. Madigan

Most recently, the Seventh Circuit, in Levin v. Madigan, held that the ADEA is not the exclusive remedy for age discrimination in employment claims. Harvey Levin was hired in 2000 as Assistant Attorney General in the Office of the Illinois Attorney General’s Consumer Fraud Bureau. He was fifty-five years old at the time of his hiring. In 2002, Levin was promoted to the position of Senior Assistant Attorney General. Levin received annual evaluations showing that he met or exceeded his employer’s expectations in twelve categories, but the Illinois Attorney General’s Office alleged that it had concerns about Levin’s low productivity, excessive socializing, inferior litigation skills, and poor judgment. In May of 2006, Levin was fired along with eleven other lawyers. Levin was replaced by a female attorney in her thirties. Two other attorneys in the Consumer Fraud Bureau were allegedly fired and replaced by younger lawyers. The Attorney General’s Office denied that any of the fired lawyers were replaced since none of their cases were reassigned to a younger attorney.

Levin filed a lawsuit in the U.S. District Court for the Northern District of Illinois against the Office of the Illinois Attorney General, the State of Illinois, and Lisa Madigan in her official capacity as the Illinois Attorney General. Levin asserted claims of sex discrimination under Title VII of the 1964 Civil Rights Act and age discrimination under the ADEA and

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145 Id. at 1369.
146 Id. at 1366.
147 692 F.3d 607 (7th Cir. 2012), cert. dismissed, 134 S. Ct. 2 (2013) (per curiam).
148 Id. at 622.
149 Id. at 609.
150 Id.
151 Id.
152 Id.
153 Id.
154 Id.
155 See id.
156 Id.
157 Id.
Levin's complaint also asserted the same claims against four other employees of the Attorney General's Office. All of the defendants filed motions to dismiss Levin's complaint and motions for summary judgment. The trial court held that Levin was not an "employee" for Title VII or ADEA purposes and could not pursue either of those claims. The trial court also held, however, that the ADEA was not Levin's exclusive remedy for age discrimination, which allowed him to proceed with his § 1983 claim.

The individual defendants appealed to the Seventh Circuit, contending that they were entitled to qualified immunity because the ADEA was Levin's exclusive remedy for his age discrimination claims. After a review of relevant case law, the Seventh Circuit explained that congressional intent plays an important role in determining whether a § 1983 equal protection claim is precluded by a federal statutory scheme. The court stated that congressional intent may be determined by: (1) reviewing the language of a statute and the extent of its remedial provisions, and (2) comparing the rights and remedies available under the federal statute with those available under § 1983.

First, the court stated that although the ADEA has a comprehensive remedial scheme, its lack of legislative history and statutory language expressly precluding § 1983 claims were insufficient to infer congressional intent to preclude § 1983 equal protection claims. Second, the court found that the rights and protections afforded by the ADEA and § 1983 diverge in significant ways. Specifically, the court stated that while the ADEA only applies to employers, employment agencies, and labor organizations, § 1983 claims could be brought against individuals. The court also stated that the exemptions

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158 See id.
159 Id.
160 See id. at 609–10.
161 Id. at 610.
162 See id.
163 Id.
164 See id. at 611–15.
165 Id. at 615.
166 Id. at 615, 621.
167 See id. at 617.
168 Id. at 617, 621.
169 Id. at 621.
provided under the ADEA to certain individuals, such as elected officials and firefighters, would not apply under § 1983 claims for age discrimination. Based on this divergence and lack of clear legislative history, the court held that the ADEA does not preclude § 1983 claims for age discrimination in employment.

III. WHY THE ADEA DOES NOT PRECLUDE § 1983 AGE DISCRIMINATION CLAIMS

A. Methods of Analyzing Possible ADEA Preclusion of § 1983 Claims

Whether the ADEA precludes § 1983 age discrimination in employment claims is a question that many courts have had an opportunity to answer. The Supreme Court, however, has never expressly stated the proper analysis for answering this question. As established above, the Supreme Court recognizes two different methods for plaintiffs to assert claims under § 1983, which does not itself create any substantive rights. The first method is to assert a violation of a federal statutory right if the underlying statute creates a substantive right. The second method is to assert a violation of a federal constitutional right. These two methods, however, require different analyses when determining whether a federal statute precludes a § 1983 claim.

Many courts faced with the issue of whether the ADEA precludes § 1983 age discrimination in employment claims have relied solely on the existence of the ADEA's comprehensive remedial scheme to foreclose the use of § 1983. These courts have held that the remedial scheme of the ADEA cannot be bypassed by bringing suit directly under § 1983. This approach is problematic.

The distinction between § 1983 federal statutory rights claims and § 1983 constitutional rights claims should be noted by courts at the outset of a case. The Supreme Court first asserted

170 Id.
171 Id. at 621–22.
172 See supra Part II.
173 Chun, supra note 29, at 466.
174 Id.
175 Id.
176 See Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1369 (4th Cir. 1989).
177 See id.
the comprehensive remedial scheme doctrine in *Middlesex County Sewerage Authority v. National Sea Clammers Association* in 1981.\(^{178}\) In *National Sea Clammers*, the Court interpreted the comprehensive remedial schemes of the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA") as congressional intent to preclude the plaintiffs' independent use of § 1983 to remedy a violation of *those federal statutes*.\(^{179}\) The Court neither mentioned § 1983 enforcement of constitutional rights nor did the plaintiffs assert any § 1983 claim to remedy the violation of their constitutional rights.\(^{180}\) Courts that have solely relied on the ADEA's comprehensive remedial scheme have ignored the fact that this doctrine was only intended to apply to § 1983 federal statutory rights claims and not constitutional rights claims.

The Supreme Court has never mandated an explicit test for courts to use when determining whether a federal statute precludes the use of § 1983 to enforce a federal constitutional right. This has left lower courts to blindly pick and choose between the varied array of factors and methods the Supreme Court has expounded with little guidance. There are two cases, however, where the Supreme Court's language can be loosely interpreted to create two different approaches for determining whether a federal statute precludes § 1983 enforcement of a constitutional right.\(^{181}\) These two cases, which result in different interpretative approaches, also demonstrate the Supreme Court's intention to distinguish § 1983 constitutional rights claims from § 1983 federal statutory rights claims.

1. The "Virtually Identical" Approach

In *Smith v. Robinson*,\(^{182}\) the Supreme Court was faced with the question of whether the Education of the Handicapped Act ("EHA") precluded § 1983 equal protection claims.\(^{183}\) The plaintiffs emphasized that their § 1983 claims were not based on

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\(^{179}\) *Id.* at 20-21.

\(^{180}\) *See id.*


\(^{182}\) 468 U.S. 992.

\(^{183}\) *Id.* at 1009.
alleged violations of the EHA, but on independent claims of constitutional deprivations. The Court took a two-step approach to reach its conclusion. First, the Court identified that the plaintiffs' constitutional claims, a denial of due process and a denial of a free appropriate public education as guaranteed by the Equal Protection Clause, were "virtually identical" to the plaintiffs' EHA claims. Second, the Court turned to "whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims." In order to answer this question, the Court looked to the comprehensive remedial scheme of the EHA and determined that it inferred implicit congressional intent to preclude the use of § 1983 to vindicate violations of constitutional rights.

The Smith decision, in which the Court grappled with preclusion of § 1983 to enforce a federal constitutional right, is distinguished from the National Sea Clammers decision, in which the Court grappled with preclusion of § 1983 to enforce a federal statutory right, because the Court first stated that the plaintiffs' constitutional claims were "virtually identical" to their EHA claims. Whether a plaintiff's constitutional claims are virtually identical to the plaintiff's federal statutory claims is a step that cannot logically be taken in a § 1983 federal statutory right preclusion case. If a plaintiff alleges a violation of the MPRSA, that violation will invariably be virtually identical to a § 1983 claim seeking vindication of a substantive federal statutory right created by the MPRSA because the substantive right created by the statute is the same right the statute grants and protects against violations. Thus, if Congress enacted a comprehensive enforcement scheme under the MPRSA, why would it have done so if an aggrieved party could simply bypass that comprehensive scheme and seek enforcement of the exact same right under § 1983? It makes little sense, but the same argument does not hold water with § 1983 constitutional rights claims. While a determination that a plaintiff's statutory and

184 Id. at 1008–09.
185 Id. at 1009.
186 Id.
187 Id.
188 See id.
190 Smith, 468 U.S. at 1009.
constitutional claims are identical is necessary when a § 1983 claim asserting a violation of a constitutional right is at stake, the Court was justified in not engaging in this comparison in *National Sea Clammers*.

2. The “Comparing the Rights and Protections” Approach

While the two-step analysis expounded by the Court in *Smith* is exceedingly appealing, the Court never took this approach again, which has only added to the confusion among lower courts and left it impossible for them to determine § 1983 preclusion cases with consistency and uniformity. In 2009, however, the Court appeared to once again recognize the importance of comparing and contrasting a plaintiff's statutory claims with a plaintiff's constitutional claims in *Fitzgerald v. Barnstable School Committee*. The Court stated:

In those cases in which the § 1983 claim is based on a statutory right, '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.' In cases in which the § 1983 claim alleges 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.

Although the Court recognized the importance of comparing the rights and protections of a statute and the rights and protections under the Constitution, it was not the first, or only factor, that the Court considered, which distinguishes the Court's approach in *Fitzgerald* from the Court's approach in *Smith*. In determining whether Title IX of the Education Amendments of 1972 precluded a § 1983 equal protection claim, the Court looked at two factors.

First, the Court looked to the remedial scheme of Title IX and discussed the Court's precedent on placing a foremost emphasis on the nature and extent of a statute's remedial

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192 Id. at 252 (citation omitted).
193 See id. at 253 (“In determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, [the Court has] placed primary emphasis on the nature and extent of that statute's remedial scheme." (citing Nat'l Sea Clammers Assoc., 453 U.S. at 20)).
scheme. The Court recognized three cases in which it determined that a statute's comprehensive remedial scheme precluded § 1983 claims: National Sea Clammers, Smith, and City of Rancho Palos Verdes v. Abrams. The Court stated that in all three cases, "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit." Since Title IX's only enforcement mechanism is an administrative procedure that will result in the withdrawal of federal funding from institutions that violate Title IX, the Court could not infer congressional intent to preclude § 1983 based on its remedial scheme.

Second, the Court looked to a comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause to demonstrate further that Congress did not intend Title IX to preclude § 1983 constitutional claims. Ultimately, the Court held that the protections afforded by Title IX and the Constitution were too divergent to infer congressional intent to designate Title IX as the exclusive remedy for violations of a plaintiff's constitutional right to be free from gender discrimination in educational institutions.

3. A Proposed Solution: Identifying Limitations of Underlying Statutes Approach

Although the Supreme Court has acknowledged that preclusion of § 1983 federal statutory rights claims and preclusion of § 1983 constitutional rights claims require examining different factors, an explicit sequential analysis would aid courts in determining this ultimate issue. While it is necessary to compare the rights and protections afforded by a federal statute and those existing under the Constitution, the Supreme Court has provided little guidance as to how this crucial comparison should be administered. First, courts should not solely rely on a statute's comprehensive remedial scheme to infer implicit congressional intent to preclude the use of § 1983 to

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194 Id.
195 Id. at 253–55.
196 Id. at 254.
197 Id. at 255–56.
198 Id. at 256.
199 Id. at 257–58.
vindicate a plaintiff's alleged violation of a constitutional right.200 Second, courts should not apply a comparison of the rights and protections afforded by an underlying statute and the Constitution as a fallback once it determines that a statute does not have a comprehensive remedial scheme.201

The most efficacious approach is to first compare the substantive rights and protections guaranteed under a particular statute with those under the Constitution. Then, courts should look to a statute's comprehensive remedial scheme for clarification of the substantive rights a statute seeks to enforce. Absent express language in a statute showing congressional intent to foreclose a plaintiff's access to the judicial system through § 1983 claims, it is illogical to infer Congress intended to preclude § 1983 by mere silence regarding this question.

By first comparing the substantive rights and protections guaranteed under a federal statute with those guaranteed under the Constitution, a court will be compelled to note the essential difference between preclusion of a § 1983 claim seeking to enforce a substantive federal right and a § 1983 claim seeking to enforce a constitutional right. Once this key distinction is made, a court will have the ability to fully determine whether a plaintiff's claim under the federal statute and constitutional claim under § 1983 are "virtually identical" or whether they are significantly divergent. Although the Smith decision can be read to suggest that if a plaintiff's claims are not "virtually identical" then the analysis should end there, it is still prudent to consider a statute's remedial scheme for further clarification of a plaintiff's divergent rights.

In order to determine whether a plaintiff's rights under a federal statute and the constitution are virtually identical or divergent, it is essential for a court to see how the rights stand up next to each other. In other words, a court may look to whether the protections afforded by the statute are broader or narrower than those afforded by the Constitution. Some questions to consider are: (1) does the statute apply to private actors while the Constitution only applies to state actors?; (2) does the statute have a lower burden of proof than the § 1983

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200 This is the approach that the Fourth Circuit took in Zombro. See supra text accompanying notes 139–46.
201 This is the approach that the Supreme Court took in Fitzgerald. See supra text accompanying notes 51–55.
claim?; or (3) what are the applicable statutes of limitation under the statute and under § 1983? If the underlying federal statute appears broader than the constitutional right a plaintiff seeks to enforce under § 1983, then Congress probably intended for that constitutional right to be enforced under the statute. If the constitutional right appears to be broader, however, then that is a paramount indication that the rights and protections are divergent.

Divergent substantive rights under a federal statute and the Constitution strongly suggest that a plaintiff is seeking to assert two distinctive, discrete rights. When plaintiffs have two distinctive, discrete rights, they should not be forced to sacrifice one of those rights because a federal statute that they also seek to enforce has a comprehensive remedial scheme in place to remedy a violation of a completely separate right. It is counterintuitive to believe that Congress intended to foreclose the use of § 1983 in these situations.

Comparing a claim alleging a violation of a federal statute and a claim alleging a violation of a constitutional right is a step that is necessary to determine if the federal statute precludes the use of § 1983 to enforce a constitutional right. In Smith, the Court stated that it does not conclude that Congress intended to preclude reliance on § 1983 as a remedy for an equal protection claim without hesitation, but that “[t]he crucial consideration is what Congress intended.”202 The problem with solely relying on a statute’s remedial scheme to assess § 1983 preclusion is that it permits courts to assume that Congress actually considered this very issue despite the Supreme Court’s conveyance that repeals of statutes by implication are disfavored. Without comparing and contrasting plaintiffs’ claims under a federal statute with their claims under the Constitution, plaintiffs could potentially be foreclosed from asserting a constitutional right, which is not a permissible outcome because it would go against the undisputed principle that where there is a legal right, there must also be a legal remedy.203

Although a statute’s remedial scheme is not completely irrelevant, it would be a mistake for a court to rely exclusively on it when determining whether that statute precludes a plaintiff

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from employing § 1983 to vindicate a violation of a constitutional right. By first examining if a federal statute contains a comprehensive remedial scheme, a court, perhaps inadvertently, affords itself the opportunity to end its analysis once it has determined that a statute does in fact have a comprehensive remedial scheme. By allowing itself to do so, a court forecloses the use of § 1983 to enforce a constitutional right before it has even considered what rights are being enforced by that comprehensive remedial scheme. This can potentially leave a plaintiff without a means of remedying a violation of a constitutional right, and it is hard to believe that Congress ever intended for this to occur. Despite the Supreme Court's cautionary tale in Smith stating that Congress, and Congress only, retains the authority to repeal or replace § 1983 with an alternative remedy,²⁰⁴ courts continue to do so with justification resting in the implicit congressional intent that the Supreme Court created through an underlying statute's comprehensive remedial scheme.²⁰⁵

B. Application of the Identifying Limitations of Underlying Statutes Approach

As in Levin v. Madigan, a plaintiff asserting a violation of the ADEA might also assert an age discrimination claim under the Equal Protection Clause, which can be enforced through § 1983.²⁰⁶ Nothing in the text of the ADEA expressly states that the ADEA is the exclusive remedy for age discrimination in employment claims.²⁰⁷ There is also no relevant legislative history supporting that idea. Thus, in order to determine if the ADEA is the exclusive remedy for age discrimination in employment claims, the substantive rights under the ADEA must first be compared with the substantive rights under the

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²⁰⁴ Smith, 468 U.S. at 1012.
²⁰⁵ See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Assoc., 453 U.S. 1, 14 (1981) ("In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA.").
²⁰⁶ See Levin v. Madigan, 692 F.3d 607, 609 (7th Cir. 2012) (demonstrating that Levin sought relief under both the ADEA and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983, cert. dismissed, 134 S. Ct. 2 (2013) (per curiam)).
Equal Protection Clause of the Constitution. After this critical analysis has been completed, the remedial scheme of the ADEA should be hesitantly considered to supplement any ambiguities.

1. Comparison of the Substantive Rights and Protections Granted by the ADEA and by the Constitution

As a preliminary matter, although a plaintiff’s claims under the ADEA and under § 1983 may be based on the same alleged conduct, the wrong each remedy is intended to address is different: The ADEA enforces a violation of its own provisions,\(^\text{208}\) while § 1983 vindicates a violation of a federal constitutional right, specifically the Equal Protection Clause.\(^\text{209}\)

First, the ADEA only permits a plaintiff to sue an employer, labor organization, or employment agency.\(^\text{210}\) On the other hand, § 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities.\(^\text{211}\) In order to sue an individual under § 1983, the individual must have caused or participated in the alleged deprivation of the plaintiff’s rights.\(^\text{212}\) In Fitzgerald, this is one of the exact reasons why the Court held that Title IX did not preclude § 1983 claims: Title IX only applies to private or public institutions and programs that receive federal funds, while § 1983 equal protection claims apply to both state actors and municipalities, which are not proper Title IX parties.\(^\text{213}\) The divergence of permissible defendants under the ADEA and § 1983 demonstrates plaintiffs’ potential ability to strategically select their defendant and present their case, but this is only possible if a plaintiff’s § 1983 claim is not precluded by the ADEA.

Second, the damages available to plaintiffs under the ADEA differ from those available to plaintiffs under § 1983 in several ways. One important difference is that state employees suing under the ADEA are left without a damages remedy because of

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\(^\text{208}\) See id. § 626(c)(1) (“Any person aggrieved may bring a civil action . . . for such legal or equitable relief as will effectuate the purposes of this chapter . . . .”).

\(^\text{209}\) Schwartz, supra note 38.

\(^\text{210}\) 29 U.S.C. § 623(a)–(c).

\(^\text{211}\) Levin, 692 F.3d at 621.

\(^\text{212}\) Id.

the Eleventh Amendment's sovereign immunity provision.\textsuperscript{214} The Eleventh Amendment immunizes states from suit for monetary damages or equitable relief absent a state's consent or express congressional abrogation in the language of a statute.\textsuperscript{215} The ADEA, however, did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals.\textsuperscript{216} In contrast, § 1983 does not provide municipalities, or local governments, immunity from damages when such actors violate the Constitution.\textsuperscript{217} Additionally, individual state actors may be denied qualified immunity from damages if the facts show that they violated a plaintiff's constitutional right and if that constitutional right was clearly established at the time of the alleged violation.\textsuperscript{218} Without the availability of a § 1983 equal protection claim, a state employee who was subjected to age discrimination in employment is left without a federal damages remedy against a state or individual state actors, but damages are "a vital component of any scheme for vindicating cherished constitutional guarantees" and courts should not take them away from a plaintiff by foreclosing the use of § 1983.\textsuperscript{219}

Another difference in damages under the ADEA and under § 1983 is that the ADEA includes no specific authorization for awarding a plaintiff compensatory damages for pain and suffering.\textsuperscript{220} In light of this absence, it is well-established among the U.S. Courts of Appeals that the ADEA does not permit a

\textsuperscript{214} 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." U.S. Const. amend. XI.


\textsuperscript{216} Id. at 91–92.

\textsuperscript{217} Owens v. Independence, 445 U.S. 622, 656 (1980). Although states cannot be sued under § 1983, they do not receive this protection from the Eleventh Amendment's sovereign immunity. Rather, it comes from the idea that states are not considered "persons" under § 1983. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 63 (1989).

\textsuperscript{218} Pearson v. Callahan, 555 U.S. 223, 232 (2009). "A [g]overnment official's conduct violates clearly established law when, at the time of the challenged conduct, 'the contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

\textsuperscript{219} Owens, 445 U.S. at 651.

separate recovery for compensatory damages.\textsuperscript{221} Under the ADEA, a plaintiff may receive unpaid minimum wages or unpaid overtime compensation, but these liquidated damages are only payable in cases of willful violation of the ADEA.\textsuperscript{222} In contrast, § 1983 permits plaintiffs to recover compensatory damages as long as they can show that they incurred actual damages as a result of a defendant’s violation of the plaintiff’s constitutional rights.\textsuperscript{223} The basic purpose of damages under § 1983 is “to compensate [a plaintiff] for injuries that are caused by the deprivation of constitutional rights.”\textsuperscript{224} Without the use of § 1983, however, a plaintiff would be prevented from receiving these damages and would be forced to rely on one of the ADEA’s permissible remedies, but the ADEA lacks the same basic purpose as § 1983.

Third, there are several instances where a particular plaintiff would not be considered an “employee” for ADEA purposes. The ADEA expressly limits its availability for firefighters or law enforcement officials.\textsuperscript{225} Under the ADEA, it is not unlawful for a state employer to fail, refuse to hire, or discharge a firefighter or law enforcement officer because of age, subject to certain qualifications.\textsuperscript{226} The ADEA also limits the term “employee” to not include “any person elected to public office in any State or political subdivision of any State . . . or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level.”\textsuperscript{227} Thus, if plaintiffs asserting an age discrimination in employment claim fall under one of these ADEA “employee” exceptions, they would be left without any viable method for enforcing their rights if a § 1983 constitutional claim was precluded by the ADEA.

\begin{footnotes}
\item[222] 29 U.S.C. § 626(b). A violation of the ADEA is “willful” if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 (1985).
\item[224] Id. at 253–54.
\item[226] Id.
\item[227] Id. § 630(f).
\end{footnotes}
Fourth, the ADEA cannot be applied to "reverse age discrimination" claims. Reverse age discrimination occurs when an employer favors relatively older employees over relatively younger employees, which can occur in the context of retirement benefits. Although a plaintiff seeking to assert a claim under the ADEA must be at least forty years of age, an employer could favor an older employer over a forty-year-old employee. Because the ADEA does not prohibit reverse age discrimination, employers are not prohibited under the ADEA from favoring an older employee. There is no such limitation, however, for § 1983 equal protection claims. Once again, this divergence between the ADEA and a § 1983 equal protection claim for age discrimination could leave a potential plaintiff without a method for enforcing the constitutional right to be free from age discrimination, which is not permissible.

Lastly, in some circumstances, the ADEA's statute of limitations may be more restrictive than § 1983's statute of limitations. Under the ADEA, a plaintiff must file a charge alleging unlawful age discrimination with the EEOC within 180 days after the alleged unlawful practice or within 300 days if the alleged unlawful practice took place in a state that has its own age discrimination law and corresponding enforcement agency. After that charge has been filed with the EEOC, plaintiffs have two options. First, plaintiffs can wait for a final determination from the EEOC, which will then give them ninety days to file suit in any court of competent jurisdiction once notified of the agency's final determination. Second, if plaintiffs choose not to wait for the EEOC's final determination, they can wait sixty days after filing a charge with the EEOC and bring a civil action in any court of competent jurisdiction.

On the other hand, § 1983 actions must be commenced in accordance with the personal injury statute of limitations of the state in which the conduct occurred. If a state has multiple

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228 Levin v. Madigan, 692 F.3d 607, 621 (7th Cir. 2012), cert. dismissed, 134 S. Ct. 2 (2013) (per curiam).
230 Id. § 626(d)(1)(a)-(b).
231 Id. § 626(e).
232 Id. § 626(d)(1). This option gives a plaintiff two years after the cause of action accrued to file a suit in federal court or three years after the cause of action accrued if the violation of the ADEA is proved to be "willful." Id. § 255(a).
personal injury statutes of limitations, the state's "general or residual statute of limitations governing personal injury actions" is to be applied.\textsuperscript{234} In New York, for example, the applicable statute of limitations for a plaintiff's § 1983 equal protection claim would be three years from the date the cause of action accrued.\textsuperscript{235}

Regardless of whether a statute of limitations is considered a substantive right or a procedural device, the ADEA's statute of limitations could be detrimental to a plaintiff's age discrimination in employment claim. If the ADEA was the exclusive means to remedy violation of plaintiffs' right to be free from arbitrary age discrimination, the Act could foreclose plaintiffs' right to sue their employer before their § 1983 equal protection claim would expire. For example, if plaintiffs receive the EEOC's final determination letter within a year of filing a charge, they will only have ninety more days to file a civil action while they could potentially have another year or two to bring a § 1983 claim. Although this argument is in no way determinative to the ADEA's preclusion of § 1983, it lends further support to the idea that the ADEA cannot be the exclusive remedy for age discrimination in employment. If plaintiffs were foreclosed from bringing a § 1983 claim, they may lose their right to a remedy because of the ADEA's statute of limitations even though they could still have more time to bring a § 1983 claim.

The ADEA and § 1983 claims for age discrimination are clearly not virtually identical. In the five instances mentioned above, the ADEA proves to be narrower than the § 1983 claims for age discrimination, which means that the protections guaranteed by the two sources of law are divergent. This demonstrates that Congress did not intend for the ADEA to be the sole means for vindicating the constitutional right to be free from arbitrary age discrimination.

2. The Remedial Scheme of the ADEA

In light of the divergent coverage of the ADEA and § 1983 equal protection claims, it is also helpful to consider the ADEA's


\textsuperscript{235} Murphy v. Lynn, 53 F.3d 547, 548 (2d Cir. 1995); cf. Farrell v. McDonough, 966 F.2d 279, 282 (7th Cir. 1992) (holding that the applicable statute of limitations in Illinois for a § 1983 claim is two years).
remedial scheme. Instead of using the ADEA's comprehensive remedial scheme to infer congressional intent to preclude the use of § 1983, the ADEA's comprehensive remedial scheme can be used to solidify the divergence between the two statutes. As stated in Levin and many of the other decisions regarding this issue, there is really no way to get around the comprehensiveness of the ADEA's remedial scheme. An argument to suggest otherwise would be extremely hollow.

The ADEA, however, only enforces a plaintiff's right to the protections granted by the ADEA itself. The language of the ADEA, which states that the Act will provide relief in order to effectuate the purposes of the Act, expressly evinces this. Thus, the ADEA only provides an instrument to enforce the substantive rights created by the ADEA itself. As established above, there are several situations in which a plaintiff may allege an age discrimination in employment claim that the ADEA does not cover. If the ADEA only enforces the substantive rights that it creates, but other substantive rights applicable to age discrimination exist that it does not create, there is no way the ADEA can be the sole remedy for age discrimination in employment because it simply cannot remedy all violations of age discrimination in employment. For the substantive rights that fall outside of the ADEA's comprehensive remedial scheme, a plaintiff is not bypassing any part of the ADEA by accessing the federal courts through a § 1983 age discrimination claim. The ADEA's remedial scheme further solidifies the ability of the ADEA and § 1983 to coexist.

The limited reach of the ADEA to protect individuals from age discrimination illustrates that § 1983 is a critical instrument for plaintiffs to enforce their constitutional rights. If Congress intended the ADEA to be the exclusive remedy for age discrimination in employment, it would not have left these gaps in the Act. Congress would have had to make sure that the ADEA protected all of a plaintiff's constitutional rights, in addition to those separate rights granted by the statute. A piece of legislation can protect more than the rights protected under the Constitution, but it cannot protect less. Once again, a right

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236 See Levin v. Madigan, 692 F.3d 607, 617 (7th Cir. 2012) (stating that the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights), cert. dismissed, 134 S. Ct. 2 (2013) (per curiam).

is not a right without a remedy, and it is unwise to infer that Congress intended to prevent plaintiffs from fully seeking enforcement of their constitutional right to be free from age discrimination in employment.

CONCLUSION

For over thirty years, many courts have had the opportunity to determine whether the ADEA is the exclusive remedy for age discrimination in employment, or whether a plaintiff could assert an independent claim under § 1983 of the Civil Rights Act of 1871. Before a plaintiff's § 1983 claim can be precluded, a court must first, and foremost, compare the rights and protections guaranteed under the ADEA with those guaranteed under the Constitution. Next, a court can look to the Act's remedial scheme to further clarify what rights the statute is enforcing. With the nation's aging population, it is pertinent now more than ever for courts to recognize the limitations of the ADEA and permit plaintiffs to bring § 1983 claims in addition to their ADEA claims.
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