RECENT CASES

EMPLOYMENT LAW — AGE DISCRIMINATION — SEVENTH CIRCUIT HOLDS THAT THE ADEA DOES NOT PRECLUDE § 1983 EQUAL PROTECTION CLAIMS. — *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012).

Section 1983,[1] which "authorizes suits to enforce individual rights under federal statutes as well as the Constitution,"[2] has long "provide[d] an impartial federal forum for a state's violation of constitutional rights."[3] Workers are protected from age discrimination by statute — the Age Discrimination in Employment Act of 1967[4] (ADEA) — as well as by the Constitution through the Equal Protection Clause.[5] However, in 1989, the Fourth Circuit held in *Zombro v. Baltimore City Police Department*[6] that the ADEA was the exclusive remedy in federal courts for age discrimination claims against state employers, precluding the plaintiff's equal protection claim via § 1983.[7] Other circuits followed the Fourth, including the D.C.,[8] Fifth,[9] Tenth,[10] First,[11] and Ninth.[12] Recently, in *Levin v. Madigan*,[13] the Seventh Circuit broke with its sister circuits and held "that the ADEA is not the exclusive remedy for age discrimination in employment claims."[14] *Levin* was the only case in this series to be decided after the Supreme Court's decision in *Fitzgerald v. Barnstable School Committee*.[15] Its recognition of *Fitzgerald*'s impact on § 1983 doctrine not only justifies the creation of a 6–1 circuit split, but also should persuade the other circuits to reexamine ADEA preclusion.

Harvey Levin served in the Office of the Illinois Attorney General (OIAG) from 2000 to 2006; he was over sixty years old when he was

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1 42 U.S.C. § 1983 (2006).

2 City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119 (2005).

3 Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not "Imply" Congressional Preclusion of § 1983 Constitutional Claims*, 77 FORDHAM L. REV. 775, 778 (2008).

4 29 U.S.C. §§ 621–634 (2006).

5 *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (subjecting age classification to rational basis test).

6 868 F.2d 1364 (4th Cir. 1989).

7 *Id.* at 1369.

8 Chennareddy v. Bowsher, 935 F.2d 315, 318 (D.C. Cir. 1991) (applied to federal employees).

9 Lafleur v. Tex. Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997) (per curiam).

10 Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998), *vacated on other grounds sub nom.* Bd. of Regents v. Migneault, 425 U.S. 1131, 1140 (2000).

11 Tapia-Tapia v. Potter, 322 F.3d 742, 745 (1st Cir. 2003).

12 Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1057 (9th Cir. 2009).

13 692 F.3d 607 (7th Cir. 2012).

14 *Id.* at 622.

15 129 S. Ct. 788 (2009).

fired.[16] Levin protested that his dismissal constituted age and sex discrimination, given that the successor to his role was a "female attorney in her thirties," but the OIAG disputed that it "replaced" Levin and asserted instead that he was terminated for poor performance.[17]

In 2007, Levin sued numerous defendants in the U.S. District Court for the Northern District of Illinois for "age and sex discrimination under the ADEA, Title VII, and the Equal Protection Clause via 42 U.S.C. § 1983."[18] The ADEA and Title VII claims became mired in litigation over those statutes' definitions of "employee" and "employer"; the defendants eventually won summary judgment on those claims by showing that Levin was not a qualified employee.[19] With regard to the § 1983 equal protection claims, the parties wrangled over a number of legal issues, including whether any of the defendants sued in their individual capacities were entitled to qualified immunity and whether the ADEA precluded age discrimination claims under § 1983.[20] The district court answered both questions in the negative,[21] and the individual defendants filed an interlocutory appeal of the qualified immunity ruling.

The Seventh Circuit affirmed. Writing for the panel, Judge Kanne[22] rejected the defendants' argument that "they [were] entitled to qualified immunity because the ADEA is the exclusive remedy for Levin's age discrimination claims."[23] An exhaustive review of existing Supreme Court doctrine on implied preclusion of § 1983 remedies by statutory schemes[24] yielded two main conclusions. First, to ascertain congressional intent — the "most important consideration" in determining whether a statutory scheme precludes a § 1983 equal protection claim[25] — the court derived a multifactor test, weighing "[1] [the] language of the statute . . . , [2] legislative history, [3] the statute's context, [4] the nature and extent of the remedial scheme, and [5] a comparison

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16 *See Levin*, 692 F.3d at 609.

17 *See id.*

18 *Id.* Levin sued the institutional defendants — the State of Illinois and the OIAG — under the ADEA and Title VII, and the individual defendants — the Attorney General in her personal capacity, as well as several colleagues — under § 1983. *See id.* at 609–10.

19 *See* Levin v. Madigan, 697 F. Supp. 2d 958, 962–65, 972–73 (N.D. Ill. 2010); *see also* Levin v. Madigan, No. 07 C 4765, 2011 WL 2708341, at *9–11 (N.D. Ill. July 12, 2011) (affirming the previous ruling). Levin did not appeal this decision.

20 *Levin*, 697 F. Supp. 2d at 968–72. Only issues raised by the § 1983 age discrimination claim — not the sex discrimination claim — reached the Seventh Circuit.

21 *Levin*, 2011 WL 2708341, at *12–13.

22 Judge Kanne was joined by Judges Bauer and Posner.

23 *Levin*, 692 F.3d at 610. The court rejected Levin's jurisdictional objection that the court should not consider ADEA preclusion, finding that a decision on the immunity defense necessarily implicated Levin's "entire cause of action." *Id.* at 611.

24 The court recounted four cases in which the Supreme Court held § 1983 claims to be precluded, *id.* at 611–13, and four in which it held the opposite, *id.* at 613–15.

25 *Id.* at 615.

of the rights and protections afforded by the statutory scheme versus a § 1983 claim."[26] Second, the court's analysis carefully distinguished between cases involving "federal *statutory* rights under § 1983" and those involving "*constitutional* rights under § 1983."[27] This analysis closed with an in-depth review of *Fitzgerald*, the Court's most recent decision on this issue, which held that Title IX did not preclude § 1983 equal protection claims.[28]

Turning to Levin's claims, the court noted that "[w]hether the ADEA precludes a § 1983 equal protection claim is a matter of first impression in the Seventh Circuit."[29] Every other circuit to have considered the issue found that such preclusion did exist, primarily on the grounds first articulated in the Fourth Circuit's *Zombro* decision.[30] However, the court also recognized conflicting case law in the district courts.[31] The Seventh Circuit thus conducted an independent review of the issue and came to the conclusion that this "close call" favored a finding of non-preclusion.[32]

Applying the multifactor "congressional intent" test to the ADEA, the court found that nothing in the statute's text or legislative history clearly resolved the issue.[33] The court therefore had to infer intent from silence. However, unlike the other circuits, the Seventh Circuit did not find in this silence an implied limit on § 1983.[34] First, the court emphasized that implied preclusion is "not favored and will not be presumed."[35] Second, the court "readily distinguish[ed]" the ADEA's comprehensive remedial scheme from similar schemes in statutes that the Supreme Court had found to preclude § 1983 constitutional claims.[36] Those other statutes "were specifically designed to address constitutional issues,"[37] while the ADEA "provides a mechanism

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[26] *Id.* (citations omitted).

[27] *See id.* at 612. The panel noted that the Supreme Court had only twice held that a statute precluded a § 1983 remedy for a constitutional right. *Id.* Furthermore, only *Smith v. Robinson*, 468 U.S. 992 (1984), involved equal protection; the issue in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), was the unique question of how to ensure that § 1983 relief does not frustrate the federal habeas corpus regime. *See Levin*, 692 F.3d at 612–13.

[28] Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 797 (2009).

[29] *Levin*, 692 F.3d at 616.

[30] *See id.*; *see also id.* at 617.

[31] *Id.* at 617 (discussing Mummelthie v. City of Mason City, 873 F. Supp. 1293 (N.D. Iowa 1995)).

[32] *Id.*

[33] *Id.* at 617–18.

[34] *Id.* at 618.

[35] *Id.* (quoting Hui v. Castaneda, 130 S. Ct. 1845, 1853 (2010)).

[36] *Id.* at 619.

[37] *Id.* at 618. For example, the statute at issue in *Smith v. Robinson* asserted that one of its statutory purposes was "to 'ensure *equal protection of the law*.'" *Id.* (emphasis added) (quoting 20 U.S.C. § 1400(c)(6)).

to enforce only the substantive rights created by the ADEA."[38] Therefore, the comprehensiveness of the ADEA's *statutory* remedial scheme was insufficient to indicate congressional intent vis-à-vis § 1983 *constitutional* claims.[39] The Seventh Circuit looked for — and did not find — "some additional indication of congressional intent"[40] to "foreclose preexisting constitutional claims."[41]

Finding the statute's text, legislative history, and remedial scheme all inconclusive, the Seventh Circuit finally "compare[d] the rights and protections afforded by the statute and the Constitution."[42] Here, the court found significant divergence in the types of potential defendants, actions prohibited, and workers protected.[43] The two claims differ significantly: The ADEA allows suits against state and private employers, while § 1983 allows claims against individuals and, in limited circumstances, state employers.[44] The ADEA also prohibits some claims permitted under § 1983, including claims by certain state officers and claims for reverse age discrimination.[45] These differences in Levin's potential claims under the ADEA and § 1983 led the court to "conclude that the ADEA is not the exclusive remedy for age discrimination in employment claims."[46]

Finally, the Seventh Circuit briefly addressed the qualified immunity issue and affirmed the lower court's decision.[47] The availability of the immunity defense turned on whether Levin's constitutional right to be free from age discrimination was "clearly established at the time of the alleged violation."[48] And because the Supreme Court had previously held that "age discrimination in employment violates the Equal Protection Clause," the Seventh Circuit found that it was.[49]

The Seventh Circuit's rejection of *Zombro* and its progeny creates a circuit split that initially appears irreconcilable. Yet both *Zombro* and *Levin* make sense within the context of the Supreme Court's § 1983 jurisprudence at the time each was decided. Section 1983, originally

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[38] *Id.* at 619 (quoting Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1373 (4th Cir. 1989) (Murnaghan, J., concurring in part and dissenting in part)).

[39] *Id.* ("For the preclusion of *constitutional* claims, we believe more is required than a comprehensive statutory scheme.").

[40] *Id.*

[41] *Id.* at 618.

[42] *Id.* at 621 (citing Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 794 (2009)).

[43] *Id.*

[44] *Id.*

[45] *Id.* The court noted that state employees could not recover damages under the ADEA due to Eleventh Amendment sovereign immunity. *Id.* (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000)).

[46] *Id.* at 622.

[47] *Id.*

[48] *Id.* (quoting Gonzalez v. City of Elgin, 578 F.3d 526, 540 (7th Cir. 2009)).

[49] *Id.* (citing *Kimel*, 528 U.S. at 83).

enacted during Reconstruction as a safeguard against state-sponsored violations of the newly enacted Fourteenth Amendment,[50] has undergone "extreme shifts in judicial theory" in the years since.[51] In particular, lower courts have struggled to decipher the Supreme Court's shifting approach to § 1983 preclusion.[52] The Court's 2009 *Fitzgerald* decision changed the standard for finding preclusion of § 1983 constitutional claims. Not only did it set a higher preclusion bar for § 1983 enforcement of constitutional rights, but it also recognized — for the first time — a difference between those claims and § 1983 claims for the vindication of *statutory* rights.[53] This approach diverged from the standard set in *Smith v. Robinson*,[54] which made no distinction between constitutional and statutory rights when analyzing § 1983 preclusion.[55] Among all the ADEA preclusion cases in the circuit courts, *Levin* was the lone beneficiary of *Fitzgerald*'s clarification of § 1983 preclusion. The Seventh Circuit astutely recognized the importance of the doctrinal shift that *Fitzgerald* represented, and the time is ripe for the other circuits to reevaluate their precedents.

Implied-preclusion doctrine imposes limits on the use of "§ 1983 as a cause of action . . . [w]here Congress has foreclosed such enforcement . . . *implicitly* in the statute's remedial scheme."[56] Originally recognized in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[57] this doctrine allows courts to infer congressional intent to preclude the § 1983 remedy for a statutory right "[w]hen the remedial devices provided in [the] particular Act [granting that statutory right] are sufficiently comprehensive."[58] If Congress provided a

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[50] *See* Levinson, *supra* note 3, at 778.

[51] Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 265, 265 (1987). After almost a century of "dormancy," § 1983 saw a significant increase in litigation in the 1960s. *Id.* Many scholars trace this increase in part to the Supreme Court's expansive application of that statute. *See* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1002–04 (2002). Since then, the Court has struggled to articulate the statute's scope. *See* 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 2.2, at 2-7 to -8 (4th ed. 2008).

[52] Indeed, the Court has recognized that its § 1983 jurisprudence has caused "conflict" in the lower courts. Gonzaga Univ. v. Doe, 536 U.S. 273, 278 (2002).

[53] *See* Martin A. Schwartz, *Supreme Court § 1983 Decisions — October 2008 Term*, 45 TULSA L. REV. 231, 241 (2009) ("The Court drew an important distinction between the enforcement of federal statutory rights under § 1983 and enforcement of federal constitutional rights.").

[54] 468 U.S. 992 (1984).

[55] *See* Levinson, *supra* note 3, at 783–84 (arguing that *Smith* applied the test for preclusion of § 1983 statutory claims to § 1983 constitutional claims).

[56] *Id.* at 779.

[57] 453 U.S. 1 (1981).

[58] *Id.* at 20. *Sea Clammers* involved an unsuccessful attempt to use § 1983 to enforce statutory rights conferred in two environmental statutes. 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 4.03[C], at 4-11 (4th ed. Supp. I 2006); *see also* Timothy Davis & Kevin E. Smith, *Eradicating Student-Athlete Sexual Assault of Women: Section 1983 and Personal Liability Following*

comprehensive scheme with "specific statutory remedies," it wanted plaintiffs to *use* those remedies — and therefore would disfavor the use of § 1983 to bypass the scheme entirely.[59]

This doctrine was first applied in the constitutional context[60] in *Smith*, in which a family sought to secure a disabled child's access to a free, public education by suing under both the Education of the Handicapped Act[61] (EHA) and the Equal Protection Clause via § 1983.[62] In holding the § 1983 claim precluded, the Court focused on "the comprehensive nature of the procedures and guarantees set out in the EHA"[63] — the exact test it established in the statutory rights *Sea Clammers* case.[64] To the Court, these measures indicated that Congress could not possibly have intended to "leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim."[65] By foreclosing the § 1983 remedy, the Court once again addressed the concern that plaintiffs could "circumvent the . . . carefully tailored scheme" if § 1983 remained available to them.[66] But Congress did not evince the same concern. It quickly overrode *Smith*'s holding: the Handicapped Children's Protection Act of 1986[67] clarified that "[n]othing in [the EHA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution . . . or other Federal statutes."[68] Indeed, *Smith* represents the first and last time that the Court inferred from congressional silence the foreclosure of a § 1983 remedy for an equal protection claim.[69]

In 2009, *Fitzgerald* "drew an important distinction between the enforcement of federal statutory rights under § 1983 and enforcement of federal constitutional rights."[70] Writing for a unanimous Court, Justice Alito restated the familiar rule that congressional intent to preclude a § 1983 claim based on a *statutory* right may be "inferred from

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Fitzgerald v. Barnstable, 2009 MICH. ST. L. REV. 629, 634–35 (describing the "evolution" of the *Sea Clammers* doctrine).

59 *Sea Clammers*, 453 U.S. at 20.

60 *See* Levinson, *supra* note 3, at 777, 783.

61 Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400–1482 (2006 & Supp. V 2011)).

62 Smith v. Robinson, 468 U.S. 992, 994, 1008–09 (1984).

63 *Id.* at 1011.

64 *See id.* at 1009 (noting that the constitutional claims were "virtually identical to the[] EHA claims" and then discussing the EHA's "carefully tailored administrative and judicial mechanism[s]").

65 *Id.* at 1011.

66 *Id.* at 1012.

67 Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415 (2006)).

68 *Id.* § 3, 100 Stat. at 797 (codified as amended at 20 U.S.C. § 1415(*l*)). "Congress apparently agreed that the Court had misconstrued its intent" and, "in essence, overturn[ed] the *Smith* holding." Levinson, *supra* note 3, at 785.

69 *See* Levinson, *supra* note 3, at 785–86.

70 Schwartz, *supra* note 53, at 241.

the statute's creation of a comprehensive enforcement scheme."[71] However, he added that "[i]n cases in which the § 1983 claim alleges a *constitutional* violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution."[72] This new test for § 1983 constitutional claims expanded the preclusion analysis from its limited focus on a statute's enforcement scheme to include consideration of the substantive scope of § 1983 and the Equal Protection Clause. This analysis[73] led the Court to conclude that Title IX did not foreclose a § 1983 remedy for an equal protection claim: "Title IX's protections are narrower in some respects and broader in others" when compared to those of the Equal Protection Clause,[74] and this "divergent coverage" indicated that Title IX did not preclude "§ 1983 suits as a means of enforcing constitutional rights."[75]

However, the Fourth Circuit decided *Zombro* under the shadow of *Smith*,[76] before the Court distinguished between constitutional and statutory preclusion in *Fitzgerald*.[77] Looking only at the ADEA's enforcement scheme, the circuit court found "that it [was] a precisely drawn, detailed statute" whose "provisions . . . evidence congressional intent to foreclose actions for age discrimination under § 1983."[78] Indeed, even the Seventh Circuit in *Levin* "agree[d] . . . that the ADEA sets forth a rather comprehensive remedial scheme."[79] Under *Smith*, the mere existence of such a scheme was enough to find preclusion of § 1983 remedies for statutory *and* constitutional claims. *Zombro*'s decision to foreclose the equal protection claim was therefore consistent with § 1983 precedent at the time, and until *Levin*, every subsequent

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[71] Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 794 (2009) (quoting City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005)).

[72] *Id.* (emphasis added).

[73] The Court also analyzed Title IX's enforcement mechanisms and found that the enforcement scheme was too limited to suggest congressional intent to preclude § 1983 actions. *See id.* at 795–96.

[74] *Id.* at 796.

[75] *Id.* at 797.

[76] *Cf.* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 514–15 (2009) (arguing that "shadow precedents" arise because congressional overrides of judicial decisions typically focus narrowly on specific holdings, rather than on the court's general interpretative approach).

[77] *See* Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1368 (4th Cir. 1989) (citing *Smith*'s holding). Judge Murnaghan's opinion, in contrast, did make this distinction. *See id.* at 1372 (Murnaghan, J., concurring in part and dissenting in part).

[78] *Id.* at 1369 (majority opinion). The Fourth Circuit also echoed the "bypass" concerns raised in *Sea Clammers* and *Smith*. *Id.* at 1367.

[79] *Levin*, 692 F.3d at 618. However, the Seventh Circuit was careful to place this scheme in the proper doctrinal framework. *See id.* ("[T]his scheme speaks volumes as to how Congress intended allegations of *statutory* age discrimination to proceed.").

appellate court to address this issue understandably relied on *Zombro*'s reasoning.[80]

Levin alone received the benefit of *Fitzgerald*,[81] and this post-*Zombro* doctrinal development explains and justifies the Seventh Circuit's contrary holding. The *Levin* court was the only one to compare the rights and protections of the ADEA against those of the Equal Protection Clause. As in *Fitzgerald*, this prong of the test revealed significant and sufficient divergences — in the types of potential defendants, actions that may be challenged, and liability standard required when the defendant is a municipal entity — to find no preclusion of the equal protection claim.

"Divergence" therefore played a decisive role for Levin — and may continue to do so for a broad group of § 1983 litigants. Under the new test, a § 1983 constitutional claim could be broader *or* narrower than the statutory claim — the Court merely requires *difference*.[82] This standard for finding nonexclusivity appears much relaxed from the test used in *Smith*. For example, many significant employment discrimination statutes — including Title VII and the Americans with Disabilities Act — do not allow the plaintiff to sue individuals;[83] thus, there exists a clear divergence between suits allowed under those statutes and § 1983 equal protection claims.[84] Although neither *Levin* nor *Fitzgerald* states that the bar is now much higher to find preclusion of § 1983 constitutional claims, it would be natural to attribute the Seventh Circuit's confidence in its ruling[85] to a recognition that *Fitzgerald*'s holding applies far more broadly than just to Title IX.[86] Indeed, the time may be ripe for the other circuits to reconsider their prior rulings on ADEA preclusion.

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[80] *See id.* at 616; cases cited *supra* notes 8–12.

[81] Although *Ahlmeyer v. Nevada System of Higher Education,* 555 F.3d 1051 (9th Cir. 2009), was decided on February 18, 2009, one month after the *Fitzgerald* decision on January 21, the briefing and argument in *Ahlmeyer* had been completed far earlier, on January 18, 2008. *See id.* at 1051.

[82] *See* Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 796 (2009).

[83] *See, e.g.*, Albra v. Advan, Inc., 490 F.3d 826, 830 (11th Cir. 2007) (ADA); Rue v. GMAC Fin. Servs., No. 3:10-cv-62, 2011 WL 812062, at *2 (W.D.N.C. Mar. 2, 2011) (Title VII).

[84] *Fitzgerald* thus may provide additional justification for those lower courts that have refused to use Title VII and the ADA to preclude § 1983 constitutional claims. *See* I SCHWARTZ, *supra* note 58, § 3.03[C][3], at 3-35 to -36.1 (Supp. II 2012); *id.* § 3.03[C][6], at 3-38 (Supp. II 2011).

[85] Although *Levin* created a 6–1 circuit split, it received not only the backing of all three panel members, but also the silent acquiescence of the entire circuit. *See Levin*, 692 F.3d at 617 n.2.

[86] Indeed, one commentator, writing before *Levin*, believed that *Fitzgerald* "strongly supports the position that the ADEA does not preclude § 1983 equal protection claims." I SCHWARTZ, *supra* note 58, § 3.03[C][4], at 3-37 (Supp. II 2011). The decision's unanimity and its resurrection of *Smith*'s oft-quoted but rarely followed cautionary language — that "we should 'not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,'" *Fitzgerald*, 129 S. Ct. at 796 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)) — both support reading *Fitzgerald* broadly.