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NOTES

THE PRECLUSION OF § 1983 CLAIMS BY THE AGE DISCRIMINATION IN EMPLOYMENT ACT FOLLOWING *HILDEBRAND V. ALLEGHENY COUNTY*

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INTRODUCTION

The aging of the Baby Boomer generation, which completed its entry into the workforce in the late 1970s and early 1980s, combined with the economic recession has resulted in older workers trying to remain in the American workforce. Baby Boomers are both retiring later and reentering the workforce after retiring.[1] Due to the aging workplace, the problem of age discrimination has become increasingly prevalent. One of the pitfalls of the aging workforce is the lack of judicial resources to accommodate for the numerous age discrimination claims. Because of this growing problem, the United States Circuit Courts of Appeals have explored the issue of which remedies are available to these aggrieved workers.

In 1967, Congress enacted the Age Discrimination in Employment Act ("ADEA") to combat the growing problem of age discrimination in the workplace.[2] The ADEA is designed "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting

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[1] Katherine Peralta, *Baby Boomers Turn On, Tune In, but Don't Drop Out*, U.S. NEWS & WORLD REPORT (Oct. 3, 2014, 3:02 PM), http://www.usnews.com/news/blogs/data-mine/2014/10/03/older-adults-staying-in-labor-force-longer-means-younger-ones-participating-less.

[2] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

problems arising from the impact of age on employment."[3] Workers are also protected from discrimination in the workplace by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[4] Specifically, 42 U.S.C. § 1983 creates a private right of action through which citizens can bring claims for equal protection violations. Thus, workers have been asserting their age-based discrimination claims under either both the ADEA and § 1983 or simply under § 1983.[5] Recently, there has been a split of authority among the circuit courts as to whether federal age discrimination claims by state or local government workers may be brought only under the ADEA as opposed to both the ADEA and § 1983.

Prior to 2012, all of the Circuit Courts of Appeals that had considered whether the ADEA is the exclusive remedy for age-based discrimination concluded that the ADEA precludes plaintiffs from bringing concurrent claims of equal protection violations under § 1983.[6] The First, Ninth, Tenth, and District of Columbia Circuits followed the analysis presented by the Fourth Circuit in the then-leading case, *Zombro v. Baltimore City Police Department*.[7] There, the court analyzed the comprehensive remedial scheme of the ADEA and concluded that age-based discrimination claims can not concurrently be brought under § 1983 because the remedial scheme implied preclusion of

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[3] *Id.* § 621(b).

[4] U.S. CONST. amend. XIV, § 1 provides, in pertinent part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[5] Section 1983 provides, in relevant part:

> 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 (2012).

[6] *See* Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051 (9th Cir. 2009); Tapia-Tapia v. Potter, 322 F.3d 742 (1st Cir. 2003); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998), *vacated on other grounds*, *sub nom.* Bd. of Regents of Univ. of N.M. v. Migneault, 528 U.S. 1110 (2000); Lafleur v. Tex. Dep't of Health, 126 F.3d 758 (5th Cir. 1997) (per curiam); Chennareddy v. Bowsher, 935 F.2d 315 (D.C. Cir. 1991); Zombro v. Balt. City Police Dep't, 868 F.2d 1364 (4th Cir. 1989).

[7] *See* 868 F.2d 1364.

§ 1983.[8] The only circuit to have concluded otherwise based its holding on the United States Supreme Court's decision in *Fitzgerald v. Barnstable School Committee*.[9]

In 2009, the Supreme Court examined whether plaintiffs claiming sexual harassment, in violation of Title IX of the Education Amendments of 1972,[10] could bring concurrent claims under § 1983 for violations of the Equal Protection Clause.[11] The Court examined the nature and extent of the remedial scheme of Title IX and found that a plaintiff would not be circumventing procedural requirements by bringing a concurrent § 1983 claim.[12] In assessing the legislative intent of Title IX, the Court noted there was essentially no remedial scheme that would have implied preclusion of § 1983 claims by Title IX.[13] The Court also reasoned that Congress did not intend for Title IX to be the exclusive means of remedying gender discrimination in schools.[14]

Following *Fitzgerald*, two circuit courts addressed the exclusivity of the ADEA as a remedy for age discrimination in the workplace—the Seventh Circuit in *Levin v. Madigan*[15] and the Third Circuit in *Hildebrand v. Allegheny County*.[16] The Seventh Circuit was the first circuit court to explore the issue of whether plaintiffs could bring age-based discrimination claims under both the ADEA and § 1983 as opposed to under only the ADEA in light of the Supreme Court's landmark decision in *Fitzgerald*. In *Levin*, the Seventh Circuit equated the ADEA to Title IX to find that plaintiffs can bring age-based discrimination claims under both the ADEA and § 1983.[17]

In 2014, the Third Circuit confronted the issue of ADEA exclusivity in *Hildebrand v. Allegheny County*.[18] The court held that the ADEA is the exclusive remedy for age discrimination claims and thus precludes aggrieved workers from bringing age-based discrimination claims under the Equal Protection Clause

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[8] *See infra* Part II.A.

[9] *See* 555 U.S. 246 (2009).

[10] 20 U.S.C. § 1681(a) (2012).

[11] *See Fitzgerald*, 555 U.S. 246; *infra* Part II.B.

[12] *Fitzgerald*, 555 U.S. at 255–56.

[13] *Id.* at 258–59.

[14] *Id.* at 258.

[15] 692 F.3d 607 (2012).

[16] 757 F.3d 99 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1398 (2015); *see also infra* Part II.C.

[17] *See generally Levin*, 692 F.3d 607.

[18] 757 F.3d 99.

through § 1983.[19] As a result, the plaintiff was allowed to maintain his age discrimination claim under the ADEA but not under § 1983.[20] In so holding, the Third Circuit reaffirmed the decisions of six of its sister circuit courts, which have held that plaintiffs cannot bring both ADEA and § 1983 claims. The Third Circuit is the first federal appellate court to hold that the ADEA precludes a plaintiff from bringing concurrent claims under § 1983 following the Supreme Court's decision in *Fitzgerald*.

This Note maintains that the Supreme Court should resolve the circuit split by affirming the *Hildebrand* court's decision. Part I of this Note discusses the background of the ADEA and § 1983, including each legislation's purpose, legislative history, and provisions. Part I concludes with a discussion of the doctrine of implied preclusion. Part II presents the circuit split by discussing the way the courts have analyzed this issue prior to *Fitzgerald* and how subsequent courts have decided the issue in light of *Fitzgerald*. Part III asserts that the ADEA precludes equal protection claims through § 1983 because of its comprehensive remedial scheme.

I. BACKGROUND

A. The Age Discrimination in Employment Act of 1967

1. Purpose

According to its preamble, the 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."[21] The stated purposes of the enactment are part of the ultimate goal of the ADEA, which is "to shift focus away from chronological age and age-related barriers and to insist on individual assessments of ability and merit in making employment decisions."[22]

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[19] *Id.* at 102.

[20] *Id.*

[21] 29 U.S.C. § 621(b) (2012).

[22] Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 235 (1990).

2. Key Provisions

The ADEA applies to workers above the age of forty who have been discriminated against by their employers on the basis of age.[23] The ADEA makes it unlawful for an employer to make employment decisions on the basis of age concerning hiring, discharging, training, wages, and classifying.[24] When an employee seeks to bring a discrimination claim against an employer, there are certain administrative remedies that the employee must first exhaust.[25] First, the employee must file a charge with the Equal Employment Opportunity Commission ("EEOC") before commencing a civil action.[26] The ADEA requires that an employee file the discrimination charge within 180 days from the date the alleged discrimination occurred.[27] Next, the EEOC will notify all named parties and attempt to eliminate the discrimination "by informal methods of conciliation, conference, and persuasion."[28] The worker must then wait sixty days from the date of filing the charge before commencing a civil action against the employer.[29] If an employer is found liable under the ADEA, the court may compel the employer to employ, reinstate or promote the aggrieved employee.[30] Further, the employer may be liable for unpaid minimum wages or unpaid overtime compensation.[31] Finally, if the employer "willful[ly] violat[es]" the ADEA, the employer may be subject to liquidated damages, which is equal to the amount of actual damages.[32]

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[23] 29 U.S.C. § 631(a).

[24] *Id.* § 623(a).

[25] *Id.* § 626(d).

[26] *Id.* § 626(d)(1). The transfer of function from the Secretary of Labor to the Equal Employment Opportunity Commission was a result of the 1978 amendments to the ADEA. JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 9 (2d ed. 1990); Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (codified as amended at 5 U.S.C. §§ 901–912 (2012)).

[27] 29 U.S.C. § 626(d)(1). The charge must be filed within 300 days in states that have their own administrative agencies for handling discrimination claims. *Id.*

[28] *Id.* § 626(d)(2).

[29] *Id.* § 626(d)(1).

[30] *Id.* § 626(b).

[31] *Id.*

[32] *Id.*

3. Legislative History

The issue of age discrimination in the workplace did not garner congressional attention until discussions surrounding the passage of the Civil Rights Act of 1964.[33] During the debates regarding the employment provision of the Act, Title VII, Congress considered including age among the groups that would be protected.[34] As opposed to the "long, tumultuous, and at times violent civil rights struggle that captured the public's attention" with regard to race, which led to the need for the Civil Rights Act of 1964, age was not a widespread problem that needed to be addressed at the time.[35] Thus, Congress resolved to have the Secretary of Labor study age discrimination in employment and report any findings.[36]

Within one year, Secretary Willard Wirtz reported to Congress his finding that there was widespread age discrimination in the workplace that needed to be addressed.[37] His report raised concerns about arbitrary age discrimination based on misconceptions about the abilities of older workers as opposed to discrimination based on the actual abilities of older workers.[38] This report became the "catalyst for swift passage of the ADEA."[39] In 1966, Congress called for legislative proposals from the Secretary of Labor, which was quickly followed by a draft bill in 1967.[40] President Lyndon B. Johnson subsequently

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[33] *See* Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

[34] 110 CONG. REC. 2596–99, 9911–13 (1964).

[35] Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 298 (1995).

[36] Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265. The Secretary was directed to "make a full and complete study of the 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." *Id.*

[37] Pontz, *supra* note 35, at 299–300 (citing 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)).

[38] Pontz, *supra* note 35, at 299.

[39] Kaminshine, *supra* note 22, at 235.

[40] KALET, *supra* note 26, at 1–2.

endorsed the bill in his Older Americans Message where he called for an "end [to] arbitrary age limits on hiring."[41] The ADEA was enacted later that year.[42]

Although the ADEA's enactment arose out of the Civil Rights Act of 1964, the drafters realized that the "mere inclusion of the term 'age' into Title VII" would be inadequate since age was not an immutable characteristic, unlike race and sex.[43] The drafters did, however, mirror Title VII's enforcement scheme and proof considerations. Since Title VII lacked a remedial scheme, the drafters modeled the remedial scheme of the ADEA after that of the Fair Labor Standards Act of 1938[44] ("FLSA"). Thus, the ADEA is a hybrid of Title VII and the FLSA.[45]

4. ADEA's Relation to FLSA and Title VII

Although the stimulus for the enactment of the ADEA can be attributed to the passage of Title VII of the Civil Rights Act of 1964, the impetuses behind the two acts are incongruent. Title VII was passed in direct response to the Civil Rights Movement, which was the result of a long history of discrimination against African Americans.[46] Title VII of the Act was enacted to ensure there was no discrimination against African Americans in the workplace. The passage of the ADEA, however, resulted from the discussion of whether age should be a class protected from discrimination in the workplace.[47] When Congress decided that age did not deserve the same protection as a class of people who had long faced discrimination in the United States, it resolved to enact the ADEA to protect against arbitrary age discrimination in the workplace.[48]

Since Title VII was a statute addressing discrimination in the workplace, the ADEA was modeled after it.[49] Both statutes are largely identical in their purpose and substantive provisions.[50] The main difference between the ADEA and Title

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[41] 113 CONG. REC. 34,743–44 (1967).
[42] KALET, *supra* note 26, at 2.
[43] *Id.*
[44] *Id.* at 2–3.
[45] *Id.*; *see infra* Part I.A.4.
[46] Pontz, *supra* note 35.
[47] *Id.*
[48] *See supra* Part I.A.1.
[49] Pontz, *supra* note 35, at 289.
[50] *Id.*

VII, however, is the varied remedial provisions.[51] In 1991, Congress amended Title VII to include the availability of compensatory damages for pain and suffering.[52] The ADEA included no such amendment, which further exemplifies the lack of congressional intent for these two statutes to be interpreted in the same way.[53]

The remedial provisions of the ADEA most closely resemble those of the FLSA.[54] The FLSA sets forth employment rules concerning minimum wages, maximum hours, and overtime pay.[55] The ADEA's remedial scheme incorporates several enforcement provisions of the FLSA by direct reference to the FLSA.[56] Specifically, it provides that the rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures provided in [the specified sections of the ADEA]."[57]

In terms of exclusivity, courts have held that Title VII does not preclude a plaintiff from bringing claims under § 1983,[58] whereas courts have held that the FLSA does preclude plaintiffs from bringing concurrent claims through § 1983.[59]

B. 42 U.S.C. § 1983: History, General Provisions, and Scope of Actions

Section 1983 provides a remedy for anyone who has been subjected to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person who acts "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

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[51] *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978).

[52] David C. Miller, *Alone in Its Field: Judicial Trend To Hold That the ADEA Preempts § 1983 in Age Discrimination in Employment Claims*, 29 STETSON L. REV. 573, 586 (2000).

[53] *Id.* at 586–87.

[54] KALET, *supra* note 26, at 2–3.

[55] 29 U.S.C. §§ 206–207 (2012).

[56] Miller, *supra* note 53, at 585.

[57] 29 U.S.C. § 626(b).

[58] Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974).

[59] Lerwill v. Inflight Motion Pictures, Inc., 343 F. Supp. 1027, 1029 (N.D. Cal. 1972).

Columbia."[60] The two essential elements of a claim under § 1983 are (1) the deprivation of a federal right (2) by someone acting "under color of" state law.[61]

Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871 in order to enforce the Reconstruction Amendments.[62] Due to the "longstanding congressional recognition that a federal right is of little practical value without a corresponding remedy for violation of that right," § 1983 was necessary to combat the racism that still existed after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.[63] The establishment of a federal cause of action for violations of one's constitutional rights through § 1983 was essential for the protection of African Americans from members of the Ku Klux Klan.[64]

Section 1983 actions are subject to a complex set of rules.[65] Section 1983 does not provide any substantive rights; it merely provides a cause of action when there has been a deprivation of one's federal or constitutional rights.[66] Despite § 1983's broad language, courts have narrowed its availability to those seeking to bring claims under it.[67] Restrictions that have been imposed on § 1983 actions include, but are not limited to, qualified immunity and express or implied preclusion.[68]

In addition to naming the individual actors who committed the alleged constitutional violation under § 1983, plaintiffs often bring in the municipal entity as a defendant.[69] To prove one's claim against the municipal entity, the plaintiff must demonstrate, by a preponderance of the evidence, that there was a municipal custom or policy to which the deprivation of a federal

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[60] 42 U.S.C. § 1983 (2012).

[61] *Id.*

[62] Jacob E. Meyer, Note, *"Drive-By Jurisdictional Rulings": The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 419 (2009).

[63] *Id.*

[64] *Id.*

[65] *See* 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3573.2 (3d ed. 2016).

[66] Meyer, *supra* note 62, at 420–21.

[67] *Id.* at 421–22.

[68] *Id.* at 422.

[69] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978) (holding that municipal corporations may be named in a § 1983 litigation).

right can be attributed.[70] There is much difficulty associated with proving this type of claim, however. The custom or practice must have been "so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice."[71] The high standard makes it difficult for plaintiffs to prove their case under the custom or practice theory.[72]

C. Implied Preclusion Doctrine

The Supreme Court has set forth guidelines that should be followed in determining when a federal statute should be considered the exclusive remedy for a wrong that another statute also addresses. The implied preclusion doctrine is based upon the idea that a statute that contains a "comprehensive remedial scheme signals congressional intent to limit enforcement of the federal right to the mechanisms contained within the remedial scheme."[73] Statutes that have precluded § 1983 causes of action include, but are not limited to, the Federal Water Pollution

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[70] MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 6 (2d ed. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/$file/sec19832.pdf.

[71] Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir. 1989).

[72] *See* Pineda v. City of Houston, 291 F.3d 325 (5th Cir. 2002) (finding that the plaintiff submitted insufficient evidence to create a triable issue that the Houston Southwest Gang Task Force was engaged in a pattern of unconstitutional searches pursuant to a custom of the city based on reports of eleven warrantless entries into residences); Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992) (holding that testimony by a fire chief that the practice of firefighters who wish to criticize emergency operations remaining silent and complaining at a later time was one he wanted to be followed was insufficient evidence of a pattern of free speech violations). *Cf.* Sorlucco v. N.Y.C. Police Dep't, 971 F.2d 864 (2d Cir. 1992). In *Sorlucco*, the court found that there was systemic gender discrimination, which is subject to a more heightened standard of review than age discrimination, in the NYPD after the plaintiff introduced evidence of the NYPD's inadequate investigation into the plaintiff's complaint, expert testimony that the department's investigation was negligent, and a statistical study regarding actions taken against probationary officers, which demonstrated that 100% of female officers who were disciplined were fired whereas only 63% of the male officers disciplined were fired. *Id.* at 871–73. The court even reasoned that the statistical study by itself would have been insufficient to establish municipal liability. *Id.* at 872.

[73] Meyer, *supra* note 62, at 417.

Control Act[74] ("FWPCA"), the Education of the Handicapped Act[75] ("EHA"), the Americans with Disabilities Act ("ADA"), the Rehabilitation Act,[76] and the Telecommunications Act.[77]

The first time the Supreme Court recognized the implied preclusion doctrine was in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.[78] There, the plaintiffs brought a private suit for damages under citizen-suit provisions of the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA").[79] Although the issue of § 1983 preclusion was not argued by the parties, the Supreme Court held that the plaintiffs could not bring their suits under § 1983 because the statutes at issue precluded a remedy under § 1983.[80]

Justice Powell's reasoning in *Sea Clammers* has been referred to as the "comprehensiveness test."[81] This test focuses on the remedial scheme that has been enacted as part of the legislation to determine whether it is sufficiently comprehensive to preclude a § 1983 claim.[82] When legislation passes the comprehensiveness test, it will usually result in preclusion.[83] The inclination toward preclusion, however, is not definitive.[84] The malleability of the test is an apt compromise between those who argue against the implied preclusion doctrine. Thus, the courts must determine exclusivity on a case-by-case basis.

In *Sea Clammers*, when the Court analyzed whether the FWPCA and MPRSA preclude § 1983 claims, it acknowledged that it needed to determine "whether Congress had foreclosed private enforcement of [§ 1983] in the enactment itself."[85] The

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[74] *See* Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

[75] *See* Smith v. Robinson, 468 U.S. 992 (1984).

[76] *See* Grey v. Wilburn, 270 F.3d 607, 611 (8th Cir. 2001).

[77] *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

[78] 453 U.S. 1.

[79] *Id.* at 6.

[80] *Id.* at 19–21.

[81] Myron D. Rumeld, Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183, 1186 (1982).

[82] *Id.*

[83] *Id.*

[84] *Id.* at 1190 ("Comprehensiveness should not emerge as a rigid test of statutory interpretation, but as a flexible form of construction that assumes a different role in and has a different impact on the adjudication of the various remedial claims.").

[85] 453 U.S. at 19.

Court stated that "sufficiently comprehensive" remedial devices "may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[86] Further, the Court reasoned that the procedural requirements of a comprehensive enforcement scheme cannot be bypassed by plaintiffs bringing a claim directly under § 1983.[87] The Court examined the statutory remedies of the FWPCA and the MPRSA, including their citizen-suit provisions that allow private citizens to sue for injunctive relief under these statutes, and the specific procedures that require plaintiffs to notify the Environmental Protection Agency, the State, and any alleged violator before filing suit.[88] Since the statutes set forth "quite comprehensive enforcement mechanisms," the Court held that Congress intended for the statutes to "supplant any remedy that otherwise would be available under § 1983."[89]

In *Smith v. Robinson*, the Supreme Court similarly examined whether a claim based on a violation of the Equal Protection Clause of the Fourteenth Amendment is precluded by a federal statute.[90] There, the plaintiff brought a claim alleging denial of a free appropriate public education due to his handicap under both the Education of the Handicapped Act ("EHA") and the Equal Protection Clause through § 1983.[91] Since the Court held that the claims were nearly identical, it used the implied preclusion doctrine to determine whether the plaintiff could bring his constitutional claims under both the EHA and § 1983.[92]

After its examination of the EHA's statutory provisions and legislative history, the Court concluded that "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim."[93] The Court emphasized that, when analyzing whether a statute precludes § 1983 claims, the "crucial consideration is what Congress intended."[94] Congress's intent is evidenced by its carefully tailored scheme, which establishes procedures to ensure protection for

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[86] *Id.* at 20.
[87] *Id.*
[88] *Id.* at 6, 14.
[89] *Id.* at 20–21.
[90] 468 U.S. 992 (1984).
[91] *Id.* at 994–95.
[92] *Id.* at 1009.
[93] *Id.*
[94] *Id.* at 1012.

handicapped children.[95] The Court reasoned that allowing a plaintiff to go directly to court with an equal protection claim would "render superfluous most of the detailed procedural protections outlined in the statute."[96] Additionally, the legislative history indicated that Congress believed the EHA would be the "most effective vehicle for protecting the constitutional right."[97] Thus, the EHA is the exclusive avenue through which plaintiffs asserting constitutional rights to a free appropriate public education can bring their claims.

Following *Smith*, the Supreme Court examined another federal statute to determine whether it precluded § 1983 claims in *Rancho Palos Verdes v. Abrams*.[98] There, the plaintiff sought injunctive relief under the Telecommunications Act of 1996 ("TCA") and money damages under § 1983.[99] The Court reinforced its holdings in previous cases that a defendant can defeat the rebuttable presumption that a right is enforceable under § 1983 by proving that Congress did not intend to allow a § 1983 remedy for a newly created statutory right.[100] The Court applied the implied preclusion doctrine, explaining that "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.' "[101] Since congressional intent is the most important factor in the analysis,[102] the Court examined whether there was a "provision of an express, private means of redress in the statute itself [because that] is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."[103] Because the TCA provided a more restrictive private remedy for statutory violations, the Court held it precluded plaintiffs from bringing § 1983 claims.[104]

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[95] *Id.* at 1010–11.
[96] *Id.* at 1011.
[97] *Id.* at 1013.
[98] 544 U.S. 113 (2005).
[99] *Id.* at 118.
[100] *Id.* at 120.
[101] *Id.* (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)).
[102] *Id.* (quoting *Smith*, 468 U.S. at 1012).
[103] *Id.* at 121.
[104] *Id.* at 127.

In its analysis of the exclusivity of the TCA, the Court examined the enforcement scheme of the statute itself. Generally, the TCA limits the regulation of the installation of facilities for wireless communications.[105] It requires local governments to respond to requests for permits within a reasonable amount of time and provide a written decision supported by substantial evidence for any denials of permit requests.[106] Further, an individual adversely affected by a government action or failure to act may file a suit after thirty days.[107] The remedy available to an individual, however, is limited; a plaintiff is not entitled to compensatory damages or attorney fees and costs. Since the TCA has a sufficiently comprehensive scheme, and enforcement of it "would distort the scheme of expedited judicial review and limited remedies," the Court held that the TCA precludes a plaintiff from resorting to § 1983 to bring his claims.[108]

The crux of the implied preclusion doctrine is looking at the statutory language to determine congressional intent in the area of exclusivity.[109] The Supreme Court, in *Sea Clammers* and *Rancho Palos Verdes*, looked at the language of the statute as the primary source for determining whether Congress intended to allow plaintiffs to bring concurrent § 1983 claims.[110] The method of statutory interpretation underlying the implied preclusion doctrine provides:

> "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.[111]

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[105] *Id.* at 115–16.

[106] *Id.* at 116.

[107] *Id.*

[108] *Id.* at 127.

[109] *See* Meyer, *supra* note 62, at 423.

[110] *See Rancho Palos Verdes*, 544 U.S. 113; Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

[111] Meyer, *supra* note 62, at 423 (quoting Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)).

II. CIRCUIT SPLIT

A. *Pre-*Fitzgerald *Cases: Finding the ADEA Is the Exclusive Remedy*

The first time the issue of ADEA exclusivity was addressed was by the United States Court of Appeals for the Fourth Circuit in *Zombro v. Baltimore City Police Department*.[112] There, the court held that the ADEA precludes age discrimination claims from being brought under the Equal Protection Clause via § 1983.[113] James Zombro, a forty-five year old police officer, brought an equal protection claim in federal court alleging that he was transferred to a different department within the police force on the basis of his age.[114] Zombro did not bring a claim under the ADEA since he did not complete the necessary administrative steps; it had been longer than six months since the alleged discrimination, which was beyond the outer time limit of filing a charge with the EEOC.[115] The lower court granted summary judgment in favor of the police department, dismissing Zombro's § 1983 claims, a decision which the Fourth Circuit upheld.[116] The Fourth Circuit held that Zombro could not assert his age discrimination claims under § 1983 because the ADEA is the exclusive remedy for age discrimination claims.[117]

To reach this conclusion, the court applied the implied preclusion doctrine to the ADEA.[118] It explained that "where Congress has provided a comprehensive remedial framework, such as the ADEA, a plaintiff is not relieved of the obligation to follow that remedial procedure by claiming that state action violative of the statutory scheme also violates the Fourteenth Amendment."[119] Further, the court acknowledged that the only time § 1983 claims would not be precluded would be if the statute "manifests a congressional intent to allow an individual a choice of pursuing independently rights under both the statutory

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[112] 868 F.2d 1364 (4th Cir. 1989).
[113] *Id.* at 1369.
[114] *Id.* at 1365.
[115] *Id.* at 1366–67.
[116] *Id.* at 1365.
[117] *Id.* at 1369.
[118] *Id.* at 1367.
[119] *Id.* at 1368.

scheme and some other applicable federal statute."[120] Even though Zombro's § 1983 claim was wholly predicated on a violation of his constitutional rights, the court held that his claim was the type that should have been brought under the ADEA.[121]

The Fourth Circuit applied the implied preclusion doctrine to the ADEA by analyzing its language and purpose. First, it engaged in an analysis of the ADEA's comprehensive remedial scheme.[122] The court recognized that the purpose of the Act is to "facilitate and encourage compliance through an informal process of conciliation and mediation."[123] It acknowledged that the ADEA's "goal of compliance through mediation would be discarded" if plaintiffs were allowed to circumvent the ADEA's administrative process.[124] Additionally, the court looked at the language and legislative history of the statute.[125] The main concern of the Fourth Circuit was that plaintiffs bringing age discrimination claims under § 1983 would be bypassing the comprehensive scheme created by Congress, thus making the ADEA superfluous.[126] Upon examining the ADEA, the court concluded that it 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."[127] Further, it reasoned, the ADEA indicates congressional intent to foreclose § 1983 actions.[128] The court found that it would be "implausible" that Congress would have intended to permit plaintiffs to bypass the ADEA's comprehensive statutory scheme by preserving a private cause of action under § 1983.[129] Thus, the Fourth Circuit held that the ADEA is the exclusive remedy for age discrimination claims.[130]

Following its discussion of the ADEA, the Fourth Circuit turned to the issue of age discrimination claims being asserted under the Fourteenth Amendment.[131] The court acknowledged

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[120] *Id.* at 1367.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 1366.
[124] *Id.*
[125] *Id.* at 1369.
[126] *Id.* at 1366–67.
[127] *Id.* at 1369.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 1370–71.

the Supreme Court's statement that the elderly are not subject to strict judicial scrutiny because they are not a suspect class.[132] Because there was no discrimination based on race, sex, or employees exercising their First Amendment rights, the Fourth Circuit did not "intervene on constitutional grounds in the hiring, discharge or promotion of public employees."[133]

Following the Fourth Circuit's decision in *Zombro*, the United States Courts of Appeals for the First,[134] Fifth,[135] Ninth,[136] Tenth,[137] and D.C.[138] Circuits have also held that the ADEA is the exclusive remedy for age discrimination claims. Most of the circuit courts applied the *Zombro* court's reasoning to the facts of their cases.[139] The Ninth Circuit, however, also explored the relationship of the ADEA to Title VII and the FLSA in *Ahlmeyer v. Nevada System of Higher Education*.[140] There, the plaintiff sued her employer for denying her privileges of employment and punishing her for actions for which younger employees were not punished.[141] The court found that the remedial provisions of the ADEA, which are the most relevant to the subject of preclusion, did not mirror those of Title VII;[142] however, the differences

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[132] *Id.* at 1370 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976)).

[133] *Id.* at 1370–71 (quoting Clark v. Whiting, 607 F.2d 634, 638–39 (4th Cir. 1979)).

[134] Tapia-Tapia v. Potter, 322 F.3d 742, 745 (1st Cir. 2003) ("The ADEA provides the exclusive federal remedy for age discrimination in employment.").

[135] Lafleur v. Tex. Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997) (per curiam) ("[B]ecause Congress has enacted a statutory provision to confront age discrimination in the work place via the ADEA, and based on this circuit's opinion that the ADEA is the sole remedy for persons who have been discriminated against based on their age, we are compelled to hold that where a plaintiff asserts a claim of age discrimination under § 1983 and where the facts alleged will not independently support a § 1983 claim, the plaintiff's age discrimination claim is preempted by the ADEA.").

[136] Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1060 (9th Cir. 2009) ("Because the ADEA provides a comprehensive remedial scheme, it should be read as precluding § 1983 actions in the area of age discrimination in employment.").

[137] Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998) ("[A]ge discrimination claims brought under § 1983 are preempted by the ADEA."), *vacated on other grounds*, *sub nom.* Bd. of Regents of Univ. of N.M. v. Migneault, 528 U.S. 1110 (2000).

[138] Chennareddy v. Bowsher, 935 F.2d 315, 318 (D.C. Cir. 1991) ("It is undisputed that the ADEA provides the exclusive remedy for a federal employee who claims age discrimination.").

[139] *See supra* notes 113–24 and accompanying text.

[140] 555 F.3d at 1058–59.

[141] *Id.* at 1054.

[142] *Id.* at 1058–59.

between the ADEA and Title VII do not merely lie in the statutes' remedial provisions. The court explained that while both statutes are designed to eliminate discrimination, an individual's capacity to work may be affected by age, unlike race or other protected groups within the scope of Title VII.[143] The Ninth Circuit concluded that the ADEA's remedial scheme is more akin to the enforcement provisions of the FLSA, which provide the exclusive remedy for claims arising under its provisions, as both statutes provide remedies such as reinstatement, backpay, injunctive relief, declaratory judgment, and attorney fees.[144] Thus, the Ninth Circuit concluded that because the ADEA's remedial scheme is different from that of Title VII, ADEA plaintiffs, unlike Title VII plaintiffs, cannot bring concurrent § 1983 claims.[145]

B. Fitzgerald v. Barnstable School Committee*: Holding That Title IX Does Not Preclude § 1983 Claims*

The Supreme Court's most recent decision on exclusivity and § 1983 claims, *Fitzgerald v. Barnstable School Committee*, explored the implied preclusion doctrine via Title IX of the Education Amendments of 1972, which seeks to prohibit all discrimination in schools based on sex.[146] There, the plaintiffs, an elementary school student and her parents, filed a § 1983 action against the school superintendent and school committee claiming student-to-student sexual harassment in violation of Title IX and the Equal Protection Clause.[147] The Court applied the implied preclusion doctrine to Title IX and concluded that the plaintiffs could assert their § 1983 claims because Title IX did not foreclose § 1983 causes of action.[148]

In its decision, the Court analyzed Title IX in light of the previously decided implied preclusion cases, including *Sea Clammers*, *Smith v. Robinson*, and *Rancho Palos Verdes*.[149] The Court began its discussion by indicating that it has "placed primary emphasis on the nature and extent of [a] statute's

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[143] *Id.* at 1059.
[144] *Id.*
[145] *Id.*
[146] 555 U.S. 246 (2009).
[147] *Id.*
[148] *Id.*
[149] *Id.*

remedial scheme" in determining whether it precludes the enforcement of a federal right.[150] In looking to the statutory language, the Court concluded that the Title IX remedies of withdrawing federal funds from a discriminatory actor and an implied cause of action were far from the " 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*."[151] Title IX does not have any administrative exhaustion requirements nor any notice provisions, which would be circumvented should a parallel and concurrent § 1983 claim be allowed.[152] Thus, since there was no comprehensive remedial scheme comparable to the schemes in the previous implied preclusion cases, the Court concluded that Title IX was not meant to be the exclusive means for addressing gender discrimination in schools.[153] Further, the Court reasoned that "Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was."[154]

*C. Post-*Fitzgerald *Cases: Analyzing the ADEA in Light of the Supreme Court's Holding That Title IX Does Not Preclude § 1983 Claims*

1. *Levin v. Madigan*: Finding the ADEA Does Not Preclude § 1983 Claims

After *Fitzgerald v. Barnstable*, the first case to decide the issue of whether the ADEA precludes § 1983 claims was *Levin v. Madigan*.[155] There, the Seventh Circuit found that § 1983 claims based on age discrimination in the workplace are not precluded by the ADEA.[156]

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[150] *Id.* at 253.
[151] *Id.* at 255.
[152] *Id.* at 255–56.
[153] *Id.* at 258.
[154] *Id.* Unlike the ADEA being modeled after Title VII and the FLSA, which were not routinely interpreted as allowing § 1983 claims at the time of the ADEA's enactment, "[a]t the time of Title IX's enactment in 1972, Title VI was routinely interpreted to allow for parallel and concurrent § 1983 claims." *Id.*
[155] 692 F.3d 607 (7th Cir. 2012).
[156] *Id.* at 617.

The plaintiff brought the action against his employer, a state government organization, and his supervisors, asserting claims under both the ADEA and the Equal Protection Clause through § 1983.[157] To determine whether the § 1983 claim was precluded, the Seventh Circuit recognized the implied preclusion doctrine and 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."[158] The court disagreed with the Supreme Court in *Fitzgerald* and reasoned that "the most important consideration is congressional intent."[159] It also acknowledged that all of its sister courts have held that the ADEA is the exclusive remedy for age discrimination claims.[160] Nevertheless, the Seventh Circuit held that the ADEA did not preclude § 1983 claims, despite the decision being "admittedly a close call, especially in light of the conflicting decisions from our sister circuits."[161]

First, the Seventh Circuit reasoned that "[n]othing in the text of the ADEA expressly precludes a § 1983 claim or addresses constitutional rights."[162] Rather than concluding that Congress's silence was an indication of exclusivity, the court determined that congressional silence was evidence that Congress did not consider the ADEA's exclusivity.[163] The Seventh Circuit added that a finding of preclusion requires "more . . . than a comprehensive statutory scheme."[164] Thus, the ADEA's remedial scheme was not enough to imply that Congress intended the ADEA to preclude § 1983 claims.

2. *Hildebrand v. Allegheny County*: Finding the ADEA Precludes § 1983 Claims

Two years after the Seventh Circuit's anomalistic decision on the issue of the ADEA's preclusion of § 1983 claims, the Third Circuit joined the discussion in *Hildebrand v. Allegheny*

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[157] *Id.* at 609.
[158] *Id.* at 613 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).
[159] *Id.* at 615.
[160] *Id.* at 616.
[161] *Id.* at 617.
[162] *Id.*
[163] *Id.* at 617–18.
[164] *Id.* at 619.

County.[165] There, the court concluded that the ADEA is the exclusive remedy for age discrimination claims and forecloses a plaintiff from bringing an age discrimination suit under § 1983.[166]

Plaintiff Anthony Hildebrand was a detective for the Allegheny County District Attorney's Office for five years before he was terminated in 2011.[167] Hildebrand alleged that his termination was based on an established practice in the District Attorney's Office of pushing older workers out of the workplace.[168] In 2009, Hildebrand was assigned to a new supervisor who allegedly demoted him because of his age despite Hildebrand's satisfactory work performance.[169] Upon learning of his termination, Hildebrand filed an internal grievance; however, his termination was upheld.[170]

In response to his termination, Hildebrand filed an Intake Questionnaire with the Equal Employment Opportunity Commission ("EEOC") alleging age discrimination and authorizing the EEOC to investigate his claim since he wanted to file a charge of discrimination.[171] Subsequently, the EEOC issued a right-to-sue letter to Hildebrand.[172] Hildebrand filed his complaint asserting violations of the ADEA and the Equal Protection Clause through § 1983.[173] However, the district court dismissed Hildebrand's ADEA and § 1983 claims.[174]

On appeal, the Third Circuit was faced with the issue of whether the ADEA is the exclusive remedy for claims of age discrimination in the workplace.[175] The court upheld the district court's dismissal of the ADEA claim because the ADEA is the exclusive remedy for claims of age discrimination in employment.[176] In its analysis, the court relied on the implied

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[165] 757 F.3d 99 (2014), *cert. denied*, 135 S. Ct. 1398 (2015).
[166] *Id.* at 102.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at 102–03.
[174] *Id.* at 103–04.
[175] *Id.* at 104.
[176] *Id.*

preclusion doctrine. It reasoned that the main consideration in the determination of whether a statutory enactment precludes a § 1983 claim is Congress's intent.[177]

The Third Circuit explored Congress's intent in its enactment of the ADEA in light of the Supreme Court's decision in *Fitzgerald* and the Seventh Circuit's decision in *Levin*.[178] The first consideration that the Third Circuit explored was *Fitzgerald*'s reaffirmation of the Supreme Court's consistent holding that the "comprehensiveness of a statute's remedial scheme is the primary factor in determining congressional intent."[179] The court reasoned that the *Levin* court wrongly interpreted the *Fitzgerald* decision by holding that "Congress must provide some 'additional indication' of its intent."[180] The Third Circuit found that, for a statute to preclude § 1983 claims, there need not be an outright manifestation of congressional intent to preclude such claims.[181] Rather, the Supreme Court's decision in *Fitzgerald* stands for the proposition that when there are extensive procedural requirements or administrative remedies in a statute, allowing a plaintiff to circumvent those statutory requirements would be "inconsistent with Congress' carefully tailored scheme."[182]

The Third Circuit applied this analysis to the ADEA and held that the ADEA's comprehensive remedial scheme sufficiently encompasses the Fourteenth Amendment's concerns of age discrimination in the workplace.[183] The Third Circuit reasoned that the ADEA provides a private right of action for employees who are subjected to age discrimination in the workplace once they exhaust the administrative remedies set out by the statute, unlike Title IX.[184] First, an employee must file a charge of discrimination with the EEOC.[185] Next, the EEOC must "promptly seek to eliminate any alleged unlawful practice

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[177] *Id.* at 104–05.

[178] *Id.* at 107–10.

[179] *Id.* at 108 (citing Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 253 (2009) ("[W]e have placed primary emphasis on the nature and extent of [a] statute's remedial scheme.")).

[180] *Id.* at 109 (quoting Levin v. Madigan, 692 F.3d 607, 619 (7th Cir. 2012)).

[181] *Id.* at 109.

[182] *Id.* (quoting *Fitzgerald*, 555 U.S. at 255).

[183] *Id.*

[184] *Id.*

[185] *Id.*

by informal methods of conciliation, conference, and persuasion."[186] Then, the employee may commence a lawsuit against his employer sixty days after filing the charge if the EEOC does not elect to file the suit to enforce the employee's claim.[187] The Third Circuit determined that allowing a plaintiff to sue directly under § 1983 and thereby circumvent this comprehensive administrative process would undermine the statutory scheme set out by Congress.[188]

The court also addressed the argument that the rights and protections of the ADEA and the Equal Protection Clause are so different that Congress could not have intended the ADEA to preclude § 1983 claims.[189] Since age discrimination claims only receive rational basis review under the Equal Protection Clause,[190] the ADEA expands the protection of employees from age discrimination in the workplace.[191] The Third Circuit held that the ADEA encompasses the protections afforded by the Fourteenth Amendment since it prohibits arbitrary age discrimination in employment.[192]

Finally, the Third Circuit explained that the fact that there is a difference in potential defendants under the ADEA and § 1983 is not sufficient to conclude Congress intended to allow both claims to proceed.[193] The court reasoned that the limitations set forth in the ADEA on potential defendants and on remedies is even more evidence that Congress intended to specifically define employees' rights rather than allow them to circumvent the administrative remedies of the ADEA.[194] Thus, the Third Circuit agreed with the majority of the United States Courts of Appeals and concluded that Congress intended the ADEA to be the

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[186] 29 U.S.C. § 626(d)(2) (2012).

[187] *Hildebrand*, 757 F.3d at 109.

[188] *Id.*

[189] *Id.*

[190] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

[191] *Hildebrand*, 757 F.3d at 109.

[192] *Id.*; 29 U.S.C. § 621(b) (2012).

[193] *Hildebrand*, 757 F.3d at 109–10.

[194] *Id.* at 110.

exclusive remedy for claims of age discrimination in the workplace because § 1983 claims are "inconsistent with Congress' carefully tailored scheme."[195]

III. ANALYSIS

The majority of the United States Courts of Appeals have consistently held that the ADEA precludes claims of age discrimination in the workplace from being brought under § 1983.[196] Only one circuit court has held that a litigant may bring claims under both the ADEA and § 1983. The Supreme Court's decision in *Fitzgerald v. Barnstable School Committee* was the impetus behind that court's anomalistic decision. This Note maintains, however, that the Seventh Circuit, in *Levin v. Madigan*, misinterpreted the Court's decision in *Fitzgerald*. The Third Circuit's decision in *Hildebrand v. Allegheny County*, on the other hand, properly concluded that the ADEA is unlike Title IX; therefore, the ADEA does preclude § 1983 claims.

First, the Third Circuit properly concluded that the ADEA precludes § 1983 claims because it followed the implied preclusion test set forth in *Fitzgerald*.[197] The court in *Hildebrand* observed that the crucial consideration in determining whether someone can bring a concurrent statutory claim under § 1983 is what Congress intended. The Third Circuit lifted the language of the implied preclusion test directly from the Supreme Court's decision in *Fitzgerald*. Unlike the court in *Levin*, the Third Circuit did not add any additional parameters to this test.[198]

When turning to the legislative history of the ADEA, it is important to note that Congress enacted this statute after the Civil Rights Act of 1964 was passed. By not including age as a class in the Civil Rights Act, Congress acknowledged the stark

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[195] *Id.* (quoting Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255 (2009)) (internal quotation marks omitted).

[196] *See Hildebrand*, 757 F.3d 99; Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051 (9th Cir. 2009); Tapia-Tapia v. Potter, 322 F.3d 742 (1st Cir. 2003); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998), *vacated on other grounds*, *sub nom.* Bd. of Regents of Univ. of N.M. v. Migneault, 528 U.S. 1110 (2000); Lafleur v. Tex. Dep't of Health, 126 F.3d 758 (5th Cir. 1997) (per curiam); Chennareddy v. Bowsher, 935 F.2d 315 (D.C. Cir. 1991); Zombro v. Balt. City Police Dep't, 868 F.2d 1364 (4th Cir. 1989).

[197] *See supra* Parts II.B, II.C.2.

[198] The court in *Levin v. Madigan* improperly held that specific congressional intent to preclude § 1983 claims must be proven to find that an enactment does not preclude § 1983 claims. 692 F.3d 607, 619 (7th Cir. 2012).

difference between race and age as protected classes.[199] Since there is no clear evidence that Congress did not intend to preclude § 1983 claims, the next step is to look at the text of the ADEA. The comprehensive remedial scheme set forth in the ADEA is the best indicator of congressional intent. The ADEA requires that a plaintiff file a claim of age discrimination with the EEOC, that the EEOC try to remedy that discrimination through mediation or other conciliatory measures, and that the plaintiff wait sixty days to file a lawsuit from the date of filing a charge of discrimination.[200] These steps are intended to help find a solution to age discrimination in the workplace aside from immediately turning to costly and time-consuming litigation. Allowing employees to sue separately under § 1983 allows them to evade the ADEA's carefully constructed remedial scheme by having direct access to the federal courts. Congress's scheme would be greatly undermined if that were the case. Therefore, it is apparent that Congress did not create this extensive statutory framework for employees to simply ignore it.

Next, the Third Circuit's conclusion that the ADEA precludes § 1983 claims is proper when comparing the ADEA to other statutes that the Supreme Court has already determined to either preclude or not preclude such claims through the implied preclusion doctrine. First, the Court in *Sea Clammers* held that the FWPCA and the MPRSA preclude § 1983 claims. There, the Court held that the elaborate enforcement provisions of the statutes—such as 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—were indicative of congressional intent to preclude § 1983 claims.[201] Further, the Court in *Rancho Palos Verdes* held that the TCA precluded § 1983 claims. There, the Court reasoned that the TCA sets out a sufficiently comprehensive scheme that indicated Congress did not intend for the TCA to coexist with § 1983 claims.[202] Similarly, the ADEA allows for a private cause of action, has notice requirements, and mandates

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[199] *See supra* Part I.A.3–4.

[200] *See* 29 U.S.C. §§ 621–634 (2012).

[201] Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

[202] City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

the satisfaction of other prerequisites before an employee can file an age discrimination suit. Thus, the ADEA should similarly preclude § 1983 claims.

Further, the Third Circuit properly held that claims of an equal protection violation are similarly precluded by the ADEA. This Note argues that the ADEA is similar to the EHA, which the Court in *Smith* held was the exclusive avenue for bringing constitutional claims. The EHA was created to establish procedures that would ensure the protection of handicapped children from discrimination. Similarly, the ADEA's enforcement scheme was created to protect older workers from age discrimination. Since allowing a plaintiff to go directly to court with an equal protection claim under the EHA would "render superfluous most of [its] detailed procedural protections,"[203] allowing aggrieved employees to go directly to court via § 1983 on the theory of an equal protection violation would nullify the ADEA.

The Court in *Fitzgerald v. Barnstable School Committee*, however, held that Title IX does not preclude claims from being brought under § 1983. There, the Court concluded that the Title IX remedies of withdrawing federal funds and an implied cause of action were far from the types of schemes that the Court has held to preclude § 1983 claims in the past.[204] Title IX does not have any administrative exhaustion requirements, nor any notice provisions that would be circumvented by a plaintiff bringing a § 1983 claim. Additionally, Congress's intent was clearer in the enactment of Title IX to prove that it did not want Title IX to be the exclusive remedy for claims of gender discrimination. Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 and passed Title IX with the understanding that it would be interpreted in the same way as Title VI has been interpreted, which is not to preclude § 1983 claims.[205] Unlike Title IX, the ADEA has notice provisions and administrative requirements that must be exhausted before an employee may bring an age discrimination suit. Thus, the ADEA is less like Title IX and more akin to the statutes that the Supreme Court has held to preclude § 1983 claims.

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[203] Smith v. Robinson, 468 U.S. 992, 1011 (1984).

[204] Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

[205] *See supra* notes 153–54 and accompanying text.

Moreover, allowing concurrent § 1983 claims with ADEA claims creates the potential for a plaintiff to recover twice on the same claim.[206] If an aggrieved employee is allowed to bring causes of action under both the ADEA and § 1983, a defendant may be punished twice for a single discriminatory event. The circuit split exacerbates this problem by allowing claimants to bring their claims under both the ADEA and § 1983 in the Seventh Circuit, whereas claimants in the First Circuit may only bring their claims under the ADEA. This Note argues that Congress, when it enacted the ADEA, did not intend for employees who have been discriminated against on the basis of age to be able to recover twice for the same injury. Further, allowing both claims is detrimental to judicial economy.[207] If all of the Baby Boomers are able to bring both claims, judicial resources will become tied up. If the ADEA does not preclude § 1983 claims, a plaintiff will conceivably be allowed to bring two separate claims on the same argument. If an individual is allowed to make two practically identical arguments based on one discriminatory event, the judicial system will be less efficient. Moreover, it is clear that Congress believes the ADEA is the most efficient way of dealing with age discrimination in employment claims due to its comprehensive remedial scheme.[208]

It is also important to note the ADEA's relationship with the FLSA. This Note maintains that the ADEA should not be construed in the same manner as Title VII because of the difference in their remedial provisions. Since the most important part of a statute to look at during preemption analysis is its remedial portion,[209] the comparison between the ADEA and Title VII's remedial provisions is irrelevant. The ADEA's remedial provisions are, however, modeled after and incorporate the

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[206] *See* Lindsay Niehaus, *The Title IX Problem: Is it Sufficiently Comprehensive To Preclude § 1983 Actions?*, 27 QUINNIPIAC L. REV. 499, 524 (2009) (arguing that allowing concurrent Title IX and § 1983 claims allows a plaintiff to "take two bites at the same apple" in spite of the Supreme Court's decision in *Fitzgerald*).

[207] *See id.* at 524–25.

[208] *See Smith*, 468 U.S. at 1012–13 (holding that the legislative history of the EHA, which proves that Congress did not intend for plaintiffs to circumvent the EHA's administrative remedies, "indicates that Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education").

[209] *See* Miller, *supra* note 53, at 594.

remedial provisions of the FLSA. Therefore, the conclusion that the FLSA is the exclusive remedy and precludes § 1983 claims should be applied to the ADEA.

CONCLUSION

The split of authority should be resolved in favor of the ADEA precluding § 1983 claims. The comprehensive remedial scheme was designed to facilitate resolving issues of age discrimination in the workplace without having to resort to litigation. The purpose of the Act, as indicated in its preamble, is to conciliate and pacify issues through administrative means. By enabling plaintiffs to bring suits under § 1983, the courts would be rendering the ADEA practically null and void through circumvention of the remedial scheme. Thus, the Supreme Court should follow the Third Circuit's holding that the ADEA is the exclusive remedy for employees' age discrimination claims.