ALONE IN ITS FIELD: JUDICIAL TREND TO HOLD THAT THE ADEA PREEMPTS § 1983 IN AGE DISCRIMINATION IN EMPLOYMENT CLAIMS*

David C. Miller**

The Supreme Court has stated that "only twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983."[1] Perhaps with this cautionary statement in mind, lower courts have held that statutes with remedial provisions as elaborate as those contained in the Civil Rights Act of 1964[2] do not provide exclusive remedies, but leave plaintiffs free, in certain circumstances, to bring concurrent claims based on identical facts under § 1983.[3] Despite this seeming reluctance, a trend is developing in the circuit courts of appeals that the Age Discrimination in Employment Act (ADEA)[4]

** B.A., Newberry College, 1978; M.S., University of Tennessee, 1982; J.D., Stetson University College of Law, 1998; Articles & Symposia Editor, 1997–98, *Stetson Law Review*. David C. Miller, Esq. practices labor and employment law and is an associate in the Miami offices of Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A..

1. Blessing v. Freestone, 520 U.S. 329, 347 (1997). In *Blessing*, the Court considered whether Title IV-D of the Social Security Act precluded private actions brought pursuant to 42 U.S.C. § 1983 to enforce "substantial compliance" with provisions of Title IV-D. *See id.* at 346–48. As might be imagined from the quoted remark, the Court found in the negative. *See id.* at 348. The two instances to which the Court referred were its decisions in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981) (finding that the comprehensive remedial scheme of the Federal Water Pollution Control Act preempted private actions brought via § 1983; this case gives its name to the "*Sea Clammers* doctrine"), and *Smith v. Robinson*, 468 U.S. 992, 1013 (1984) (finding likewise as to the Education of the Handicapped Act). Section 1983, of course, does not create any substantive rights, but merely serves as a means of vindicating federal constitutional and statutory rights that have an independent basis. *See, e.g.*, Maher v. Gagne, 448 U.S. 122, 129 n.11 (1980). Section 1983 provides a private right of action against persons who, under color of state law, deprive others of federal constitutional or statutory rights. *See* 42 U.S.C. § 1983.

2. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-1–17 (1994)) [hereinafter Title VII].

3. *See, e.g.*, Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1231 (11th Cir. 1998) (holding that Title VII does not preempt constitutional claims brought under Section 1983).

4. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat.

provides the exclusive remedy for claims of age discrimination against employers, and that § 1983 suits are thereby preempted.[5] Every circuit that has considered the question directly has held that the ADEA preempts § 1983 claims for age discrimination in employment. District court decisions, however, fall on both sides of the question.[6] This Article argues that the ADEA clearly preempts age discrimination in employment claims brought under § 1983. Part A discusses the overwhelming weight of authority holding that the ADEA provides an exclusive remedy for age discrimination in employment claims and examines the leading decision on the issue.[7] Part B identifies and explains the proper analytical framework for determining preemption.[8] Part C applies that framework to the ADEA and shows how it compels the determination that the ADEA preempts § 1983 claims for age discrimination in employment.[9] Part C also demonstrates the fatal error in the reasoning employed by the leading case holding contrary to that position.[10] Finally, Part D discusses the inappropriateness of applying Title VII jurisprudence to the question of preemption by the ADEA.[11]

A. The Overwhelming Weight of Authority Holds That the

602 (1967) (codified as amended at 29 U.S.C. §§ 621–624 (1994)).

5. The Fourth Circuit was the first to so hold, in what remains the leading decision, *Zombro v. Baltimore City Police Department*, 868 F.2d 1364, 1369–70 (4th Cir. 1989). After a long pause, two more circuits have joined the Fourth since 1997. *See* Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998); *see also* LaFleur v. Texas Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997) (adopting what was stated in dicta by the Fifth Circuit earlier in *Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1448 (5th Cir. 1992)).

6. *Compare, e.g.*, Ring v. Crisp County Hosp. Auth., 652 F. Supp. 477, 482 (M.D. Ga. 1987) (holding ADEA preempts § 1983 age discrimination in employment claims) *with* Mummelthie v. City of Mason City, 873 F. Supp. 1293, 1323 (N.D. Iowa 1995), *aff'd*, 78 F.3d 589 (8th Cir. 1996) (holding the opposite). While *Mummelthie* was affirmed by the Eighth Circuit, the court of appeals did so in an unpublished table decision (text available at 1996 WL 95-2349NI) of no precedential value. *See* 78 F.3d 589. Further, the single paragraph of the opinion reveals that the lower court decision was upheld on grounds other than the preemption issue, which the court of appeals did not address. *See id.*

7. *See infra* Part A.

8. *See infra* Part B.

9. *See infra* Part C.

10. *See infra* Part C.

11. *See infra* Part D.

ADEA Preempts Age Discrimination Claims in Employment Brought Under § 1983

Three circuit courts of appeals have considered and ruled on the issue of whether the ADEA provides an exclusive remedy for all claims of age discrimination in employment, and, thus, preempts claims under § 1983. All have held that it does.[12] The district courts addressing the question are divided.[13] The most important of the circuit court decisions deserves careful examination.

In *Zombro v. Baltimore City Police Department*,[14] a police officer sued under § 1983 after he was transferred to what he considered a job of lesser status.[15] He claimed the transfer was based on his age, forty-five, in violation of the Equal Protection Clause of the Fourteenth Amendment.[16] The plaintiff did not sue under the ADEA, evidently because he sat idle while the time limit for filing an administrative complaint expired.[17]

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12. *See Migneault*, 158 F.3d at 1140; *Lafleur*, 126 F.3d at 760; *Zombro*, 868 F.2d at 1369. The Eighth Circuit, in *Mummelthie*, affirmed a district court decision that the ADEA did not preempt § 1983. *See* 78 F.3d at 589. The decision, however, is of no precedential value. First, pursuant to Eighth Circuit Rule 28A(k), unpublished opinions are not precedent, even for that circuit. *See* 8TH CIR. R. 28A(k). Second, as explained below in Part C, decisions of other circuits are of no value in showing that the law is clearly established. *See infra* Part C. Third, an examination of the single-paragraph, per curiam opinion reveals that the lower court decision was upheld on grounds other than the preemption issue, which was not mentioned at all. *See Mummelthie*, 78 F.3d at 589.

13. *See Mummelthie*, 873 F. Supp. at 1302, 1315–17 (stating that the great weight of recent decisions finds the ADEA to provide the exclusive remedy for age discrimination in employment and listing cases). A non-comprehensive list of district court cases deciding the question, besides those already cited, includes the following, which hold the ADEA preempts age discrimination in employment claims under § 1983: *Gregor v. Derwinski*, 911 F. Supp. 643, 651 (W.D.N.Y. 1996); *Ford v. City of Oakwood*, 905 F. Supp. 1063, 1066 (N.D. Ga. 1995); *Reale v. Jenkins*, No. 92 Civ. 7234 (LJF), 1993 WL 37091, at *4 (S.D.N.Y. Feb. 9, 1993); *Frye v. Grandy*, 625 F. Supp. 1573, 1576 (D. Md. 1986); *Morgan v. Humboldt County School District*, 623 F. Supp. 440, 443 (D. Nev. 1985). The following cases hold the opposite: *Hornfeld v. City of North Miami Beach*, 29 F. Supp. 2d 1357, 1369, 1371 (S.D. Fla. 1998); *Jungels v. State University College of New York*, 922 F. Supp. 779, 785 (W.D.N.Y. 1996); *Howard v. Daiichiya-Love's Bakery, Inc.*, 714 F. Supp. 1108, 1113 (D. Haw. 1989); *Haag v. Board of Education*, 655 F. Supp. 1267, 1274 (N.D. Ill. 1987); *Price v. County of Erie*, 654 F. Supp. 1206, 1208 (W.D.N.Y. 1987); *Bleakley v. Jekyll Island-State Park Authority*, 536 F. Supp. 236, 241 (S.D. Ga. 1982).

14. 868 F.2d 1364 (4th Cir. 1989).

15. *See id.* at 1365.

16. *See id.* at 1365–66.

17. *See* Colleen Gale Treml, Note, Zombro v. Baltimore City Police Department: *Pushing Plaintiffs Down the ADEA Path in Age Discrimination Suits*, 68 N.C. L. REV.

The court engaged in a lengthy and careful examination of the preemption issue.[18] First, it noted that the ADEA provides a comprehensive scheme to prohibit age discrimination in employment.[19] Included in that scheme is a detailed remedial framework that emphasizes administrative attempts at conciliation aimed at avoiding excessive litigation.[20] The court pointed out that this elaborate and carefully drawn scheme would be subverted if a plaintiff could bypass it by suing directly through § 1983.[21] The question, then, was whether the ADEA preempted other claims for age discrimination in employment brought pursuant to § 1983.[22]

Section 1983, the court stated, "cannot withstand preemption" in the face of a comprehensive statutory scheme like the ADEA's unless there is manifest congressional intent to preserve it.[23] The court noted the Supreme Court's disinclination to preserve § 1983 claims in the face of other comprehensive statutory schemes, such as the habeas corpus statute and the Education of the Handicapped Act.[24] Significantly, the *Zombro* court identified a

> general policy of precluding § 1983 suits[] where Congress has enacted a comprehensive statute specifically designed to redress grievances alleged by the plaintiff. . . . We hold that this policy should be followed unless the legislative history of the comprehensive statutory scheme in question manifests a congressional intent [not to preempt § 1983.][25]

Based on the *Zombro* court's reasoning, only if contrary intent is manifest — primarily in the statute, or secondarily, in its legislative history — should a mode of determination other than the *Sea Clammers* doctrine[26] be employed.[27]

995, 996 & nn.12–13 (1990).

18. *See Zombro*, 868 F.2d at 1366–71.

19. *See id.* at 1366.

20. *See id.*

21. *See id.* at 1367.

22. *See id.*

23. *Id.* (referring to *Sea Clammers*, 453 U.S. at 20 (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting))).

24. *See Zombro*, 868 F.2d at 1368 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Smith v. Robinson*, 468 U.S. 992 (1984)).

25. *Id.* at 1368–69.

26. *See supra* note 1 and accompanying text.

27. *See Zombro*, 868 F.2d at 1369.

In its analysis, the court first turned to the language of the statute itself to determine congressional intent.[28] The court found it "obvious," because the statute created such a comprehensive scheme, that the ADEA was intended to preempt § 1983 and further found it "implausible" that Congress could have intended to preserve § 1983 claims that would "debilitate" the ADEA.[29] Having found manifest intent in the language of the statute itself, the court properly looked no further, but allowed the statute itself to control.[30] The court did state that the legislative history revealed no intent to preserve a § 1983 claim.[31] In a postscript to this analysis, the court added that special factors inherent in the relationship between governments and their employees further counseled that a § 1983 claim should not be recognized.[32] The court concluded by declining to bypass the ADEA and "transfer wholesale public employment relations into the federal courts without any concrete and specific expression of federal constitutional priority."[33]

Zombro is the most comprehensive of the significant decisions bearing on whether the ADEA preempts § 1983 age discrimination in employment claims.[34] The most recent case in the *Zombro* line,

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28. *See id.* This hierarchy in which to seek congressional intent is in consonance with the cardinal rule of statutory interpretation that courts shall look no further than the plain meaning of the words of statute, and only if the meaning cannot be determined from the statute itself shall further evidence of intent be sought. *See Sea Clammers*, 453 U.S. at 13 (stating, in considering preemption of § 1983, "We look first, of course, to the statutory language."); *see also* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98–99 (1991) (stating that where a statute is unambiguous, the courts "do not permit" changes in meaning based on the statements of legislators or committees during the enactment process).

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

30. *See id.*

31. *See id.*

32. *See id.* at 1369–70.

33. *Id.* at 1370.

34. The district court decision in *Mummelthie* qualifies as the leading case for the opposing view. Certainly, at 46 pages, it must be the longest. However intricate its reasoning and involved its arguments, though, *Mummelthie* rests in large part on a rejection of *Zombro* — on mistaken grounds. *See Mummelthie*, 873 F. Supp. at 1319, 1323. The linchpin argument in *Mummelthie*, and all following cases, is a supposed connection in the legislative history of the ADEA to that of Title VII. *Id.* at 1323–24. This argument is examined in detail and found to be incorrect. *See infra* Part C.4.

The *Mummelthie* court asserts that the Fourth Circuit in *Zombro* did not adequately explore the legislative history of the ADEA and particularly its relationship to Title VII legislative history, to determine whether Congress intended to preempt claims of age discrimination in employment. *See id.* at 1319, 1323. A careful reading of *Zombro*,

Migneault v. Peck,[35] rests on *Zombro*. *Migneault*, however, raises an additional issue in the course of addressing the individual defendant's affirmative defense of qualified immunity.[36] The *Migneault* court pointed out that a plaintiff must first show that his purported Equal Protection claim brought via § 1983 is cognizable under the Constitution, independent of the ADEA, before he can show the existence of a clearly established right for qualified immunity purposes.[37]

The Supreme Court examined the same idea in *Siegert v. Gilley*.[38] The Court explained that the question of whether a right exists necessarily precedes the question of whether it is clearly established.[39] The significance of the point to the preemption question

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however, shows not only that the ADEA's legislative history was before the court, but that the arguments against preemption based on the history — later taken up by the *Mummelthie* court — had a forceful advocate, dissenting Judge Murnaghan. *See Zombro*, 868 F.2d at 1374–77 (Murnaghan, J., dissenting). Judge Murnaghan relies heavily on *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987) (holding Title VII does not preempt concurrent § 1983 claims). *See* 868 F.2d at 1376.

The *Keller* court, in turn, made an exhaustive inquiry into Title VII legislative history. *See Keller*, 827 F.2d at 958–62. Judge Murnaghan used *Keller*'s investigation of Title VII and made the same argument as the court in *Mummelthie*. *See Zombro*, 868 F.2d at 1374–77. To assert, as the *Mummelthie* court does, that the *Zombro* court did not look at the ADEA's legislative history is simply wrong. The dissent presented the history and made the arguments; the majority simply rejected them.

35. 158 F.3d 1131 (10th Cir. 1998).

36. *See* 158 F.3d at 1140. Qualified immunity may be asserted by public officials who are sued in their individual capacities for conduct occurring pursuant to their discretionary authority. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982). Government officials are shielded from liability for performing their discretionary duties so long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Further, the immunity is from suit, not merely from liability. *See* GJR Invs., Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1366 (11th Cir. 1998); *see also* Siegert v. Gilley, 500 U.S. 226, 231–33 (1991). Thus, the public official asserting qualified immunity should not be subjected to the burdens of litigation, including discovery. *See Siegert*, 500 U.S. at 231–33; Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

37. 158 F.3d at 1140.

38. 500 U.S. 226 (1991).

39. *See Siegert*, 500 U.S. at 229. In *Siegert*, the plaintiff alleged that the defendant had unconstitutionally deprived him of a liberty interest under the Fifth Amendment when the defendant made an unfavorable employment reference. *See id.* The defendant argued that a "right" to a favorable job reference did not exist under the Fifth Amendment. *See id.* The Court agreed, stating that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff [was] `clearly established' . . . is the determination of whether the plaintiff has asserted the violation of a constitutional right at all." *Id.* at 232.

is the same as that for qualified immunity. That is, if there can be no actionable claim[40] for age discrimination in employment that may be brought via § 1983 (typically, of course, on an equal protection or liberty interest theory), then the question of preemption by the ADEA simply does not arise — there is nothing to preempt. Indeed, in *Whitacre v. Davey*[41] one circuit court has questioned whether a claim for age discrimination in employment could arise under the Constitution.[42] The court stated that, because "age discrimination does not implicate a suspect class or a fundamental right, [the plaintiff] may not possess `a compensable injury to a constitutionally protected interest.'"[43] The *Whitacre* court pointed out that it may be impossible to designate a certain age, beyond which one is susceptible to bias based on being classified as "old."[44] The court stated, "[i]n the ADEA, Congress drew the line at 40, but it is hard to see such a constitutional boundary."[45] The court identifies the arbitrariness of any classification based on age and, thus, the impossibility of defining a protected class under the Equal Protection Clause.[46]

The great weight of authority, including all the circuit courts of appeals that have ruled on the question, holds that the ADEA provides the exclusive remedy for age discrimination in employment,

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40. "Rights" that are unsecured by law are not actionable. *See* Davis v. Scherer, 468 U.S. 183, 194 & n.12 (1984). In *Wascura v. Carver*, 169 F.3d 683, 685 (11th Cir. 1999), the court stated that "[i]f a . . . court lacks subject matter jurisdiction over a claim, that claim cannot provide a basis for imposing liability, and it necessarily follows that the claim states no violation of federal law."

41. 890 F.2d 1168 (D.C. Cir. 1989), *not followed as dicta*, Crawford-El v. Britton, 93 F.3d 813, 818 (D.C. Cir. 1996).

42. *See id.* at 1170 n.3.

43. *Id.* (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)). This language implicitly recognizes that we are dealing with rights that can be the basis for an action, and not merely abstract, but unsecured, statements of principle. Notably, now-Supreme Court Justice Ruth Bader Ginsburg sat on the unanimous panel in *Whitacre*, although she did not author the opinion. *See id.* at 1168. Judge Cox of the Eleventh Circuit cites *Whitacre* and notes that it questions whether age discrimination can arise under the Constitution in an ADEA decision now pending before the Supreme Court. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1448 (11th Cir. 1998) (Cox, J., concurring in part and dissenting in part), *cert. granted*, 119 S. Ct. 901 (1999). The defendant in *Kimel* challenges the ADEA on Eleventh Amendment grounds. *See id*. at 1428–29.

44. *See* 890 F.2d at 1170 n.3.

45. *Id.*

46. It has long been established that there is no automatic right, much less a fundamental right, to public employment. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283–84 (1977); Elrod v. Burns, 427 U.S. 347, 360 (1976); Perry v. Sindermann, 408 U.S. 593, 597 (1972).

preempting concurrent claims under § 1983.[47] Moreover, those district court opinions which hold otherwise do so on a mistaken basis. Clearly, then, the *Sea Clammers* analysis, employed by the *Zombro* court in the leading decision on this question, is proper for this question, and will now be examined in detail.

B. The *Sea Clammers* Doctrine Is the Proper Means of Determining Whether the ADEA Preempts Claims for Age Discrimination in Employment Under § 1983

Put succinctly, the *Sea Clammers* doctrine states:

> When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. . . . "[W]hen a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983."[48]

The Court elaborated on this rule in *Golden State Transit Corp. v. City of Los Angeles*.[49] There, the Supreme Court stated that the existence of a comprehensive scheme was "not *necessarily*" the sole criterion for determining preemption.[50] The scheme must show that permitting a § 1983 claim "`would be inconsistent'" with the statutory framework.[51] Inconsistency is derived from the comprehensiveness of the statutory scheme itself.[52]

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47. *See Migneault*, 158 F.3d at 1140; *Lafleur*, 126 F.3d at 760; *Zombro*, 868 F.2d at 1369–70.

48. 453 U.S. at 20 (quoting *Chapman*, 441 U.S. 600, 673 n.2 (citations omitted) (Stewart, J., dissenting)).

49. 493 U.S. 103, 106–07 (1989).

50. *Id.* at 106 (emphasis added).

51. *Id.* (quoting *Robinson*, 468 U.S. at 1012).

52. *See Robinson*, 468 U.S. at 1009 (examining the "carefully tailored" administrative procedures of the statute at issue); *Sea Clammers*, 453 U.S. at 13 (focusing on the "unusually elaborate enforcement provisions" of the act in question); *see also Blessing*, 520 U.S. at 346–48 (analyzing *Sea Clammers* and *Robinson* on this issue). Some district courts, including the district court in this matter, apparently have read a conjunctive into the *Sea Clammers* doctrine, requiring findings that Congress enacted a comprehensive remedial scheme *and* that the scheme is inconsistent with allowing a § 1983 claim. *See, e.g.*, *Mummelthie*, 873 F. Supp. at 1314. The Supreme Court's statement in *Golden State* that the existence of a comprehensive scheme is "not necessarily" the only determi-

As stated in the introduction to this Article, implicit statutory repeals are disfavored.[53] Some have argued that the *Sea Clammers* line of cases represents a conflict of authority within Supreme Court jurisprudence on the issue.[54] The better view is that the Supreme Court recognizes exceptions to the general rule that implicit repeals are disfavored, and that the ADEA falls squarely within an exception. The Supreme Court has stated that § 1983, specifically, may be implicitly repealed when, first, Congress fails to create enforceable rights in the statute being considered, or, second, when the statute evinces congressional intent to preempt § 1983 claims through a sufficiently comprehensive remedial scheme.[55] Surveying Supreme Court decisions on preemption, the Fourth Circuit stated that "the Supreme Court has increasingly focused on the comprehensiveness of a statute and its remedies. . . . Thus, in the absence of a specific congressional intent to the contrary, the comprehensive nature of [a

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nant of preemption presumes that, in some cases, it is the sole determinant. *See* 493 U.S. at 106. Nevertheless, an inquiry into "inconsistency" may be undertaken as further analysis of the issue. Thus, the Court is not mandating a two-step process in every case. A finding that a § 1983 remedy is inconsistent with a comprehensive remedial scheme is merely a restatement of the finding that there exists a comprehensive scheme, and not a second prong of analysis. *See id.* Some courts find a lack of inconsistency by reasoning that the § 1983 claim and ADEA claim spring from the violation of different rights, e.g., those conferred by the ADEA itself and those secured by the Fourteenth Amendment. *See Hornfeld*, 29 F. Supp. 2d at 1366. However, this is not the appropriate analysis. Instead, the § 1983 claim is inconsistent because the ADEA itself provides a comprehensive remedial scheme.

53. *See Blessing*, 520 U.S. at 347.

54. *See* Treml, *supra* note 17, at 1000–01. Treml appears to posit the existence of a number of inconsistent Supreme Court decisions and rules on implicit repeal. *See id.* For example, she contrasts *Morton v. Mancari*, 417 U.S. 535 (1974) — "repeals by implication are disfavored" — with *Preiser v. Rodriguez*, 411 U.S. 475 (1973) — "precisely drawn, detailed statutes preempt more general remedies." Treml, *supra* note 17, at 1000 n.56. She then contends that the "key to determining exclusivity is uncovering congressional intent." *Id.* at 1001. This is no discovery, but merely a statement of the obvious, i.e., that all statutory interpretation is, at base, an inquiry into legislative intent. *See, e.g.*, Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (stating that the Court's task in interpreting statutes "is to give effect to the will of Congress" (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982))); United States v. Grigsby, 111 F.3d 806, 816 (11th Cir. 1997) (stating that the court's objective in interpreting statutes "is to determine the drafters' intent" (quoting United States v. Castro, 829 F.2d 1038, 1049 (11th Cir. 1987), *modified on other grounds*, 837 F.2d 441 (11th Cir. 1988))).

55. *See Sea Clammers*, 453 U.S. at 19–20; Brown v. Housing Auth. McRae, Ga., 784 F.2d 1533, 1536 (11th Cir. 1986), *vacated on other grounds*, 820 F.2d 350 (11th Cir. 1987); *cf.* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981).

statute is] strong evidence" of intent to preempt a § 1983 claim.[56]

The "irreconcilability" language of *Golden State* thus is not an additional requirement to finding preemption, but is nothing more than a generalization of the specific rule that a comprehensive remedial scheme is evidence of intent to preempt.[57] The Supreme Court stated that "availability of administrative mechanisms to protect the plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. . . . Rather, the statutory framework must be such that `[a]llowing a plaintiff' to bring a § 1983 action `would be inconsistent with Congress' carefully tailored scheme."[58] The Court's language makes clear that "irreconcilability" is simply a way of stating the degree of comprehensiveness of the scheme. That is, an administrative scheme that is sufficiently comprehensive is "irreconcilable" with the statute sought to be preempted, and therefore, creates an exclusive remedy.

This is the case with the ADEA.[59] The ADEA is irreconcilable with allowing a claim for age discrimination in employment under § 1983 because the ADEA's remedial scheme is so comprehensive. Briefly put, the ADEA provides an elaborate structure of administrative charges, deadlines, hearings, and conciliation mechanisms, an exacting schedule of notices as conditions precedent for private actions, and incorporates many of the elaborate remedial provisions of the Fair Labor Standards Act (FLSA).[60] Thus, the *Sea Clammers* doctrine is the appropriate vehicle with which to analyze whether the ADEA preempts § 1983 claims. *Sea Clammers* was expressly relied upon, or implicitly relied upon by reference to *Zombro*, by the three circuit courts that have considered the question.[61] More significantly, the comprehensive remedial scheme carefully crafted into the ADEA presents precisely the circumstances for

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56. *Keller*, 827 F.2d at 965.

57. *See* 493 U.S. 103, 106–07; *see also supra* notes 47–50 and accompanying text.

58. *Golden State*, 493 U.S. at 106–07 (quoting *Robinson*, 468 U.S. at 1012, and citing Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 425–28 (1987)).

59. *See Zombro*, 868 F.2d at 1366.

60. Fair Labor Standards Act, ch. 676, § 1, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201–219 (1994)); *see* 29 U.S.C. § 626; *Zombro*, 868 F.2d at 1366. The application of the *Sea Clammers* doctrine to the ADEA, and, thus, the comprehensiveness of the ADEA's remedial scheme, is examined in detail *infra* Part C.

61. *See Migneault*, 158 F.3d at 1140; *Lafleur*, 126 F.3d at 760; *Zombro*, 868 F.2d at 1367.

which the doctrine was created.[62] Thus, the structure and language of the statute itself, providing implicit evidence of congressional intent, forecloses use of some other analysis.[63] Finally, if resort is made to an interpretive analysis based on expressions in the legislative history, there is in the history of the ADEA no expression of congressional intent to retain remedies competing with and undermining the comprehensive scheme of the ADEA.[64]

C. Under the *Sea Clammers* Doctrine, the ADEA Clearly Provides

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62. *See Zombro*, 868 F.2d at 1366.

63. *See Sea Clammers*, 453 U.S. at 13; *Zombro*, 868 F.2d at 1369. The alternative approach improperly employed by some district courts examining this question looks beyond the statute to the legislative history. *See Mummelthie*, 873 F. Supp. at 1324–25. In the case of the ADEA, this led the *Mummelthie* court on an exhaustive search, eventually disclosing its needle in a haystack, not in the legislative history of the ADEA itself, but in that of Title VII. *See id.* at 1325 (citing 118 CONG. REC. 15,895 (1972)). The material cited in *Mummelthie* contains comments quoted by a single legislator that were made during hearings regarding the passage of amendments to Title VII. *See id.* Similar changes were not made to the ADEA until two years later. *See id.* at 1325–26. To rely on such a tenuous connection as the determinative factor in deciding the question of preemption is inappropriate. *See* Maher v. Strachan Shipping Co., 68 F.3d 951, 957 (5th Cir. 1995) (stating that "isolated statements in the legislative history, particularly those speaking to the motives of individual legislators, are not relevant to the issue of what Congress actually did"); Coalition for Clean Air v. Southern Cal. Edison Co., 971 F.2d 219, 227 (9th Cir. 1992) (emphasizing that "statements of individual legislators are entitled to little, if any, weight"). This issue is explored in detail *infra* Part D.

64. *See Zombro*, 868 F.2d at 1369; *Ring*, 652 F. Supp. at 482 (stating "there is no legislative history which indicates that Congress did not intend the ADEA to be the exclusive remedy for age discrimination"). The *Ring* court's formulation underscores a fundamental difference of approach between the dominant line of cases, which hold the ADEA preempts § 1983, and those cases, like *Mummelthie*, which hold otherwise. As explained earlier, the *Zombro* line looks first to the language of the statute for evidence of congressional intent. *See* 868 F.2d at 1369. Finding intent to preempt there, those cases may additionally look to the legislative history; when they do, they find silence, which merely confirms the prior conclusion. *See id.*; *Ring*, 652 F. Supp. at 482. *Mummelthie* declines to find intent from the language of the statute alone, but proceeds to examine the legislative history, strains to discover the barest indication of intent not to preempt, and then accords that expression determinative weight over the enacted language of the statute. *See* 873 F. Supp. at 1319, 1324–27. *Mummelthie*'s decision to infer from silence an affirmative congressional intent to preserve § 1983 claims in the face of the comprehensive scheme enacted in the ADEA leads that court down an improper analytical path resulting in a holding that is incorrect, no matter how meticulously reasoned.

the Exclusive Remedy for Claims of Age Discrimination

1. The ADEA's Comprehensive Remedial Scheme Evinces Congressional Intent to Preempt Claims of Age Discrimination in Employment Under § 1983

The *Sea Clammers* doctrine operates when Congress has enacted a remedial scheme so comprehensive that it evinces intent to foreclose competing remedies via § 1983.[65] The conclusion to be drawn from such an enactment is that allowing a plaintiff to circumvent the statutory framework would be inconsistent with that framework.[66] The courts look first to the language of the statute, particularly to the remedial portions thereof.[67] Then the court may look to legislative history.[68]

The ADEA provides just such a comprehensive remedial scheme for the field of age discrimination in employment.[69] It provides a

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65. *See Sea Clammers*, 453 U.S. at 20; *Zombro*, 868 F.2d at 1366–71.

66. *See Robinson*, 468 U.S. at 1012. This concern that the statutory remedial scheme not be bypassed by a § 1983 suit does not mean that if the scheme exempts some class of persons from liability, then a § 1983 claim against a defendant in that class would not be preempted on the theory that such a claim does not bypass the statute. For example, the ADEA imposes liability on "employers." *See* 29 U.S.C. § 623(a). In the case of a government defendant, the employer is the public entity; public officials have been held not to be employers under the ADEA. *See* Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (stating that individuals "cannot be held liable under the ADEA"). However, courts construing both the ADEA and other statutes have not been concerned with this issue, but have held in favor of preemption. For example, the Tenth Circuit in *Migneault* had before it a public official sued as an individual defendant asserting the defense of qualified immunity to a § 1983 claim. *See* 158 F.3d at 1135. In granting qualified immunity, the court stated, "[the individual defendant] claims [the plaintiff] failed to show the law is clearly established that a claim for age discrimination in employment is cognizable under the Equal Protection Clause, independent of the ADEA. We agree." *Id.* at 1140. Thus, the *Migneault* court made no distinction in the "type" of defendant.

Similarly, in *Brown v. General Services Administration*, 425 U.S. 820, 823–25 (1976), the Supreme Court considered whether Title VII preempted a constitutional claim of racial discrimination in federal employment brought under 42 U.S.C. § 1981. The Court had before it both governmental and individual defendants. *See* Brown v. General Servs. Admin., 507 F.2d 1300, 1303 (2d Cir. 1974) (in the decision appealed from, listing the defendants), *aff'd*, 425 U.S. 820 (1976). Nonetheless, the Court found Title VII to be the exclusive remedy for claims of racial discrimination in federal employment and dismissed the § 1981 claims against both the federal government and the individuals. *See Brown*, 425 U.S. at 835. This argument as to "uncovered" defendants is analogous to that of "uncovered" claims made *infra* Part D.

67. *See Sea Clammers*, 453 U.S. at 13.

68. *See Golden State*, 493 U.S. at 106–07; *Sea Clammers*, 453 U.S. at 13.

69. *See Zombro*, 868 F.2d at 1366.

complex and detailed framework of time limits, administrative intervention, conciliation, and enforcement, compliance with which are conditions precedent to bringing suit.[70] Suits by the United States Equal Employment Opportunity Commission (EEOC), which administers the ADEA, are given preemptive power over private suits; that is, if the EEOC brings suit based on an occurrence, the right to a private action based on the same occurrence terminates.[71] The ADEA's coverage affects public and private employers, employment agencies, and labor organizations, with special provisions for federal employers.[72]

2. The ADEA's Remedial Scheme Incorporates Portions of the Comprehensive Remedial Scheme of the Fair Labor Standards Act (FLSA)

In addition to its own enforcement provisions, the ADEA incorporates by reference several enforcement provisions of the FLSA,[73] specifically, §§ 209, 211, 215, 216 (except for subsection (a)), and 217.[74] Section 209 of the FLSA deals with agency investigations.[75] It makes procedural rules for witnesses and evidence used by the Federal Trade Commission applicable to investigations under the FLSA, and, thus, to investigations under the ADEA.[76] Section 211 of the FLSA deals with the collection of data pursuant to investigations.[77] The enforcing agency is empowered to collect data, inspect workplaces, and question employees, using staff from the Department of Labor.[78] The section further provides for cooperation with state and local government, for record keeping by employers, and for regulating industrial homework so as to prevent circumvention of the FLSA.[79]

Section 215 of the FLSA prohibits, among other things, selling

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70. *See* 29 U.S.C. § 626 (1994); *Zombro*, 868 F.2d at 1366.
71. *See* 29 U.S.C. § 626(c); *Zombro*, 868 F.2d at 1366.
72. *See* 29 U.S.C. §§ 623, 630, 633a (1994).
73. *See id*. § 626.
74. *See id*.
75. *See* 29 U.S.C. § 209 (1994).
76. *See id.*
77. *See* 29 U.S.C. § 211 (1994).
78. *See id.*
79. *See id.*

goods produced in violation of the standards set forth in the FLSA and retaliation against employees who file complaints under the FLSA.[80] The ADEA makes any violation of its prohibitions in § 623 also a violation of § 215, further interrelating the two acts.[81] Section 216 of the FLSA provides for penalties for violations of the FLSA as well as the ADEA.[82] It provides liability for unpaid minimum wages or overtime and an additional, equal amount is available as liquidated damages for willful violations.[83] Application of the liquidated damages provision under the ADEA was meant to be punitive in nature.[84] In fact, the ADEA expressly provides that damages under the ADEA will "be deemed to be unpaid minimum wages or unpaid overtime" for purposes of §§ 216 and 217.[85] Section 216 also provides for other legal and equitable relief.[86] Section 217 of the FLSA empowers the courts to enjoin violations of the FLSA.[87] Thus, not only is the ADEA's remedial scheme itself comprehensive, but it gains added comprehensiveness through inclusion of elaborate and extensive procedures under the FLSA.

3. The Irreconcilability of Remedies Available Under the ADEA and Under § 1983 Demonstrate that the ADEA Was Intended to Preempt Concurrent Claims Under § 1983

The availability of compensatory and punitive damages under § 1983 is simply irreconcilable with the remedial scheme of the ADEA. Further, Congress never intended for such remedies to be available for claims of age discrimination in employment, by analogy to Title

80. *See* 29 U.S.C. § 215 (1994).
81. *See* 29 U.S.C. § 626(b).
82. *See* 29 U.S.C. § 216 (1994).
83. *See id.* § 216(a)-(c); *see also* 29 U.S.C. § 626(b).
84. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985). Here, perhaps, is the clearest indication of why § 1983 claims are inconsistent with the ADEA. Section 1983 provides for compensatory damages; the ADEA does not. *See* Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1446 (11th Cir. 1985). Section 1983 provides for punitive damages against the individual; the ADEA allows for liquidated damages against the employer, which are meant to be punitive in nature. *See Trans World Airlines*, 469 U.S. at 125.
85. 29 U.S.C. § 626(b).
86. *See* 29 U.S.C. § 216.
87. *See* 29 U.S.C. § 217 (1994).

VII[88] or otherwise. The provisions of the Civil Rights Act of 1991[89] (1991 Act) make this congressional intent quite clear.

The 1991 Act made substantial changes in Title VII's remedial scheme.[90] One of the most sweeping was the addition of the availability of compensatory damages for pain and suffering, previously unavailable under Title VII.[91] The 1991 Act also extended this remedy to claims arising under the Americans with Disabilities Act (ADA).[92] The ADA was intended to provide the same remedies as Title VII.[93] In fact, the ADA incorporates portions of Title VII's remedial scheme by reference.[94] Thus, because the remedial schemes of Title VII and the ADA are interwoven, a change to the first logically impels a change to the second. Nonetheless, Congress felt the need to make the availability of compensatory damages for mental pain and suffering under the ADA express.[95] With the 1991 Act, however, Congress did not make compensatory damages available under the ADEA.[96]

The fact that Congress did not provide compensatory damages under the ADEA must reflect Congress' realization that such damages were inconsistent with the ADEA's different remedial scheme. Further, it cannot be argued that this lack was mere oversight. The 1991 Act amends the ADEA's limitations structure (the only change made by the 1991 Act to the ADEA).[97] Further, the legislative history of the 1991 Act refers to the ADEA several times.[98] Congress obviously addressed the ADEA, portions of its enforcement scheme, and its similarities and differences from Title VII when it considered

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88. *See* 42 U.S.C. § 2000e.

89. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (1994)).

90. *See* 42 U.S.C. § 1981a.

91. *See* 42 U.S.C. § 1981a(b); *see also* H.R. REP. NO. 102-40(I), at 64-70 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602–08.

92. *See* 42 U.S.C. § 1981a(a)(2) (citing the American with Disabilities Act of 1990, 42 U.S.C. §§ 12117(a), 12112 (1994)); *see* Civil Rights Act § 102(a)(2).

93. *See* H.R. REP. NO. 102-40(II), at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.

94. *See* 42 U.S.C. § 12117; *see also* H.R. REP. NO. 102-40(II) at 4, *reprinted in* 1991 U.S.C.C.A.N. at 697.

95. *See* 42 U.S.C. § 1981a(a)(2).

96. *See id*.

97. *See* Civil Rights Act § 115.

98. *See* H.R. REP. NO. 102-40(I) at 96, 104, *reprinted in* 1991 U.S.C.C.A.N. at 634, 642; H.R. REP. NO. 102-40(II) at 4, 40-41, *reprinted in* 1991 U.S.C.C.A.N. at 697, 734–35.

the changes made by the 1991 Act. Had it wished to provide compensatory damages under the ADEA — as it did under the ADA — it would have done so expressly. Further, had Congress wanted to clarify the availability of concurrent § 1983 claims, it likewise could have done so. That Congress did not do so when it had the perfect opportunity reflects a conscious choice that plaintiffs not be able to claim such damages for age discrimination in employment actions. Thus, allowing plaintiffs to be awarded compensatory damages for age discrimination in employment claims under § 1983 flies in the face of obvious congressional intent to the contrary.

Given the extreme comprehensiveness of the remedial scheme of the ADEA, it is clear that allowing other remedies to exist would conflict with it and be inconsistent.[99] This conclusion is confirmed by examination of the ADEA's statement of purpose.[100] Further, the comprehensiveness of the ADEA, or of any enactment, is not diminished by the fact that the scheme may not provide every imaginable remedy or create a basis for every imaginable claim. The *Zombro* court decisively addressed this argument.[101] The court stated:

> [W]here 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 (or some other constitutional right). A mere assertion that constitutional rights have been somehow infringed does not ipso facto defeat the coverage, application and exclusivity of a comprehensive statutory scheme specifically enacted by Congress to redress the alleged violation of rights.[102]

This obligation remains whether the supposed violations "rest in

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99. *See Zombro*, 868 F.2d at 1369.

100. *See* 29 U.S.C. § 621. The statement reveals a commitment to a cooperative method of resolving problems engendered by the impact of age on employment, a clear reference to the extensive conciliation and mediation procedure contained in the act. *See id*. § 621(b). The subsection states, in full: "It is therefore the purpose of this chapter 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 problems arising from the impact of age on employment.*" *Id.* (emphasis added). This language contemplates a preference for cooperative, conciliatory methods, not litigation. Congress' commitment to the enforcement scheme it created is undeniable.

101. *See Zombro*, 868 F.2d at 1368.

102. *Id.*

part or in whole on alleged violations of substantive rights under the ADEA" or are alleged to be independent.[103] The basic policy of these cases is that the existence of a sufficiently comprehensive remedial scheme demonstrates congressional intent to displace other remedies.[104]

Further, Congress' election not to provide every remedy does not detract from the comprehensiveness of a remedial scheme.[105] Implicit repeal of one statute by another almost necessarily involves including some remedies and leaving some out.[106] For example, in *Brown v. General Services Administration*,[107] the Supreme Court held that Title VII provides the exclusive remedy for race discrimination in federal employment.[108] This holding means that Congress intended that federal employees not have access to those remedies available under § 1983, like individual liability and punitive damages, which are excluded from Title VII against a government.[109]

Thus, the mere absence of a remedy in the ADEA does not support the conclusion that Congress must have intended to preserve § 1983 claims for age discrimination in employment. On the contrary, it argues for a choice by Congress to withhold the remedy and to enforce instead the use of its chosen remedies under the comprehensive scheme. The ADEA simply represents Congress' choice that all claims for age discrimination in employment should be brought pursuant to that Act.

Sea Clammers clearly is applicable to the ADEA. The existence of separate constitutional and statutory rights has not deterred the Supreme Court from holding that other statutes provide exclusive remedies. Indeed, the *Sea Clammers* doctrine provides a principled method for determining preemption in just such cases. The only

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103. *Id.*

104. *See id.* at 1368–69.

105. *See* Bush v. Lucas, 462 U.S. 367, 388–89 (1983) (stating that Congress is in the best position to determine whether to preserve or to withhold remedies and where it has provided an elaborate remedial system, the courts should not intervene to fill in perceived gaps); *cf. Smith*, 468 U.S. at 1019–20 (stating that availability of an additional remedy under the Rehabilitation Act did not preclude finding that Congress intended its comprehensive scheme under the Education of the Handicapped Act to be an exclusive remedy).

106. *See Smith*, 468 U.S. at 1019–20.

107. 425 U.S. 820 (1976).

108. *See id.* at 835.

109. *See* Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (holding that individual liability for supervisors is not available under Title VII).

counters to this demonstration of congressional intent are clear expressions to the contrary in the statute itself or in its legislative history.[110] As the following section establishes, neither exist in the ADEA.

4. There Is No Evidence in the ADEA's Legislative History That Congress Intended to Preserve Concurrent Claims for Age Discrimination in Employment Under § 1983

By any standard, the ADEA creates a comprehensive remedial scheme to redress age discrimination in employment. Thus, under *Sea Clammers*, the language of the statute itself — the primary interpretive source — demonstrates congressional intent to preempt § 1983 claims. Going further, however, to examine the legislative history, reveals a resounding silence as to the issue.[111] The *Mummelthie* court stated that it undertook an independent analysis and examination of the legislative history and determined that, indeed, Congress intended to retain § 1983 claims for age discrimination.[112] This determination rests on the discovery of a supposed linkage of ADEA and Title VII "principles" regarding § 1983 claims.[113] A careful reading of the history, however, shows that linkage — and, thus, the argument — is without substance.

The foundation of the *Mummelthie* court's contention is Congress' extension of Title VII coverage to public employees in the Equal Employment Opportunity Act of 1972.[114] In House Report Number 92-238, the House Education and Labor Committee stated that Title VII provides an alternative remedy to suits brought under § 1983.[115] This report — which never mentions the ADEA — is the key to the *Mummelthie* court's argument, which it must somehow tie to the ADEA or else fail utterly.

The *Mummelthie* court finds the "crucial link" in a single remark made by Senator Lloyd Bentsen in his 1972 failed attempt to extend ADEA coverage to public employees.[116] In his attempt, Sena-

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110. *See Zombro*, 868 F.2d at 1368.
111. *See id*. at 1369; *Ring*, 652 F. Supp. at 482.
112. *See Mummelthie*, 873 F. Supp. at 1323–27.
113. *See id.* at 1325–26.
114. *See* H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154.
115. *See id*. at 2154.
116. *See Mummelthie*, 873 F. Supp. at 1325.

tor Bentsen noted recent debate about extending Title VII coverage to public employees. He quoted an unspecified Senate committee report that stated the committee's belief that public employees should have the same benefits of equal employment as private employees.[117] Senator Bentsen then stated that he believed "the principles underlying these provisions in the EEOC bill are directly applicable to the [ADEA]."[118] The *Mummelthie* court evidently contends that this terse, utterly ambiguous statement incorporates wholesale into the ADEA everything ever said about Title VII's extension to public employees. On the contrary, it is absolutely indiscernible to what principles Senator Bentsen refers. First, he references Senate Bill Number 3318[119] to extend ADEA coverage to public employees.[120] However, the Senate companion to the House bill that actually amended Title VII was Number 2515.[121] It is hard to say what bill and what report he is talking about. Therefore, it simply is not established that Senator Bentsen is referring to the "principles" regarding the extension of Title VII coverage to public employees that are stated in House Report Number 92-238, which are the heart of the *Mummelthie* court's argument. Even indulging the fiction that he does refer to those "principles," it is entirely unclear what "principles" he may mean. He speaks only of extending Title VII (or ADEA) coverage to public employees and compares their protections to those of private employees.[122] The only explicit reference, then, is to the extension of coverage to public employees, not to preemption.

To reach the *Mummelthie* court's conclusion, one must pile inference upon inference. First, one must conclude that Senator Bentsen was referring to the ideas expressed in House Report Number 92-238, even though he references different legislation, i.e.,

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117. *See* 118 CONG. REC. 15,895 (1972). Private employees, of course, can have no employment claim whatsoever under the Fourteenth Amendment, which requires state action. *See* U.S. CONST. amend. XIV, § 1. Therefore, Bentsen's statement, if it can be so read, that he wanted public employees to have all the rights of private employees, could not possibly have included any right to sue for impairment of equal protection under § 1983.

118. 118 CONG. REC. at 15,895.

119. *See id*. at 15,894. Senate Bill Number 3318 says absolutely nothing about § 1983 or preemption. *See* 118 CONG. REC. at 7746.

120. *See* 118 CONG. REC. at 15,894; 118 CONG. REC. at 7745.

121. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154.

122. *See* 118 CONG. REC. at 15,895.

Senate Bill Number 3318. One must additionally infer that Senator Bentsen intended to incorporate not just those "principles" that supported giving public employees the same rights as private employees, which is what he said, but also those "principles" that asserted the preservation of claims under § 1983 in addition to claims under Title VII, which he did not say.[123] The tortured analysis *Mummelthie* urges shows nothing more than that Senator Bentsen's remarks are, at most, ambiguous and are, in fact, of indeterminable import.

Even weaker and more ambiguous is a possible argument based on information added to the *Congressional Record* in 1977.[124] This material is the text of a column from a newspaper that Senator Frank Church ordered attached to his comments after the fact in the *Congressional Record*.[125] Thus, this information was never heard on the floor.[126] The newspaper column refers to an unidentified federal court which held that the Fifth Amendment precludes singling out certain employees for early retirement.[127] Thus, this supposed evidence of congressional intent consists of the opinion of a newspaper writer, referencing an unidentifiable court decision and purporting to interpret it, which opinion evidently dealt with federal employment under the Fifth Amendment.

This "authority" was offered up by Senator Church during consideration of the 1978 amendments to the ADEA.[128] Those amendments, among other things, raised age limits under the ADEA.[129] Nothing in the committee report from the Senate or the conference committee report suggests that Congress had any thought concerning the preservation or elimination of § 1983 or other constitutional claims.[130]

A careful reading of the ADEA's legislative history shows no congressional intent to preserve claims for age discrimination in

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123. *See id.*

124. *See* 123 CONG. REC. 34,306–07 (1977).

125. *See id*. at 34,306.

126. *See id.*

127. *See id.* at 34,306–07. Further robbing the statement of support for this position, it has been held that the ADEA is the exclusive remedy for claims of age discrimination in federal employment, preempting claims under § 1983. *See* Ray v. Nimmo, 704 F.2d 1480, 1485 (11th Cir. 1983).

128. *See* 123 CONG. REC. 34,305.

129. *See* 123 CONG. REC. 34,293.

130. *See* H.R. CONF. REP. NO. 95-950 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528; S. REP. NO. 95-493 (1977), *reprinted in* 1978 U.S.C.C.A.N. 504.

employment under § 1983. Further, it shows no linkage to Title VII legislative history on the issue. The vital link in that argument — Senator Bentsen's "principle" remark — is weak indeed. *Zombro*, the most authoritative judicial pronouncement on the issue, specifically found the ADEA's legislative history silent on the issue.[131] Finally, even accepting, arguendo, the *Mummelthie* court's conclusion, Senator Bentsen's comment is unpersuasive.[132] It is simply the opinion of a single legislator recorded two years before the salient action on the law.

It is easy to get lost in the trees when addressing the counterarguments that would hold compatible the ADEA and claims for age discrimination in employment under § 1983. Simply put, the ADEA provides a comprehensive remedial scheme that evinces congressional intent that it be an exclusive remedy. The internal evidence of the ADEA's remedial provisions — their complexity and extensiveness, their close connection to the FLSA and divorce from Title VII, and their incompatibility with remedies provided under § 1983 — conclusively demonstrate that the ADEA was intended to stand alone. Further, nothing in the legislative history clearly contradicts this evidence or links the ADEA to Title VII legislative history addressing the question. Therefore, under *Sea Clammers*, the ADEA fills the field of age discrimination in employment and preempts claims brought under § 1983.

D. The ADEA and Title VII Should Not Be Construed *in Pari Materia* for the Issue of Preemption

As the foregoing discussion makes clear, the Court need not necessarily look further than the language of the ADEA itself to conclude that the *Sea Clammers* doctrine is appropriate and that it compels a finding of preemption. However, the *Mummelthie* court and its followers also argue that the ADEA should be interpreted in pari materia with Title VII on the preemption issue, the specifics of

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131. *See Zombro*, 868 F.2d at 1369; *see also Ring*, 652 F. Supp. at 482 (referring to Paterson v. Weinberger, 644 F.2d 521 (5th Cir. 1981)), which held the ADEA was the exclusive remedy for federal employees because legislative history did not indicate otherwise.

132. *See Maher*, 68 F.3d at 957 (stating that isolated comments in the legislative history are irrelevant to congressional actions); *Coalition for Clean Air*, 971 F.2d at 227 (stating that comments by individual legislators should be given little or no weight in determining legislative intent).

the legislative history explored above aside.[133] Therefore, some discussion of that issue is in order.[134] In short, it is inappropriate to construe the two statutes in pari materia on this issue.[135] Title VII and the ADEA do have many similarities; substantive provisions of the ADEA were imported from Title VII.[136] Reference to Title VII case law is appropriate in interpreting and applying those provisions.[137]

However, as the Court in *Lorillard v. Pons*[138] emphasized, it is inappropriate to apply Title VII precedent in interpreting the remedial aspects of the ADEA because those provisions are closely modeled after those of the FLSA, and even incorporate some of that statute's enforcement provisions by reference.[139] The focus of inquiry for purposes of preemption is on the remedial and enforcement provisions of a statute.[140] During enactment of the ADEA, Congress actu-

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133. *See Mummelthie*, 873 F. Supp. at 1319–23.

134. For example, the *Hornfeld* court analogized the ADEA to Title VII, referring to *Johnson*, 148 F.3d at 1228. *See Hornfeld*, 29 F. Supp. 2d at 1364. In *Johnson*, the court considered whether the Civil Rights Act of 1991 rendered Title VII's remedial scheme sufficiently comprehensive that it should preempt § 1983 claims. *See* 148 F.3d at 1230. The court pointed out that several circuits had already determined that Title VII did not preempt § 1983 prior to the 1991 Act. *See id.* (referring to Keller v. Prince George's County, 827 F.2d 952, 958 (4th Cir. 1981)). These determinations were based in part on legislative history that expressly indicated intent to retain the § 1983 remedies. *See id.* at 1230–31. Further, the court cited congressional findings accompanying the amendments expressly indicating its provisions were "additional," finding therein an implied intent to retain § 1983 remedies. *See id.* at 1231. Thus, in *Johnson*, the court had before it a widely held view of the law, express legislative history, express congressional findings, and decisions of other circuit courts, all in favor of retaining claims brought pursuant to § 1983. In considering the ADEA and § 1983, the court is in virtually the opposite situation. The great weight of authority holds that the ADEA preempts § 1983. *See Mummelthie*, 873 F. Supp. at 1302. Second, no legislative history nor anything else shows congressional intent to preserve claims brought pursuant to § 1983. *See Zombro*, 868 F.2d at 1369. Finally, all the circuits that have considered the question have held that § 1983 claims are preempted. *See Migneault*, 158 F.3d at 1140; *Lafleur*, 126 F.3d at 760; *Zombro*, 868 F.2d at 1369–70.

135. *See Ring*, 652 F. Supp. at 481; *cf.* Lorillard v. Pons, 434 U.S. 575, 584 (1978).

136. *See Ring*, 652 F. Supp. at 481.

137. *See Trans World Airlines*, 469 U.S. at 121 (interpreting liability under the ADEA in the light of Title VII precedent because substantive, though not remedial or procedural, provisions of the two statutes are similar).

138. 434 U.S. 575 (1978).

139. *See id*. at 577–80, 583–85.

140. *See Robinson*, 468 U.S. at 1012 (stating that allowing a plaintiff to circumvent a statute's comprehensive remedial scheme would not comport with congressional intent); *Sea Clammers*, 453 U.S. at 20 (stating the classic formulation of the doctrine as "[w]hen the remedial devices" in an act are comprehensive, they preempt § 1983 suits).

ally had before it a proposal to adopt the enforcement scheme of Title VII but chose instead to adopt a scheme based on the FLSA.[141] The choice of the FLSA model obviously was not casual or uninformed.[142] It was, in fact, strongly indicative of congressional intent that the remedial portion of the ADEA differ from that of Title VII.[143] Thus, it is inappropriate to apply Title VII precedent to the ADEA when analyzing the preemption issue. Preemption analysis looks to the remedial portion of a statute, and it is in the remedial provisions where the ADEA and Title VII differ most.[144]

The appeal to interpret the ADEA identically with Title VII breaks down further when considered in the context of public employment. Title VII was extended to public employees in 1972.[145] Congress contemporaneously considered the same extension of the ADEA.[146] It was not until two years later, however, when the FLSA was amended, that the ADEA was extended to public employees.[147] As pointed out above, the ADEA's remedial provisions are patterned on and incorporate those of the FLSA.[148] The proposition that the ADEA amendments were only fortuitously attached to those of the FLSA is questionable.

The Senate Committee on Labor and Public Welfare discussed the 1974 amendments to the FLSA in Senate Bill Number 2747, which included a proposed amendment to the ADEA extending coverage to state and local employees.[149] The brief discussion of the ADEA states, "[t]he amendment is a logical extension of the Committee's decision to extend FLSA coverage to Federal, State, and local government employees."[150] The report further states that the reason the ADEA did not cover local employees from its inception was because the original enforcement agency for the ADEA did

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141. *See Lorillard*, 434 U.S. at 578.

142. *See id.* at 585.

143. *See id.* at 585 n.14 (stating that "the very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind [from that of Title VII]").

144. *See Ring*, 652 F. Supp. at 481.

145. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *reprinted in* 1972 U.S.C.C.A.N. 2137.

146. *See* EEOC v. Elrod, 674 F.2d 601, 604 (7th Cir. 1982).

147. *See id.* at 605.

148. *See Lorillard*, 434 U.S. at 577–80.

149. *See* S. REP. NO. 93-690, at 55.

150. *Id.*

not cover such employees.[151] There is no mention of Title VII and no mention of § 1983 or any constitutional cause of action.[152] The evidence of congressional intent, clearly, is the close link between enforcement of the ADEA and of the FLSA, not Title VII.

THERE IS SILENCE ON § 1983

House Report Number 93-913 also accompanied the Senate bill because the language of the companion House bill substituted that of the Senate bill, which was then passed.[153] That report presents an even shorter, but substantially identical, discussion of the ADEA.[154] Again, there is no mention of Title VII, § 1983, or other constitutional claims.[155]

Moreover, courts using the Title VII analogy are oblivious to the logical jump they make. Certainly, Title VII case law is helpful in interpreting claims made under the similar substantive provisions of the ADEA. However, interpreting congressional intent with regard to the preemption issue is a wholly different matter. Analyzing claims is factually driven, case-specific, and geared toward resolving a single dispute set in discrete circumstances.[156] Analyzing congressional intent regarding preemption is abstract, generalized, and geared toward setting policy for the resolution of many disputes.[157] Uncritically stating that Title VII case law applies to the ADEA for all purposes simply assumes the two statutes are functional equivalents for all purposes. Aside from the objection just pointed out, this view simply ignores the fact that the statutes serve different purposes and function differently. Title VII covers discrimination based on suspect or quasi-suspect classifications, that is, groups that have suffered from purposeful animus based on distinctive characteristics not shared by the majority of those with political and/or economic

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151. *See id.*

152. *See id.*

153. *See* Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, 88 Stat. 55, 1974 U.S.C.C.A.N. 2811.

154. *See* H.R. REP. NO. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2849–50.

155. *See id.*

156. *See, e.g.*, Brown v. VanNostrand Reinhold Co., No. 89 Civ. 7309 (CSH), 1991 WL 197592, at *4 (S.D.N.Y. Sept. 24, 1991) (stating that common sense dictates case specific formulae in ADEA suits).

157. *See, e.g.*, Hawaiian Airlines, Inc. v. Finazzo, 512 U.S. 246, 251 (1994) (stating that federal preemption is a question of congressional intent).

power, such as race.[158] The ADEA, by contrast, covers discrimination based on a classification that the Supreme Court has explicitly recognized is not suspect, and against a group that suffers not from status-based animus but from stereotypical attitudes about the quality of human abilities as we age.[159]

Thus, Title VII simply is unhelpful in interpreting the ADEA on the issue of preemption of age discrimination in employment claims brought under § 1983. And, without the bootstrapping help of Title VII, there is no support, however weak, for the argument that the ADEA and claims for age discrimination in employment under § 1983 can coexist.

CONCLUSION

While it may be true that the Supreme Court disfavors repeal by implication, it certainly does not disfavor it when the circumstances call for it. The ADEA obviously presents such circumstances, and a growing number of courts of appeals have recognized this. Any principled analysis of the question leads inevitably to the *Sea Clammers* doctrine. Application of the doctrine, starting with the language of the statute and even proceeding through the legislative history, demonstrates conclusively the intent of Congress that the ADEA provide the exclusive remedy for age discrimination in employment. If the ADEA does not provide every conceivable remedy, if it does not offer a basis for every imaginable claim, then that is because Congress chose not to include them — in the ADEA or in an

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158. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

159. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976); *see also* EEOC v. Wyoming, 460 U.S. 226, 231 (1983). Because age is not a suspect or quasi-suspect classification, age discrimination claims brought under the Fourteenth Amendment need merely meet the rational basis test. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (applying rational basis test to state constitutional provision establishing mandatory retirement age); *Murgia*, 427 U.S. at 314 (applying rational basis test to state law establishing a mandatory retirement age). Under the rational basis test, a state-made classification will survive scrutiny if the distinction it makes rationally furthers a legitimate state interest. *See* Zobel v. Williams, 457 U.S. 55, 60 (1982); Plyler v. Doe, 457 U.S. 202, 208 (1982) (stating that a state law will survive if the distinction it makes bears a rational relationship to a legitimate state interest); *see also Migneault*, 158 F.3d at 1137–38 (analyzing the application of the Equal Protection Clause to age discrimination). On the other hand, suspect classifications, such as race, trigger strict scrutiny. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 91 (1997) (providing that state action predominately motivated by race must be narrowly tailored to meet a compelling governmental interest).

end run via § 1983. The connection that some have seen between Title VII and the ADEA regarding preemption is illusory and, even if accepted, is too fragile a reed upon which to base a holding against preemption in the face of the plain evidence of congressional intent in favor of preemption revealed by the *Sea Clammers* analysis. The ineluctable conclusion is that the ADEA preempts claims of age discrimination in employment brought under § 1983.