THE PROPER PRECLUSION STANDARD: WHY THE ADEA IS NOT THE EXCLUSIVE REMEDY FOR AGE DISCRIMINATION IN EMPLOYMENT

MURRAY A. DUNCAN III*


INTRODUCTION

For twenty-four years, an incorrect circuit court decision has effectively eliminated a federal remedy for state employees suffering from age discrimination in employment. In 1989, the Fourth Circuit in Zombro v. Baltimore City Police Department concluded that the Age Discrimination in Employment Act (ADEA) is the exclusive remedy for age-based employment discrimination. Specifically, the court held that the ADEA precludes § 1983 claims based on violations of the

---

* J.D. candidate, Labor and Employment Law Certificate candidate, May 2013, Chicago-Kent College of Law, Illinois Institute of Technology; Michigan State University, B.A., Political Science/Pre-Law, August 2009. To my Mother, Father, and Samantha: Thank you for your support.
2 868 F.2d 1364, 1369 (4th Cir. 1989).
3 Preemption refers to situations where federal law displaces state law. See generally Rosalie Berger Levinson, Misinterpreting “Sounds of Silence”: Why Courts Should Not “Imply” Congressional Preclusion of § 1983 Constitutional Claims, 77 FORDHAM L. REV. 775, 806 (2008). “Preclusion” will be used in this Comment to describe situations where a federal statute forecloses a remedy under another federal statute or the Constitution.
Equal Protection Clause of the Fourteenth Amendment. Until 2012, no circuit court to consider the issue disagreed with Zombro.

Section 1983 was created “to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law.” The statute does not contain any substantive rights; it provides individuals with a federal cause of action to remedy violations of other federal laws or the Constitution. Congress has the authority to replace § 1983, or any other statute, with an alternative remedy. However, the courts ultimately determine whether or not Congress intended to preclude a specific remedy.

In Smith v. Robinson and in Middlesex County Sewerage Authority v. National Sea Clammers Ass'n (Sea Clammers), the Supreme Court established two tests to determine whether or not Congress intended to preclude § 1983 claims. The Sea Clammers doctrine evaluates whether Congress, by enacting a federal statute, intended to preclude

---

4 Zombro, 868 F.2d at 1370.
6 Section 1983 states that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.A. § 1983 (2006).
10 Id.
§ 1983 claims based on statutory violations. Alternatively, the test from Smith applies to the preclusion of § 1983 claims predicated on constitutional violations.

The question before the Fourth Circuit in Zombro was: Does the ADEA preclude § 1983 claims based on violations of the Equal Protection Clause? The Fourth Circuit incorrectly applied the Sea Clammers preclusion analysis reserved for statute-based § 1983 claims. Inexplicably, most circuit courts have relied on the reasoning of the Fourth Circuit and engaged in little independent analysis.

In 2012, a Seventh Circuit panel comprised of Judges Kanne, Posner, and Bauer stepped out of the shadow of Zombro and its progeny. In Levin v. Madigan, Judge Kanne, writing for a unanimous court, held that the ADEA does not preclude § 1983 equal protection claims. Ultimately, the Seventh Circuit in Levin applied an improper analysis. Nevertheless, the decision is significant given its divergence from the weight of authority and its unique analysis: It is the only

12 Sea Clammers, 453 U.S. at 1.
13 Smith, 468 U.S. 992.
14 Zombro v. Baltimore City Police Dep’t, 868 F.2d 1364, 1366 (4th Cir. 1989).
15 Id. at 1367.
16 See Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1056 (9th Cir. 2009) (the court found the Zombro reasoning “particularly persuasive”); Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998), vacated on other grounds, Bd. of Regents of Univ. of N.M. v. Migneault, 528 U.S. 1110 (2000) (the court relied on Zombro and stated it was unnecessary to repeat the court’s reasoning); Lafleur v. Tex. Dep’t of Health, 126 F.3d 758 (5th Cir. 1997) (the court relied on the weight of authority, including Zombro, holding that the ADEA is the exclusive remedy for age discrimination in employment).
17 Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012).
18 Id. at 622.
19 See Zombro, 868 F.2d at 1370 (the ADEA precludes § 1983 equal protection claims); Tapia-Tapia v. Potter, 322 F.3d 742, 745 (1st Cir. 2003) (ADEA is the exclusive remedy for age discrimination); Ahlmeyer, 555 F.3d at 1057 (the ADEA precludes § 1983 equal protection claims); Migneault, 158 F.3d at 1140 (refused to recognize equal protection claims to remedy age discrimination in employment); Lafleur, 126 F.3d at 760 (Section 1983 claim of age discrimination was preempted by ADEA where facts alleged did not support a § 1983 claim); Chennareddy v. Bowsher, 935 F.2d 315 (D.C. Cir. 1991) (the ADEA is the exclusive remedy for age discrimination); Britt v. Grocers Supply Co., Inc., 978 F.2d 1441, 1449 (5th Cir.
circuit to compare the rights and protections of the ADEA to the rights and protections of a § 1983 equal protection claim. The Seventh Circuit’s decision undoubtedly changes the legal landscape, and more importantly, it gives state employees a federal forum to vindicate age discrimination in employment.

This Comment argues that the ADEA is not the exclusive remedy for age discrimination in employment. Part I will provide a description of the relevant statutes: the ADEA and § 1983. This Section will also discuss how the Equal Protection Clause is implicated in age-based employment discrimination. Part II will outline the underlying legal precedent. Specifically, it will discuss how the Supreme Court has limited the availability of § 1983 relief. Part III will present the circuit split; it will illustrate how the circuit courts have overwhelmingly applied an improper preclusion analysis concerning the ADEA’s preclusion of § 1983 equal protection claims. This Section will also discuss the implications and significance of the Seventh Circuit’s Levin decision. Based on Supreme Court precedent, Part IV will propose the proper standard for courts to utilize when determining whether a federal statute precludes § 1983 claims predicated on constitutional rights. Finally, Part V will apply this Comment’s proposed standard to the ADEA and § 1983. By expanding on the Seventh Circuit’s comparative evaluation, this Comment concludes that the ADEA does not preclude § 1983 equal protection claims.

I. UNDERSTANDING THE STATUTES

In order to examine whether or not the Age Discrimination in Employment Act (ADEA) precludes § 1983 equal protection claims, it is necessary to understand the underlying statutes. This Section examines § 1983 and the ADEA; it also describes how § 1983 equal protection claims arise in the context of age-based employment discrimination.

1992) (“Congress intended the ADEA to be the exclusive remedy for age discrimination claims”).
A. The Age Discrimination in Employment Act

1. Overview

The ADEA was enacted 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.” Substantively, the Act provides that it is unlawful for an employer to discriminate against an employee because of his or her age. The ADEA is applicable against private employers, the federal government, employment agencies, and labor unions. In 1974, Congress amended the ADEA and extended application of the ADEA’s substantive requirements to the States. However, in Kimel v. Florida Board of Regents, the U.S. Supreme Court found that Congress did not validly abrogate the States sovereign immunity. As such, the States are immunized from federal suits by private individuals for ADEA violations. The ADEA only protects employees forty years of age and older. It also limits or exempts protection for elected officials, specific members of their staff, firefighters, and law enforcement officers.

---

20 Levin, 692 F.3d at 615 (quoting 29 U.S.C. § 621(b)).
21 29 U.S.C.A § 623(a)(1) (2006) (an employer cannot “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”).
24 Id. at 91. The Eleventh Amendment establishes the principle of sovereign immunity; the Eleventh Amendment states that “[t]he 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.
25 Kimel, 528 U.S. at 73.
27 Levin v. Madigan, 692 F.3d 607, 621 (7th Cir. 2012) (citing 29 U.S.C. §§ 623(j), 630(f)).
Furthermore, State employees have limited rights under the ADEA because of the States’ sovereign immunity.\(^{28}\)

2. Administrative Requirements

Under the ADEA, an employee subjected to age discrimination must file a charge with the Equal Employment Opportunity Commission (EEOC).\(^{29}\) Generally, the charge must be filed within 180 days of the misconduct.\(^ {30}\) A charge must be filed with the EEOC if the individual wants to file a civil suit.\(^ {31}\) Once a charge is filed, the EEOC performs an investigation to determine if the employer engaged in prohibited conduct.\(^ {32}\) If the EEOC concludes that a violation of the ADEA occurred, it will attempt “informal methods of conciliation, conference, and persuasion” to eliminate the discrimination.\(^ {33}\) An employee can file a civil suit in federal court sixty days after filing a charge with the EEOC;\(^ {34}\) an employee loses the right to file suit if the EEOC files its own lawsuit to enforce the charge.\(^ {35}\)

3. Remedies

The ADEA incorporates the remedial provisions of the Fair Labor Standards Act (FLSA).\(^ {36}\) Specifically, the ADEA authorizes backpay, reinstatement, injunctive relief, attorney’s fees, and liquidated damages.\(^ {37}\) Courts also have the authority to award “equitable relief as may be appropriate to effectuate the purposes” of the Act.\(^ {38}\)

\(^{28}\) Id. (citing Kimel, 528 U.S. at 91-92).
\(^{29}\) 29 U.S.C.A. § 626(d).
\(^{30}\) Id.
\(^{31}\) Id. at § 626(c)(2)(d)(1).
\(^{32}\) Id. at § 626(a).
\(^{33}\) Id. at § 626(b).
\(^{34}\) Id. at § 626(c)(2)(d)(1)(a).
\(^{35}\) Id. at § 626(c)(1).
\(^{37}\) Id.
\(^{38}\) 29 U.S.C.A. § 626(b). Liquidated damages are also available but only when a violation of the ADEA was “willful.” Id.
B. Section 1983

Section 1983 was created as part of the Civil Rights Act of 1871. Congress’ objective was to provide individuals with an avenue to the unbiased federal forum against state actors acting unconstitutionally. Today, § 1983 provides state and local employees with a federal cause of action for violations of the Constitution and federally created rights. The statute does not contain any substantive rights; it operates as an enforcement mechanism by providing a cause of action against any “person” acting under color of state law. A § 1983 claim may be brought against state and local government officials, as well as municipal and county governments.

A state actor that violates § 1983 “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” The central purpose of a § 1983 damages award is to compensate injuries resulting from the state actor’s unconstitutional conduct.

C. Utilizing § 1983 Equal Protection Claims for Age Discrimination in Employment

The ADEA is not the only remedy available to employees who suffer from age-based employment discrimination. It is well settled

41 Maine v. Thiboutot, 448 U.S. 1, 4 (1980).
43 Id. “The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
that the Fourteenth Amendment forbids arbitrary age discrimination.\footnote{Levin v. Madigan, 692 F.3d 607, 622 (7th Cir. 2012) (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000)).} State employees have brought justiciable equal protection claims against the States for age classifications affecting employment.\footnote{See generally Kimel, 528 U.S. at 83; Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (involving equal protection challenge to state statute that required police officers to retire at age fifty); Gregory v. Ashcroft, 501 U.S. 452 (1991) (State court judges challenged mandatory retirement provision of State law as violating Equal Protection Clause).} A Fourteenth Amendment Equal Protection Clause claim based on age discrimination is subject to a “rational basis” level of scrutiny:\footnote{Kimel, 528 U.S. at 83-84.} a State may discriminate on the basis of age without violating the Equal Protection Clause so long as it is “rationally related to a legitimate state interest.”\footnote{Id. at 83.}

Employees use § 1983 to enforce the constitutional right to be free from age discrimination.\footnote{See e.g., Levin, 692 F.3d 607 (plaintiff asserted claims for relief under the ADEA under § 1983 Equal Protection Clause); Ahlmeyer v. Nevada Sys. of Higher Educ., 555 F.3d 1051 (9th Cir. 2009) (plaintiff asserted claim under § 1983 against supervisor for age discrimination in violation Equal Protection Clause); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998), abrogated on other grounds by Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000), reaffirmed by Migneault v. Peck, 204 F.3d 1003, 1004 n.1 (10th Cir. 2000) (plaintiff brought § 1983 equal protection claim to vindicate alleged age discrimination); Lafleur v. Texas Dep’t of Health, 126 F.3d 758 (5th Cir. 1997) (plaintiff’s § 1983 claim alleged “an equal protection violation to be free from age discrimination in employment”); Mustafa v. State of Nebraska Dep’t of Corr. Services, 196 F. Supp. 2d 945 (D. Neb. 2002) (employee brought § 1983 equal protection claim against employer for alleged age discrimination); Shapiro v. New York City Dep’t. of Educ., 561 F. Supp. 2d 413 (S.D.N.Y. 2008) (teacher asserted § 1983 equal protection claim to vindicate alleged age discrimination by the municipal board and principal).} A state employee discriminated against because of age can file a charge with the EEOC based on ADEA violations.\footnote{8-121 Larson on Employment Discrimination § 121.06.} However, aside from a few exceptions, the States’ sovereign immunity prevents employees from enforcing violations of
the ADEA in a federal suit. For a state employee to achieve a remedy under the ADEA, the State must consent to be sued or the EEOC must bring a suit on behalf of the employee. Consequently, state employees assert § 1983 equal protection claims to remedy age discrimination in employment.

II. LIMITING § 1983 CLAIMS: THE PRECLUSION STANDARDS

It is important to recall that § 1983 can be used to vindicate both statutory and constitutional rights. Accordingly, the U.S. Supreme Court has limited § 1983 relief by creating two distinct tests. The Sea Clammers test assesses whether a federal statute precludes § 1983 claims based on violations of that same statute. The Smith test determines whether a federal statute precludes § 1983 claims predicated on constitutional violations. This Section outlines the Supreme Court’s preclusion decisions and summarizes the applicability of the preclusion tests.

A. Precluding § 1983 Claims Predicated on Statutory Violations

Congress asserts that a federal statute “will not give rise to liability under § 1983” when it provides a comprehensive enforcement scheme in the statute. In Middlesex County Sewerage Authority v. National Sea Clammers Association (Sea Clammers), the plaintiff asserted § 1983 claims based on violations of two federal statutes.

53 Kimel, 528 U.S. at 91.
54 8-121 Larson on Employment Discrimination § 121.06.
55 See Note 51.
56 Maine v. Thiboutot, 448 U.S. 1, 4 (1980).
60 Sea Clammers, 453 U.S. at 4.
The Court noted that the statutes contained “unusually elaborate” enforcement provisions. For instance, both statutes required violations to be enforced by a government agency. The Court declared that when Congress includes a comprehensive enforcement scheme in a federal statute, “the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.” Because of the elaborate enforcement provisions, the Court concluded that the statutes precluded the § 1983 claims.

The Sea Clammer’s decision specifies that courts can infer Congress’ intent to preclude a statute-based § 1983 claim when the remedial scheme provided in that statute is “sufficiently comprehensive.” In later decisions, the Court announced that Congress’ intent could also be inferred from the context and legislative history of the statute. The Sea Clammers doctrine applies only to situations where a plaintiff seeks statutory relief under § 1983. In the succeeding Supreme Court cases, the plaintiffs relied on § 1983 to enforce constitutional rights rather than statutory rights.

B. Precluding § 1983 Claims Predicated on Violations of the Constitution

In Smith v. Robinson, the plaintiff brought claims under the Education of the Handicapped Act (EHA) and § 1983 for violations of

---

61 Id. at 13.
62 Id.
63 Id. at 20.
64 Id. at 21.
65 Id. at 20.
67 Smith, 468 U.S. at 1004-1005.

226
the Equal Protection Clause of the Fourteenth Amendment. Before the Court engaged in a preclusion analysis, it distinguished itself from Sea Clammers: the Court noted that the plaintiff in Sea Clammers attempted to “enlarge a statutory remedy by asserting a claim based on that statute under . . . § 1983.” Conversely, the plaintiff in Smith asserted an EHA claim and a separate constitutional claim under § 1983.

To determine if the EHA precludes § 1983 equal protection claims, the Court applied a two-step test. First, the Court ascertained whether the § 1983 claim was “virtually identical” to the EHA claim. The Court relied on the court of appeal’s conclusion that the constitutional claim was equivalent to the statutory claim. To the Court, this indicated that the EHA was set up by Congress “to aid the States in complying with their constitutional obligations.” By creating federal rights virtually identical to constitutional rights, the statute incorporated the protections of the Constitution.

Next, the Court examined the EHA for additional congressional intent to preclude § 1983 equal protection claims. At this stage, the Court applied what was likely a Sea Clammers analysis. The Court focused on the EHA’s comprehensive remedial scheme and concluded that it would be improper to allow plaintiffs to bypass such enforcement procedures. It was apparent to the Court that the EHA, not § 1983, was “the most effective vehicle for protecting the constitutional right.” According to Smith, the Sea Clammers doctrine is not determinative of preclusion unless the statutory claim and the § 1983 constitutional claim are virtually identical.

68 Id. at 994-996.
69 Id. at 1004.
70 Id. at 1004-1005.
72 Smith, 468 U.S. at 1009.
73 Id.
74 Id. (emphasis added).
75 Id. at 1011-1012.
76 Id. at 1013 (emphasis added).
77 Id. at 1009.
More recently, in Fitzgerald v. Barnstable School Committee, the Supreme Court was faced with the following question: Does Title IX of the Education Amendments of 1972 preclude § 1983 claims predicated on Title IX and the Equal Protection Clause? The Court applied both the Sea Clammers doctrine and Smith’s two-step analysis to determine preclusion: the Court was dealing with a § 1983 constitutional claim and a § 1983 statutory claim.

First, the Court discussed the importance of congressional intent as outlined in Sea Clammers. Specifically, the Court noted that Title IX did not contain a comprehensive remedial scheme similar to the statutes in Sea Clammers. Without a comprehensive remedial scheme, a plaintiff could not bypass Title IX by bringing a § 1983 claim based on violations of Title IX. The § 1983 statutory claim was not precluded.

To address whether Title IX precludes § 1983 equal protection claims, the Court engaged in a comparison of the substantive “rights and protections.” The Court determined that the rights and protections offered under Title IX diverged from the rights and protections under § 1983 equal protection claims in the following ways: the claims apply to different actors; the standards of liability are different; and Title IX exempts conduct that could violate the Equal Protection Clause. The divergent rights lent “further support” to the Court’s conclusion that Congress did not intend Title IX to be the “sole means of vindicating the constitutional right.” The Court concluded that neither § 1983 claim was precluded and held that the legislative history and context of Title IX confirmed this holding.

---

79 Id.
80 Id. at 252.
81 Id. at 255.
82 Id. at 255-256.
83 Id. at 256.
84 Id.
85 Id. at 256-258.
86 Id. at 256.
87 Id. at 258-259.
III. DOES THE ADEA PRECLUDE § 1983 EQUAL PROTECTION CLAIMS?
THE CIRCUIT COURTS WEIGH IN

Courts should not lightly infer that Congress intended to preclude § 1983 as a remedy for Equal Protection Clause violations.\(^{88}\) Keeping in mind this presumption against implied preclusion, it is difficult to believe that every circuit court–excluding the Seventh Circuit–to consider the issue, has found that the ADEA is the exclusive remedy for age discrimination in employment.\(^{89}\) The Zambro v. Baltimore City Police Department decision has been dubbed the most important circuit court decision concerning the ADEA’s preclusion of § 1983.\(^{90}\) Since it was decided, many circuits have merely trusted the court’s reasoning and failed to engage in an independent analysis.\(^{91}\) This Section outlines and evaluates three circuit court decisions to address the ADEA’s preclusion of § 1983; it also discusses the implications of the Seventh Circuit’s Levin v. Madigan decision.

A. The Weight of Authority

1. Zambro v. Baltimore City Police Department

In Zambro v. Baltimore City Police Department, a city police officer alleged that the police commissioner and the department engaged in age-based employment discrimination.\(^{92}\) The officer brought claims under § 1983 for violations of the Equal Protection Clause.\(^{93}\) To ascertain whether or not the ADEA precluded the

---

\(^{88}\) Id. at 250.
\(^{89}\) See Note 18.
\(^{91}\) See Note 15.
\(^{92}\) Zambro v. Baltimore City Police Dep’t., 868 F.2d 1364, 1365 (4th Cir. 1989).
\(^{93}\) Id. The officer failed to timely file a complaint with the EEOC. The officer did not file a charge with the ADEA. Colleen Gale Treml, Zambro v. Baltimore City
officer’s § 1983 claim, the Fourth Circuit used the Sea Clammers doctrine and focused on the ADEA’s comprehensive enforcement scheme. As previously explained, the ADEA specifies that a charge of age discrimination must be filed with the EEOC; the agency will then investigate the charge and attempt to mediate the dispute. The court opined that the ADEA’s comprehensive remedial scheme would preclude § 1983 equal protection claims unless Congress manifestly intended to permit other remedies.

The Zombro court discovered Congress’ intent in the ADEA’s damages provision. The ADEA incorporates the damages clause of the Fair Labor Standards Act (FLSA). To the Zombro court, the incorporation of the FLSA’s damages provision evinced Congress’ intent to foreclose actions under § 1983:

Primarily, the Fourth Circuit was concerned that permitting § 1983 equal protection claims would “debilitate” the enforcement mechanism provided in the ADEA. It feared that plaintiffs could bypass the EEOC procedures by asserting § 1983 claims “merely because they [were] employed by an agency operating under color of state law.” Consequently, the court held that the ADEA precludes § 1983 equal protection claims for age-based employment discrimination.


94 Zombro, 868 F.2d at 1367.
95 See supra Part (I)(A)(2).
96 Zombro, 868 F.2d at 1369.
97 Id.
98 See supra Part (I)(A)(3).
99 Zombro, 868 F.2d at 1369.
100 Id. at 1369 (citing Lerwill v. Inflight Motion Pictures, Inc., 343 F.Supp. 1027 (N.D. Calif. 1972)).
101 Id.
102 Id. at 1369.
103 Id.

Following Zombro, the Ninth Circuit, in Ahlmeyer v. Nevada System of Higher Education, concluded that the ADEA precludes § 1983 equal protection claims. In Ahlmeyer, the plaintiff alleged that her employer, a state actor, engaged in age-based employment discrimination. Unlike younger workers, the plaintiff was denied a request for an assistant. The district court dismissed the plaintiff’s ADEA claim because the State was entitled to sovereign immunity. In response, the plaintiff replaced her ADEA claim with a § 1983 equal protection claim.

The Ninth Circuit recognized that the plaintiff was asserting a constitutional claim under § 1983 and was not bringing a § 1983 claim to enforce violations of the ADEA. Even so, the court stated that the Sea Clammers doctrine was the applicable preclusion standard; § 1983 claims are not available where Congress’ intent to preclude can be inferred from the passage of a comprehensive remedial scheme. The court found the Zombro reasoning “particularly persuasive” and declared that it would not become the first circuit to contradict the Zombro holding. The court concluded that the ADEA’s comprehensive remedial scheme was enough to overcome the presumption against implied preclusion.

The court went on to rebut arguments put forth by district courts that have disagreed with the Zombro reasoning. One district court maintained that the Sea Clammers doctrine applies only to the

104 555 F.3d 1051, 1054 (9th Cir. 2009).
105 Id.
106 Id.
107 Id.
108 Id.
109 Id. at 1055.
110 Id. at 1055-1056.
112 Ahlmeyer, 555 F.3d at 1056.
113 Id. at 1057.
114 Id.
preclusion of § 1983 claims predicated on statutory violations, not constitution-based § 1983 claims.\textsuperscript{115} The Ninth Circuit cited\textit{Smith} as an example of the Supreme Court relying on a comprehensive remedial scheme to preclude a § 1983 constitutional claim.\textsuperscript{116}

Another district court argument was that state employees, without the availability of § 1983, would be left without a federal remedy for age discrimination in employment.\textsuperscript{117} The ADEA was amended to allow suits against the States but the Supreme Court declared that Congress did not validly abrogate the State’s sovereign immunity; therefore, individuals cannot bring ADEA suits against state actors.\textsuperscript{118} The Ninth Circuit stated that courts must analyze the Act as it was written.\textsuperscript{119} Consequently, the court held that the ADEA precludes § 1983 equal protection claims because it considered the amendment as Congress’ intent to subsume constitutional violations into the ADEA.\textsuperscript{120}

\textbf{B. Creating the Split}

In 2012, the Seventh Circuit decided\textit{Levin v. Madigan}.\textsuperscript{121} In\textit{Levin}, a fifty-five year old employee was terminated and replaced by a worker in her thirties.\textsuperscript{122} The employee brought an ADEA claim and a § 1983 equal protection claim against the State of Illinois, the Office of the Illinois Attorney General, and five supervisors in their individual or official capacities.\textsuperscript{123} Because the plaintiff was not an “employee” under the ADEA, his ADEA claim was dismissed.\textsuperscript{124}  

\textsuperscript{115} Id. at 1057-1058 (citing Mummelthie v. Mason City, Iowa, 873 F.Supp. 1293 (N.D. Iowa 1995)).
\textsuperscript{116} Id. at 1058.
\textsuperscript{117} Id. at 1060 (citing Mustafa v. State of Neb. Dep’t of Correctional Servs., 196 F.Supp.2d 945 (D. Neb. 2002)).
\textsuperscript{118} See supra Part (I)(A)(1).
\textsuperscript{119} Ahlmeyer, 555 F.3d at 1060.
\textsuperscript{120} Id.
\textsuperscript{121} 692 F.3d 607 (7th Cir. 2012).
\textsuperscript{122} Id. at 609.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 610.
However, the district court concluded that the § 1983 equal protection claim should proceed to trial. On appeal, the defendants asserted that the ADEA is the exclusive remedy for age-based employment discrimination.

The Seventh Circuit started its analysis by outlining the Supreme Court decisions limiting § 1983 relief. For constitution-based § 1983 claims, the court ascertained that congressional intent is essential. Furthermore, the court established that Congress’ intent can be inferred from the language of the statute, the legislative history, the statute’s context, the comprehensiveness of the remedial scheme, and by a comparison of the rights and protections afforded by the statute and the § 1983 claim.

Firstly, the court noted the comprehensive remedial scheme of the ADEA–filing with the EEOC, the EEOC investigatory process, and conciliation and mediation efforts. However, the court declared that a comprehensive remedial scheme evinces Congress’ intent to preclude § 1983 claims predicated on statutory violations, not constitutional violations. Consequently, the ADEA’s comprehensive remedial scheme would not be enough to preclude § 1983 equal protection claims without additional evidence of congressional intent.

The Seventh Circuit disputed the Zombro court’s contention that Congress’ intent to preclude is implicit in the ADEA’s incorporation of the FLSA’s remedial provisions. In Levin, the court stated that the FLSA’s remedial scheme evinced Congress’ intent to exclude § 1983 claims to enforce FLSA rights. Unlike the ADEA, the FLSA lacks a

---

125 Id.
126 Id.
127 Id. at 611-615.
128 Id. at 615.
129 Id.
130 Id.
131 Id. at 617.
132 Id. at 619.
133 Id. at 620.
134 Id.
constitutional counterpart. Therefore, the FLSA is irrelevant in determining the ADEA’s preclusion of § 1983 equal protection claims.

Secondly, following Fitzgerald, the Seventh Circuit compared the “rights and protections” afforded by the ADEA to the rights and protections afforded under § 1983 equal protection claims. The court deduced that the rights applied to different defendants and different plaintiffs; it also noted that the two claims have different standards of proof. Aside from the ADEA’s comprehensive remedial scheme, the court was unable to discover additional congressional intent to preclude. Thus, the Seventh Circuit became the first circuit to hold that the ADEA is not the exclusive remedy for age-based employment discrimination.

C. Confusion in the Courts: What Happened to Step Number One?

In Smith, discussed supra, the Court announced a preclusion analysis for constitution-based § 1983 claims. The Smith Court stipulated that the first step, when dealing with the preclusion of constitution-based § 1983 claims, is to determine if the statutory claim and the constitutional claim are “virtually identical.” The question presented before the courts in Zombo, Levin, and Ahlmeyer was: Does the ADEA preclude § 1983 claims based on violations of the Equal

\[\text{id} \]
Protection Clause. Each court misconstrued the reasoning in Smith and applied an improper preclusion analysis.

Zombro, Ahlmeyer, and Levin referenced Smith, however, each Court interpreted the Smith reasoning differently. The Zombro court likely interpreted Smith as declaring that a comprehensive remedial scheme would preclude a constitution-based § 1983 claim unless there was manifest congressional intent indicating otherwise. To the Ahlmeyer court, Smith dictated that a statute’s comprehensive remedial scheme was conclusive of Congress’ intent to preclude a constitution-based § 1983 claim. To the Seventh Circuit, Smith enumerated that a comprehensive remedial scheme would not preclude a constitution-based § 1983 claim without additional congressional intent. Although the Smith Court engaged in a comprehensive remedial scheme analysis, it first established that the rights of the § 1983 claim were virtually identical to the statutory claim. Neither the Zombro or Ahlmeyer court performed a “virtually identical” analysis. Instead, the courts applied the Sea Clammer’s comprehensive remedial scheme analysis designed for statute-based § 1983 claims.

143 Zombro v. Baltimore City Police Dep’t., 868 F.2d 1364 (4th Cir. 1989); Ahlmeyer v. Nevada Sys. of Higher Educ., 555 F.3d 1051 (9th Cir. 2009); Levin, 692 F.3d 607.
144 Zombro, 868 F.2d at 1368; Levin, 692 F.3d at 619; Ahlmeyer, 555 F.3d at 1058.
145 Zombro, 868 F.2d at 1368-1369 (“[T]he general policy of precluding § 1983 suits, where Congress has enacted a comprehensive statute specifically designed to redress grievances alleged by the plaintiff, is as applicable in . . . cases where a constitutional claim is attached to a statutory claim brought under § 1983. We hold that 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 both the comprehensive statutory scheme and other applicable state and federal statutes.”).
146 Ahlmeyer, 555 F.3d at 1058.
147 Levin, 692 F.3d at 619.
149 Zombro, 868 F.2d at 1366; Ahlmeyer, 555 F.3d at 1056.

235
In Levin, the court concluded that a comprehensive remedial scheme was not enough to preclude constitution-based § 1983 claims. Unlike the courts in Zombro and Ahlmeier, the Seventh Circuit required additional evidence of Congress’ intent to preclude. To find that additional evidence, the court followed the guidance of Fitzgerald: The court engaged in a preclusion analysis that integrated a comparison of the rights and protections of the ADEA to § 1983 equal protection claims. Because the rights and protections significantly differed, the court concluded that the ADEA did not preclude § 1983 equal protection claims.

The Seventh Circuit properly recognized that additional evidence of Congress’ intent to preclude is necessary for a comprehensive remedial scheme to preclude a § 1983 constitutional claim. However, the court looked to the comprehensiveness of the ADEA’s remedial scheme before it engaged in a comparison of rights and protections. As stated above, Smith demonstrates that the first step when dealing with the preclusion of § 1983 constitutional claims is to determine if the statute and the § 1983 claim are virtually identical.

Even though the Seventh Circuit did not correctly apply the preclusion analysis, the court’s holding has major implications. For instance, the ruling gives state employees within the Seventh Circuit a federal forum for a state actor’s age-based employment discrimination. Moreover, state employees in other circuits now have a stronger foundation for bringing § 1983 equal protection claims. Most

---

150 Levin, 692 F.3d at 617-618.
151 Id.
152 Id. at 621.
153 Id. at 621-622.
154 Id. at 618.
important, circuits that have not addressed the ADEA’s preclusion of § 1983 will certainly have to contend with the Levin analysis; no other circuit court has engaged in a comparative analysis or found the ADEA not to preclude § 1983 equal protection claims. The Levin decision will likely persuade other circuits to rule opposite of Zombro and its progeny. Supreme Court review of the issue seems inevitable.

This Section examined three circuit court decisions dealing with the ADEA’s preclusion of § 1983 equal protection claims. It demonstrated how three circuits interpreted Supreme Court preclusion precedent differently. Ahlmeyer’s reliance on Zombro exemplifies that courts do not understand which preclusion analysis to apply. Despite being decided after Fitzgerald, the Ninth Circuit failed to mention the Fitzgerald decision and did not engage in a comparative analysis, as directed by Fitzgerald and Smith. The next Section of this Comment proposes the proper standard for determining the preclusion of constitution-based § 1983 claim.

IV. THE PROPER STANDARD FOR DETERMINING THE PRECLUSION OF CONSTITUTION-BASED § 1983 CLAIMS: SYNERGIZING SMITH, FITZGERALD, AND SEA CLAMMERS

In order to determine if the ADEA precludes § 1983 equal protection claims, courts must understand the proper preclusion analysis. The previous Section indicates that circuit courts do not comprehend Supreme Court preclusion precedent. The Supreme Court’s Smith decision was understood three different ways by three different courts and the Ninth Circuit altogether disregarded the Court’s preclusion analysis in Fitzgerald. This Comment proposes the following interpretation of Supreme Court precedent:

\[\text{See Zombro v. Baltimore City Police Dep’t, 868 F.2d 1364 (4th Cir. 1989); Ahlmeyer v. Nevada Sys. of Higher Educ., 555 F.3d 1051 (9th Cir. 2009); Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012); Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).}\]
A. Step One: Smith and Fitzgerald: Are the Rights and Protections Offered Under the Statute Virtually Identical to the Rights and Protections Offered under the § 1983 Constitutional Claim?

When ascertaining Congress’ intent to preclude, courts should bear in mind that statutory repeals by implication are disfavored. With that said, Smith mandates that courts should first evaluate whether or not the statutory claim and the constitution-based § 1983 claim are “virtually identical.” Although the Smith Court did not expand on its virtually identical analysis, in 2009 the Fitzgerald Court engaged in what was likely a Smith evaluation by comparing “the rights and protections of the statute [to] those existing under the Constitution.” If the rights and protections are virtually identical, it indicates that Congress viewed the statute as the “most effective vehicle for protecting the constitutional right.” Consequently, the reviewing court should move to the second step of the analysis. However, if the “rights and protections diverge in significant ways,” a court should infer that Congress did not intend to preclude the constitution-based § 1983 claim; the analysis is over and the statute does not preclude the § 1983 claim.

B. Step Two: Sea Clammers: If the Rights and Protections are Virtually Identical, is there Additional Congressional Intent to Preclude?

A court should only move to the second step if the rights of the statute and the constitution-based claim are virtually identical. At

---

158 Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (a cardinal principle of statutory construction is that “repeals by implication are not favored”).
159 Smith, 468 U.S. at 1009.
161 Smith, 468 U.S. at 1013.
162 Fitzgerald, 555 U.S. at 252-253.
163 See generally Michael A. Zwibelman, Why Title IX Does Not Preclude Section 1983 Claims, 65 U. CHI. L. REV. 1465, 1470 (1998) (“Under Smith . . . even if a plaintiff raises a Section 1983 claim predicated on a constitutional right that is identical to the right conferred by a statute, that statute will not preclude the Section 1983 claim unless the court finds that Congress intended such preclusion.”).
this step, a court should apply the Sea Clammers doctrine to determine whether or not Congress intended the statute to be the exclusive remedial avenue. Congressional intent can be inferred from the statute’s context,\(^ {164}\) the legislative history,\(^ {165}\) or from the existence of a comprehensive enforcement scheme.\(^ {166}\) If the statute contains a comprehensive remedial scheme, or there are other indicia of congressional intent to preclude, the statute subsumed the constitutional right and the § 1983 claim is precluded.

**C. Why this Proposal?**

1. Where rights and protections differ, a comprehensive remedial scheme will not be bypassed.

Where the rights and protections offered by a statute differ from the rights and protections offered by a constitution-based § 1983 claim, it is inappropriate to apply the Sea Clammers doctrine. In Sea Clammers, the Court held that when a statute contains a comprehensive remedial scheme, statute-based § 1983 claims allow plaintiffs to proceed to federal court based on violations of a statute that commands a different enforcement path.\(^ {167}\) Statutes containing comprehensive remedial schemes would become frivolous if plaintiffs could bring violations of the statute directly to the unbiased federal forum by utilizing § 1983.\(^ {168}\)

The circumvention concern also exists with constitution-based § 1983 claims *but only if* the rights and protections are virtually identical to the statutory claim. If constitutional protections are virtually identical to statutory protections, a plaintiff filing a § 1983


\(^{165}\) See Smith, 468 U.S. at 1006 (the Court investigated the legislative history to discover Congress’ intent).


\(^{167}\) Id.

\(^{168}\) Smith, 468 U.S. at 1011.
constitutional claim is enforcing what are essentially statutory violations in federal court. Consequently, the plaintiff procures the benefits of federal court, bringing what is effectively a statutory claim, but is able to sidestep the remedial scheme of the statute. This is indistinguishable from a plaintiff bringing a § 1983 claim to enforce statutory violations where the statute has a comprehensive remedial scheme that mandates a different remedial path: in both instances, the plaintiff is bypassing a statute’s remedial avenue to enforce statutory rights or significantly similar rights in federal court.

Notably, the circumvention concern is not present when the § 1983 constitutional claim and the statutory claim have divergent rights and protections. When Congress includes a comprehensive remedial scheme in a statute, it anticipates that the scheme will be used to enforce rights protected by that statute; it does not anticipate that the scheme will be utilized to enforce distinct rights secured by another body of law. Simply put, a plaintiff is not bypassing a statute’s comprehensive remedial scheme by bringing a § 1983 claim to vindicate distinct rights external to the statute.

2. Another interpretation of Fitzgerald?

This Comment interprets Fitzgerald as an expansion of the “virtually identical” analysis revealed in Smith. However, based on Fitzgerald, an argument could be made that the proper analysis begins with the existence of a comprehensive remedial scheme. In Fitzgerald, the Court applied the Sea Clammers doctrine before it compared rights and protections.169 The Court then stated that the lack of similarity between the constitution-based § 1983 claim and the statutory claim “len[t] further support” to the conclusion that the § 1983 claim could not be precluded.170 This could be construed as evidence that a comprehensive remedial scheme is the first step for determining the preclusion of any § 1983 claim.

170 Id. at 256.
However, unlike the Courts in *Smith* and *Sea Clammers*, *Fitzgerald* dealt with the preclusion of a statute-based § 1983 claim and a constitution-based § 1983 claim.\(^{171}\) Because the Court addressed the § 1983 statutory claim first, it engaged in a *Sea Clammer’s* analysis first. Accordingly, the *Fitzgerald* Court’s initial discussion of *Sea Clammer’s* could be attributed to its formatting of the issues. At best, *Fitzgerald* is ambiguous and it is unclear which analysis applies first to the preclusion of constitution-based § 1983 claims.\(^{172}\) Since the *Fitzgerald* decision did not overrule the *Smith* test, it should be read as an expansion of the virtually identical analysis.

V. **THE ADEA DOES NOT PRECLUDE § 1983 EQUAL PROTECTION CLAIMS FOR AGE DISCRIMINATION IN EMPLOYMENT**

The question this Comment seeks to answer is: Does the Age Discrimination in Employment Act (ADEA) preclude § 1983 claims to vindicate violations of the Equal Protection Clause of the Fourteenth Amendment? This Comment’s preclusion standard, discussed *supra*, applies to § 1983 claims based on constitutional rights. Accordingly, this Section utilizes this Comment’s preclusion analysis and evaluates whether the rights of the ADEA are virtually identical to the rights of § 1983 equal protection claims. By expanding on the Seventh Circuit’s assessment in *Levin v. Madigan*, this Section concludes that the ADEA

\(^{171}\) *Id.* at 250.

\(^{172}\) It is unclear which analysis would come first based on the language in *Fitzgerald*. In one section the Court states that “[a] comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause lends further support to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits.” *Id.* at 256 (emphasis added). This language might indicate that the comparative analysis would come second to the comprehensive remedial scheme analysis. The *Fitzgerald* Court also provided: “In light of the divergent coverage of Title IX and the Equal Protection Clause, *as well as* the absence of a comprehensive remedial scheme comparable to those at issue in *Sea Clammers*, . . . we conclude that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools.” *Id.* at 258 (emphasis added). This language suggests that the comprehensive remedial scheme analysis is secondary to the comparative analysis.
is not the exclusive remedy for age discrimination in employment. To finish, this Section reveals why it is inappropriate to apply the Sea Clammer’s doctrine to the ADEA and § 1983.

A. The Rights and Protections Under the ADEA are not “Virtually Identical” to the Rights and Protections of § 1983 Equal Protection Claims

To determine if a federal statute precludes a constitution-based § 1983 claim, the first step is to apply the “virtually identical” analysis.173 That analysis demands a comparison of the rights and protections of the statute to those available under the Constitution.174 When the “contours of such rights and protections diverge in significant ways,” Congress did not intend to preclude the constitution-based § 1983 claims.175 In Levin, the Seventh Circuit engaged in an inclusive comparison of the rights offered under the ADEA to those existing under § 1983 equal protection claims.176 That assessment has tremendous value to the preclusion analysis and is expanded on here:

First, there are several divergences concerning who can be sued under the ADEA and who can be sued under § 1983.177 The ADEA only restricts private employers, the federal government, unions, and employment agencies.178 Conversely, a § 1983 plaintiff may file suit against persons acting under color of state law.179 Persons acting under color of state law include individuals in their personal or official capacities.180 In certain situations, liability under § 1983 can also extend to municipal and county governmental entities.181 If the ADEA

173 See supra Part (IV)(A).
174 Fitzgerald, 555 U.S. at 252.
175 Id. at 252-53.
176 Levin v. Madigan, 692 F.3d 607, 621 (7th Cir. 2012).
177 Id.
181 Id. (“Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to
precludes § 1983 equal protection claims, the number of potential defendants shrinks substantially. For instance, employees would be unable to bring age-based discrimination claims against culpable individuals acting under color of state law.

Second, the ADEA and § 1983 protect different types of employees. The ADEA excludes from its protection elected officials and limits protection for certain members of their staff, appointees, law enforcement officers, and firefighters. The ADEA also limits its protection to employees over the age of forty, it does not prevent employers from favoring older employees. The constitution does not have similar limitations. Significantly, without § 1983 equal protection claims, employees under the age of forty who are discriminated against because of age, will be left remediless for otherwise actionable employment discrimination.

Moreover, if the ADEA precludes § 1983 equal protection claims, state employees are left without a federal forum for age discrimination. Interestingly, this lack of federal remedy did not trouble the Ninth Circuit in Ahlmeyer. In Ahlmeyer, the court held that Congress intended to foreclose § 1983 claims when it amended the ADEA to include state employers. However, according to the Supreme Court, what the ADEA amendment actually evinced was

be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.”).

182 Levin, 692 F.3d at 621.
183 Id. (citing 29 U.S.C. §§ 623(j), 630(f)); Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009) (Court found preclusion inappropriate where the statutory exemptions would have rights under § 1983 equal protection claim)).
185 Levin, 692 F.3d at 621.
186 Stephanie Armour, Young Workers Say Their Age Holds Them Back, USA TODAY, Oct. 7, 2003, available at http://usatoday30.usatoday.com/money/workplace/2003-10-07-reverseage_x.htm (“In this tepid economy, some workers in their 20s and 30s say their age is being unfairly held against them”).
187 See e.g., Mustafa v. State of Nebraska Dep’t of Corr. Services, 196 F. Supp. 2d 945, 955 (D. Neb. 2002); Levin, 692 F.3d at 621.
188 Ahlmeyer v. Nevada Sys. of Higher Educ., 555 F.3d 1051, 1060 (9th Cir. 2009).
189 Id.
Congress’ intent to provide state employees with a federal remedy for age-based employment discrimination.\textsuperscript{190} Because the amendment was overturned, the ADEA is not applicable against the States by private federal suit.\textsuperscript{191} Accordingly, a court that precludes § 1983 equal protection claims is disregarding Congress’ intent to provide state employees with a federal remedy.\textsuperscript{192} Without the availability of § 1983 equal protection claims, state employees suffering form age-based employment discrimination will be left without a federal cause of action.\textsuperscript{193}

Third, the two claims have different standards of proof.\textsuperscript{194} An equal protection claim is subject only to rational basis review, meaning the age classification must be rationally related to a legitimate state interest.\textsuperscript{195} A court will not find a State’s action unlawful unless the different treatment “is so unrelated to the achievement of any combination of legitimate purposes” that the only conclusion is the State’s conduct was irrational.\textsuperscript{196} Rational basis of review is so deferential that a court may even hypothesize a State’s legitimate interest if the State does not provide one.\textsuperscript{197} As such, an individual challenging the constitutionality of an age-based employment classification bears a heavy burden.\textsuperscript{198} In contrast, an ADEA plaintiff

\textsuperscript{190} Kimel v. Florida Bd. of Regents, 528 U.S. 62, 74 (2000) (“the plain language of [the ADEA’s] provisions clearly demonstrates Congress’ intent to subject the States to suit . . . at the hands of individual employees” in federal court).

\textsuperscript{191} Id. at 91.

\textsuperscript{192} \textit{Mustafa}, 196 F. Supp. 2d at 956.

\textsuperscript{193} See e.g. \textit{Mustafa v. State of Nebraska Dep’t of Corr. Services}, 196 F. Supp. 2d 945, 955 (D. Neb. 2002); \textit{Levin}, 692 F.3d at 621.

\textsuperscript{194} \textit{Levin}, 692 F.3d at 619.

\textsuperscript{195} \textit{Kimel}, 528 U.S. at 83–84.

\textsuperscript{196} Id. at 84.


\textsuperscript{198} \textit{Kimel}, 528 U.S. at 84 (quoting \textit{Vance v. Bradley}, 440 U.S. 93, 111 (1979)) (“[B]ecause an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the ‘facts on which
need only prove by a preponderance of the evidence that age was a "but-for" cause of an employer’s decision. As the Seventh Circuit notes, the ADEA “prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.”

In Ahlmeyer, the Ninth Circuit found the difference of proof problematic. Because the ADEA provides greater protection, plaintiffs have “nothing substantive to gain” by bringing a § 1983 equal protection claim. The Ninth Circuit’s assumption is incorrect because without § 1983 equal protection claims, state employees suffering from age-based employment discrimination and employees suffering from reverse age discrimination are left without a federal remedy. Moreover, even if plaintiffs had nothing substantive to gain, that would not change the fact that the standards of proof are different. The important question is whether the claims are virtually identical and the difference in proof is another example that they are not.

Fourth, § 1983 commonly has a more generous limitations period than the ADEA. Under the ADEA, an individual must file a claim with the EEOC, usually within 180 days of the employer’s misconduct. By contrast, the limitations period for § 1983 equal protection claims is likely to be substantially longer because it is adopted from the State’s statute of limitations for personal injury

the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”).

200 Levin v. Madigan, 692 F.3d 607, 619 (7th Cir. 2012); accord Kimel, 528 U.S. at 87 (“Measured against the rational basis standard ... the ADEA plainly imposes substantially higher burdens”).
201 Ahlmeyer v. Nevada Sys. of Higher Educ., 555 F.3d 1051, 1058 (9th Cir. 2009).
202 Id.
203 See supra Part (IV)(A).
204 Stephen Bergstein, Age Discrimination Can Violate Section 1983, (June 29, 2008, 1:47 PM), http://secondcircuitcivilrights.blogspot.com/2008/06/age-discrimination-can-violate-section.html (Section 1983 equal protection claims have a "longer statute of limitations than the ADEA: three years to 300 days.").
suits.\textsuperscript{206} The longer statute of limitations should provide state employees with greater rights and protections against age discrimination in employment. However, if § 1983 equal protection claims are precluded, the statute of limitations is worthless; state employees will not even be able to file a federal suit.

Finally, the Supreme Court has recognized substantial differences between the ADEA and Equal Protection Clause claims. In \textit{Kimel v. Florida Board of Regents, supra}, the Court held that the ADEA did not validly abrogate the States sovereign immunity and therefore, the ADEA is not applicable against the States.\textsuperscript{207} As part of its analysis, the Court compared the ADEA’s protections to Equal Protection Clause guarantees.\textsuperscript{208} The Court made two points that are crucial to this Comment’s analysis: (1) the ADEA “cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,”\textsuperscript{209} and (2) “the ADEA prohibits very little conduct likely to be held unconstitutional.”\textsuperscript{210}

The Court’s language establishes that there is a constitutional right to be free from age-based employment discrimination\textsuperscript{211} and the ADEA does not fully enforce violations of that right. It is an “indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded.”\textsuperscript{212} If the ADEA precludes § 1983 equal protection claims, state employees and employees suffering from reverse age discrimination will have the constitutional right to be free from age-based employment discrimination, but may have no remedy for its violation. That conclusion would be odd; especially since § 1983 was created to remedy such unconstitutional conduct.\textsuperscript{213}

\textsuperscript{208} See \textit{Id.} at 83-91.
\textsuperscript{209} \textit{Id.} at 82 (internal citation omitted).
\textsuperscript{210} \textit{Id.} at 88.
\textsuperscript{211} See also \textit{Levin v. Madigan}, 692 F.3d 607, 622 (7th Cir. 2012) (stating that \textit{Kimel} clearly established that age discrimination in employment violates the Equal Protection Clause).
\textsuperscript{212} \textit{Marbury v. Madison}, 5 U.S. 137, 163 (1803).
It is apparent that the rights and protections offered by the ADEA are not “virtually identical” to the rights and protections offered by § 1983 equal protection claims. Therefore, it is unnecessary to apply step two and search for additional evidence of Congress’ intent. According to this Comment’s proposed preclusion analysis, the different rights establish that the ADEA does not preclude § 1983 equal protection claims to vindicate age discrimination in employment.

B. A Final Word of the Inappropriateness of the Sea Clammers Doctrine: The ADEA’s Comprehensive Remedial Scheme Will not be Bypassed by § 1983 Equal Protection Claims

The Zombro court’s central argument was that the ADEA’s comprehensive remedial scheme would be debilitated if plaintiffs could file § 1983 equal protection claims.214 Specifically, the court was concerned that plaintiffs—in order to bring claims directly to the unbiased federal court—would assert § 1983 claims and circumvent the ADEA’s comprehensive remedial scheme.215

Undoubtedly, the remedial scheme of the ADEA is comprehensive. The ADEA’s remedial scheme, including the filing and other procedural requirements with the EEOC,216 is on par with the scheme declared comprehensive in Smith.217 The scheme evinces Congress’ intent for the ADEA to be the sole means of vindicating violations of the ADEA; it does not establish that Congress intended the ADEA to be the sole means of enforcing violations of the Equal

---

214 Zombro v. Baltimore City Police Dep’t., 868 F.2d 1364, 1369 (4th Cir. 1989).
215 Id.
Protection Clause. This is especially true given the different rights and protections offered by § 1983 equal protection claims. Hypothetically, if the claims were virtually identical, allowing a plaintiff to file a § 1983 equal protection claim would be indistinguishable from a plaintiff filing a § 1983 claim based on violations of the ADEA: the plaintiff filing the § 1983 equal protection claim is circumventing the remedial scheme of the ADEA in order to vindicate what are essentially ADEA violations.

However, § 1983 equal protection claims reach different defendants, protect different employees, and have different standards of proof than ADEA claims. According to the proper reading of Smith, Fitzgerald, and Sea Clammers, no court could conclude that Congress perceived the ADEA to be the exclusive remedy for age discrimination in employment: the protections guaranteed by the two sources of law are substantially different.

CONCLUSION

Prior to the Seventh Circuit’s Levin v. Madigan decision, a string of circuit court cases rendered the ADEA the exclusive remedy for age discrimination in employment. These circuits left their state employees without a federal remedy for age-based employment discrimination and slowly created a weight of authority that no circuit would rule against. When the Ninth Circuit disregarded Supreme Court precedent in favor of Zombro and its progeny, the validity of the weight of authority needed to be questioned. The Seventh Circuit answered the call. Following Fitzgerald, the Seventh Circuit properly compared the rights and protections of the ADEA to § 1983 equal protection claims and concluded that the ADEA is not the exclusive remedy for age discrimination in employment. However, even the

---

219 See supra Part (V)(A).
220 See Note 18.
221 Levin v. Madigan, 692 F.3d 607, 622 (7th Cir. 2012).
Seventh Circuit was slightly misguided in its application of Supreme Court precedent. Due to circuit court confusion, this Comment provides the proper standard for determining the preclusion of constitution-based § 1983 claims. Using this standard, this Comment expands on the Seventh Circuit’s comparative assessment and correctly concludes that the ADEA does not preclude § 1983 equal protection claims. In order to protect all employees from age discrimination, courts must come to the understanding that the ADEA and § 1983 equal protection claims are simply alternative methods of fighting age-based employment discrimination as each supplies different rights and protections.